



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 108th CONGRESS, FIRST SESSION

Vol. 149

WASHINGTON, THURSDAY, MAY 22, 2003

No. 77—Part II

Senate

THE FAIR ACT

Mr. HATCH. Mr. President, today I rise to introduce S. 1125, the bipartisan Fairness in Asbestos Injury Resolution Act of 2003, the FAIR Act. I am joined by my colleagues Senators BEN NELSON, DEWINE, MILLER, VOINOVICH, ALLEN, and CHAMBLISS who share my concern on this important issue and have worked very hard to help bring about a resolution up to this point. They have all felt the impact of this situation in their home States and have shown the courage that we need to move forward to legislate a solution.

I also commend the interests of my good friend and Judiciary partner, Senator LEAHY, as well as Senators DODD and CARPER, whom I would hope will continue to work with us to improve this important legislation.

I also want to recognize and commend my colleague from Oklahoma, Senator NICKLES, who has also been a leader on this issue and recognizes the harm the current system poses to our workers and to our economy.

There can be no doubt that our Nation faces an asbestos litigation crisis. We have all heard the statistics, but they bear repeating. The RAND Institute for Civil Justice tells us that, to date, over 60 companies—I have been informed almost 70 companies—have been forced into bankruptcy—at least three with operations in my own home State of Utah.

The number of claims continues to rise, as does the number of companies pulled into the web of this abusive litigation, often with little, if any, culpability. More than 600,000 people have filed claims, and more than 8,400 companies have been named as defendants in asbestos litigation, some of them for no good reason at all but who are now stuck with horrendous defense costs, even though they would win every case.

This has become such a gravy train for some abusive trial lawyers—just some—that over 2,400 additional com-

panies were named in the last year alone. RAND also notes that “about two-thirds of the claims are now filed by the unimpaired, while in the past they were filed only by the manifestly ill.” Two-thirds of the complaints are filed by people who are not even sick. Former Attorney General Griffin Bell, amongst many others, has denounced this type of “jackpot justice.”

There is broad support for a comprehensive solution, and I believe that our legislation is a major step in the right direction. I have been and will continue working with my colleagues on both sides of the aisle to resolve this issue. We need to ensure that the truly sick get paid, while providing stability to our economy by stemming the rampant litigation that has resulted in a tidal wave of bankruptcies, endangering jobs and pensions and health care and almost everything else that workers need in these companies. This crisis reaches far and wide, and it hurts everyone.

I am pretty pleased with what we have been able to accomplish to date. I have worked with all kinds of companies. I have worked with the unions. I have worked with some trial lawyers. And I have worked with insurance companies, reinsurers. You name them—they have been to Senator NELSON’s office and my office. And Senator NELSON has worked long and hard and diligently side by side with me to be able to come up with what we have right now, which is a pretty darn good package and a good bill.

I am proud of the product we are putting forth today, but we are not done. We know that. But we have made significant progress.

Let me tell you what this bill does. We pay victims faster. The FAIR Act creates a fair and efficient system to resolve claims of asbestos victims in a reasonable way that enables legitimate claimants to obtain recovery much faster and easier than the current system. A new specialized court will pay

eligible claimants through a no-fault system within just a few months. Asbestos victims will no longer have to wait several years or more to be paid.

Our proposal will streamline the process and decrease the need for attorneys so that claimants will be able to retain more of their awards, without huge attorney’s fees or transaction costs. Transaction costs—most specifically, attorney’s fees—have drained essential resources in the current system, to the point where there will not be resources for those who are truly ill, unless we do this bill.

Non-sick claimants will no longer deplete resources that should pay the truly sick victims. In order to direct the resources to those most in need, the FAIR Act implements measured medical criteria and fair dollar values for claimants so that all those who are sick will be able to get compensation. The medical criteria are modeled on the 2002 Manville Trust Distribution Process. These standards were intensely negotiated with the plaintiff’s bar before they were enacted, and they represent a fair guideline for determining the respective diseases, and for determining who is impaired and who is not. For those who are not sick, we provide medical monitoring. If and when they become sick, they are ensured access to the fund. This is the FAIR approach.

