



Statement of Senator Dianne Feinstein In Favor of Asbestos Trust Fund

February 7, 2006

Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.) today urged the Senate to end debate on the establishment of an asbestos trust fund and pass the Fairness in Asbestos Injury Resolution (FAIR) Act. Senator Feinstein co-sponsored the legislation. The following is the text of the statement Senator Feinstein made on the Senate floor:

“Mr. President, I rise to speak on the asbestos bill and to indicate my support for the cloture motion which will be voted on at 6 o'clock this afternoon.

For over 15 years now, believe it or not, the U.S. Supreme Court has repeatedly urged Congress to create a solution to this asbestos crisis. In 1997, in a case called *Amchen Products v. Windsor*, Justice Ginsburg wrote this:

‘The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.’

This is exactly what we are trying to do in this effort. It is true it is not easy to do. It is true it has taken many years of hearings in the Judiciary Committee, and it is true efforts to draft this legislation have been ongoing for many years, but I would like to take this opportunity to commend the chairman and ranking member of our committee, Senator Specter and Senator Leahy, for their tireless efforts to develop a true bipartisan compromise, and I know it hasn't been easy.

Before discussing the specifics of this legislation, I think it is important to remember what has brought us here and why so many of us have spent hundreds of hours working through the complex issues in trying to develop a no-fault administrative solution. As has been stated, the pivotal question before this body is, Will a victim be better off in a trust fund, or will they be better off in the tort system? I believe that overall a victim will be better off in this trust fund.

Up to this point, more than 70 American companies have filed for bankruptcy caused by asbestos liability. This has cost the American economy up to 60,000 jobs. Each displaced worker from a bankrupt company 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.

This impact is not limited to workers who lose their jobs. For the workers who are able to keep their jobs at these companies, they can expect an average 25-percent reduction in the

value of their pensions. And for every 10 jobs lost to an asbestos bankruptcy, a community will lose 8 additional jobs.

At least four companies headquartered in my home state of California have been bankrupted from asbestos lawsuits. Additionally, 41 companies with current or former operations in California have been sued or are currently facing lawsuits. They include: Allwood Door Company; Ashland; Atlas Corporation; Bechtel; Bethlehem Steel; California Portland Cement Company; Celotex; Dow Chemical; Exxon Mobil; Federal Mogul; Flintkote; Gencorp; Georgia Pacific; Goodrich Aerospace; Hill Brothers Chemical Company; Honeywell; Jacuzzi Brands; JM A/C Pipe Corporation; Kaiser Cement; Kelly Moore Paint; Metalclad Insulation; National Gypsum; National Steel and Shipbuilding Company; Norton and Sons of California; Occidental Petroleum; Owens-Illinois California Container; Owens Corning Fiberglas; Pacific Gas and Electric; Pittsburgh Corning; Plant Insulation Company; Polyone; Raymark Industries; Reinhold Industries; RPM; The Scotts Company; Southern California Edison Company; Todd Shipyards; Tyler Pipe Industries; Walter Industries; Unocal; U.S. Gypsum; and Viacom.

One of those companies, Celotex, had three plants and two regional sales offices in California. In 1987, Celotex employed 325 people there, with a payroll of \$7 million. They were forced into bankruptcy and today they operate in the United Kingdom. This is one impact of what has been happening.

According to a study done by the RAND Institute for Civil Justice, in 1980, 300 companies were being sued for asbestos claims. This grew so much that by 2002, 8,400 companies had been named as defendants.

RAND also concluded that litigation has spread beyond the asbestos and building products industries to the point that companies now being sued cover 75 out of 83 different types of industries in the United States. And, just through 2002, \$70 billion had been paid out to 730,000 personal injury claims.

So again, the question is whether a victim is better off in a no-fault trust where they automatically recover if they meet the criteria or in the tort system with high transaction costs that often eat up 50 to 60 percent of a judgment.

It is true that bankruptcies have tragic consequences, not just for the businesses, but also for their employees who lose their jobs, lose their savings, and for the victims whose settlements are frequently reduced even more by bankruptcy trusts until they are receiving pennies on the dollar.

I think the most startling and most egregious example of the asbestos tragedy is what occurred in Libby, MT. Candidly, this is what put it on my radar screen big time. This small community has been devastated because of the callous and potentially criminal actions of one company, W.R. Grace.

The asbestos found in Libby, MT, tremolite asbestos, has demonstrated an unusually high level of toxicity, as compared with chrysotile asbestos. Diseases contracted from tremolite asbestos are unique and they are highly progressive, which means they move quickly. So far 192 residents from this small community have died and 1,400 are suffering from asbestos-related diseases.

