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S. 852: A FAIR AND EFFICIENT SYSTEM TO RESOLVE CLAIMS OF VICTIMS FOR BODILY INJURY CAUSED BY ASBESTOS EXPOSURE, AND FOR OTHER PURPOSES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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A FAIR AND EFFICIENT SYSTEM TO RESOLVE CLAIMS OF VICTIMS FOR BODILY INJURY CAUSED BY ASBESTOS EXPOSURE, AND FOR OTHER PURPOSES

TUESDAY, APRIL 26, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:00 a.m., in room SR–325, Russell Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Kyl, Sessions, Cornyn, Coburn, Leahy, Kennedy, Feinstein, Feingold, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. It is precisely 9 o'clock, the time scheduled for this hearing by the Senate Judiciary Committee. We meet in one of the most historic rooms on Capitol Hill, the Senate Caucus Room, where hearings were held on Teapot Dome, Army-MacArthur, Kefauver Crime Commission, McClelland Committee. President John F. Kennedy announced for the Presidency in this room. During fairly recent tenure, highly celebrated hearings with Judge Bork and Justice Thomas. And today we approach a subject of, I think, great importance to the United States for tens of thousands of asbestos victims who are suffering without compensation because their companies have gone into bankruptcy, and some 74 companies in bankruptcy are a tremendous drag on the economy.

Senator Leahy and I, on April 19th, introduced Senate bill 852, joined by a group of Democrats with Senator Leahy and a group of Republicans with me, after working on a very, very carefully crafted bill to achieve certain core principles, and as previously stated, those principles will be maintained on the agreement that Senator Leahy and I have. They are subject to modifications on improvements which we can agree to.

The discussion draft on this bill was circulated on February 7th, and an updated draft on April the 12th incorporating a great many changes, and the discussion draft was formulated after very, very extensive proceedings on legislation which was reported out of Committee by Chairman Hatch, who deserves an enormous amount of credit for moving forward on the trust fund concept. And that bill was reported out largely along party lines. Senator Feinstein

joined Republicans at that time. And the bill had a great many problems, and I voted for it but said it was necessary to move the bill along. And I then enlisted the aid of the former Chief Judge of the Court of Appeals for the Third Circuit, Judge Edward Becker, who had taken senior status a couple of months before. Judge Becker convened a meeting of all the so-called stakeholders—the manufacturers, the AFL–CIO, the insurance industry, and the trial lawyers—in his chambers for 2 days in August. And that has been followed by a series of meetings totaling some 39, all counted, in my conference room where we have worked through many of the issues. Those meetings have been attended by some 27 Senators' representatives, and discussions have been ongoing.

I called Senators yesterday to see if there were any additional witnesses which they would like to have heard today. Yesterday we worked through many of the issues with representatives of AFL–CIO in the morning and sat down with a group of my Republican colleagues in the afternoon. And we have worked through many, many of the issues, and we are prepared to consider other modifications which will supplement and be consistent with the core provisions.

Our Judiciary calendar is very, very heavy, and it is well known generally we anticipate a Supreme Court nomination in the course of the next several months. This bill is a longstanding product, and it is not possible to satisfy everybody on everything. And on the four interested stakeholders, we have interested parties who have great strength and great courage in the political world of the United States Congress. If we are not successful, I do not see any time in the reasonably near future when we will again revisit this issue.

I am going to yield back the one second and turn to my very distinguished colleague, Senator Leahy, who I want to compliment specially. He has taken on a very, very difficult job and a courageous job in dealing with many people on his side of the aisle. I have had a few on my side who do not like everything he has done. A lot of people do not like everything I have done. We are having a hard time finding people who like anything we have done.

[Laughter.]

Chairman SPECTER. Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Mr. Chairman, I like what you have done, if that is any help. But this is a bipartisan bill. It is the result of years of conscientious work, and the Chairman, who has worked so hard on this, called this one of the most complex issues he has ever tackled. I agree. I think in that regard we have been very fortunate to have Judge Becker join with us on this, and, Judge, I salute you for all the work you have done. But, Mr. Chairman, I salute you because I do not think we would be this far if you had not persevered as hard as you have.

Among the other hearings held in this room which the Chairman did not mention was the hearing on the sinking of the Titanic. Now, in this case, we are bringing the ship back up. We are not putting it down. And we are bringing up a ship well worth saving.

It is not the bill that I would have written if I was the only one to write it. It is not the bill that Senator Specter would have if he were the only one writing it. But you have to get consensus. Nobody should be surprised here that the interested groups—the labor organizations, industrial participants in the trust fund, the insurers, the trial bars—are each less than pleased with some portion or another of the bill. But that is the essence of legislative compromise. We either compromise or we have no bill. It is as simple as that.

And this is a good compromise. We have tried to protect the ultimate goal of fair compensation to the victims. That is the lodestar of our efforts. We have all had to make sacrifices on a group of subsidiary issues as we moved forward. But what we have achieved is a significant step toward a better, more efficient way to compensate asbestos victims.

This is the most lethal substance ever to be widely used in the workplace. Between 1940 and 1980, more than 27.5 million workers were exposed to asbestos on the job. Nearly 19 million of them had high exposure over long periods of time. We even know of family members who have suffered asbestos-related diseases just because they lived with the person, because they washed the clothes of loved ones.

The economic harm caused by asbestos is real. The bankruptcies that resulted are a different kind of tragedy for everyone, for workers and retirees, for the shareholders, and for families who built these companies. In my own State of Vermont, the Rutland Fire Clay Company is among more than 70 companies nationwide to have declared bankruptcy.

Now, I am encouraged by the favorable reaction this bill has generated among many. In the past week, we have received letters of support from United Automobile Workers, the UAW; the Asbestos Workers Union, certainly a union that has a great deal of interest in what happens; the Veterans of Foreign Wars of the United States, the VFW; the Asbestos Study Group; the Blinded Veterans Associations; and others, and I ask consent that all these letters be put in the record.

Chairman SPECTER. Without objection, they will be made a part of the record.

Senator LEAHY. The UAW notes in its April 13th letter to us, "This will provide more equitable, timely, and certain compensation to victims of asbestos-related disease, and I am pleased that Alan Reuther, their legislative director, will be here today."

The VFW letter of April 14th says, "The national trust fund you are proposing offers our members who are sick and dying the opportunity to secure timely and fair compensation for the injury they suffered in the course of serving their country."

The National Association of Manufacturers also released a statement expressing their hope that the legislation will engender broad support. And I thank Governor Engler for NAM's support, and I look forward to his testimony today.

All unimpaired asbestos victims are eligible for medical monitoring, and unlike last year's bill, the bill provides for medical screening for high-risk workers, a relatively low-cost way to help

make sure that those most likely to be harmed as properly diagnosed and treated, and I thank the AFL–CIO for their help in this.

Organized labor strongly supported the provision ensuring that victims' awards under the new trust fund would not be subject to subrogation by insurance companies. The initial funding of the trust is more realistic and more substantial than the bipartisan bill that passed last Congress.

And unlike the earlier bill, this bill ensures that all contributors in the fund will be a matter of public record, as are their obligations to the fund. And we guarantee that court cases that have reached judgment or attained verdicts will not be upset by the new trust fund, unlike last year's.

I want to thank the senior Senator from California, Senator Feinstein, for her tireless efforts. Under her approach we adopted, exigent cases may receive an immediate lump sum payment. The history of asbestos use in this country must come to an end. Senator Murray's provision does that.