Payments in the new court process will be fair and reasonable. Claimants will have a reasonable expectation of the amount they will receive. There will not be any more runaway jury awards for people who have never actually been sick, draining the resources away from the victims who truly need our help.

We provide stability and certainty. In order to get the stability we need for victims and the economy, the Fair Act is the exclusive remedy for asbestos personal injury claims. There will be no more “forum shopping” abuses that have made a mockery of our justice

• This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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system where some legitimate victims are currently left with no recourse while others with no illness at all receive windfalls.

We have taken great pains to ensure adequate funding for claim awards. Awards to claimants are paid out of a newly created fund consisting of contributions over a 25-year period from both the bankrupt and solvent defendants with asbestos liabilities and insurance and reinsurance companies with policies covering asbestos personal injury claims.

The business community receives the certainty they need to protect jobs and pensions. In our legislation, we set out mandatory funding of \$90 billion from industry and insurers, with an additional \$4 to \$6 billion or more available from current asbestos trusts, and the authority to assess another \$14 billion from companies that may be avoiding future liability. I am really pleased that the various companies and industry have come together on this. Defendant companies have reached an agreement on allocating their \$45 billion in contributions. I am encouraged that the insurers continue to work toward a similar agreement. For now, we have in place a Blue-Ribbon commission that can make those determinations should the insurers be unable to resolve their shares. Overall, the business community has really made tremendous progress to provide funds that are projected to compensate victims appropriately and for the next 50 years.

They haven't been happy to do that but they are going to have to do that. They are not happy with this \$108 billion trust fund. It is at least \$18 billion more than what they were willing to pay. But I believe that they will, in the end, have to come along with this bill. And many of them are saying that right now. They are not happy but they realize that we are trying to resolve this in a way that is fair to everybody.

We all want to ensure that there is enough money in the fund to compensate claimants. Toward that end, I have included provisions such as a payment guarantee surcharge account and an orphan share account where additional funds will be set aside to grow and be available in the unlikely event of a shortfall. In addition, I provide for contribution obligations to be a priority in bankruptcy and for Attorney General enforcement of contribution obligations.

Over the last few days since I circulated the FAIR Act, I have received a lot of helpful feedback. As a result, we have made a number of changes in response to reasonable concerns. I expect we will make more down the road. All we have to do is have reasonable people work with us in good faith, and we are going to try to improve this bill every step of the way. But we have a limited time in which to get this done. Anybody who does not understand that is going to be somebody who destroys or at least attempts to destroy the only game in town, the only way we can resolve these problems.

We have received some suggestions from Senators LEAHY and DODD. I commend their interest in and leadership on this issue. They have provided some valuable suggestions which we will study. We have already incorporated some of their suggestions in the bill we introduce today.

First, we have included language that permits the Administrator of the fund to refer to the Attorney General for enforcement any information received regarding violations of EPA or OSHA regulations.

Second, we specify that life insurance will not be counted as a collateral source offset to any award granted to victims.

Third, as a further safeguard against imbalance in the appellate procedure, we ensure that the judges of the en banc panel of the new U.S. Court of Asbestos Claims are assigned randomly.

We are considering other proposed suggestions that will further our progress on this issue. Again, I want to thank my colleagues on the other side of the aisle who have been engaged in this issue over the last several months, especially my cosponsors, Senators NELSON and MILLER, as well as Senators LEAHY, DODD, CARPER, LEVIN, and FEINSTEIN, who are contemplating co-sponsorship down the line but have not been able to do so as of this date. I encourage them to stay involved and work with us during this process.

I also want to thank the leadership of Senators DEWINE, VOINOVICH, BROWNBACK, NICKLES, and ZELL MILLER in particular, who all share my view that this asbestos crisis must be resolved. I know there are other issues that remain. The issue of a potential shortfall in funding at the end is certainly an important one. I think we can work together to address this issue, although it is premature to come up with a solution to that right now. Perhaps exploring private insurance mechanisms or some other avenue may be the way to go. I don't know. But we are willing to listen.

