ADDITIONAL VIEWS OF SENATORS GRASSLEY, KYL, SESSIONS, CRAIG AND CORNYN

Although the goal of this legislation to compensate those harmed from asbestos exposure is both noble and necessary, the means chosen are susceptible to abuses that could bankrupt the fund and, ultimately, impose financial obligations upon the taxpayer. It is also troubling that the bill does not contain any limitations on attorneys' fees or mandatory sanctions for abusive filings. The bill could also be underfunded if certain settlements are not accounted for by the fund, and it creates disturbing inequities among defendants and insurers. Finally, the bill includes a provision requiring certification of payment of claims that could prematurely dismantle the fund and return all claims to the tort system. These flaws must be corrected prior to final passage.

The most significant failing of the bill is its medical criteria and claims values. Two categories in particular are ripe for abuse. First, claim level two allows payment of up to $20,000 for ''mixeddust'' cases. Exposure to multiple industrial elements is commonplace. A mixed-dust claimant's respiratory injuries may well have been caused by something other than asbestos, yet under the bill's medical criteria, that claimant can obtain an award simply by showing qualifying exposure. Second, claim levels seven and eight allow current and former smokers to obtain large awards for lung cancer that (according to expert testimony presented to the Committee) medical science conclusively links to smoking, not asbestos. Abuse of these two categories could rapidly bankrupt the fund and deny relief to truly injured claimants. The fact that bystander claimants can also recover from the fund only adds to the risk.

In addition, the fund sets up a non-adversarial process, but does not place any limitation on attorneys' fees. Attorneys will remain over-incentivized, and likely will file frivolous claims and appeals that could unnecessarily stress the fund. While any cap on attorneys' fees must be generous enough to ensure that those who believe they need to hire legal representation are able to entice qualified counsel, it should also maximize award dollars for worthy claimants—and not act as an incentive to file frivolous suits. The majority of claims filed in this no-fault system should be routine and non-controversial, and not require significant legal work. Moreover, claimants may take advantage of pro bono services and the fund's legal assistance office. Reasonable caps should be placed on attorneys' fees to allow maximum recovery of awards for claimants. We are pleased that Senator Sessions offered and won acceptance of an amendment that requires attorneys to notify claimants of the availability of free legal services. This amendment will prevent claimants from being victimized twice—once by asbestos, and a second time by the trial bar.

Limits on attorneys fees alone, however, will not prevent abuse. Appropriate sanctions should be available, and their use encouraged, to thwart abusive practices by attorneys. This is so because even a cap on attorneys fees of, for example, 10%, could provide $100,000 for an attorney claiming to represent an asbestos victim with lung cancer. The promise of a $100,000 payday may be too much incentive for an unscrupulous attorney to file a frivolous claim and, accordingly, sanctions will control abusive filings. The bill needs to clarify that sanctions will be mandatory for lawyers who abuse the asbestos fund claims process.

Also, to preserve the integrity of the Fund, it is imperative that the only settlement agreements to be paid outside of the trust be final settlement agreements that are based on a current injury, where there is no contingency other than payment. Questions continue to be raised about what settlement agreements are covered by S. 1125. For example, some argue that inventory or matrix settlements—which bind defendant companies to pay future claims meeting specific criteria—or bankruptcy settlements subject to bankruptcy court approval are not included in the language of the bill. In either of these cases, failure to include the settlement in the trust will expose companies to dual liability and entitle claimants to dual recovery, by forcing defendant companies to both contribute to the Fund and pay settlement costs. As a result, billions of dollars, thousands of claimants, and the fundamental premise of the FAIR Act will be removed from the asbestos trust fund.

The bill also has the potential to create hardships for companies who adequately insured themselves against asbestos litigation exposure. Certain companies could have expected minimal out-of-pocket exposure but, by virtue of previous litigation expenses that insurance covered, will qualify for a more expensive tier. One company, which expected only ten million dollars in out-of-pocket expenses, calculates that its obligation under the bill would be $500,000,000 over the 27 year life of the fund. During the markup, the Chairman committed to working to resolve this problem prior to floor action because of this type of gross unfairness. Resolution of this issue is critical.

In addition, the bill poses potential inequities particularly in the allocation of contingent call funding between defendant companies and their insurers. The contingent call funding provision of the bill charges additional billions to participants should the Fund run out of money during the mandatory funding period. We must make sure that the ultimate allocation is fair and reasonable between both sides.

The potential of collusive default judgments against insurers under the bill also is troubling. These judgments are entered as a result of a defendant company's agreement not to contest certain asbestos claims, in exchange for plaintiffs' agreement to enforce the judgment only against insurers, not against the defendant company. One company, a distributor of asbestos products, allowed billions of dollars of default judgments to be entered against it in exchange for agreements from plaintiff's counsel that enforcement would be sought only against insurers. The Insurer/Defendant Coverage Claims Amendment proposed by Chairman Hatch would remedy this problem by preempting collection of these judgments against insurers. In addition to this amendment, language prohibiting all direct actions against insurers should be considered to ensure that insurers enjoy the same kind of certainty that defendant companies and claimants receive under the bill.

Finally, the Biden sunset amendment could seriously jeopardize the relief that the fund is intended to provide victims of asbestos. Senator Biden correctly noted that claimants could be left without recourse in the event that the Fund runs out of money prior to year 27's additional payments. Even those of us who voted for the Biden amendment, however, believe there are better ways to address this problem. The effect of the Biden amendment is to dismantle the Fund and return all claims to the tort system if income in a given year does not meet 95% of all claims—regardless of whether sufficient funds will be available in the next year of the Fund. The Biden amendment thwarts the purpose of the bill, which is to find a viable solution outside of the tort system. This issue should be revisited and corrected in order to allow the Fund to function and claimants to receive payments with some flexibility to address temporary funding shortfalls.

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