So these are very complex things. I will close with this, and I will put my whole statement in the record. But Chairman Specter and I know that what we are attempting here rates off the charts in legislative degrees of difficulty. Neither of us were born yesterday. We have served a long time in the Senate. We have worked on compromises, Republican legislation, Democratic legislation, legislation that passes—not legislation that is put in to score points for one interest group or another, one party or another. But we have worked on legislation that passes because it benefits Americans, first and foremost. This is one of those pieces of legislation.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy.

We turn now to Judge Edward R. Becker, former Chief Judge of the Court of Appeals for the Third Circuit, who wrote the opinion on the asbestos class action case, which was affirmed by the Supreme Court of the United States. He has had a very extraordinary judicial record, served on the United States District Court for the Eastern District of Pennsylvania for 12 years and for 23 years after that has been on the Court of Appeals for the Third Circuit. He last year received the Devitt Award as the Outstanding Federal Jurist in America. His academic background is extraordinary: Phi Beta Kappa of the University of Pennsylvania, where I first met him; Yale Law School graduate, where we attended at the same time. And he has undertaken a labor of love here in tackling this issue in addition to his regular judicial duties.

The only major point where he and I have a substantial disagreement on what has happened is that he will not take reimbursement for travel or hotel lodging.

Judge Becker, the floor is yours.

STATEMENT OF EDWARD BECKER, JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge BECKER. Thank you, Mr. Chairman, for the privilege of appearing again before the Committee, and I thank you and Senator Leahy for your kind words about me and about my stewardship.

S. 852 is different in many important respects from the discussion bill about which I previously testified. As a result of many, many hours of negotiation in recent months, most of the loose ends that I identified in my previous testimony have been tied down. I do not represent that they have been tied down to the satisfaction of all the stakeholders any more than that the bill as a whole is satisfactory to all stakeholders. As you and Senator Leahy have said, a bill completely satisfactory to any one stakeholder or any on Senator could probably never pass. S. 852 represents a compromise.

In my testimony, I will focus on the changes from the previous draft, the areas that have provoked the greatest controversy in recent months, and the issues that we are still working on. I will, however recapitulate the salient features of the bill, which, as we know, is a trust fund bill providing for a $140 billion trust fund.

When I appeared previously, I represented that the financial experts had demonstrated that trust fund was more than adequate to pay the projected claims. New figures from Goldman Sachs represent that by reason of elimination of the Level VIIs, even with the increase in the claim values, the fund is at least $5 billion more secure than before, which I hope will give assurance to those Senators who have expressed concerns about the solvency of the fund. The total program cost in this current bill is estimated to be $120 billion, and the fund is $140 billion. The first 5-year outflow is within the up-front money.

Now, the $140 billion is based upon the Goldman Sachs translation of the projections of future asbestos disease of Dr. Fran Rabinovitz, which, when I examined them in our marathon sessions last May, impressed me as correct. I know that there will be testimony today that those figures are off. That is the testimony of Mr. Peterson, which will be countered, as I understand, by that of Dr. Rabinovitz. I note for the benefit of the panel that the recent, very recent figures show a significant decline in claims. Sangabam, one of the major companies with asbestos liability claims, are down 70 percent in the last 2 years.

The Peterson and Rabinovitz estimates have been examined in a judicial proceeding by one of the most experienced judges in the Federal system, Judge John P. Fullam, of the District Court for the Eastern District of Pennsylvania, a bankruptcy expert who reorganized the Penn Central. And with respect to the Owens-Corning estimation, Dr. Peterson's estimate of $11 billion in future OCF liability was rejected by Judge Fullam as not sound, and he accepted Dr. Rabinovitz's figures, which came up with a figure of $4 billion less.

So it seems to me that there is at least credible evidence based upon Judge Fullam's findings that the Goldman Sachs figures, which are based upon Dr. Rabinovitz's projections, are sound and that we should have some confidence that the fund will be able to meet the claims.

The huge projected numbers of 300,000, according to David Austern, who is the most experienced man in this field, who has administered the Manville Trust for decades now, tells me that the bulk of those figures are either unimpaireds who will not be filing early claims against the fund because, as you know, they are only

entitled to medical monitoring, or they are people who are maxed out, that is, people who have already in other lawsuits achieved or secured the maximum amount that they could get under the fund.

So it seems to me that based on the Manville figures and what I have talked about, the Peterson projections, which start above the actual experience, are questionable. The funding seems sound. It is guaranteed by business as a whole, Section 204(l) at page 162 of the bill, the guaranteed payment surcharge. I stress, too, that contrary to recent press reports, the Government and the taxpayers have no obligation to contribute to the fund. That is made very clear in Section 406 of the bill at page 287. And the up-front funding appears, as I said in my previous testimony, to be realistic.

Now, what about getting the money up front first? Business and insurance will be putting up the lion's share. The big guys can quickly determine the amount that they must contribute, and I anticipate that the bulk of the up-front money will be available within months of enactment. Section 204(i)(L), pages 148 and 149 of the bill, requires that Tier II to Tier VI defendant companies must provide the administrator within 120 days of enactment a good-faith estimate of past asbestos expenditures, their 2002 revenues, which is the CalPERS, and an initial payment specified in the bill of very substantial amounts, for example, in Tier II it must be at least $22 million for each participant. Besides, the participants want the fund to work and not to sunset; hence, they have every motive to pay quickly.

Professor Green will testify, has expressed concern about the companies paying up. For the reasons that I have stated, I think this concern is misplaced. The companies have every motive to pay up. In all events, contrary to Mr. Green's testimony, there are very strong enforcement remedies in this bill. Section 225 of the bill at page 210 gives the Government liens, and it seems to me that with the availability of liens and action by the Justice Department, the companies will pay up, and will pay up when they are supposed to. That will cure the fund.

The great advantage of the trust fund, of course, is that it removes asbestos litigation from the tort system, where it can languish for years and years, often with disastrous results for the victim because the defendants have gone into bankruptcy or the victim cannot identify the product to which he was exposed 30 years previous. And I know of cases where there was a mesothelioma case where the meso victim could not recover simply because the exposure having been 30 years previous, nobody could identify the product, and they simply could not pin it on any given defendant. Whereas, under this fund, which is no-fault, you do not have to get into the product identification.

It also provides an administratively streamlined no-fault system, telescopes the process into the here and now with the money in place, and in my judgment this is far superior to the medical criteria approach under which litigation will continue for decades in the State tort system, mostly in State courts, attended by endless legal challenges in the State courts, which the Congress had in mind, would be imposing tort reforms.

Now, under the bill, priority in payment goes to the exigents, the very sick people first, which means that they will get promptly paid. Will this, in fact, happen? I say yes.

Now, I know that concerns have been expressed as to the ability of the Department of Labor to handle the anticipated volume of claims. The revised bill addresses those concerns. Senator Feinstein has offered a proposal which is in the bill for an offer for judgment, Section 106(f)(a) at page 38 of the bill. Additionally, to the extent that someone does not pursue the offer of judgment, the Labor Department is required to contract out—Section 106(c)(4) at page 33. Contract out to whom? Contract out to claims facilities. There are claims facilities, the Manville Fund, the Western MacArthur Trust, the Fuller-Austin Trust. This asbestos claims process has been in effect for years, and there are entities, claims facilities like Manville, which have hardware/software experience, experienced workers who can be used in connection with processing these claims, who can process them with great facility. The Manville Trust processed as many as 150,000 claims per year. Based upon my conversation with Mr. Austern in the early—in the first 9 months, which is the start-up period for the exigents, there will be nowhere near that number of claims.