We have to start now, or we don't have a chance of getting a bill through that will help all of those concerned in this area, from the unions to the smallest company and the largest company. As I have said before, I oppose making taxpayers responsible for any potential mismanagement of the fund. If we employ appropriate medical criteria to ensure that those who are actually sick receive the compensation, that will go a long way toward increasing the manageability of this fund so that we don't have to worry about a shortfall. With our funding levels set at the highest level of current projection, I do not expect a shortfall to occur, and I don't think others do as well who have done the accounting work on this. But we can find a way to give more comfort to those who believe that even the highest level may underestimate the number of claims. If the medical criteria are reasonable, then it will be much easier to resolve the issue of ensuring that there

will be enough funds to redress future claimants.

As I have mentioned to my colleagues, if the desire for a legislative solution is genuine, then we must take a position and move forward with the legislative process. This complex legislation will require our collective efforts and our serious cooperation.

I would like to go to this chart. This chart is on the effects of asbestos bankruptcies on workers. A lot of people don't realize, a lot of union members don't realize how serious this is. According to a study by the notable Nobel-winning economist, Joseph Stiglitz, commissioned by the American Insurance Association, entitled "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms" in December of 2002, bankruptcies led to a loss of an estimated 52,000 to 60,000 jobs. That was in 2002. It is higher now. Each displaced worker at the bankrupt firms will lose on average an estimated \$25,000 to \$50,000 in wages over his or her career because of periods of unemployment and the likelihood of having to take a new job paying a lower salary. The average worker at an asbestos-related bankrupt firm with a 401(k) plan suffered roughly \$8,300 in pension losses, which represented on average roughly a 25-percent reduction in the value of the 401(k) account.

That is important. If we don't solve this problem within the next month, I believe we will have many more companies headed towards bankruptcy with a loss of jobs, a loss of high-paying jobs, a loss of union members' jobs. I believe in the end, the unions will go broke, too. Because if they have any guts at all and any desire to help their members, they will have to help pick up the health costs for these people among other things. But the pensions are going to be gone. The union jobs will be gone. That is why we have to do something now, not keep trying to get blood out of a stone. Unfortunately, we have some who want to do that.

Let me go to this next chart, which is the New York Times. This shows the surge in asbestos suits, many by healthy plaintiffs. The ones who are very injured, cancer ones, are represented by the red line on the bottom. Look at the black line, which is non-cancer victims, many of whom have never suffered a sick day in their lives who are now approaching 70,000 claims, many of whom show no signs of being sick at this point. We provide medical monitoring for them during the lifetime of this trust. We pay for it. If they get sick at any time, they can come in and on a no-fault basis get their compensation without having to pay exorbitant attorney's fees or transactional costs. This is something I think every worker should be cheering and hoping for.

The impact of bankruptcy on employment: After adjusting for the changes in industry employment, the firms for which we have data lost 51,970 jobs in the 5 years prior to bankruptcy.

That is a couple years ago. It is a lot worse than that now. Assuming that employment losses at the firms for which we lack data were proportionate to those for which we have data, the implied total employment loss would be roughly 60,000.

Now, with regard to the change in employment in 5 years prior to bankruptcy, after accounting for changes in industry employment, in firms filing for bankruptcy before January 1998, was 24,551, the number of jobs lost. Firms filing for bankruptcy after January 1998, 27,419 jobs. Total for firms with data, 51,970. The estimated total for all bankrupt firms is 60,000 as of the day that was done. I believe it is now over 70,000.

This is a serious issue. We have to get serious about it. I have tried to work in good faith on behalf of everybody involved. I am calling on all parties—from the unions to the reinsurers—to get together with us and help us to improve this bill.

But realize there is only so much blood you can get out of this stone. If we don't do that, there are going to be hundreds of thousands of union jobs and other jobs lost that literally are going to be devastating to this country and to the individuals involved; and we would deserve the blame in the Congress because this bill would go a long way toward solving it.

