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S. 852: The Corporate Asbestos Bailout Fund

The Specter/Leahy asbestos bill, S. 852, is an attempt to legislate administrative resolution of injury claims against corporations that extracted decades of profit from knowingly exposing workers, consumers and entire communities to a powerful toxin. Underpinning the administrative scheme, which would be run by new bureaucracy created within the Department of Labor, would be a \$140 billion trust fund endowed by scheduled contributions from the corporations responsible for asbestos contamination. The fund would operate for 30 years, by which time it is expected that all health claims qualifying for consideration under the bill will have been processed.

What this misguided legislation would really do is leave millions of Americans who risk developing deadly asbestos diseases hopelessly vulnerable to uncompensated income loss, crippling medical expenses, and denial of health insurance, while letting the corporations responsible for their injuries off the hook. The bill is an affront to justice—and a socio-economic disaster waiting to happen.

From 1940-1978, the peak years of industrial asbestos use, some 27.5 million workers were exposed to the lethal mineral on the job and inadvertently contaminated their families by carrying particles home on their hair and clothing. As recently as the early 1990s, factories across the country continued to receive, process and release toxic emissions from asbestos-tainted vermiculite ore, which they transformed into some 3,000 common products that were aggressively marketed to unsuspecting customers. An estimated 30 million home, school and commercial structures still contain asbestos insulation that jeopardizes occupants' health whenever its microscopic fibers are sent airborne by common chores, repairs or the ordinary operation of a ventilation system. Firefighters, construction crews, those living in the vicinity of demolition sites all run the risk of tissue damage caused by inhaling asbestos building materials turned to dust.

Some 10,000 people died of asbestos-related diseases in 2003 alone, and because of the 20-50 year latency period between exposure and manifestation of symptoms—and the fact that asbestos was not strictly regulated until 1986—experts predict that asbestos diseases will not peak until 2018.¹ Projections range anywhere from 750,000 to 2.6 million future incidents of sickness and death associated with asbestos.² A Congressional Budget Office (CBO) estimate released in August 2005 predicted that claims would reach 1.6 million over the life of the trust fund—and this was premised on an expectation of diminished exposure to asbestos over time due to stricter control over handling and industrial adoption of non-toxic replacements.³

Under the scheme proposed by S. 852, many of those stricken would not qualify for help from the trust fund, and those who did would likely receive lower payments than they would have won in the courts. In short, S. 852 is:

- ***Grossly unjust.*** It would bar all those harmed by asbestos from suing the companies that hurt them, but would allow only a select group to apply for compensation from the trust fund. Even eligible claimants who manage to surmount the bill's formidable evidentiary and administrative hurdles—including scientifically-unfounded medical criteria, unreasonable evidentiary requirements, and significant impediments to retaining legal counsel—would have to make do with incremental payments that may well not cover their medical needs. Many corporate culprits, on the other hand, would face only limited accountability. In return for making assessed contributions into the fund at a fraction of their current estimated liability, corporations would get immunity from future lawsuits involving the devastating health effects of their lucrative, lethal fraud.
- ***Poorly conceived.*** It creates a cumbersome new federal bureaucracy to handle claims. Delays can be expected from the moment administration doors swing open because all existing court cases will be wiped out, generating an instant backlog of pending claims that must be funneled through a rigorous, untested vetting process. Because compensation hinges on the ability to meet and document complicated eligibility requirements with which neither claimants nor administrators have had prior experience—employment background, exposure history, medical diagnosis evidence, and smoking status must all be established—a substantial accumulation of claims will likely choke the pipeline for years. This means that some critically sick claimants will be deprived of medical treatment that could measurably enhance their quality of life and extend their survival rate; others may die waiting for an answer from the fund.
- ***A financial time bomb.*** Initial heavy borrowing to finance administrative start up and processing of backlogged claims, coupled with a static revenue stream that does not adjust to claims volume fluctuation means the trust fund could quickly exhaust its ability to satisfy obligations as they come due. If that happens, the fund would sink into insolvency, sticking taxpayers with the tab. Corporate contributors could face resurrected civil liability compounded by financial liability for interest payments on the fund's bad debt. Similar federal trust funds set up in the past were soon reduced to subsistence on emergency injections of tax dollars because they underestimated the number of claims.

The potential large-scale public health crisis that could arise from the millions of tons of asbestos still present in work, home and school environments demands that any alternative to traditional adjudication provide a more comprehensive and equitable approach to compensating victims than that offered by this manifestly flawed bill. What follows is a closer look at S. 852's more glaring defects.

Most victims of community exposure to asbestos are excluded from the fund.