So the expertise is out there. The Labor Department can contract those who want to pursue the offer of judgment and may do so. As I have said, the fund is solvent. The money will be in place, and I think that things will work.

A proposal was made as an alternative for a private corporation to administer it in lieu of the Department of Labor. Careful research has suggested that there are serious constitutional, non-delegation problems with that, which would doubtless lead to litigation. The mandatory contracting is only for evaluation or settlement of the claims. It would then come back to the Labor Department for processing. The Labor Department would sign off on them so you don't have a non-delegation problem there.

Now, let me quickly turn to a number of areas where there has been controversy or disagreement among the stakeholders. One area is medical criteria. Senator Hatch and Senator Leahy I thought did a magnificent job of crafting medical criteria. We have not spent a great deal of time in our deliberations over medical criteria, which we had thought were untouchable; but, however, a number of points have been raised.

As you know, under the medical criteria, which started with 1125, those who were unimpaired do not get paid under the bill, as they do get paid large sums in the tort system. They get only medical monitoring. The most significant change in this new bill, S. 852, is the elimination of the Level VIIs.

Insofar as the Level VIs are concerned, there is certainly significant medical evidence, as Senator Coburn and Dr. Crapo have pointed out, that there are a number of cancers. This is the Level VIs that are not caused by asbestos exposure: pharyngeal, laryngeal, esophageal, stomach, and colon cancer. There has been a proposal that level VI should be eliminated.

Senator Specter's proposal was and is, as in this bill, Section 121(e) at page 87, for the Institute of Medicine of NIH to make a study which must be completed by April 1, 2006. That study is

mandatory. If that study demonstrates that esophageal, laryngeal, stomach, colon, these other cancers are not caused by asbestos exposure, then Level VI is out of the bill.

There was some concern that a lot of money would be paid out between now and then. The fact of the business is that under Section 121(e), the proof requirements are very rigorous. My guess is that very few, if any, people are going to be paid out under Level VI because they need tremendous medical backup and an opinion from a physician, which would be against the medical literature, or much of it, that these particular cancers were caused by asbestos exposure. So I don't think that Level VI is a problem.

The claims values have been increased, Section 131, page 92. The start-up has been modified, Section 106 at page 232. If the fund is not up and running and paying the exigents within 270 days, they can go back to the tort system. But as I have suggested, the offer of judgment and the contracting should solve that problem.

Insofar as subrogation is concerned, Senator Leahy pointed out Section 134(b) at page 105, there is no subrogation in this bill. A lot of people are very unhappy about that, but it is a trade-off. As I said and Senator Specter and Senator Leahy said, this is not a bill that—no stakeholder or no Senator would write this bill. A bill that any particular stakeholder or Senator would write could probably not pass. There has to be a compromise. There has to be a trade-off.

A lot of people are very unhappy about the Level VIIs being out of the bill, but the Level VIIs are out of the bill, and subrogation is in. It is a trade-off and, obviously, the Senators will have to decide, politics being the art of the possible, as to whether this is a fair compromise.

In my last testimony, the last time I appeared, you will recall that there was also subsequent to that a hearing on the so-called mixed dust or silica. Section 403(i) at page 243 seems to have solved the so-called silica or mixed dust claims, which says that someone who honestly has a bona fide claim from silica exposure, so long as they can demonstrate it was not due to asbestos exposure and, therefore, they are not compensated under this bill, but they can demonstrate that it was due to exposure to silica, they can proceed in the tort system. But as a result of the hearing and interim developments, it seems to me—the situation which appeared in Texas and I believe in Mississippi seems to have evaporated or been mooted.

An example of the process that we have engaged in here is the issue with respect to the rail workers. One of the problems that we thought intractable was dealing with the rail workers. As a result of, I think, about 12 or 13 negotiating sessions, we have worked out a solution to that, Section 131(b)(4), page 94, to the satisfaction of the Association of American Railroads and Rail Labor. I submit that this is probably the longest-running markup in the history of the United States Senate. It has been going on for at least a year and a half, and the 13 or 14 sessions which resulted in the special adjustment for rail workers, which will be a surrogate for the payments they would otherwise get under the Federal Employers Liability Act, is an example of that.

Screening is another example of a controversial issue. Some want it in; some want it out. It is, in effect, a compromise, but we have, however, been able to limit the cost of medical screening, and I do credit a very wise suggestion of Dr. Coburn, who pointed out that the way we can control costs—and this is in Section 225(c)(6) at page 221—is to make payments limited by the CPT code, which is what Medicare pays and which is what private doctors pay for the kinds of procedures that they do and that would be involved in medical screening.

Insofar as the counsel fee issues, according to the figures, the plaintiffs' lawyers have gotten $3 billion in fees already over the history of asbestos in the tort system. Again a compromise. People on one side or the other will not be completely happy with it. The previous amounts have been reduced to 5 percent. Is that too much? Well, it can be a lot in a simple meso case; it can be too little in other cases where there may be causation issues.

My concern, frankly, on the counsel fee issue is administrative convenience. I do not want to see the Secretary of Labor, the administrator, I don't want to have to see the administrator get involved in complicated counsel fee determinations. I know how much time I spent—I just wrote a 107-page—it ended up a 95-page opinion on counsel fees. Now, it was in class action cases. I have another case I am working on right now.

Obviously, these are not as complicated, but determination of individualized counsel fees can take a lot of time. And we have a streamlined administrative system, and there are enough burdens on the administrator that I think that it is preferable to have a fixed sum, maybe too much in some cases, too little in other cases. But it seems to me that administrative convenience is important. And, of course, the client can negotiate. We do have time record requirements. There are penalties for infractions by lawyers. Indeed, if you look at Section 401 at page 30, very severe sanctions for misconduct, for anyone who abused the system by false claims.

There also is an extensive pro bono provision with a notice that has to be given to the putative client as to the availability of pro bono representation, and the administrator has to retain a pro bono roster.

I know Senator Kohl, who is not here, was concerned about the mesothelioma research and treatment center. Section 222(c) at page 203 provides $1 million for each of the year 2005 to 2008 for each of up to ten mesothelioma research and treatment centers.

Insofar as the sunset provision, we have a compromise, again, that was proposed by Senator Feinstein that in the event of sunset, which we think will not happen, but if it does, after extensive program review, the reversion goes either to the Federal court or the State court where the individual was exposed or where the individual lives so that it cannot go to the bete noire of Madison County, Illinois. And we are looking at a proposal by Senator Kyl that would tighten up program review.

There are a number of open issues that we are still working on, and I am nearing the end of my testimony, Mr. Chairman. Senator Levin I know, among others, and Senator Feinstein expressed concern about the little guys. When I say the little guys, I don't mean the small business folks, because they are exempt, but the whole-

sales and others who are not the real big guys who have been doing the negotiation at the table, and there is a proposal which is very close that will give some relief, and this is satisfactory to business, have in mind that business guarantees the fund. You say, well, what good is the guarantee? Well, General Electric and Viacom and Dow Chemical, you know, all these big companies, if they go down the tube, the American economy is down the tube, and we are all in big trouble. But as long as the American economy stays healthy, these businesses have guaranteed—and I gave you the section before—the solvency of the fund and have in mind that the little guys—the littler guys also have the availability of an inequity adjustment, Section 204(d) at page 138 of the bill, if the payments that would be imposed upon them would be inequitable. So that is still being looked at. We think we are close insofar as the issues posed.

A number of you are familiar with the issues raised by Equitas, the Lloyd's of London runoff, and the problems that some of the insurers had, or the orphan share issue. That is being worked on. We may be close to an agreement about that.

