

Chamber of Commerce of the United States of America

Washington

March 27, 1979

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From the Washington Office
ASARCO Incorporated

TO: Members of the House Education and Labor Committee

FROM: Hilton Davis, Vice President
Legislative and Political Affairs

H.D.

RE: H.R. 1524, The Asbestos School Hazard Detection and Control Act of 1979

H.R. 1524, which is to be marked up by full committee on March 29, stands on the premise that schools have a health problem with asbestos, a premise not based on sound data. Its passage would create undue alarm by suggesting that all children are now being exposed to a possible carcinogen.

The Environmental Protection Administration (EPA), designated by the Congress to monitor environmental conditions, has not made such a finding. In fact, EPA is presently making a survey that would determine whether such a condition does exist and, if so, where.

An in-depth survey by the State of Michigan indicated no problem exists in the classrooms of that state.

If the committee is being influenced by the testimony of Dr. Robert Sawyer of Yale, it should be noted that in his statement to the subcommittee, he admits that he limited his testing to measurement of particles by a microscope that does not differentiate asbestos from any other dust particle. As pointed out by EPA, the analysis for asbestos is an expensive procedure and requires sophisticated equipment and skilled technicians.

Absent a scientific determination by EPA that a health problem exists, the passage of legislation that would cause undue concern among parents does not encourage the respect for environmental improvement the committee surely seeks.

Enclosed are copies of a press release and technical documents EPA prepared to assist schools in making such a determination. We think you will conclude after examining these documents that the question is being effectively addressed by that agency.

We have these further concerns with H.R. 1524:

1. It would place a retroactive liability on manufacturers ("refiners") of "consumer construction materials" made with asbestos, use of which was often mandated by building codes. Further, it casts a wide net to include even those firms making products where asbestos fibers are completely sealed and which pose no health problems. This is contrary to Congress' normal test of fixing civil liability specifically on products or actions.

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2. It creates a standard-setting task force outside the normal decision making structures of those health agencies created by Congress that possess the in-depth expertise to make such decisions. Such a precedent is dangerous and unwise, since it gives power to a handful of people and removes decisions from the reasoned thinking of expert agencies.

3. It requires the reporting of corporate data in order to determine the appropriate assessment under this bill for the proportion of a company's "contribution" to the problem during the period 1946-1972. This is despite the fact that no company, to our knowledge, keeps such records more than five years.

We urge you to delay consideration of H.R. 1524 until after EPA has completed its report or, as a minimum, consent to full committee hearings to personally learn more about these ramifications.

FOCUS ON *issue*

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March 1979

HR 1524: THE ASBESTOS SCHOOL HAZARD DETECTION AND CONTROL ACT OF 1979

Objective: This bill would establish a program for the inspection of schools for the presence of hazardous asbestos materials, create a fund for the testing and evaluation of potential hazards, and create a loan program to assist in the containment or removal of imminent hazards to health and safety.

Principal Provisions:

1. Would establish a task force with the following authority/functions:

--Provide scientific, technical and financial assistance to local educational agencies to enable them to conduct an asbestos detection program to identify possible asbestos hazards in schools;

--Assist the Secretary of HEW in formulating standards and safety procedures for asbestos hazards and in reviewing and approving grants and loans for the detection and correction of these hazards.

2. Gives the Secretary of HEW the authority to assess persons who were engaged from 1946 to 1972 in the mining, refining or importation of asbestos used in a consumer construction material for their proportionate share of the total cost of the detection program to the federal government. The Secretary would also have the authority to subpoena all records of the amount of asbestos mined, refined or imported from 1946 to 1972 and information as to its intended use.

3. Provides for civil penalties of up to \$5,000 a day for violations of the information gathering and assessment sections of the bill.

4. Allows the Secretary of HEW to grant loans to local educational agencies for the cost of projects for the containment, removal or replacement of materials containing asbestos which pose an imminent hazard to health.

5. Gives the Attorney General of the United States the authority to sue persons on behalf of the loan recipients to recover the costs of projects to contain, remove or replace materials containing asbestos which pose an imminent hazard to health.

6. Authorizes direct federal funding of up to \$30 million over a three year period for detection purposes.

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ANALYSIS: Although this bill appears to be a legitimate federal response to a publicly perceived health hazard, it raises serious constitutional questions, duplicates the efforts and expenditures of other federal departments, and would establish dangerous precedents for handling other similar national health concerns.

