

We need to continue to work toward opening foreign markets to American goods and services. What we do not need to do is to apply the brakes on the economy by raising taxes on hard-working moms and dads, small businesses, college students, and teachers across the country. That is not the prescription for continued economic growth. I have said this many times, but the fact is by cutting taxes you grow jobs. We have been through a recession, national emergency, corporate scandals, and a war. Yet because the President has stepped forward with an economic plan based on the common-sense belief that we should put money back into the pockets of ordinary Americans, the economy is going strong. By providing businesses with incentives such as bonus depreciation and expensing, they will be able to reinvest in their operation, purchase more goods, and hire more employees. That translates into jobs, economic growth, and opportunity for all Americans.

Given the good news on the economy, even the most persistent critic must concede that the President's economic program boosted the economy's performance and played a crucial role in helping the economy to rebound from the recession that began during the final months of the Clinton Presidency. I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

ASBESTOS

Mr. KYL. Mr. President, when the Judiciary committee reported an asbestos-trust fund bill in 2003, I proposed three criteria for evaluating such a bill: the trust fund must be fair to people with asbestos injuries; its cost must be reasonable; and it must provide a permanent solution to the asbestos-litigation crisis. Last year, I voted to report this bill out of committee because I believe that the bill does meet or has the potential to meet each of these criteria. I also voted for the bill in no small part out of appreciation for the chairman's extensive efforts to address my concerns about the bill. I particularly appreciate his assistance in adding to the bill a gatekeeper mechanism for certifying exigent claims seeking an early settlement. Any startup provision that threatens to prematurely return the trust fund to court is bad for victims, bad for participant businesses, and bad for the U.S. Government. Once this fund is started, it need to work—we cannot shift victims back and forth between the tort system and the fund, especially those victims with malignant conditions, who likely do not have long to live.

The need for this bill is obvious. Current asbestos litigation practices have been accurately described by Professor Lester Brickman as a "massively fraudulent enterprise fit to take its place among the pantheon of American scandals." Typically, trial lawyers con-

solidate thousands of claims and file them against a series of defendants. These claims are generated by mass-screening recruitment companies that ignore all scientific standards for identifying asbestos disease and employ corrupt physicians who will say that anyone has asbestosis if the fee is right.

In the perverse rules, plaintiffs' lawyers have a de facto veto over confirming the bankruptcy trust and can thus dictate its terms.

The results are predictable: even for asbestos bankruptcy trusts amounting to billions of dollars, the plaintiffs' lawyers take 40 percent off the top. These recoveries inevitably compensate lawyers in an amount several orders of magnitude greater than anything resembling a reasonable hourly rate. And all for bringing claims that no honest doctor would ever describe as legitimate cases of asbestos injury. It is easy to see where a well-crafted trust fund could improve on this system—how it could cut out the trial lawyer middle man and preserve recoveries for actual victims of asbestos disease.

Nevertheless, when I voted for this bill in the committee, I expressed reservations about the final product. One concern about this bill looms above all others, and it directly threatens all three of the above-stated criteria for evaluating the bill: solvency. I remain deeply concerned that this fund will run out of money and prove unable to pay all qualifying claimants. Allow me to explain why I am concerned about the fund's finances.

Here are a couple of reasons why. First, look to the bankruptcy trust funds previously existing and that have existed in the past. What has our experience been? Not very good.

In written questions to Dr. Francine Rabinovitz, who has been retained by trust fund bankers to estimate future claims under the fund, I asked her about the experience under the asbestos bankruptcy funds. Those funds are about the closest analog to what we are doing here—no-fault funds that compensate all claimants who meet particular exposure and medical criteria. Indeed, the criteria for this fund explicitly are borrowed from the latest version of the Johns Manville bankruptcy fund, which is part of her study. I appreciate her candor. Here is what she had to say:

To my knowledge, none of the bankruptcy trusts created prior to 2002 have been able to pay over the life anywhere close to 50 percent of the liquidated value of qualifying claims. Of the current generation of bankruptcy trusts, the expected payout of those trusts, to my knowledge, ranges from a low of 5 percent (Manville) to a high of 31.7 percent (Western McArthur). The only current operating Trust to pay 100 percent of its scheduled values in the Mid-Valley Trust. These percentages are sensitive, of course, to the eligibility criteria the trusts apply. Under its original eligibility criteria, Manville was forced to drop its initial 100 percent payout first to 10 percent and then 5 percent of liquidated value. There will be a reevalua-

tion of Manville's ability to pay a higher percentage in the near future by virtue of the impact of its recently imposed more stringent eligibility criteria.