There has also been some issue about what happens to the bankruptcy trust in the event of sunset. There is a proposal for a master trust that would address that issue, and as I said before, Senator Kyl has some proposals for more searching program review and a possible revision of the medical criteria if the fund runs into trouble.

Let me conclude by saying that this is not only one of the most contentious—one of the most complicated bills, I think, in the history of the Senate, but one of the most contentious because the stakeholder groups are not monolithic; rather, individual insurers, businesses, and unions are affected differently by the bill. Most of the insurers, I believe, support it. Many insurers oppose. Most businesses, as reflected by the statistics you have, are for it, but there are some businesses who think they are adversely affected who are not for it. And the same is true with respect to the unions. And to the extent that each of them is motivated and looks to their own pocketbook, any coalition is fragile. We cannot avoid that.

My hope is that the Senate will rise above the temptation to protect particular constituents and look instead to the good of the Nation, the economy, and the victims. The fact remains that asbestos litigation has wrought more havoc on the American court system, State and Federal, including the Federal bankruptcy courts, and on American business and on the economy and on victims than any other species of litigation in American legal history. The Supreme Court has stated in three opinions that a legislative solution is needed. As a toiler in the vineyards of the court system, I have witnessed with my own eyes the grapes turning sour. I hope that the Senate will summon the political will and courage to act.

S. 852 is not perfect, but it is the product of years of toil and I believe a fair compromise, as good as we are likely ever to get, and I commend it to you.

That concludes my statement. I would be pleased to answer any questions that any members of the Committee may have.

[The prepared statement of Judge Becker appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge Becker, for that summary, and thank you for the thousands of hours you have put into this matter.

The bill is a complicated one, and it is our conclusion that we ought to have an explanation that is not really as detailed as it might have been, but he has covered all the points and has given you some feel for the trade-offs, for the complex issues that we have had to wrestle with.

I would like now to call the balance of the first panel. Governor Engler, Ms. Seminario, and Mr. Berrington, if you would step forward. We have a custom of having opening statements, as a generalization, of 5 minutes and 5-minute rounds for Senators, and we will have multiple rounds to the extent it is practical. We labor under time constraints in the Senate. The Majority Leader has scheduled a vote for 11:45. I do not think it is possible to conclude before that time, so Senators will go and vote, or this Senator will go and vote and come right back. And it is my hope to avoid an afternoon session because we have briefings on transparency on this issue. But this is a very, very important hearing, and we will take whatever time is required to hear the witnesses and to have Senators with a full opportunity to question.

Our first witness is John Engler, who is the President of the National Association of Manufacturers. Governor Engler comes to that position after a three-term status as Governor of the State of Michigan, served 20 years in the Michigan Assembly, 7 years as the Senate Majority Leader, the youngest man ever elected to the Michigan House of Representatives.

Thank you for joining us, Governor Engler, and we look forward to your testimony, which will be at 5 minutes. Thank you.

STATEMENT OF JOHN M. ENGLER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C., ON BEHALF OF THE ASBESTOS ALLIANCE

Governor ENGLER. Thank you, Mr. Chairman.

Chairman Specter, Senator Leahy, members of the Committee, thank you for the opportunity to testify. Today I am speaking on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad-based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. Last week's introduction of the bipartisan S. 852 represents a major step forward in the decades-long push for asbestos legislation, almost coinciding with my arrival in the legislature many years ago. It has been a long time. But I commend you, Mr. Chairman and Senator Leahy, along with Majority Leader Frist, Senator Hatch, and so many others who worked so hard on this legislation, for your strong leadership and incredible persistence in dedicating yourselves to crafting a bill that compensates victims, provides fairness and certainty to companies, and delivers a major boost to our Nation's economy. Today I would like to focus on why passage of the trust fund legislation is so vital to our economy.

In the last few years, we have seen numerous studies documenting the negative economic impact of asbestos litigation. This morning a new study, being released by NERA Consulting, quan-

tifies for the first time the tremendous benefits of a legislative solution like S. 852. Here are some of the key findings:

Enactment of trust fund legislation will reduce administrative costs, such as legal fees, and bankruptcy costs, including serious impacts on workers, by $85 billion. According to NERA, these costs and the cost to the economy of lost productivity have reached a staggering $343 billion.

To date, productivity losses due to litigation represent $303 billion. This means that companies involved in asbestos litigation pay more to borrow to expand and create jobs. Companies also have expended significant resources on the lawsuits themselves, and they have lost countless opportunities perhaps for acquisitions or mergers, certainly less attractive to investors. A trust fund bill will eliminate these drags on productivity and substantially reduce productivity losses that in the past have been as high as $50 billion a year in these industries affected.

Another plus cited by NERA is the near elimination of the transaction costs, such as legal fees, which have eaten up almost 60 percent of the billions spent on litigation. RAND previously reported that claimants are only getting 43 cents of every dollar today. NERA reports that the reduction in transaction costs means that with a $140 billion trust fund, claimants will receive up to $65 billion more in compensation than they would if we allowed the status quo to continue.

Finally, NERA quantified the expected value of asbestos reform on Wall Street using stock market valuation of defendant companies. They note that Wall Street would value enactment of an asbestos trust fund bill at as much as $137 billion. By removing the cloud of uncertainty with the passage of asbestos legislation, stock market gains would benefit the pensions of millions of workers and retirees as well as other investors in the market.

These new findings from NERA clearly demonstrate that the passage of asbestos trust fund legislation will provide an immediate and long-lasting boost to the economy. And, Mr. Chairman, I brought a copy of the full study to be made part of the record this morning.

Chairman SPECTER. Without objection, it will be made a part of the record.

Governor ENGLER. As I said earlier, other studies, Mr. Chairman and members of the Committee, have also detailed the significant economic effects of asbestos litigation. The impact on workers and jobs is particularly worth noting. According to a 2002 study by Nobel laureate Joseph Stiglitz, about 60,000 jobs, many in the manufacturing sector, have been lost due to asbestos bankruptcies. Many of those lost jobs were union jobs, and I note, as you did in your statement, that the UAW, which represents so many workers across this Nation, strongly endorsed the draft that formed the basis before the Committee.

Now, the direct losses in the Stiglitz study are only part of the story. Communities are also affected as laid-off workers tighten up their spending or move away in search of new jobs and bankrupt companies cut operations, slash purchases, and, of course, reduce charitable and community giving. In fact, another NERA study

showed that for every ten jobs lost due to an asbestos bankruptcy, a community loses as many as eight other jobs.

The scope of the asbestos litigation scourge is quite clear. More than 8,000 companies have been dragged into this litigation. These are from the largest to small, family-owned businesses. For 30 years, these companies have been paying an asbestos tort tax. That is estimated now to be about $70 billion. That is through 2002. Nearly 60 percent of that money went to the trial bar, defense lawyers, and court costs. And, unfortunately, this asbestos tax has been levied quite randomly. While defendants will certainly pay into a trust fund, these companies and their Wall Street analysts will at least get a clear picture of their liability, now and in the future. That certainly, Mr. Chairman, is a compelling reason for this legislation.

Chairman SPECTER. Governor Engler, your time has expired. Your full statement will be made a part of the record. If you could summarize, we would appreciate it.

Governor ENGLER. In summary, a major advantage of the trust fund solution ends the scandal of asbestos litigation by getting the problem out of the courts and into a no-fault system; complies at long last with the Supreme Court—and these are repeated exhortations, I think on four or five occasions—that Congress step in and solve the problem. It gets the asbestos issue to a point where the flow of the funds goes now to the people who are ill, not to the lawyers. It ends this random assessment of the asbestos tort taxes on certain companies. And, most importantly—well, let me say it restarts the growth of these individual companies, but most importantly, it provides for the people who are sick—and manufacturers acknowledge there are people who are sick—sure, fair, timely compensation to medical victims.