Asbestos-tainted vermiculite ore from the W.R. Grace mine in Libby, Montana, was shipped to hundreds of towns throughout the U.S. and processed by local factories whose emissions spewed contamination across entire communities. S. 852 makes extensive findings regarding the

extraordinary toxicity of *tremolite* asbestos, the form contained in Libby vermiculite. Because of this, residents of Libby sickened by asbestos are entitled to payments from the fund even if they did not work with asbestos or live with a family member who was exposed on the job. They are entitled to greater damages for the same level of disease than other comparably ill claimants, and they are exempted from meeting certain burdens of proof. But residents of other mining and factory towns—even those that received and processed the same Libby ore—get nothing at all unless they or their families had contact with asbestos on the job and meet the bill’s minimum exposure and medical criteria. That means asbestos disease victims who as teenagers spent summers shoveling vermiculite ore out of boxcars to make some extra money will not be able to recover anything from the fund. Neither will people who as children played on compacted piles of crushed asbestos industrial waste, only to develop terminal illnesses decades later. This flagrant injustice is compounded by the fact that those ineligible for the trust fund have no right to file a lawsuit either: once the bill is enacted into law, the courts will be closed to all asbestos health claims.

Living in a town with an asbestos mine or processing facility is not the only risk factor for asbestos disease. Asbestos in the ambient air presents a real health threat for many other individuals, including:

- Residents of neighborhoods abutting demolition sites, such as the St. Louis-Lambert airport extension in Missouri, where EPA regulations for safe asbestos abatement were long ignored in favor of cheaper, unproven methods;
- Homeowners where the real estate developers of their property knowingly, and with municipal complicity, constructed on asbestos-laden rock without encapsulating or covering the source of contamination, or advising buyers of the latent health risk, as is the case in El Dorado, California; and
- Communities near industrial sites where asbestos contamination was ostensibly cleaned up, but was later found to be present in significant quantities in the soil and water, such as the former W.R. Grace plant in Hamilton, New Jersey.

People who fall ill because they inhaled or ingested asbestos under any of these circumstances would be excluded from the trust fund and shut out of the courts. If S. 852 is passed, they would have no right to any remedy for their injuries.

Unreasonable medical criteria that will result in denial of many legitimate claims.

Even members of the select class of asbestos victims deemed eligible for trust fund consideration will be so prejudiced by the medical criteria that many will be turned away empty handed. The bill rejects most of the guidelines established by the AMA for determining the existence and extent of asbestos disease—the same guidelines used for workers compensation decisions in nearly every state. It ignores entirely the American Thoracic Society recommendations that were developed over the course of three years by the country’s leading lung specialists. Instead, S. 852 legislates arbitrary disease definitions that lack a clinical basis and in some cases contradict prevailing scientific consensus. As one pulmonary physician put it, the bill’s medical criteria “represent the best that 1950s medicine has to offer.” For example, the bill:

- Requires outmoded X-ray evidence of disease instead of more accurate, sensitive and readily-available CT or PET scans. The AFL-CIO estimates that 25,000 to 30,000 victims of asbestos-related lung cancer would be denied compensation on this basis alone, even though many would qualify if permitted to use appropriate diagnostic technology.
- Sets fixed exposure thresholds, contrary to epidemiological evidence that there is no safe level of exposure to asbestos, which even the EPA has acknowledged. To make matters worse, the bill's exposure minimums of 5 to 15 years depending on the disease level are arbitrarily discounted—weighted—based on the period during which exposure occurred. Every year of on-the-job exposure from 1975 to 1985 counts as only half a “weighted” year toward the threshold requirements for recovery from the fund; every year from 1985 forward equals just one-tenth of a “weighted” year. The absurdity of this formula becomes clear from its practical application: a person who started working after 1975 and developed lung cancer would need 105 *actual* years of occupational exposure to accumulate the 15 *weighted* years needed to fit the criteria for that disease category.
- Imposes the clinically discredited requirement that cancer victims demonstrate evidence of non-malignant asbestos disease in addition to having malignant tumors. Moreover, those slowly suffocating from asbestosis must show that thick scars have formed around asbestos fibers in both lungs: tissue damage in just one lung does not meet the definition of disease.
- Requires claimants with lung, colon, larynx, esophagus or stomach cancer to document their smoking status—which for non-smokers and ex-smokers means the logical impossibility of proving a negative. Non-smokers must prove they never smoked or smoked fewer than 100 cigarettes in their lifetimes. Ex-smokers must prove they stopped using tobacco at least 12 years before their cancer diagnoses. There is no presumption in favor of non-smokers: every cancer victim is suspect and bears the evidentiary burden.
- Reduces compensation levels for smokers and ex-smokers regardless of the extent or intensity of their asbestos exposure. The synergistic effect of inhaling both tobacco and asbestos fibers—each of which are known human carcinogens—is well documented. People exposed to asbestos are five times more likely to develop lung cancer than those not exposed. Smokers run a 10-fold risk of developing lung cancer compared to non-smokers. But a smoker who is also exposed to asbestos has 55 times the background risk of developing lung cancer.⁴
- Makes no provision for technological advances in either diagnosis or treatment, thereby consigning asbestos disease sufferers to delayed detection of illness, delayed intervention, inferior quality of life, and shorter lifespans than medically indicated. As for those who develop laryngeal, esophageal, stomach and colon cancer, they could be out of luck entirely if an Institute of Medicine report provided for in the bill recommends disallowing their claims.

