

July 31, 2003

Dear Senator:

As you know, the "Fairness in Asbestos Injury Resolution Act of 2003" (S. 1125) was reported out of the Judiciary Committee on a near-party line vote. I am writing on behalf of the AFL-CIO to inform you of our continuing concerns about the deficiencies of this bill. Although we recognize that some progress was made during the committee markup, we are convinced that in its present form the bill would still deal a major setback to victims of asbestos disease. Without significant additional changes to the bill, the AFL-CIO would strongly urge you to vote against its passage.

Federal asbestos compensation legislation must include fair, timely and certain compensation for victims of asbestos-related diseases. While the Graham-Feinstein amendment adopted by the Committee increased claims values for most diseases over those originally proposed in S. 1125, for most victims of asbestos-related disease, particularly lung cancer claimants, the bill still does not provide fair compensation.

In addition to the (1) amounts and timing of payments for victims within each medical category, the other vital issues that must be addressed include: (2) the inadequacy of mandatory "front-end" funding by businesses and insurers; (3) the back-end solvency of the Fund; (4) the need for a truly non-adversarial, no-fault administrative system to process claims, with an impartially selected and impartially functioning Medical Advisory Committee; (5) the separate treatment of pending claims and settlements; (6) the need for medical screening of high risk workers; and (7) exclusion of FELA-covered employees from the scope of this law.

The attachment to this letter summarizes our specific concerns about these interdependent issues. It explains why, without a satisfactory resolution of all of them, fair compensation values alone will simply not be enough to produce an acceptable bill. Without these improvements, the goal of providing fair compensation will likely be undermined and victims left in a far worse position than they are today in the current tort system.

The AFL-CIO has indicated from the outset that we are prepared to support legislative reforms that will improve the system of compensation for victims of asbestos disease. This should not be an effort to simply bail out corporations who are struggling under the weight of asbestos liability. We urge you not to lose sight of the fact that the so-called asbestos litigation crisis is the direct result of a much more serious crisis: the tragic poisoning of millions of American workers who were improperly exposed to asbestos through their jobs.

Sincerely,

William Samuel, Director
DEPARTMENT OF LEGISLATION

Attachment

AFL-CIO

Major, Interdependent, Unresolved Asbestos Issues

Under S. 1125, as it presently stands, a number of major issues, including but not limited to the inadequacy of compensation values for victims of asbestos disease remain unresolved. Without resolution of all of these interdependent issues, victims will be left unprotected in this new system.

1) Fair Compensation Values on a Timely Basis

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(a) Values must be at least as high as those contained in the Leahy Amendment.

One of the cornerstones of asbestos compensation legislation must be fair, timely and certain compensation for victims of asbestos-related diseases. While the Graham-Feinstein amendment adopted by the committee increased claims values for most diseases over those originally proposed in S. 1125, for most victims of asbestos-related disease, the bill still does not provide fair compensation.

All of the individuals who qualify for monetary awards under S. 1125 will have significant impairment from their asbestos-related disease. For many individuals these diseases will be fatal. Measured against the health impact and economic impact on victims and their family members, the compensation provided in the bill for many victims clearly is unfair.

Just as one example, virtually all lung cancer victims in Category VII, i.e., those without underlying asbestosis but with 15 weighted years or more of substantial occupational exposure to asbestos, would be limited to \$25,000-\$75,000 -- a bare fraction of what they would almost universally receive in the tort system today.

Similarly, it is estimated that more than 100,000 victims will file claims that will qualify for Level III compensation, which covers asbestosis or pleural disease that has resulted in a 20% to 40% loss of lung function. Claimants with this level of impairment will not be able to continue to work if they have a physically demanding job. Most of the jobs that entailed substantial asbestos exposure, such as shipyard work and construction and demolition work, are physically demanding. So many claimants in this group will be disabled for work. But S. 1125 would provide these victims only \$75,000, leaving victims to bear much of the cost.

If in exchange for giving up their rights in the current tort system claimants will depend upon this Fund for full and complete payment of any and all asbestos related claims, then it becomes even more important to bear in mind that the values that are currently being paid to victims by the Manville Trust, the other bankruptcy trusts, and other individual defendant companies in tort actions each only represent a fraction of what a claimant is owed by all defendants collectively.

Moreover, if the procedures required under the administrative system are at all adversarial in nature, as they would be under the current bill, then we cannot assume a significantly diminished role for attorneys, or a corresponding reduction in the attorney fees that would be deducted from compensation values.