And, Mr. Chairman, I thank you for the time and for the opportunity to summarize.

[The prepared statement of Governor Engler appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Governor Engler.

We turn now to Ms. Margaret "Peg" Seminario, who is the Director of Occupational Safety and Health for the AFL–CIO, where she has been a key employee since 1977. She has a master of science in industrial hygiene from Harvard School of Public Health and a B.A. from Wesley College. Thank you for being here today, Ms. Seminario, and for attending so many, many, many long sessions of the so-called stakeholders. We look forward to your testimony.

STATEMENT OF MARGARET SEMINARIO, DIRECTOR, SAFETY AND HEALTH DEPARTMENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, D.C.

Ms. SEMINARIO. Thank you very much, Senator Specter. We do appreciate the opportunity to testify on S. 852. I would first like to acknowledge the work that you and Senator Leahy have put forward, your tireless efforts and the efforts of many others, including Senator Feinstein, Senator Hatch, and, of course, judge Becker, to attempt to develop a fair and effective asbestos compensation bill.

As you are well aware, the AFL–CIO has a long involvement in the asbestos issue, and for the last 3 years we have been deeply engaged in the discussions and process that have led to the current proposal. We have done so because we believe that many victims are not being well served by the current system and that hundreds of thousands of victims who will develop asbestos disease in the future could be better served by an alternative system that provides compensation to sick individuals in a more efficient and equitable manner.

The AFL–CIO has consistently supported the establishment of a Federal asbestos trust fund to fairly compensate asbestos victims for their injuries, and we continue to support the establishment of such a trust fund. At the same time, we have made clear that we cannot accept a substitute to the current civil litigation system unless it would provide a means by which victims could obtain fair compensation on a timely basis.

The legislation introduced last week includes a number of important improvements over past proposals. These include higher award values, no subrogation of awards, a medical screening program. And, again, we want to acknowledge the work of you, Senator Specter and Senator Leahy and your staffs, in securing these important changes.

Unfortunately, in the AFL–CIO's view, the bill still fails to ensure victims just and timely compensation and would leave tens of thousands of individuals with no remedy at all, and that is why we opposed the legislation as introduced.

Over the past 3 years, as we have worked on this legislation, we have listened to the concerns and the proposals put forward by business and insurers, and we have attempted to be responsive. In the interest of reaching agreement on legislation, we have compromised on numerous aspects of the legislation, including accepting the $140 billion in overall funding, a much lower level of funding for the program than we think may be actually required to meet anticipated claims.

But on the fundamental issue of insuring that the legislation will create a system that will, in fact, deal fairly with victims and pay timely compensation to those who are sick from asbestos disease, we cannot accept a compromise that does not achieve this basic objective. It is not in victims' interest to trade one flawed system for another that has serious, identifiable problems and deficiencies and threatens to leave many individuals worse off.

These serious problems include the exclusion of thousands of asbestos-related lung cancer claims, leaving most victims with no remedy during the start-up period; the inclusion of restrictions preventing individuals with both asbestos and silica disease from obtaining access to the courts or fair compensation from the fund; unworkable statute of limitations provisions that could bar tens of thousands of worthy claims; and program sunset provisions that could leave claimants in limbo should the fund run out of money.

We continue to believe that the major problems with the bill can still be corrected, and we have put forward proposals to do so. Moreover, we believe that a primary reason they have not been address is due to objections by some business and insurer groups who

want to limit claims and costs or make it difficult or impossible for individuals who are sick to receive compensation.

If the goal is to truly enact a bill that provides prompt and fair compensation to victims who meet the eligibility requirements, then there is no valid reason not to fix the problems we identified. We have prepared detailed comments on the legislation, which we have included in an attachment to our testimony. For now I would just like to spend the remaining time that I have just to highlight a couple of the major problems in the bill.

One of the first major problems is that the compensation for thousands of asbestos lung cancer victims is eliminated; that with the elimination of the Level VII lung cancer categories, based on CBO estimates, 40,000 individuals with lung cancer related to asbestos are no longer covered specifically by the bill. Provisions have been added that allow some of these lung cancer victims to use CT scans to show that they have asbestosis, but that does not apply to victims with pleural disease. The net result is about 25,000 asbestos lung cancer victims previously covered may not be eligible for compensation.

The start-up provisions leave claimants in limbo for as much as 2 years. An estimated 60,000 to 80,000 claimants currently pending who are sick will have nowhere to go for 2 years under the provisions of this fund, the bill. This is not fair.

As I said, there are also problems with some of the other provisions related to silica, statute of limitations, and we have provided comments and proposals on those matters.

Let me conclude by saying that we have spent years working on this legislation, and we believe that we have played a constructive and responsible role in the process. We intend to keep working to address the major problems with the bill, with the hope that changes will be made that will enable the AFL–CIO to support the bill.

However, in its present form, the AFL–CIO must oppose S. 852 since it fails to ensure asbestos disease victims the just and timely compensation they deserve.

Thank you.

[The prepared statement of Ms. Seminario appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Seminario.

We now turn to Mr. Craig Berrington, Senior Vice President and General Counsel of the American Insurance Association, extensive experience from the Department of Labor, including Deputy Assistant Secretary for Employment Standards, a law degree from Northwestern, and a graduate of the School of International Service at American University.

Thank you, Mr. Berrington, for being a regular attendee at the numerous, lengthy sessions of the stakeholders and your contributions there, and the floor is yours for 5 minutes.

STATEMENT OF CRAIG A. BERRINGTON, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN INSURANCE ASSOCIATION, WASHINGTON, D.C.

Mr. BERRINGTON. Thank you, Mr. Chairman. I am testifying today on behalf of the AIA and the Reinsurance Association of

America and have a written statement that I would appreciate having entered into the record.

Chairman SPECTER. Without objection, your statement and all statements will be made a part of the formal record.

Mr. BERRINGTON. Thank you so much.

As always, we greatly value the opportunity to be here and to work with you and the Committee on this important legislation and, of course, to salute Judge Becker for his heroic efforts in this regard, not to mention his patience.

Mr. Chairman, your bill as introduced makes some very important improvements in the medical criteria aspects of the legislation, in removing the Level VII cases, and, in addition, requiring that claimants establish their asbestos exposure was a substantial contributing factor to their disease.

Unfortunately, other important problems remain that are critical to our evaluation of the legislation. I would like to touch on six of them quickly.

First, litigation leakage from the trust fund. Captured in a phrase, a national trust fund must provide an exclusive remedy for resolution of all asbestos claims. Without that certainty, we will find ourselves paying both substantial sums into the fund and into the tort system for claims permitted to leak outside of the fund. In S. 852, leakage would occur before the fund gets operational certification, while the fund is fully up and running, and in the event of fund sunset.

We are particularly concerned about leakage during the fund start-up. If the new law does not have a fast and effective start-up, it will fail. Sure as shooting, it will fail. And with that failure will come recriminations all around. So this is no small matter. In our judgment, to make the start-up happen, all of the bill's incentives must be aimed toward obtaining that fast, efficient implementation.

S. 2290, introduced last year, met this test by having a legislative red light/green light approach, with the President's signature resulting in an immediate red light for the old litigation system and an equally immediate green light for the new trust fund. Embedded in this approach was language giving the Labor Secretary all the authority she would need to enable the program to review and decide claims quickly, including the use of outside contractors and a priority for exigent claims.