Having said that, I praise my colleague, Senator NELSON of Nebraska, and the other cosponsors of this bill. Without Senator NELSON and his encouragement over the last number of months, I don't think we would have reached this far. He has had the guts to cosponsor this bill at this time, and I have nothing but respect for him, and also Senator MILLER as well on his side, and the others on our side, who are willing to stand up. I haven't talked to a lot of Senators about cosponsoring, but I will. I pay tribute to my colleague for his stalwart support in trying to do something about this tremendous set of problems we have in our society today.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. NELSON of Nebraska. Mr. President, thank you for the opportunity to appear here with my colleague from Utah to say how much I appreciate the opportunity to cosponsor with him and others this very important legislation.

I should also say that when I went to the ranking member, Senator LEAHY, a year or so ago and talked about how difficult an issue this was and how difficult it was becoming, he was gracious and granted a hearing, and he has worked very diligently to make certain this issue gets the kind of exposure it should. He has also worked toward finding solutions to it. Senator DODD has also worked tirelessly on this issue, and they both remain very interested in finding a solution.

My colleague from Utah has outlined very clearly much of the statistical

support for this kind of legislation. Historically, in the early 1970s, lawsuits against the asbestos manufacturers opened the door for victims suffering from asbestos-related diseases to be justly compensated for their issues, and they were.

When Johns-Manville—the largest asbestos manufacturer—filed for bankruptcy in 1982, there were fewer than 20,000 asbestos cases, most on behalf of individuals with severe asbestosis or mesothelioma—a vicious asbestos-related cancer. The system worked. Sick people and their families were given the financial security they deserved.

But then the system stopped working. A flood of cases overwhelmed it—some from individuals who were not yet sick but could potentially get sick in the future. We don't want to prevent these individuals from recovering down the road, but we also need to work toward allowing those who are sick now to recover now. With the current docket load, that just isn't happening. Over 90,000 new asbestos lawsuits were filed in 2001 alone, representing an increase of 30,000 from the previous year. However, the American Academy of Actuaries estimates that there are only about 2,000 new mesothelioma cases filed each year, another 2,000 to 3,000 cancer cases that are likely attributable to asbestos, and a smaller number of serious asbestosis cases. As a result, we need to work toward finding a way to address the lawsuits of seriously ill individuals immediately without eliminating the ability for those who may become sick in the future to have their case addressed at the appropriate time.

The unfortunate result of these tens of thousands of lawsuits is that people who are seriously sick and dying from asbestos must wait longer to recover less money than they deserve—if they can recover anything at all. After transaction costs and fees for both plaintiff and defense lawyers, only about one-third of the money spent on asbestos litigation will actually reach the claimants.

Moreover, as insurance is depleted and an increasing number of these defendants declare bankruptcy, it is inevitable that many asbestos victims who develop cancer in the future will go uncompensated, unless we take the action this bill will provide.

The economic fallout from this situation, though, extends beyond sick victims. Because every company that manufactured asbestos is now bankrupt, plaintiffs have been forced to seek alternative defendants to take their place. According to the Rand Institute for Civil Justice, 300 firms were listed as defendants in asbestos cases in 1983. But by 2002, Rand estimates that more than 6,000 independent entities have been named as asbestos liability defendants. More recently, another Rand Institute study has estimated that there is about \$200 billion in pending asbestos claims. Many of these new defendants are small busi-

nesses located in every community across the country, with little or no actual connection to asbestos.

I have heard from scores of small businesses in my State—local hardware stores, plumbing contractors, auto parts dealers, lumber yards—and none of these businesses manufactured it. Many did not sell it or install it. But these businesses and the jobs they represent are at stake. They are now afraid that as primary asbestos defendants declare bankruptcy, they will be next in line for the thousands of cases being filed and their businesses will not, therefore, survive.

As the Wall Street Journal reported recently:

Lawsuits are now piling up against consultants, engineering firms, plant owners, and maintenance and construction contractors, all of whom are being blamed for workers' exposure to asbestos.