(b) Payments of no less than 40%-30%-30% over a maximum three year period.

Similarly, our assumptions of fair values assume that claimants will be paid in full over a three year period, again in keeping with practice in the bankruptcy trusts. Otherwise, there is again little to be gained for victims who typically wait too long to receive their compensation in the existing tort system. Yet, S.1125, as it stands, provides merely for a presumption of payment over a three-year period, but allows payment under undefined circumstances to be paid over a four-year period. More significantly, S. 1125 presently does not specify that the claims must be paid annually in amounts no less than 40%-30%-30% over the three years. The longer the period over which payments can be made, the greater their effective value is reduced.

(c) Values must be structured as a range, reflecting individually varying factors such as age and number of dependents.

Another major inequity in the compensation values under this bill is the uniformity of payments for victims regardless of age and dependents. It is simply impossible to justify awarding a 40 year old mesothelioma victim with 4 children the same amount as a 75 year old retiree. Yet, as it now stands, the bill allows no adjustments in award values to address these inequities.

(d) Subrogation rights must be eliminated or strictly limited.

Although the bill was amended to remove some of the collateral source inequities, it still would allow for subrogation of workers compensation and health insurance claims. Again, unless the values paid by the Fund are substantially increased, this will too often mean that a workers compensation award or health insurance payments will utterly negate the payments received from this Fund.

(e) Non-Discrimination protection must be extended to claimants so that they do not lose health insurance coverage in response to the filing of asbestos-related claims.

The bill provides claimants who meet the exposure and medical requirements for Category 1 with periodic medical screening to help to ensure that they receive timely diagnosis and treatment and are educated about how to reduce their future health risk. The public health benefits of these measures will, however, be undermined if these workers face discrimination by health plans or health insurers because their participation in these programs identifies them as high risks for serious asbestos disease.

The 1996 Health Insurance Portability and Accountability Act (HIPAA) prohibits health plans and insurers from discriminating on the basis of “health status” and various health status-related factors. To avoid any possible ambiguity, provisions should be added to S. 1125 to clarify that participating in any monitoring or screening program established in this bill is a “health-status related factor” that falls within HIPAA’s protection, and that employees therefore cannot be denied or lose their health coverage for that reason.

2) Inadequacy of Front-end Funding

- (a) The front-end contributions must be increased, e.g. by indexing contributions to the rising cost of inflation and by requiring larger contributions in the early, transitional years.**

Unless the front-end and back-end funding and solvency issues are resolved, there will remain a real possibility that values that seem fair on paper will nonetheless be illusory, because the available funding may not be adequate to pay those values. Goldman Sachs estimates that the likely projected cost of the Leahy Amendment values would amount to approximately \$127 billion. Thus, the Fund will require approximately \$19 billion more in front-end funding contributions. Significantly, one simple step that would provide most, if not all of the additional money would be gained by indexing industry’s contributions to the rising cost of inflation, just as the bill requires for the compensation values themselves.

Furthermore, in the first few years of the new system there are likely to be disproportionate demands on the Fund, particularly if the Fund is required to absorb claims currently pending in the tort system. Insurers have expressed a willingness to make their contributions, funding for which is presently being held in their reserve funds, in the early years. This would seem most advisable and should be legislatively provided for.

3) Back-end Solvency of the System

- (a) More back-end contingency funding, including borrowing authority, is necessary.**

While the Feinstein-Kohl Amendment -- which permits the Administrator to delay or eliminate periodic “step-downs” in the funding requirements -- was a helpful step in addressing the back-end problems, it was not sufficient by itself.

For one thing, the first additional "contingent" dollars that could be drawn upon under the Feinstein-Kohl Amendment do not become available until 2009 when the first step contributions are scheduled to be reduced. Yet, the parties all basically agree that if there is a strain on the Fund's finances it will most likely occur in the first few years, when a disproportionately large number of claims are anticipated to be filed, and --

unless the bill is changed -- when some 300,000 pending claims will be absorbed by the new system. Thus, the need for additional revenue may well occur even before the Feinstein-Kohl Amendment could first be triggered.

Furthermore, even with additional front end contributions, it is clear that the Feinstein-Kohl Amendment's contingent revenue stream may not be enough to provide the "worst case scenario" cushion that must be available in the event that the actual number of claims filed greatly exceed the generally accepted "likely projection" estimates. In our view, the most realistic source of additional contingent funding would come from the 1% surcharge on commercial property insurance that was proposed offered by Senator Hatch and insurance industry prior to the mark-up and then rescinded a few days later. (In exchange, insurers could potentially be relieved of their share of the contingent funding under the Feinstein-Kohl Amendment.)