What happens to those ineligible to file a claim with the fund? They will have no right to sue in court. Because they are diagnosed with asbestos-related diseases (although the diagnoses do not

meet the bill's criteria) they will be unable to obtain health or life insurance (ironically, insurance discrimination is prohibited by the bill only against those who conform to the trust fund definitions of disease). Some will be unable to continue in their current trade or to work at all. The cost of their continuing medical care—which for someone with asbestosis could be several thousand dollars a month for oxygen alone—will ultimately be borne by taxpayers, if at all. This is not just unfair, it is bad public policy, with significant social and economic ramifications.

Claims already in court are stayed and may wait years to be resolved.

Although pending court cases are automatically stayed when S. 852 is signed into law, they cannot be filed and processed by the trust fund until the administration becomes operational. The bill allows claims to hang in limbo for up to two years while the trust fund is setting up, after which they may return to court if the fund is still not working. The stay on pending cases is limited to a maximum of nine months for “exigent” claims—for example, those involving terminally ill people with less than one year to live—which are also entitled to expedited consideration and special settlement accommodations. But even these deadlines are not carved in stone. Non-exigent claims that have waited for two years only to get bounced back to court could still be yanked out a second time if the fund is certified as operational before the case reaches the evidentiary phase. Moreover, once they have been stayed, claims for medical monitoring—involving people whose lungs show cellular changes caused by asbestos fibers, but whose health has not yet dropped below the minimum limit of normalcy—will never regain access to the courts: the right to file a lawsuit for medical monitoring is extinguished forever, regardless of whether the trust fund is working or not. That means people who have documented lung damage would get no help paying for the periodic tests that are vital to early intervention. It means they would lose precious months—and perhaps years—of medical treatment by having to start from scratch through the laborious trust fund claims process once their lung function shows sufficient signs of deterioration. It also means that if asbestos cases were allowed to go back to court, these victims would likely have exceeded the statute of limitations for filing a lawsuit, and would therefore have no way to seek damages for their injuries.

Extreme limits on attorneys fees will deprive claimants of legal assistance.

In order to qualify for compensation, claimants must meet grueling evidentiary standards to establish disease (in conformity with explicit medical criteria), asbestos exposure, employment history, involvement in prior asbestos lawsuits and smoking status. But the bill prohibits claimants from paying more than 5 percent of a final award for legal counsel, a draconian cap on attorneys' fees that is unprecedented in the federal statutory scheme. This restriction will severely hinder the ability of claimants to hire lawyers to help them navigate the fund's complex procedural obstacles, and will therefore prejudice their chances of success. The bill does foresee establishment of a claims assistance program and keeping a roster of attorneys offering free services. But it is highly unlikely that an unfunded assistance program or volunteer lawyers would be able or willing to donate sufficient resources to cover the cost of compiling the extensive documentation needed to substantiate claims.

Inadequate and unreliable funding that will lead to default and delays.

CBO budget estimates for S. 852 range from \$120 billion to \$150 billion, premised on the assumption that 85 percent of non-malignant claims would be denied payment. Even this projection fails to account for \$1 billion in anticipated administrative costs, including salaries for

700 staff, and interest payments on anticipated borrowing to cover what CBO estimates will be an \$8 billion shortfall in the first 10 years. CBO predicts that borrowing to fill the gap—*without taking interest payments into account*—will add \$6.5 billion to the federal budget deficit. Interest payments on trust fund debt could add billions to total costs over the life of the fund.

Even these projections fall short, however, because they are based on unrealistic assumptions, the most important of which is underestimation of potential claims. Past experience with similar federal trust funds should serve as a warning. The Black Lung Disability Trust Fund was set up in 1977 with financing from an excise tax on the coal-extraction industry to compensate miners suffering from coal-dust disease. By 1981 it was more than \$1.5 billion in debt due largely to a higher than expected level of claims, leading Congress to double the tax. By 2001, the fund was incurring annual obligations of \$1 billion, twice the rate of income, with half its revenues going to service an already \$7.5 billion debt to the U.S. Treasury.⁵