CONSTITUTIONAL ISSUES: The Bill's funding provision retroactively requiring industry payment for detection of products neither manufactured nor installed by the assessed industry is fundamentally unfair and violates the Constitution of the United States in several respects:

1. Bill of attainder - The Constitution specifically prohibits legislation that punishes named individuals or companies or ascertainable members of a group without the procedural safeguards of a judicial trial.
2. Due process of law - The Constitution guarantees that a "law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained." Retroactive legislation has been consistently disfavored by the Courts on due process grounds.
3. There is an elemental transgression of the separation of powers doctrine, which reserves to the judiciary determinations of individual liability. Further, this bill deals with protection of a totally local, and only potential problem, which raises questions of Congressional authority under the Interstate Commerce Clause.

PRECEDENTS: This legislation establishes a task force under the Secretary of HEW to set health and safety standards, now the responsibility of regulatory agencies. Indeed, the Environmental Protection Agency already has in effect a program to provide the guidance needed to properly determine if school construction materials contain asbestos, and if so, what corrective action, if any, need be taken. Consequently, neither EPA nor HEW have endorsed this legislation.

Further, assessing all companies involved in the mining, refining or importation of a possibly hazardous substance used in a consumer construction material (installed in the schools to accommodate the building code requirements of the time) without regard to whether the material was or was not hazardous, forces innocent parties to bear a portion of the cost of detection and correction for which they had no responsibility.

DEFECTS: The lack of a definition of "consumer construction materials" and the fact that the definition of "asbestos" is still subject to scientific debate raise the problem that companies associated with non-hazardous asbestos products may be unjustly assessed for the costs of the detection program.

Problems associated with the release of hazardous materials--perceived, potential or actual--are complex, and further constrained by liability considerations. There are at present several regulatory agency studies underway, and the Department of Justice Interagency Task Force will release a study on compensation and liability for release of hazardous materials in April. For Congress to act now and subject the proposed legislation to extensive litigation would certainly defeat Congressional intent to provide timely resolution to a subject of public concern.

FIXING CIVIL LIABILITY

At page 31, line 16 strike subparagraph (B)(ii) and insert in lieu thereof:

" (ii) a percentage (determined by the Secretary) which accurately reflects the persons proportionate share of the amount of asbestos which is identified to have been mined, refined or imported and which is identified to be such person's product which was used in schools for insulation, fireproofing or decorative uses during 1946 through 1972."

Discussion

Section 5(e) offends the entire concept of American jurisprudence. The common law basis of this nation as well as federal statutory law requires the identification of harm and also the identification of the person causing the harm prior to imposing civil or criminal sanctions. However, section 5(e) identifies harm but states since it cannot identify the person causing the harm, it imposes a penalty upon all who are implicated. This is a carry-back to ancient societies in which the legal process would punish all suspects to ensure punishment of one offender. Unfortunately, many innocent persons were also punished. For example, in China, six persons were executed in order to ensure that the person who actually committed a murder was punished.

Fortunately, this nation has avoided such a process. We only punish those identified as causing the harm. If we cannot, through use of records and other aspects of the legal system discover the culprit, we should not destroy our entire legal system out of vengeance. Instead we should correct the wrong directly and only punish those we can identify.

This amendment would limit the mandatory assessment established in Section 5(e) only to those companies which produced construction products that can be officially identified as those used in school buildings for the uses that the bill finds have "created unwarranted hazards" - in insulation, fireproofing or decorative purposes.

Further, it limits section 5(e) liability to those areas more appropriate to the American system of jurisprudence. Simply, liability is only assessed when the wrongdoer is identified. There is no mass punishment to ensure that no one escapes.

FUNDING AMENDMENTS

1. At page 31, line 1 strike subsection (e) of section 5(e).
2. At page 43, lines 17-23, strike Section 11(a) and insert in lieu thereof:

"Section 11. (a) There is authorized to be appropriated \$30,000,000 to be used to carry out the asbestos detection program under section 5. Such funds shall remain available until expended. Not more than ____% of the amounts appropriated under _____, _____, and _____ shall be for purposes of implementing the asbestos detection program.

Discussion

Amendment number one is necessary to eliminate the provision of the bill of most concern to business. This provision would place retroactive liability on industries engaged in the asbestos business from 1946 through 1972 with no differentiation given to whether their products were safe. Indeed, no distinction is made as to whether their products even went into school construction materials. Few, if any, businesses even have records going back to 1972, which means that the enforcement of this provision would be difficult if not impossible.

If the committee insists that this bill is still needed to respond to the asbestos in schools question, which the material emanating from EPA does not lead one to conclude, then the perceived public need requires that it be paid for through public funds.

Amendment number two is complement and "sweetener" to the elimination of the industry reimbursement procedure. It would enable the program to be funded without the necessity of having to get a new appropriations line item or the need to incur new federal funding, which is opposed by OMB.

The funding mechanism would be triggered upon passage of the bill by tapping a minute percentage of funds already appropriated for four or five of the existing (and huge) federal education programs. Therefore, public funds are at hand as soon as the authorizations, in the form of this bill, are passed by Congress.