Admittedly, the Biden Amendment, passed in Committee on a bipartisan basis, would ensure that if funding is ever inadequate to meet the Fund's promised obligations to victims, there will be a reversion to tort system. However, it is surely in all parties' interest to be confident that this will never be necessary. For this reason, a truly adequate back-end cushion of funding is critical.

The Administrator must also be given borrowing authority as against future revenue, beyond the one year limit currently provided in the bill.

4) Fairness of the Administrative Process and the Medical Advisory Committee

(a) Amendments are needed to ensure a truly user-friendly system that will not require claimants to rely on attorneys in the same fashion or to the same degree that they do in a court-based system.

Another interdependent issue of major concern is the process for handling compensation claims. As reported out, the bill provides for an adversarial, court-based process that is more akin to the current system of litigation than to a truly no-fault system. But, to be fair to asbestos victims, the system must enable claimants to obtain their awards in a timely and efficient manner, with a minimum of transaction costs. Indeed, without corrections necessary to ensure a user-friendly, non-adversarial system, the claims values we have proposed will have to be increased, since those values assume that claimants will have substantially lower legal fees than under the current tort system.

The bill must be amended to provide for a well-run administrative system, which situates both the claims processing function and the fund itself in a single, independent administrative agency or trust fund. This entity should (1) be headed by a board comprised of representatives of the parties to this process (claimants, defendant companies, insurers, labor representatives and public health professionals), who would provide policy leadership; (2) provide centralized oversight of the claims-handling process; (3) charge its personnel with assisting claimants in presenting their claims and

securing necessary documentation; (4) authorize its decisionmakers to engage in a consultative process with claimants; and (5) include an independent process to resolve disputes arising from claims determinations. The system would also provide a final opportunity for judicial review at the court of appeals level.

(b) Provisions must be included for selecting the members of the Medical Advisory Committee

The bill creates a Medical Advisory Committee with responsibility for assisting in processing certain categories of claims. The bill does not, however, prescribe how committee members will be appointed or any of the details of their tenure. Provisions must be added to the bill to ensure that the committee membership is balanced and objective.

5) Pending Claims and Settlements

(a) All pending claims filed on or before December 31, 2002, or at least those that have already been significantly processed through the current system, should be grandfathered.

Another major issue of concern relates to the handling of pending claims and settlements, and the transition issues from the current litigation system to a new no-fault Fund approach. How will the law ensure that all contributions due under the terms of the bill are in fact paid immediately? What will replace the needed contributions from parties who choose to legally challenge their assessment? What of claims that have been pending for many months or even years and are on the verge of resolution?

At the present time there are an estimated 300,000 pending claims, valued at \$15 billion under the Graham-Feinstein Amendment. Excluding pending claims that have already been processed under the existing system would not only be equitable for those victims who filed their claims many months or even years ago and would otherwise be forced to start over again in the new system, but it would relieve an enormous amount of administrative and financial pressure from the new Trust in its initial years when the possibility of underfunding will be most severe.

6) Medical Screening for High Risk Workers

(a) Any new, no-fault system must provide subsidized medical screening for high-risk workers.

Related to all of these issues is how the new system takes care of workers with significant histories of occupational exposure to asbestos who do not yet have evidence of disease. Under the present system, trial lawyers and others have had their own incentives to help ensure that such workers are periodically screened. That will no longer be true. We have repeatedly stressed that the new system must ensure that high risk workers with significant histories of occupational exposure must receive subsidized

screening so that if and when they develop disease they know to seek treatment and monitoring as quickly as possible.

7) FELA Exemption

(a) FELA must not be preempted by S. 1125.

One final matter involving compensation affects only rail employees but is of utmost importance to the entire labor movement. This involves their coverage under the Federal Employees Liability Act (FELA) which serves as the workers compensation system for our nation's rail employees. If FELA is preempted by this bill for asbestos-related diseases, as S.1125 currently provides, it will inadvertently put rail employees at a distinct disadvantage *vis-a-vis* all other types of employees, who will continue to have access to their respective state workers compensation systems for asbestos disease, separate and apart from their rights under this Fund. By contrast, FELA-covered employees would lose not only their right to bring product liability actions against rail carriers, but they would also lose their right to recover workers' compensation for on-the-job asbestos-related diseases.

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