The Energy Employees Occupational Illness Compensation Program, established in 2000 to compensate workers sickened or killed by radiation and other occupational health hazards in the energy industry, was expected to compensate some 3,000 injury claims. By the end of 2004 it had processed over 60,000 claims, paying nearly \$976 million to 13,000 claimants. The Radiation Exposure Compensation Act, which set up a trust fund for those injured by radiation from nuclear testing or uranium mining activities, was entirely depleted of funds within the first eight years and was unable to pay awards to 227 claimants. Despite several subsequent attempts to improve claims forecasting and additional appropriations from Congress, the fund is currently projected to fall \$107 million short of obligations by 2011.⁶

Even if asbestos claims predictions were accurate, the revenue stream would remain unreliable. Not even the Senate Committee on the Judiciary has been able to obtain full information on the number, extent of liability, and financial characteristics of the corporate defendants that would be obligated to pay into the fund. With no certain knowledge of who is putting up the money and how much—not to mention that 30-year forecasting of any company's financial soundness or even continued existence would be highly speculative—it is impossible to guarantee that the fund will collect the maximum aggregate \$90 billion (less bankruptcy trust credits and offsets for claims resolved after enactment) from asbestos defendants, nor the aggregate \$46 billion (again, less bankruptcy trust credits and offsets for claims resolved after enactment) from insurers over its duration. Nor are private-sector investment earnings of \$200 million any more certain than a best-guess estimate of economic prospects over the next three decades. In fact, the CBO report plainly asserts that although S. 852 projects a \$140 billion trust, “maximum actual revenues collected under the bill ... could be significantly less.”

That's the big picture. A closer look at some of the details betrays the fragility of speculative construction on top of a shaky foundation. According to the CBO, some \$70 billion will be needed to process the nearly 1 million claims it believes may be submitted in the first 10 years, including 322,000 claims currently pending in courts—those automatically terminated upon creation of the trust fund. What's more, the CBO admits that this is a low-ball estimate: a “significantly higher” volume of filings could come in if the “technically pending” but inactive claims against at least one unnamed asbestos defendant were revived. Total revenues during this period, however, are not expected to exceed \$63 billion. The funding gap would have to be made

up with borrowing or by delaying payment on claims. Again, even this forecast is uncertain because without any way to predict with some degree of confidence the volume, pace, type or approval rate of claims, it is impossible to gauge how the fund will perform over the long or short term.

Taxpayers may be saddled with billions of dollars in bad debt.

If the trust fund does default on its obligations, which appears likely, it will leave tens of billions of dollars of debt that will have to be paid off by taxpayers. Defendant companies and their insurers may also be tapped to cover at least part of the tab—in fact, the decision to terminate the fund does not relieve corporate contributors of their continuing payment obligations. This puts defendants in the precarious position of incurring renewed asbestos liability through the court system—because the opportunity to sue in court is restored in the absence of a functioning trust fund—at the same time as they are servicing the debt. Such a scenario would revive the specter of bankruptcy that the trust fund was meant in part to address.

No clear end in sight—even if the trust fund becomes insolvent.

Previous versions of the asbestos trust fund bill required the trust fund to be shut down if it could not meet its payment obligations, and restored the right of claimants to seek compensation for their injuries in court. But S. 852 has no provision for mandatory sunset, nor does the bill specify conditions under which the Administrator would be forced to close up shop. Instead, the bill instructs the Administrator to furnish Congress with recommendations for fixing the fund to keep it afloat. The Administrator has discretion over the range of alternatives he can propose, which can include tightening medical criteria to whittle down claim eligibility still further, dispensing with medical monitoring for those who have tissue damage but do not yet show signs of impairment, reducing compensation levels—essentially, rendering an already inadequate scheme still more unjust. The bill offers no guidelines on how far the Administrator can go because it does not define minimum performance standards in terms of claims processing rate, wait time, or compensation level for the trust fund to be considered “operational.” Moreover, because the Administrator’s fiduciary duty is to the trust fund, not to claimants, any proposed “fix” is likely to be at the expense of victims.

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¹ Nicholson WJ, Perkel G, Selikoff IJ. 1982. *Occupational exposure to asbestos: population at risk and projected mortality -- 1980-2003*. Am J Ind Med 3:259-311.

² Testimony of Laura S. Welch, MD, Medical Director, Center to Protect Workers Rights, before the Senate Judiciary Committee, June 2003.

³ Congressional Budget Office *Cost Estimate: S. 852 Fairness in Asbestos Injury Resolution Act*, August 2005. All references in the text to CBO estimates are taken from this report.

⁴ Testimony of Philip J. Landrigan, MD, MSc, DIH, before the Senate Committee on the Judiciary, 4/26/05.

⁵ Peter S. Barth, Professor Emeritus at the University of Connecticut. *Commentary on the Creation of a Fund for Victims of Asbestos Caused Diseases*, 2/15/05.

⁶ Ibid.