These figures should disturb us all.

We are legislating a \$140 billion trust—one that must work, because the costs of failure would be catastrophic. And yet the model for this fund is one that has failed every time that it has been tried. The miserable performance of the bankruptcy trusts should, at the very least, make us very cautious in proceeding down the same no-fault trust-fund path. While I recognize that this Fund is not exactly like the bankruptcy trusts—that it is designed better in some ways—in other ways the compensation criteria employed by this Fund are a change for the worse.

Another example that ought to give us some pause is the black lung fund, which is designed to compensate miners with CWP, a coal-mining-induced lung disease. That fund is now \$8.7 billion in debt. It is now finally bringing in enough revenue to pay current claimants, but it is unable to service its debt. Each year's interest is simply added to the total debt. This is no way to run a trust fund.

It is telling to read the story of the black lung fund and hear why it has become so overburdened. The narrative should sound familiar to anyone who has closely followed the committee proceedings for the asbestos fund. There is a June 12, 2002 report from the Congressional Research Service. I wanted to quote from part of it, but the bottom line is that the crafters of the black lung fund ignored medical science when they set up the fund's compensation criteria. As is predictable for Congress, criteria were developed in the spirit of political compromise rather than under the guidance of hard science. The results have been very unfavorable.

The report basically said:

Virtually all of the expectations for the Black Lung Benefits Act when it was enacted in 1969, e.g., the numbers of claims submitted or approved, were contradicted by subsequent experience. Corrective legislation was adopted in 1972, 1977, and 1981, including the establishment of trust fund financing in 1977, but results have continued to be at variance with expectations. As a consequence, the trust fund has perennially been in a position of growing deficit.

In other words, even at a time when the black lung fund's liberal compensation criteria were generating a surplus of claims, political pressures nevertheless pushed Congress to further liberalize those criteria and further bankrupt the fund.

In the asbestos arena, I fear that we already have repeated the first part of the black lung fund story. Our concern is that as we continue down this path, we risk repeating the rest of the story as well.

But this fund is different from black lung in one key respect: it is much, much more expensive. This fund has the potential to burn through scores of billions of dollars, rack up \$30 billion in

debt, and throw us back into the tort system—all within one decade. Such a result truly would make the black lung fiasco seem insignificant. It would be an utter disaster. We cannot let it happen.

I wish that the Judiciary Committee had learned more from the black lung experience—that we could at least recognize that a no-fault trust fund must be run as a tight ship, with rigorous compensation criteria and no leakage of claims. Unfortunately, that does not describe the bill that has been produced by the Judiciary Committee.

In his recent testimony before this committee, Dr. James Crapo described how we are repeating the same mistake made in the black lung fund: we are compensating diseases that are not caused by occupational exposure to asbestos. Dr. Crapo criticized the fund's compensation of persons with pleural reactions, which are not regarded as a disease and are not even a predictor of future disease. He also criticized the fund's claim level for persons with colorectal, stomach, and other cancers, noting that it would "result in large compensation to large numbers of individuals who develop a cancer for which there is no established causal relationship to asbestos exposure."

And just as was the case with black lung, despite the asbestos fund's use of criteria that are far more liberal than what can be justified by medical science, we already are hearing arguments that the fund should go further, that its compensation criteria should be even more liberal. For example, the medical literature strongly demonstrates that the only marker for asbestos-related lung cancer is clinically significant asbestosis. The cohort studies overwhelmingly show that unless a person has at least some asbestosis, asbestos exposure played no role in his lung cancer. But in this bill, we go further than compensating lung cancer in the presence of asbestosis. We also compensate lung cancer with pleural plaques. Pleural plaques are evidence of asbestos exposure but are not a valid marker for asbestos-related lung cancer.

And yet, even this has not satisfied some fund critics. This committee was even forced to vote several times on an amendment that would have obligated the fund to pay compensation for lung cancer when the claimant did not even have pleural plaques. The committee did defeat that amendment by a vote of more than 2 to 1, showing some respect for medical science. Nevertheless, the amendment is a harbinger of the political pressures that this Fund ultimately will face over its life.

Several other aspects of this bill also cause me concern. Let me summarize some of those.

