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Asbestos Litigation Developments Further Pressure Legislators

Since publishing our first piece on asbestos litigation reform efforts in Congress Monday (March 3), much has happened, and most of it confirms the call we made then, namely that we have reason to be cautiously optimistic in our expectation that asbestos reform legislation will be enacted this year.

You may recall that in the aforementioned piece, we forecast one of these developments, noting that Senator Orrin Hatch (R-UT), Chairman of the Senate Judiciary Committee, was to hold a hearing on the subject that Wednesday (March 5). We wrote in that piece, and have long believed that Hatch is the key to reform efforts, and that this hearing would set the tone for this year's debate. Hatch did not disappoint.

Addressing the interested parties in the hearing room – representatives from industry, labor, plaintiffs' organizations, and legal groups, and his fellow legislators – Hatch declared, "It's time to get together and come up with a solution." He gave the quarreling factions a deadline of two weeks to set aside their differences and agree on a reform approach and cautioned that if they could not do so, they risked squandering their last, best opportunity to resolve the problem. "This is the year to do it, if it's going to get done," Hatch warned, "It's your last chance to get this thing resolved, as far as I'm concerned."

Hatch reiterated his intention to introduce his own asbestos litigation reform bill by the end of the month, telling those at the hearing that he would like help in forging a consensus bill, but would proceed with his efforts even in the absence of cooperation. He also warned that while he might be willing to overlook his concerns and compromise on the idea of establishing a trust fund to pay future claimants, he would not support an open-ended trust fund. "I'm not," the Chairman said, "for a trust fund that's an open-ended situation." Hatch reaffirmed his belief that a medical criteria approach to reform would be constructive, but indicated that he is concerned that legislation based solely on medical criteria (such as that introduced last month by Budget Committee Chairman Don Nickels, R-OK) would be unable to attract sufficient bipartisan support.

A second major development took place on Monday, when the Supreme Court ruled 5-4 to uphold a lower court ruling that railroad workers exposed to asbestos and diagnosed with asbestosis could sue their employers under the Federal Employers' Liability Act (FELA) of 1908. Though the ruling was on the

very narrow issue of the railroad workers' right to sue, many interested parties were looking for a sign from the Court as to its disposition on the topic. As with Senator Hatch, the Court did not disappoint.

Justice Ruth Bader Ginsberg, in writing the opinion for the majority (which ironically enough teamed her with Clarence Thomas, Antonin Scalia, John Paul Stevens, and David Souter), reiterated the admonition she first issued in 1999 that "the elephantine mass of asbestos cases" practically screams for "national legislation." Judiciary Committee ranking member Pat Leahy (D-VT) concurred, telling reporters after the ruling that "this adds even more pressure to Congress to find a fair and balanced bipartisan solution."

We should note, that while the ruling did deal with issues that are related to the medical criteria approach under consideration on the Hill and supported by Senators Hatch and Nickles and endorsed by the American Bar Association, it is not expected to hinder legislative efforts. The Committee indicated that the narrowness of the ruling and its application only to FELA mean that their efforts should not be affected.

Finally, yesterday, Connecticut Senator Chris Dodd indicated that he is planning a "summit" for concerned and interested parties in the asbestos debate. This morning, Senator Hatch signed on, agreeing that such a summit could be productive. Dodd has been supportive of efforts in the past (co-sponsoring the bill written by then-Senator John Ashcroft, R-MO, in the 106th Congress), and is one of the key Democratic players in this debate. As a senator from the state that is home to many of the insurance companies who are footing a substantial portion of the bill in this mess, it is clear that Dodd has a good deal at stake in this debate. (For the record, last time around, Dodd was joined in sponsoring the bill by Connecticut's junior Senator, Joseph Lieberman; though Sen. Lieberman has not publicly indicated a substantial interest in the debate this year, it is presumed that he too will support reform efforts once again.)

As we noted at the top of this piece, the last week-and-a-half has been a busy one in asbestos litigation reform discussion. We continue to believe that there is reason to expect legislation to be passed and enacted this year, and much of what has transpired recently confirms our belief. Pressure on Congress is mounting, and more and more Congressional stakeholders are taking a proactive approach to building a consensus. We remain cautiously optimistic.

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