Moreover, S. 2290's red light/green light approach made it crystal clear to everyone, including the trial bar, that once the bill was enacted, it was time to quit fighting over it and to get to work implementing it.

S. 852 adopts a very different approach, therefore jeopardizing the ability of the new law to quickly and efficiently be implemented. Indeed, S. 852 actually provides incentives to those who believe that the loss of the legislative battle on the bill need only be a skirmish in the longer-term war over keeping the litigation system going. The result would be stress on this new law of enormous proportions, which should be avoided at all costs.

This problem did not exist in the trust fund as laid out in S. 2290. We believe the policy choice in S. 2290 which would have applied the exclusive remedy provisions to any litigation outstanding

upon the date of enactment was much the better approach. It would have established an understandable, bright-line test, making it clear that the moment the President signed the new law, the old litigation system ended and the new trust fund system began, cutting off the opportunity for litigation game-playing.

Second, the bill's handling of exigent claims. Although part of the broader litigation leakage problem, the new exigent claims provision raises its own unique questions. Exigent claims are those, as we know, from individuals who have mesothelioma or whose asbestos illness is at a critical stage where they are likely with less than a year to live. We believe the trust fund, not continuing the litigation system, would work best for these cases. However, S. 852 does not follow this approach. Instead, it uses an offer of judgment provision to keep current exigent cases going in the litigation system after the bill is enacted and even allows new exigent cases to be filed in court.

While the new offer of judgment provision was obviously done in good faith to speed review and payment of exigent claims, I don't think the provision works. Not only does it provide an opportunity for new litigation, but with its 200-day litigation process for getting from beginning to end, it not only is unlikely to speed reviews for people with critical illnesses, but is also likely to be slower than the Labor Department's processing of these very same claims.

While it is unlikely to speed up the process for individuals getting their money, it does nothing to control attorneys' fees. So if one assumes the normal attorney fee of perhaps a third of recover, it will reduce the amount of money that a claimant will get for himself and his family.

Other issues that are of concern to us relate to the operational certification provisions in the bill. The bill's prohibition on workers' compensation subrogation, that issue has been well vetted, but we still do not understand why it is a problem, having the same system here that exists in the State workers' compensation systems to prevent double recoveries. And, of course, the fifth issue is program sunset. We would prefer that all cases go to Federal court. We think that is what ought to happen.

Mr. Chairman, we do applaud the improvements made in this version of the bill, but we have substantial concerns still that prevent us from being able to support it as currently drafted.

Thank you very much.

[The prepared statement of Mr. Berrington appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Berrington.

We will now proceed with 5-minute rounds for members' questioning.

Ms. Seminario, with respect to the CT scans, which is an issue on the minds of a number of Senators, Senator Leahy and I worked through this after our first draft and came to the combination on CT scans for Category IX and not for Category VIII. And we are going to be hearing a good bit of medical testimony. We have added some extra witnesses today after you and I and others sat down in the afternoon and after consulting with Senator Coburn.

The question that I have for you, on a bill which cannot put its arms around everything and we do find a major concession, which

Senator Leahy and I worked on a long time on the number VIIs, on the smokers, and we were able to find a trade-off on some very key items like subrogation, whether it would not be sufficient under the exceptional medical claims section, where there can be CT scans submitted in addition to X-rays, wouldn't that be a safety valve for the kind of injured party whom you have referred to?

Ms. SEMINARIO. Well, we are looking for more than a safety valve. We are looking for a system that actually does, in fact, have criteria to compensate people that have asbestos-related disease. I will not go into our views at length on the Level VIIs, but we still believe that with the 15-year substantial occupational exposure that those lung cancers are attributable to asbestos. So we start from believing very firmly that the science supported the Level VIIs.

Chairman SPECTER. We agree with you on moving in to get the lung cancers caused by asbestos. We really agree with you totally. I think there is no disagreement. But the question is—I did not mean to use safety valve in derogation. Coverage—let's call it that instead of safety valve.

Ms. SEMINARIO. What we tried to do with the medical criteria, if you remember, is to set up categories where if an individual had the diagnosis, they had the exposure, that they were covered. And it was not the exception, it was he rule. And I think if you do indeed look at both the epidemiology but also the latest American Thoracic Society guidelines on diagnostic techniques, you find that indeed the use of CT scans has become a routine diagnostic method for the non-malignant diseases. And if they are permitted as a presumptive diagnostic tool for asbestosis, we do not see why it should not be the same for the other categories. But I would leave it to the medical experts to have that more informed and knowledgeable discussion with you about the use of those—

Chairman SPECTER. Governor Engler—

Ms. SEMINARIO. —techniques.

Chairman SPECTER. I do not mean to cut you off, Ms. Seminario.

Ms. SEMINARIO. That is fine.

Chairman SPECTER. But I want to cover a couple more issues here in the 5 minutes I have.

The Committee thanks you for the very material assistance which Pat Hanlon has rendered in the Asbestos Study Group on Gary Slaiman and thank you for your letter. We are still working through some of the issues which you have reserved.

Let me turn to Judge Becker at this point on an issue which is raised by the Chamber of Commerce, Thomas Donahue, a letter dated April 25th, which is generally laudatory and supportive and we want a bill and keep working, all of which we intend to do. And the one issue which is raised is the issue of leakage. Would you address the Herculean efforts which the stakeholders worked to try to find an accommodation on that issue?

Judge BECKER. We spent many, many, many sessions, and I think the leakage is virtually gone. And, frankly, I do not understand the drama with which Mr. Berrington describes the leakage problem. Anything that has gone to judgment already, final judgment, well, obviously that is preserved. If a case is actually on trial before a judge or a jury, the case may continue. I mean, it just

seems to me unfair, you are in the middle of a case, it has gone to the jury or the testimony has been going on, and all of a sudden the bill is signed, to say, okay, jury and lawyers, go home, we are not going to conclude the case. I mean, it is a very limited number of cases, and it is limited to individual cases, not consolidations. I mean, there are some instances where you have hundreds or thousands of cases consolidated. The bill very precisely says it is a one-on-one case and it is actually on trial.

It seems to me reasonable to let it continue, and with respect to settlements, if a settlement has been negotiated—not an inventory settlement, the plaintiff's asbestos lawyer has a deal that covers 500 or 1,000 cases, the bill says a one-on-one settlement. And if it has got to be signed by the plaintiff and signed by the defendant or someone on behalf of a defendant, and there is 30 days after the Act, there are certain data that has to be supplied, so long as the settlement has already been signed, well, then there is 30 more days. And, frankly, I don't see what the problem is. With respect to virtually everything else, the tort system is closed down and everything else goes into the fund. And it seems to me that these minimal examples with respect to cases actually on trial and settlements and, indeed, the insurance company can even protect itself or the defendant by putting in some requirement in the settlement agreement that the paperwork be submitted sooner.

I just don't see what the problem is. It seems to me the leakage issue is virtually gone. We had many, many, many sessions, and we have come up with provisions which are in the Act.

Chairman SPECTER. Thank you, Judge Becker. The red light went on during the middle of your answer, so I will now turn to—my red light went on. Yours did not go on, Judge Becker. Mine went on.

I turn now to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Governor Engler, welcome, and I appreciate all the time you have spent on this. We did not want you to completely have to forget all the hours you had to spend with the Michigan Legislature. So we have tried to make up for that in your life. But I want to thank you for NAM's support of this bipartisan legislation. And I agree with your assessment about the tremendous economic impact of the legislation to create jobs and get a more efficient compensation system.