Also, part of this litigation is now being targeted at insurance providers. As the same story states:

Many of the smaller [companies] lack resources to defend thousands of lawsuits or pay huge verdicts. But the companies do have one thing in common: plentiful insurance.

As the number of asbestos claims filed each year has nearly tripled in the last 5 years, the pace of asbestos-related bankruptcies has also accelerated dramatically.

Since 1998, more companies have filed for bankruptcy protection than in the previous 20 years combined; and in the first 7 months of 2002 alone, 12 companies facing significant asbestos liability went bankrupt—more than in any other 3-year period before 1999. Firms declaring bankruptcy since 1998 employed more than 120,000 workers prior to their filing, many of whom were significantly invested in their company's stock, pension, and 401(k) plans.

According to Fortune magazine, for example:

[A]t the time of the Federal-Mogul's bankruptcy filing [in 2001], employees held 16 percent of the company's stock, which had lost 99 percent of its value since January 1999.

It was reported that Federal-Mogul employees lost over \$800 million in their 401(k). Similarly,

[A]bout 14 percent of Owens Corning's shares—which lost 97 percent of their value in the two years before its filing—were owned by employees.

I think we can all agree that those individuals with legal claims who are truly very sick need to be taken care of in the most timely and equitable manner possible. That must be our No. 1 priority. We must also work to ensure that those who are not sick now, but may become sick in the future, are not precluded from recovery and that there are still funds available for such a recovery.

Mr. President, this bill, as it is currently, begins the process of doing just that. And as indicated by my colleague, it is a work in progress. There are many opportunities yet to modify and to improve it as we go through this

process. That is what the hearing will be about, and that is what the negotiation would be about.

I am a strong believer that every American has a right to their day in court, but I also believe people dying of asbestos-related disease deserve just compensation for themselves and their families. Fortunately, we are coming closer to being able to restore balance to the system. The fund is in the process of being created that will, I hope, provide a pool of lasting benefits for those with meritorious claims. At the same time, this fund will spread the burden of the cost more evenly and ensure the financial impact will not solely be directed at some parties due to their ability to pay rather than their true liabilities.

There are a number of task that remain to be done, and we recognize that, and we welcome the opportunity to bring all those folks together to make sure we come together with the best possible bill that will do the best possible job for those who are truly sick and those who will become sick.

We are now at a time, I believe, when this issue can be and should be resolved, perhaps not once and for all, as some would hope, but for a good long while, giving us a chance to restore stability and certainty to a very uncertain issue.

While this may not be a perfect bill, as they say, we must not let our desire for the perfect become the enemy of the good. Much work remains to be done, but I hope the parties, the stakeholders, will come together and work with us to refine the bill.

I look forward to working with Members on all sides who truly are striving to ensure that those who have been injured the most have an opportunity to make their cases heard.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. The Senator from Montana.

TAX CUT BILL

Mr. BAUCUS. Mr. President, sometime in the near future—near is in the eyes of the beholder—we are going to vote on the conference report to the tax cut bill. When that does come up before the Senate, I will oppose the bill and recommend the conference report not be adopted.

The conference report, which will be before us soon, is, first, not fiscally responsible. It is not fair to working Americans, and is not likely to succeed in rebuilding the American economy.

First, fiscal responsibility: Two years ago when we considered the 2001 tax cut, the Congressional Budget Office projected trillions of dollars of surpluses well into the future. In fact, \$5.6 trillion was projected as budget surpluses over the next 10 years. Today, that same neutral, independent body, the Congressional Budget Office, projects deficits well into the future, and the rough estimate is about \$2 tril-

lion of deficits, a swing of close to \$7 trillion to \$8 trillion over just 2 years.

The fiscal environment has dramatically changed since 2002. If that is the case, I believe our tax policies should also change. Whereas in 2001 it made sense to cut taxes, today we should look much more carefully at any potential tax cut.

The fiscal environment has changed very much today compared to where it was in 2001. Consequently, we should be carefully examining our tax policies and asking whether our tax policies should change accordingly.