In addition, W.R. Grace not only sent its workers into the earth to mine asbestos without proper protection, it also pumped asbestos out of its factory and into the community of Libby. W.R. Grace provided asbestos materials to high schools and parks. It even put out piles for children to play in. For decades, there was an unprecedented 24-hour-per-day contamination of this community.

Based on this and other actions, a Federal grand jury in February of last year indicted W.R. Grace on multiple criminal counts. The indictment charges that W.R. Grace was aware of several studies that demonstrated the dangers of asbestos exposure and concealed this information from the people of Libby and from the Environmental Protection Agency. The prosecutor is quoted in the press as saying W. R. Grace's treatment of workers and residents is 'a human and environmental tragedy.'

Sadly, while the situation in Libby is extraordinarily unique and our legislation recognizes this, the harm caused by asbestos is far reaching.

In California, we have had shipments of asbestos from Libby in 35 locations. Our shipyards became hotspots for asbestos-related diseases because the shipping industry used asbestos to insulate boilers, steam pipes, hot water pipes, and incinerators.

In fact, according to the data compiled from the National Center for Health Statistics, between 1979 and 2002, 4,618 Californians died because of asbestos-related diseases.

Statistics do not adequately tell the full story of this tragedy. The day after Father's Day in 2003, Alan Reinstein of Redondo Beach, CA, first learned about the devastating effect asbestos can have. After months of ineffective and inaccurate testing to diagnose his health problems that Mr. Reinstein was experiencing in his lungs, doctors finally determined that he was suffering from mesothelioma. Mesothelioma is a debilitating and aggressive form of cancer that has been directly linked to asbestos exposure.

After learning the correct diagnosis, Mr. Reinstein had to have major surgery to remove his left lung, his diaphragm, and the lining around his heart. The surgery to save his life was so extensive it nearly killed him. He and his wife, Linda, today face his continued health problems from mesothelioma. As a matter of fact, he is a very rare case and the only person I know of who has survived for more than 1 year with mesothelioma.

Billy Speicher from Ontario, CA, spoke of his experience with mesothelioma before the Judiciary Committee around this time last year. He discussed how he was exposed to asbestos while serving as an aircraft mechanic for the Marine Corps in the late 1950s and again as a pipefitter from 1965 to 1999. He stated that in his jobs:

'Asbestos was everywhere. It was all over me and all over everyone who worked near me...At first the doctors I was seeing for two years kept telling me I had asthma -- even though I had CAT scans that showed my lungs were scarred. But finally the fluid built up so much in my lungs they realized I had mesothelioma.

Now I'm living with a lot of pain -- and I can barely get my breath. [I] can't hardly sleep at night either. You know that mesothelioma is a death sentence.'

These stories illustrate the personal tragedies asbestos has caused.

Unfortunately, these two men are not alone. So the question is what to do, and many people think: Just leave it up to the tort system. I looked at that. But then you also hear cases of people who receive pennies on their judgment, and the question arises, Is it not possible to protect victims and not bankrupt companies and have a no-fault system whereby medical people can make the judgments and people can be paid a fair sum? That is what this legislation is all about.

Compromises have been made. What I have tried to do, on the Judiciary Committee, is ensure that there are strong provisions in place to protect individuals who were struck with terminal asbestos-related diseases.

There are some important provisions that I would like to highlight. The bill we are about to consider contains higher awards values for victims than the version that was before the Senate in the 108th Congress.

A broader definition of asbestos has been included to address the potential threat of naturally occurring asbestos that has been discovered in California and other parts of the country.

During the startup period, the bill incorporates a process so mesothelioma victims and other terminally ill victims will have their claims resolved and paid within 9 months or else they will be allowed to take their case to court. So either they get prompt payment or they can go to court. I have insisted on that. Thanks to Senator Specter and Senator Leahy, that is in the bill.

The committee also adopted an amendment that provides accelerated payments for terminally ill victims so they can get their awards quickly, once the fund becomes operational.

The bill protects cases that have a verdict, final judgment, or final order issued by a trial court and cases in trial or those that have an enforceable settlement so that victims who have had their claims resolved are not suddenly uprooted.

And this legislation prevents subrogation of awards, ensuring that victims' awards cannot be reduced.

As everybody has said, this bill is not perfect. However, given the current state, I think it is an important solution to help provide relief to both victims and businesses. My understanding is that the chairman will have a managers' package that will further clarify and make improvements to the bill as well. I urge my colleagues to look carefully at that managers' package because many improvements have in fact been made.

During this huge undertaking, there have been many concerns raised and criticisms levied against the bill. At every step, Senators Specter and Leahy have attempted to address any flaws or ambiguities. This has not been a 'take it or leave it' piece of legislation. I know of no chairman or ranking member who have been more receptive to looking at changes and evaluating them.

