now proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

ASBESTOS LEGISLATION

Mr. SPECTER. Mr. President, I have sought recognition to comment briefly on the bill, S. 1125, which provides for relief on the serious problem facing America involving asbestos.

I have had a number of inquiries on the status of the bill. I recently received a comprehensive memorandum by former Chief Judge Edward R. Becker for the Court of Appeals for the Third Circuit. I thought it would be useful to comment as to the status of this bill at the present time.

Asbestos litigation has caused some 67 bankruptcies in America, and the injuries from asbestos have left workers without compensation and suffering from mesothelioma, asbestosis, and other very serious ailments. In July, the Judiciary Committee passed out S. 1125. I voted for it. It was a vote pretty much along party lines. We passed it out of committee so we could take the next step looking toward floor action.

But the bill required a great deal of evaluation, analysis, and significant changes. I contacted senior Circuit Judge Edward R. Becker, who had been chief judge of the Court of Appeals for the Third Circuit until May 5 of last year. Since he had been involved in major asbestos litigation, I thought he would have special insights into this issue and this problem. He is one of America's leading Federal jurists, if not the leading Federal jurist. He received the Devitt award last year as the author of many scholarly opinions. He was a district judge from 1970 to 1982. He has been on the Court of Appeals for the Third Circuit from 1982 until the present time.

I think bringing in a Federal jurist to help on a legislative matter is unprecedented. During the month of August, when the Senate was in recess, 2 full days were spent in Judge Becker's chambers in Philadelphia, where I attended, and we had representatives from the manufacturers of asbestos; insurance companies, which insured asbestos manufacturers; reinsurers, who reinsured the insurers; representatives of the AFL–CIO, representing the injured parties; and trial lawyers, also representing the injured parties.

Since those two meetings in August, there have been a series of additional meetings in Washington in my office, where Judge Becker has attended. One meeting involved Majority Leader BILL FRIST. Another meeting involved representatives of the Department of Labor. In total, there have been some 15 meetings. We are scheduled to have our 16th one on Thursday of this week.

The bill—the product of very inventive thinking by the chairman of the committee, Senator HATCH—has created a fund, funded initially at $104 billion. It has subsequently been increased. The thrust was to create a schedule of payments very much like workers' compensation, where there would not have to be proof of causality, proof of liability; but once the damages were established coming from asbestos, the payments would follow this schedule.

The situation has been compounded, as I say, by the bankruptcy proceedings and the reorganization of some 67 companies. The law has been that workers, or others exposed to asbestos, could be compensated for the full range of their potential injuries even if they had not yet sustained those injuries—a result which I submit does not make good sense in a context where many people who have serious injuries, mesothelioma, asbestosis, and others who are not being compensated at all. This seeks to correct those inequities.

We have wrestled with a great many of the problems, and we have solved a great many issues. Enormous progress has been made on others. We have had the cooperation of many Senators. Senator HATCH has had representatives at the meeting. Senator LEAHY, the ranking Democrat, has had representatives there. The majority leader, Senator FRIST, and the Democratic leader, Senator DASCHLE, have had representatives there. Senators DODD, CARPER, FEINSTEIN and NELSON have also participated with representatives present. Judge Becker prepared a very comprehensive memorandum, dated March 16, outlining the evaluation of the current status of ongoing efforts to achieve a consensus among the manufacturers and insurers, the trial lawyers, and the AFL–CIO.

It is my view that this is the kind of bill that cannot be enacted unless there is a consensus. Unless there is agreement among all of the stakeholders or parties, I think we will not be able to enact this important legislation. If this legislation were to be enacted, it would be an enormous stimulus to the economy and would take these many companies that are in bankruptcy proceedings out of those proceedings so that they become again productive.

Many of those companies are in my home State of Pennsylvania and many across the country.

That is a very brief summary as to where we stand. We will be back at work on Thursday. We are determined to solve these problems. I am optimistic they can be solved. The majority leader has stated his intention to bring this matter to the floor for a vote some time next month. I think we are very close to knowing whether we can resolve these issues, and we will continue to try to do that.

I repeat, I am optimistic we can resolve the issues. The stakes are very high. We have many injured workers who are relying upon some answer to their just compensation. The companies are looking for an answer, and the economy needs to be stimulated and also looks for an answer.

I ask unanimous consent that the memorandum from Senior Chief Judge Edward R. Becker, dated March 16, 2004, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MEMORANDUM

Date: March 16, 2004.
To: Senator Arlen Specter.
From: Judge Edward R. Becker.
Re: Pending Asbestos Legislation S. 1125 (Fairness in Asbestos Injury Resolution Act) (Status Report on Progress of our Mediation).