The Senator from Ohio, Mr. VOINOVICH, kept his word and forced the conferees to keep the conference report, at least on its face, within the \$350 billion Senate agreement. Unfortunately, this tax cut bill busts through that \$350 billion ceiling through a series of gimmicks that hide the true cost of the bill, and in this time of increasing deficits, I believe we must live within our limits, and this conference report fails to do so.

Instead, it uses phase-ins and sunsets to shoehorn large tax cuts into a small budget window. Republicans have designed a tax cut that is one big yo-yo. Now you see it, now you don't. Here again, on again, off again. It is one big yo-yo which I will explain in a few minutes.

The child credit, for example, has increased for the years 2003 and 2004, and then guess what. It is taken away. That is one yo-yo.

Part of the marriage penalty is eliminated for the years 2003 and 2004. Guess what again. The penalty comes back again after 2004.

The 10-percent bracket is expanded for 2003 and 2004. Then it reverts back.

Even the dividend tax cut disappears after 2008.

Individual taxpayers and corporate taxpayers, I believe, want certainty. They want some predictability. They want to be able to plan for their families, and companies want to plan for the future. Individuals want to know whether they can plan for vacations, education, and companies want to know whether to invest or not invest. We certainly do not give them that certainty and predictability in this bill.

As for planning, this bill tells American taxpayers, for example, to get married in the year 2003 or 2004, have a child in 2003 or 2004, and then get divorced in 2005. This bill is simply full of way too many gimmicks.

Last year, Members of Congress and the President expressed their outrage at the accounting gimmicks and manipulations of income and expenses by Enron, WorldCom, Adelphia. In fact, legislation was enacted last year to put the brakes on the use of accounting gimmicks by corporate America.

If these accounting gimmicks and financial statement manipulations are so intolerable in corporate America, then why are they not intolerable for the U.S. Congress? Why should Congress be allowed to deceive the American public?

What is really going on here? What is really going on is that the majority intends to extend these tax cuts beyond the budget window. That is what is really going on here. That is the accounting gimmick. That is what is hidden. But if we extend the tax cuts, they will only add to the long-term budget problem. That is, if they are extended as intended by the majority party, they will add to the fiscal nightmares just as we face budget strains brought on by the baby boom generation. Congress should come clean with what is really going on, what it is really up to.

Second, this conference report is not fair to working Americans. The benefits of this bill are skewed heavily to the elite in this country. It mistakenly directs less of its resources to working American families—much less. In this sluggish economy, that is also not good economic policy. Working American families are more likely to spend tax cuts quickly; that is, tax cuts directed at working American families will more likely help rebuild the American economy, but that is not what this bill does.

Take, for example, the tax cuts for dividends. This tax cut alone is heavily weighted to the elite. Three out of four American taxpayers have no dividend income, and half of those who do have dividend income have less than \$500 in dividend income. That is about one out of eight at \$500 or less in dividend income. So the overwhelming majority of Americans will get little or no benefit from this provision. But look how much this single provision will benefit the elite who do profit from it.

A taxpayer who had a million dollars in dividend income will get a tax break of \$236,000. In contrast, \$118 or less in tax cuts for the seven-eighths of taxpayers who receive \$500 or less in dividend income and \$236,000 for the dividend millionaire. That is simply not fair.

Let's look at priorities. The dividends provision is the single largest provision in the bill. That means the bill imposes a penalty on wage earners by definition.

Under the bill, the maximum tax on investment income, that is, dividends and capital gains, is 15 percent. The tax on the wages, however, continues to be heavy. A single fireman earning \$35,000 per year pays 40 percent of his marginal income in Federal taxes, 15 percent in payroll taxes, plus 25 percent in income taxes.

In contrast, a retired investment banker living off the dividends on a \$1 million portfolio of stocks pays only 15 percent of his marginal income in Federal taxes. Again, this is not fair.

Whatever happened to the argument that we need to eliminate the double taxation of dividends? I thought that is what this bill was supposed to be primarily about. This conference report does not do that. It does not eliminate the double taxation of dividends. Rather, in many cases it would eliminate not only the double taxation of dividends, but it eliminates even the one-