A major component of the bill is to ensure that the fund is operational through higher front-end funding, something you have looked at closely. In your testimony to the Committee in January and in some of the follow-up letters to me, you stated that you expect to have written commitments or letters from financial institutions regarding the availability of $20 billion in front-end funding once the legislation was introducing, including estimates of the interest costs on such potential borrowing.

Now that we have introduced it, when do you expect to receive such written assurances from financial institutions?

Governor ENGLER. The specificity of the draft makes this easier as it gets obviously closer, but we think by Thursday that from Goldman Sachs we may have a letter that gives us assurances. We have been talking to a lot of the different financial houses about

how this gets done. We think this is clearly bankable, but we are anticipating that Thursday we would have something, you know, in time for markup, that you would have a commitment on, you know—

Senator LEAHY. And you have—

Governor ENGLER. It can still be couched, I suppose, as financial folks do, based on what exactly the mechanisms are, but we think that the Committee has done a nice job in the draft of trying to put a framework together that somebody like Goldman Sachs can kind of come in and say this is what we think it would be.

Senator LEAHY. And, Governor, will you be able to share that with Senator Specter and me?

Governor ENGLER. Yes.

Senator LEAHY. And the Committee. Thank you.

Ms. Seminario, you have probably felt that you have taken up residence up here on the Hill, but I appreciate all the work you and your staff have done with Senator Specter's staff and with mine as we tried to craft this bill. So many of the victims of asbestos exposure, of course, are under the AFL–CIO umbrella. I might want to note, you have represented them tirelessly in this regard.

I have been pleased we have been able to make many of the constructive changes that the AFL–CIO has promoted: higher awards values for victims, no subrogation, proof of exposure, medical screening program, new criminal penalties for willful OSHA violations and so on. I appreciate your comments, which have been constructive, on the statute of limitations and the need for ongoing oversight and planning and mechanisms hopefully to avoid termination of the fund. I know Senators Kyl and Cornyn have similar concerns about the drastic nature of the sunset provisions. I hope we can work out a refinement.

Would you send me and Senator Specter any proposed language, legislative language you might have on this issue?

Ms. SEMINARIO. We would be happy to, and we would also be happy to continue the discussions over the next couple days and weeks.

Senator LEAHY. Thank you. If we have time, I am going to come back to you.

Mr. Berrington, the last time you appeared before the Committee, in January, your testimony was in support of a medical criteria bill. I am pleased that you and the American Insurance Association have now joined the asbestos trust fund bandwagon. I want to welcome you aboard. I can see by the expression on your face how happy you are to be onboard.

[Laughter.]

Mr. BERRINGTON. I am just trying to recall my testimony.

Senator LEAHY. I recall it very, very well. I strongly disagreed with your position of allowing insurers to reduce the awards to victims through subrogation. We have been very direct with each other on that. I do want to work with you and the insurance industry to find common ground on refinements for our bipartisan trust fund legislation. We need that as it moves forward in the legislative process, and I would ask you to continue to work with us.

Mr. BERRINGTON. Mr. Leahy, if I might, just for a moment.

Senator LEAHY. Sure.

Mr. BERRINGTON. I believe my testimony in January said that if we could work out a good trust fund, we are all in favor of doing that, but if it were not possible to do that, that we would recommend alternatives to that. And we have been at the table. We plan to stay at the table, and we are certainly hopeful that we can work out a good bill. But it has to be a good bill from our perspective.

Senator LEAHY. I understand.

Now, I will include for the record, Ms. Seminario, some questions on chest X-rays, and that will sort of follow up on what you and the Chairman have talked about. But, again, I appreciate it. You and I want to help the Chairman keep to the time, too.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, and thank you for your leadership on this important issue. Asbestos litigation has been a colossal disaster for the litigation system in America. I cannot think of anything that is more embarrassing to me as someone who believes in a good, efficient legal system than a system that has paid out tens of billions of dollars, put companies in bankruptcy, but only 40 percent of the money being paid out going to the people who are sick, and many of those under this system today receiving money are not sick. Hundreds of thousands of lawsuits are pending in Federal courts today, and they have been pending. They are handled in huge groups. Individual plaintiffs are not often having their day in court. There is just no way physically to do that, as, Judge Becker, I think you have indicated now before us.

So I am very concerned about this system. There is no doubt in my mind that we can create a trust fund that will allow people who are sick to receive compensation promptly, to receive it fairly, to get more than they would get under the current system, to relieve the stress on the courts, to end this aberrational thing where some plaintiff gets $50 million and some plaintiff gets $500,000 for the very same illness just because of a different jury and a different situation. I believe we can make improvements in the way we do that, and we should do that.

This is not a perfect piece of legislation. It is not even a pretty piece of legislation. I don't know how to make it pretty or better.

I know we can get more money to the victims and we can get more money to the victims promptly. From my experience in the system, victims receive a check from some defendant, one of maybe 300 they have sued for $250. The lawyer takes that 30, 40 percent of it, and they get this little check. Six months goes by, another one, another company sends in their check. Some fund sends in their check. The idea that today under the current system victims are getting substantial compensation promptly is just not so. I know, Ms. Seminario, you know that, and that is one reason you are interested in having a fund that would work better for the victims.

Is it a tax? We need to talk about who is paying and how they are being paid? Is it an allocation of liability or a tax? I don't know. Maybe it is a little bit of both, Judge Becker. What do you think? To assess the companies that are being held liable today in a trust fund, would you construe that as a tax?

Judge BECKER. Well, to me, a tax is what is paid by the taxpayers, and under Section 406, nothing can be imposed on a taxpayer or on the Government. Loosely, you could call it a tax, but basically it is a contribution in lieu of what they would be paying in the tort system. It is a kind of fair approximation, and it seems to me within the power of Congress within the Commerce Clause to make these rough approximations, rough justice. Rough approximations based on policy judgments is what you folks do, and I think when you do it, it is not really right to call it a tax.

Senator SESSIONS. Well, whatever, it is an assessment of some kind. We need to be careful how we do that and make it as fair as we possibly can.

Under the attorneys' fees provision, 5 percent of $140 billion is $7 billion. At one point this bill was up to 20 percent; that is $28 billion of the fund going to attorneys. And I just do not believe that is necessary. These are going to be much more akin to workmen's comp or Social Security claims where the attorneys follow the processes, and if they have medical proof that the person is sick, they are going to be paid.

Mr. Berrington, would you agree with that?

Mr. BERRINGTON. Absolutely. It is absolutely analogous to a workers' compensation system.

Senator SESSIONS. And they do not get big fees and do not need big fees.

Mr. BERRINGTON. And, ideally, in the system, which I think is well laid out in the legislation, most people should not need an attorney at all. The Labor Department is obligated to provide assistance to help people work through their claims if they need that. And so attorneys' fees, if they are necessary at all, should be not very high.

Senator SESSIONS. Well, attorneys have made enough money in these cases. These attorneys, many of them, have just become incredibly rich over it. I don't think even they are proud of the current system, and I think most trial lawyers know it needs to be fixed.

With regard to exigent cases, such as mesothelioma, Judge Becker, just briefly how much does the fund contemplate today?

Judge BECKER. $1.1 million.

Senator SESSIONS. $1.1 million. What about the concern that—normally, would they not be paid promptly, once this fund is up and running, how soon would it take before a claimant came in with a medical report that they had meso, they had exposure significantly to asbestos, and made their claim before they got the 1.1?