You have asked that I memorialize my evaluation of the current status of our ongoing efforts to achieve a consensus among the manufacturers and other defendant companies, the insurers, the reinsurers, organized labor, and the trial lawyers, i.e., the stakeholders concerned with S. 1125, so as to facilitate consideration of the legislation by the Senate and make possible its ultimate passage in a form satisfactory to the stakeholders and the Senate. This is an interim evaluation. I will be in better position to evaluate the situation after the weekly meeting this Thursday, March 18, 2004. That is because at our meeting of March 11, it was represented to us that draft legislative language with respect to a number of key issues, including ''start-up'' of the National Trust Fund, on which the stakeholders are apparently close to consensus, will be presented on March 18. The start-up consensus, as I understand it, is to have the insurers and manufacturers put up substantial sums on ''day one'' so that the Fund can be jumpstarted and exigent claims can come right into the Fund and not have to linger in the tort system. I have urged that language be drafted to authorize Bankruptcy Courts to approve immediate payments by the Tier 1 (Chapter XI) companies into the Trust Fund. I will give you a follow-up evaluation after the March 18 meeting.

As you know we have made enormous progress over the last few months on quite a number of issues, and already have a clean consensus draft of a comprehensive administrative structure for processing claims which, subject to review by Senate Legislative Counsel, can go right into the bill. Based on representations at recent meetings, I believe that we can expect (consensus) bill language in the next week or two, tying up the few loose ends on the administrative structure, particularly the statute of limitations issue and the definition of exigent claims. The issue of limits on attorney's fees will also have to be resolved, but I think that is do-able. I also expect very shortly consensus bill language covering non-discrimination by health insurers with respect to coverage against workers receiving benefits under S. 1125; and engrafting into S. 1125 Health Insurance Portability & Accountability Act (HIPAA) presumptions regarding exposure criteria; i.e., rebuttable presumptions concerning the extent to which employment (a) in specific industries, (b) in specific occupations within those industries, and/or (c) during specific time periods constitutes ''significant occupational exposure.''

There are quite a number of other issues on which the stakeholders represent that they are close to agreement including:

1. Values as a range
2. Timing of payments
3. Exclusivity for all asbestos related claims (silica, etc.)
4. The anatomy of medical monitoring
5. Collusive default judgment

6. The smoking matrix.

These matters can, I believe, be put into consensus bill form quickly, and I will seek to establish a timetable at Thursday's meeting.

Another key area on which the parties seem close to agreement is the status of settlements and pending cases. The views that you expressed—that a case that has been settled should be out of the National Trust—seemed to be accepted by all. There were two caveats. One related to partial settlements—with some but not all potential defendants, but I believe that a formula can be worked out to deal with that situation. The second related to generalized agreements between plaintiffs' counsel with large inventory of cases and insurance carriers as to the terms of settlement when the cases become ripe. I do not believe that such ''settlements'' should qualify. I believe that other pending cases should go into the S. 1125 National Trust. I note, however, that there are 300,000 pending cases, and unless start-up can be quite effective Labor would prefer that they be processed in the tort system. I still believe that the pending claim issue is resolvable.

Another critical area where much progress has been made is ''sunset.'' Based on representations at last week's meeting, I believe that we are in striking distance of an agreement on sunset, including the timing of sunset; program review (so as to anticipate the need for sunset); and return to the tort system. There is some disagreement as to whether the return to the tort system should be in state or federal court. I understand that your position is that the return should be to federal court, so as to avoid the excesses of certain state jurisdictions. I agree, and believe that the stakeholders, with the exception of the trial lawyers, will be satisfied with that result. Another sunset-related issue that is under discussion and needs resolution is whether, in the event of sunset, the Tier 1 companies (those presently in Chapter XI) go back to the Bankruptcy Court, so as to assure that funds dedicated to Bankruptcy not be dispersed (disbursed) at large. I believe that issue too to be capable of early resolution.

In our recent meeting with high officials of the railroad industry and the rail unions, we discussed in depth the treatment of rail workers with asbestos disease under S. 1125. It was the position of the rail unions that the preemption by S. 1125 of the right of rail workers to file claims under the Federal Employers Liability Act (FELA) is unfair because non-rail workers maintain their full rights to seek workers' compensation from their employers for asbestos related diseases. However, our discussion revealed that the supposed discrimination was largely illusory because 95% of the rail workers with asbestos disease are retired and would have no traditional workers' compensation claims. It was acknowledged by all that the scheme of S. 1125 does leave non-retired rail workers modestly worse off than their non-rail counterparts, and we charged the stakeholders with coming up with a formula that would create parity. We are awaiting the results of their deliberations. If they do not reach agreement, the Senate could settle it.

The insurers and reinsurers are struggling to come up with an allocation formula that would obviate the need for an Asbestos Insurer's Commission (appointed by the President). If they cannot, the Commission can remain in the bill (as a kind of ''club''—for S. 1125 already provides that if an allocation formula is agreed to by all participants in each insurer group and approved by the Commission and the House-Senate Judiciary Committees, the Commission will terminate. Section 212(2). I have entreated the stakeholders to work on a redraft on the Asbestos Insurer's Commission language, §219 et seq., which is presently cumbersome, and they have agreed to do so. At the very least, the requirement of 100% agreement seems too high. I note that the creation of a Commission is not a matter of great urgency because it is anticipated that the start-up payment of both the insurers and reinsurers will be very substantial, postponing the need for a Commission decision on allocation. We also discussed last week mechanisms for assuring the contributions (and collecting of contributions) from offshore reinsurers. A number of potential statutory provisions were discussed, and I think that this aspect of the matter can be resolved.