Several concerns have been expressed regarding how quickly money will come into the fund and whether the trust fund will be able to process the immediate flood of claims that are

currently pending in court. The so-called upfront funding has been increased throughout the process, so now the fund will have \$42 billion in the first 5 years to pay claims. In addition, the committee adopted an amendment to speed up the initial contributions by insurers, defendant companies, and bankruptcy trusts so that the administrator can pay claims quickly.

The bill also provides the administrator of the trust fund with borrowing authority, so if the upfront funding of \$42 billion proves to be inadequate, he or she may borrow funds to cover any shortfall.

Next, the bill includes a streamlined process to settle claims of terminally ill individuals immediately upon enactment of the legislation. This provision ensures that terminally ill individuals will have their claims processed quickly, and it should resolve some of the most pressing claims before the trust is up and running so there would not be an overwhelming flood of claims filed with the trust on day one.

Finally, Senator Specter included language in the statute of limitations to give individuals sufficient time to file their claims -- 5 years -- so there will not be a need to rush to the fund for fear of being cut off.

Another concern that has been expressed, and I want to address it, is that the legislation will harm small businesses by requiring payments to the fund that are well beyond the means of these small businesses. Under this bill, small businesses, as defined under section 3 of the Small Business Act, are explicitly exempt from having to contribute to the fund.

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At the same time, these companies will receive the protections provided under the legislation. They don't have to contribute, and they will receive the protections provided under the legislation -- meaning they cannot be sued.

For example, manufacturing companies that have fewer than 500 employees will qualify as a small business. Some categories of manufacturing, including chemical manufacturing, will qualify if they have fewer than 750 employees.

It is also important to remember that companies are only required to pay if they have already expended money on asbestos claims. Smaller companies that had not incurred asbestos liability-related costs of \$1 million or more before December 31, 2002, are exempt from having to contribute to the fund.

In addition, for those companies which are not exempt from having to contribute to the fund, the bill tiers companies by size and amount of liability. The current tort system provides no protections for small businesses and allows any company of any size, no matter how small, to be sued into bankruptcy.

Another argument made against the bill is that there is inadequate funding to cover all future asbestos claims. Trying to project how many individuals will make claims is clearly an inexact science -- if you can each call it a 'science.' Even the Manville Trust, an almost 20-year-

old trust that was created after the bankruptcy filing of the Johns-Manville Corporation, has had to alter its projections time and time again.

Since we do not know how many people have been exposed to asbestos and, of those, who will develop a disease, we must rely on protections based on sound calculations and real-world experiences of other trust funds. The size of the fund is based on the strongest statistical data and economic models available. A leading actuary with Tillinghast-Towers Perrin testified before the committee on June 4, 2003, that '\$108 billion appears to be more than adequate,' while RAND Corporation estimates the remaining future cost of asbestos-related loss and expense at \$130 billion.

By using a no-fault administrative system, the fund will significantly reduce the substantial transaction costs of the current tort system, costs that most experts agree consume more than half of the total amount being expended. Of the \$130 billion of future asbestos-related costs, it is estimated -- and listen to this carefully -- it is estimated that approximately \$28 billion, or 21.5 percent, is attributable to defendant costs and approximately \$41 billion, or 40 percent, will go to plaintiffs' attorneys. So there you have 61.5 percent going to lawyers.

I understand how lawyers feel, but 61.5 percent of the total amount going to lawyers means that amount of money is not going to victims. Because of these transaction costs, if we continue in the current system, less than 40 percent of the \$130 billion estimate of future asbestos-related loss and expense -- less than 40 percent will be paid to asbestos victims.

This legislation provides for \$140 billion to come into the fund over 30 years without the transaction costs of the legal system, allowing for more money to go to victims. The bill, as amended, obligates defendant and insurer participants to contribute \$136 billion to the fund, and at least \$4 billion more would be contributed from confirmed bankruptcy and other asbestos compensation trust funds.

As an added protection against the risk of insufficient funding, the legislation gives the administrator of the fund the authority to borrow from commercial and government lending institutions.

Finally, if the projections are wrong and the amount of money available proves to be insufficient in the long run, victims will be allowed to return to the courts.

With this safety net, carefully thought out and eagerly debated, this legislation ensures that no one is left without an avenue for recourse.

Another argument opponents of the bill make is that victims will be forced to wait years before they receive compensation.

While California has a system to provide expedited trials when a victim is terminally ill, victims in most States across the country are forced to wait years before they can have their cases brought before a judge or a jury. And often, even after the case is heard and decided, or a settlement is reached, payments can still be stretched out for several months or even years.