For example, the sunset: The bill still contains a provision that would prematurely terminate the fund and return all claims to State and Federal court, with no mechanism for fixing problems even if the reason that the

fund is running out of money is because it is paying non-meritorious claims. Once the fund is started, it must work. Going back to court is not a realistic option. As the bill now stands, the fund would borrow \$30 billion prior to any sunset. Once companies are back in court defending against asbestos claims, they would also be paying down this debt. This would require full trust fund assessments for at least a decade. These payments, combined with renewed litigation and no, or heavily eroded, insurance policies, would be unaffordable for many companies. The effects of such a sunset likely would be so devastating that companies would demand that the Federal Government begin directly subsidizing the fund. This is a prospect that we should do all that we can to avoid. The fund should have a self-correction mechanism that makes sure that a sunset will never happen.

Another problem is allocation. This is an emerging problem, the scope of which we are only gradually becoming aware of, and, frankly, one to which I will devote my primary attention. The bill requires companies to pay into the fund based on their past asbestos expenditures, judgments, settlements, and litigation costs, even if those payments in the past were all absorbed by insurance. Companies' insurance will not cover their trust fund payments; insurers pay into the fund separately. The fact that the bill effectively invalidates the company's insurance contracts creates colorable takings claims against the fund. It also creates some serious inequities. Companies that found their asbestos liabilities to be manageable will find themselves facing unaffordable fund assessments. I am going to insist we have language in this bill that will address these inequities.

Another problem is startup. Much progress was made during the last days of markup toward fixing the so-called startup provisions. Nevertheless, the fund still ultimately allows claims to return to court if there are delays in startup, with no limits on award and no offsets in future fund payments for participants. Other, much simpler trust funds, such as those for radiation workers, have taken 18 months to start functioning. We cannot dismiss the possibility that this fund will require more than 2 years to begin paying all claims. Without an offset in limits, such a startup reversion would be disastrous for many companies.

Another issue relates to pending claims. The fund allows claims that already have advanced to trial to remain in the tort system with no offsets and no limits on damages. Already, some trial lawyers have begun seeking acceleration of their trial dates in order to take advantage of this provision. For the same reasons as applied to the startup provisions, such continued litigation could be very damaging.

A final problem is the problem of medical criteria which I alluded to ear-

lier. Although improved over the 2003 committee bill, especially with regard to removal of level VII smokers, the fund still pays people with very common diseases that were not caused by exposure to asbestos. Credible medical experts had expressed the view to the committee that these problems will bankrupt the fund. These flaws in the bill would be less severe if the fund contains some self-correction mechanism that allowed tightening the million-dollar criteria in the event of insolvency caused by nonmeritorious claims, but it currently contains no such mechanism.

In summary, the bottom line is this is a bill which remains very much a work in progress. I am committed to addressing its problems as the bill advances through the Congress. I want to see it advance through the Congress. The bill is so important to so many people: the asbestos victims seeking compensation—at least it might help take care of their families, the businesses with only marginal connections to asbestos that nevertheless face bankruptcy through litigation, and workers and pensioners who see their jobs and retirement accounts destroyed by the litigation juggernaut. This bill is important. I look forward to working on the legislation with the chairman of the committee, the ranking member, and others who are supporting it. I will support the cloture motion and motion to proceed to the consideration of the bill.

The PRESIDING OFFICER. The Senator from Kentucky.

REMEMBERING CORETTA SCOTT KING

Mr. MCCONNELL. Mr. President, with the passing of Coretta Scott King, we have lost the First Lady of America's civil rights movement. She and her husband, the Rev. Dr. Martin Luther King Jr., helped awaken the Nation to a dream of an America where each person, to use Dr. King's beautifully profound formulation, is judged by the content of his character, not the color of his skin. Ms. King continued to sustain the dream after her husband's death. We can take comfort in the hope that, 38 years after his tragic death, this couple has been reunited at last.

Because of Coretta Scott King, Dr. King's legacy is still alive. Her tireless efforts led to the establishment of Martin Luther King Day on the third Monday of January every year beginning in 1986 to mark Dr. King birthday.

Because of Ms. King, Americans everywhere can explore Dr. King life and vision through the King Center in Atlanta. Established in 1968, the King Center attracts over 650,000 visitors annually.

Born in poverty in Heiberger, AL, in 1927, Coretta Scott grew up in the midst of segregation, walking to a one-room schoolhouse every day as a school bus full of white children passed her by. But these harsh surroundings did not extinguish her spirit.