We had a good deal of discussion last week about what to do with pending bankruptcies. I expressed the view, based upon a conversation that morning with the bankruptcy judge who is handing most of the asbestos bankruptcy cases, that it will be quite some time, at least a year and probably a good deal longer, before the major bankruptcies can be resolved; even if plans are agreed upon and are confirmed, the insurers will appeal. Consequently, I urged that the pending bankruptcies be folded into the National Trust. The Tier 1 (Chapter XI) companies are liable under S. 1125 for roughly 20% of the Trust funding, so that their participation in the National Trust is essential. Additionally, it appears that, with fast start up, the claimants will receive compensation from the Trust Fund much more quickly then they would from the bankruptcy trusts. I believe that the stakeholders are comfortable with this view. Drafting is simple.

It appears that Labor feels that the Tier 1 companies should pay more than S. 1125 provides, i.e. what they would pay on bankruptcy. The Tier 1 companies, however, point out that they will already pay a significantly greater percentage then the non-bankrupt companies, and further argue that any effort to make them pay into the Trust Fund the amount they might have to pay in bankruptcy is not sound, because: (1) in most cases these amounts are at present speculative (usually agreed to by only one class of creditors), and, at all events, subject to approval of the Bankruptcy Court (in one case the Court disapproved); (2) the deal under S. 1125 is different because in bankruptcy they are forever discharged whereas under S. 1125 they may be back in the tort system; and (3) companies such as Armstrong would be dealt a body blow by such a provision. Since the increment is at most $1 billion, I do not think that this is a ''deal breaker.''

I turn now to the few remaining issues. Medical screening and education for high risk workers must be resolved. I do not think that one is too tough. Some technical bankruptcy issues such as the problematic floating Chapter XI lien and some points raised by the Bankruptcy Administration Division of the Administrative Office of the United States Courts must be resolved. These are just drafting problems. There are, however, three critical issues remaining, the second and third of which will make or break the bill, and they are related.

The first is subrogation of workers' compensation payments (health insurer subrogation is apparently not a problem). Labor firmly believes there should be no subrogation; it represents that no similar federal program provides for it. The insurers and business think there should be subrogation to avoid ''double dipping.'' One major manufacturer represented at the talks did not see failure to provide for workers comp subrogation as a problem, but others thought that the failure to mention subrogation in the bill would alter future behavior by encouraging more comp claims. We charged the stakeholders with ascertaining the dollar amounts involved. I suspect that they are not as great as imagined, especially in view of the number of workers with asbestos disease who are retired. These appears to be a will to work this out.

The second issue is ''transparency''—the need to assure Labor and the claimants that the funding formula (for insurers and especially manufacturers and other defendants) will yield the sums projected by the bill's sponsors. Labor maintains that on the present record there is no way to know this. Business concedes that there is no extant list of the companies who will be in the various tiers, and that there will not be one. The companies acknowledge that they must come up with a solution to the transparency problem, whether it is joint or several liability, or guarantees, or surcharges, or something else, or there can be no consensus. They have promised to come up with something.

The final—and most difficult issue—is the funding level. Labor claims that the projected $114 billion is grossly inadequate to pay the needed compensation to the injured workers. This matter is well beyond my portfolio. I believe that Labor must come down considerably from the Leahy-Kennedy values, and that business must ''sweeten'' considerably the Frist values. If all the other issues can be worked out, perhaps the Senate leadership can prevail on the stakeholders to reach agreement on the projected dollars.

One final comment. I cannot praise too highly the representatives of the stakeholders who have participated in our dialogue. They are working assiduously, constantly (two or three meetings per week), and, in my view, earnestly, and in a spirit of cooperation and in good faith to try to reach consensus. Senate staff has also been of very great help. I believe that if we can keep up the current pace for another four weeks, five at the most, we can get the job done. I may be wrong. The dollars may be the final stumbling bloc, However, I am prepared to give it my ''best shot,'' and to come to your office every week to work with you to keep the ball rolling.

TRIBUTE TO HANH THAI DUONG

Mr. MCCONNELL. Mr. President, I rise today to pay tribute to Hanh Thai Duong, a woman who epitomizes the American dream. Duong is the owner of a restaurant in my hometown of Louisville, KY, The Lemongrass Café.

Duong's journey from Vietnam to America is a miraculous one. In 1979, when she was only 10 years old, the Vietnamese government told her family that they would be able to leave Vietnam because of her father's Chinese ancestry, but only if they gave up all of their possessions and paid a sum in gold to the Vietnamese government. They decided the trip would be worth the risk, so they left everything behind and boarded a fishing boat that took them to a new life in Hong Kong.

A year later, with the help of a relative in Louisville and a number of Catholic charities, Duong and her family left Hong Kong for Kentucky. Duong's unwavering determination and a belief in the importance of an education, helped her work her way through the University of Louisville and earn a degree in finance and international business.