Due to the long delays in other States, I have fought throughout this process to ensure that the fund follows California's example and resolves claims of terminal individuals as quickly as possible.

An amendment was adopted in committee that ensures once the trust fund becomes operational, individuals who have mesothelioma are paid in one lump sum within 30 days after their claims are approved, or within 6 months after their claims are filed, whichever is shorter.

Let me repeat that because that is important.

Mesothelioma victims are paid in one lump sum within 30 days after their claims are approved, or within 6 months after their claims are filed, whichever is shorter. What we are trying to do is prevent the delay in payment to someone who is terminally ill.

Other terminally ill claimants, individuals who have been diagnosed with less than a year to live, must be paid within 6 months after their claims are approved, or 1 year after their claims are filed, whichever is shorter.

During the committee consideration of the bill, we also adopted an amendment to speed up payments to terminally ill individuals while the administrator is attempting to get the fund up and running. This amendment provides for a process whereby terminally ill victims can receive a settlement directly from the administrator or claims facility even before the fund is operational. So the first people to be served before the fund is operational are terminally ill victims.

If, for whatever reason, the administrator or claims facility is unable to process or pay these claims during the startup period, the companies or the insurers will be required to make a settlement offer directly to the individual.

We cover that possibility as well.

If the offer is rejected because it is less than the individual would have received under the fund -- in other words, the company makes an offer but it is a low offer -- the companies have 20 days to make a new offer or else they are penalized.

Under these settlement agreements, claims are to be paid to mesothelioma victims, with 50 percent of the claim to be paid within 30 days after the settlement is accepted, and the other 50 percent within 6 months after the settlement is accepted. Other terminal victims are to be paid 50 percent of the claim to be paid within 6 months after settlement is accepted, and 50 percent within 1 year after settlement is accepted.

If after 9 months, as I said, the terminally ill individual has still not had their claim processed or fully paid, then they may return to the court.

This has been hard fought for, and this is the fail-safe in this legislation. I think it is fair to say that the companies would like to avoid this. I don't know if Senator Specter would agree with that, but I found that to be true. And, therefore, this ability to go back into court if you are terminally ill and you are not paid right away is an added protection that you will get paid.

Finally, I want to address the argument that this bill creates a new entitlement program and will cost the people millions of dollars. This is simply untrue.

According to the Congressional Research Service, entitlement programs are a form of mandatory spending, which 'require the payment of benefits to persons...if specific criteria established in the authorizing law are met,' and they are not subject to discretionary appropriations from Congress. Entitlement payments are legal obligations of the Federal Government, and beneficiaries can sue to compel full payment.

That is not the case here. The fund created by this legislation will be privately funded. The money collected for the fund comes from businesses and insurance companies -- not from the U.S. Treasury.

Although the program will be housed in the Department of Labor, the bill ensures that all expenses, including administrative expenses, are paid by the moneys collected from businesses and insurers. In addition, as an extra protection, it is expressly stated several times throughout the bill that nothing in the act shall be construed to create any obligation of funding from the United States or to require the United States to satisfy any claims if the amounts in the fund are inadequate. If anyone doubts that, they can look up section 406(b) of the bill.

Some have argued that the Government's liability is derived from the provision that allows borrowing from the Federal financing bank. In response to an inquiry from former Senator Don Nickles on a previous version of this bill, the GAO stated that '[t]o ensure that the government incurs no liability for repayment of borrowing under the act, Congress may wish to explicitly state that repayment of borrowing is limited solely to amounts available in the fund.'

That is what Senator Specter did.

The bill expressly provides that '[r]epayment of moneys borrowed by the administrator...is limited solely to amounts available in the [Fund].'

It also states that 'Nothing in this Act shall be construed to create any obligation of funding from the United States Government, including any borrowing authorized...' With these explicit statements throughout the bill, it is abundantly clear that this legislation would not be a burden on the U.S. Treasury.

In conclusion, from the beginning it has been clear that creating a national asbestos trust fund is an extraordinarily complex undertaking. This has been a compromise effort and there are numerous issues where competing interest groups have come together, such as the creation of a no-fault administrative system, the equitable allocation of contributions, the establishment of reasonable medical standards, the resolution of pending claims and settlements, fair compensation values, and transparency of the system to both victim and corporate stakeholders alike. That is very important.

However, I must say it often seemed that with every solution and compromise, more concerns and problems would arise. In the end, there are some provisions I think all sides would like to change, but compared to the shortfalls in the current system, this is a strong solution and a good compromise.

I hope Members will vote to close off debate and that we will be able to pass this important piece of legislation.

I thank the Chair. I yield the floor.”