INFORMATION EQUITY AMENDMENT

At page 40, line 11, insert:

"(3) procedures for releasing to the public all background, scientific, factual, medical and testing data that any Department, Agency or Office of the federal government developed or accumulated."

Discussion:

This bill provides that industry must give to the Secretary of HEW all information that may be necessary to assess fees in accordance with Section 5(e). However, if asbestos is indeed a problem, the task force established by Section 3 of this bill should have as much information as is available in order for it to properly perform its functions (standard setting, etc.).

Therefore, since the federal government has studies on the possible effects of exposure to asbestos, going back over forty years, all this information should be made available to the task force and indeed, to the general public.

LIMIT OF SEACH AMENDMENT

Page 32, line .3, strike lines .3 through 11 of subparagraph (3)(a), and insert in lieu thereof:

"(3)(a). Each person who was engaged in the mining, refining or importation of any asbestos products during the period 1946 through 1972 shall make available to the Secretary records which provide, to the extent available, an accurate accounting of the amount and types of asbestos products such person mined, refined, or imported during such period and which were used in schools for insulation, fireproofing, or decorative uses.

Explanation

This is to limit the federal government's search of corporate files for the information needed to implement the purpose of the Act.

Further, the Attorney General may be defending the United States in asbestos civil law suits along with industries that will have to turn over information under this Act. It would be improper to give the Attorney General information outside the scope of this Act. If the Attorney General can obtain all information he may use such powers to gather information for other lawsuits in which the U.S. is a party.

ATTORNEY GENERAL SHOULD NOT BE ALLOWED
TO SUE ON BEHALF OF PARTIES OTHER THAN THE FEDERAL GOVERNMENT

Page 35, line 4 strike subsection 6(b)(4).

Explanation

Section 6(b)(4) authorizes the Attorney General of the United States to represent private parties other than the United States. Such a section is unprecedented. With the backlog of criminal and civil cases the Attorney General should spend his time prosecuting and defending in the name of the United States and should not dilute his time on matters of private concern for which there are many private attorneys available to handle such matters.

LOAN PROGRAM IS REALLY A GRANT PROGRAM

Page 33, line 13, strike section 6 "Asbestos Hazards Control Loan Program".

Explanation

There are really two grant provisions in this legislation. Section 5 is a direct grant. Whereas section 6 is a no-interest loan program which means the United States is paying over 10% interest to make such loans to the schools. Further, the loan program is unlimited. This means the United States might be absorbing 10% of billion of dollars for a period of 20 years. This could be the most expensive labor, environmental or health program in U.S. history.

H. R. 1524 Amendments

Objectives

1. Number one priority is the deletion of Section 5(e).
2. If efforts to delete Section 5(e) are not successful, the next priority should be to amend H. R. 1524 so that it applies only to asbestos materials used in schools for insulation, fireproofing or decoration. This language is extremely important because these are the only applications which have been specifically identified as being potentially hazardous. Unless this change is made manufacturers of asbestos containing materials which do not represent any hazard to health will be forced to bear a portion of the cost of detection and correction of hazards for which they had no responsibility.

Attached are a series of technical amendments which are required to amend H. R. 1524 so that it applies only to asbestos materials used in schools for insulation, fireproofing or decoration.

At page 21, strike line 5 through line 8 and insert in lieu thereof:

materials used in schools for insulation, fireproofing or decoration during the period 1946 through 1972 to reimburse the federal government for the federal share of the costs of the asbestos detection program conducted under the Act;

At page 31, strike line 9 through line 10 and insert in lieu thereof:

mining, refining or importation of asbestos materials used in schools for insulation, fireproofing or decoration.

At page 31, strike lines 21 through 22 and insert in lieu thereof:

during such period and was ultimately used in schools for insulation, fireproofing or decoration.

At page 32, strike lines 5 and 6 and insert in lieu thereof:

period 1946 through 1972 which were used in schools for insulation, fireproofing, or decoration shall make available to the Secretary records which provide an accurate accounting of ...

At page 33, strike lines 21 through 24 and insert in lieu thereof:

(A) the containment or removal of any insulation, fireproofing or decoration materials containing asbestos in school buildings in which such materials pose an imminent hazard to the health and safety of children or employees; and

At page 40, delete line 25 through line 2 on page 41 and insert in lieu thereof:

asbestos materials used in schools for insulation, fireproofing and decoration or any claims of disability or death related to exposure to asbestos in a school setting; or

At page 43 add a new item 9 as follows:

(9) For the purposes of sections 2, 5, 6, and 9, asbestos materials shall mean asbestos materials used in schools during the period from 1946 through 1972 for insulation, fireproofing and decoration.