Judge BECKER. I think it should not be more than a couple of months because the everything is going to go up—they are going to use websites, I assume, and you can download the form from the websites, and there is instruction, and we have a claims facility to process these. You do not have causation problems in mesothelioma.

Senator SESSIONS. Right.

Judge BECKER. The only known cause is asbestos exposure.

Senator SESSIONS. Now, what about the concern that as the fund is coming online, the legislation is passed, there would be some delay—I have heard as much as 2 years—before the mesothelioma claimants would get their money? Is that correct?

Judge BECKER. I don't think that is true. I think you are talking maybe 60 to 90 days.

Senator SESSIONS. Ms. Seminario, do you have a different view of that?

Ms. SEMINARIO. The different view is that I think for mesothelioma victims, hopefully the start-up will be very quick. But most of the victims are not mesothelioma victims, but they are also very sick. And so the 2 years applies to everybody who is not terminally ill, and based upon the CBO estimates, you are talking about 60,000 to 80,000 people who fall in that category, who are either pending or claims will come in in the first 2 years of the fund.

So that I think is the bigger concern, this very large number of sick people who really will have nowhere to go perhaps up to 2 years of time. And I would just point out that—

Senator SESSIONS. But right now you would admit that the average plaintiff that files a lawsuit is waiting 2 years or more before they begin to receive any substantial compensation?

Chairman SPECTER. Senator Sessions, your clock—

Senator SESSIONS. You are right. I am sorry.

Chairman SPECTER. It has defective wiring. Your red light has been on from the start, so you have not had a timer. We are trying to get that fixed. But your time has expired. But if you want to finish up that last question, go ahead.

Senator SESSIONS. I would just ask—

Ms. SEMINARIO. I think generally for many of them it does, but some of them can get very quick access right now in the bankruptcy trust. They can go file a claim and get ready compensation. Those are going to be extinguished immediately. We think they should remain in place while the fund is getting up and going and give people at least a place to go to receive compensation from that source of—from that remedy.

The other thing is a lot of these people have already been waiting for years because of the stays of Halliburton, Babcock and Wilcox, and others, and we don't think it is fair that people who have been waiting 5 or 6 years have to wait another 2 years. So we think this 2 years is too long and that there can be more work done on trying to deal with the issues for those victims.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much.

Senator Specter and Senator Leahy have, as we have all noted, devoted an enormous amount of time and effort to negotiating this revised asbestos trust fund legislation, and they deserve great credit for their work. And I want to thank Judge Becker as well.

But the bill before us still contains serious flaws which make it unfair and unworkable, and it does not provide a reliable guarantee of just compensation to the enormous number of workers who are suffering from asbestos-induced disease, as we have just been listening to.

The problem is that powerful corporate interests responsible for the asbestos epidemic have fought throughout this process to escape full accountability for the harm that they have inflicted. The real crisis which confronts us is not an asbestos litigation crisis; it is an asbestos-induced disease crisis. All too often the tragedies these workers and their families are enduring become lost in a complex debate about the economic impact of asbestos litigation. We cannot allow that to happen.

The litigation did not create these costs. Exposure to asbestos created them. They are the costs of medical care, the lost wages of incapacitated workers, the costs of providing for the families of workers who died years before their time. Those costs are real. No legislative proposal can make them disappear. All legislation can do is shift those costs from one party to another. Any proposal which would shift more of a financial burden onto the backs of injured workers is unacceptable to me, and it should be unacceptable to every one of us.

The legislation before us would close the courthouse doors to asbestos victims on the day it passes, long before the trust fund will be able to pay their claims, as Peg Seminario just illustrated. Their cases will be stayed immediately. Seriously ill workers will be forced into legal limbo for up to 2 years. Even those victims who have less than a year to live will be forced to stop their cases for 9 months, and many will die without receiving either their day in court or compensation from the trust fund.

Experts tell us the asbestos trust created by the legislation is seriously underfunded. It is $13 billion less than the amount provided in the Committee's 2003 legislation, even though many of the award values have been increased. The funding plan in this bill relies on very substantial borrowing in the early years as the only way to pay the flood of claims.

The result of this will be a huge debt service cost over the life of the trust fund that could reduce the $140 billion intended to pay the claims by 40 percent or more, according to testimony we will hear today. The amount remaining would be far too little to pay claims to cover all of those who are entitled to compensation under the terms of the bill.

We cannot allow seriously injured workers with valid claims not to be paid fully in a timely manner by the trust. That would be a shameful injustice.

I am particularly upset by the change in the way lung cancer victims are treated. Under the medical criteria adopted by the Committee overwhelmingly 2 years ago, all lung cancer victims who had at least 15 years of weighted exposure to asbestos were entitled to receive compensation from the fund. That provision now has been removed. Under this bill, the lung cancer victims who have had very substantial exposure to asbestos over long periods of time are denied any compensation unless they can show scarring on their lungs.

The Committee heard expert medical testimony that prolonged asbestos exposure dramatically increases the probability that a person will get lung cancer even if they do not have scarring on their lungs. Deleting the Level VII category will deny compensation to approximately 40,000 victims suffering with asbestos-related lung cancer, and under that legislation as now drafted, these victims are losing their right to go to court but receiving nothing from the fund. How can any of us support such an unconscionable provision?

The bill also tampers with the agreed upon medical criteria by raising the standard of proof for each disease category. The new language requires the workers to prove that asbestos was a substantial contributing factor to their disease instead of just a contributing factor. This is a major increase in the burden workers must overcome to receive compensation, and it is a serious step in the wrong direction, raising the bar even higher on injured workers.

This bill shifts more of the financial burden of asbestos-induced disease to the injured workers by unfairly and arbitrarily limiting the liability of defendants. It does not establish a fair, reliable system that will compensate all those who are seriously ill due to asbestos, lacks a dependable funding stream which can ensure that all are entitled to compensation actually receive full and timely payment. These are very basic shortcomings. We cannot allow what justice requires to be limited by what the wrongdoers are willing to pay. Unless substantial improvements are made in the legislation to the Committee's markup, I intend to vote no.

I know my time is just about up, Mr. Chairman. I was just asking Peg Seminario about the Title 7 provision, if she could just describe briefly for the Committee why those victims were included in the original medical criteria and why they should be eligible for compensation in the trust fund.

I thank the Chair.

Ms. SEMINARIO. The original medical criteria had three categories of lung cancer. The Level VII lung cancers were those individuals diagnosed with lung cancer that was related—had 15 years of substantial occupational exposure to asbestos and a determination made that the lung cancer indeed was asbestos-related. And so it was a group that did not have scarring on the lungs that showed up on X-ray. And the medical studies and the epidemiologic studies will show that people without scarring, without these underlying markers indeed are at increased risk. It had a higher level of exposure when you did not have the X-ray changes than the exposure requirements for those individuals who had asbestosis or has pleural disease. And so there was a higher burden on them to show exposure, but they indeed were covered under this category.

The other provision was in the bill that each of those cases had to be reviewed by a physicians panel, a three-member physicians panel, for confirmation. And so we felt pretty comfortable that the evidence was strong, but also that they would be reviewed and confirmed by experts before payment was made.

Senator KENNEDY. I thank the Chair. My time is up.

Chairman SPECTER. Thank you very much.

Senator Cornyn? We have the early-bird rule, and I commented to Senator Cornyn that it was my error in not calling on him earlier. But now you have the floor, Senator.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman. And let me add my congratulations to you and the Ranking Member, Senator Leahy, and all the people on this Committee who have worked so hard with so many people here in this room to try to get us where we are today.

I regret to say that I cannot support the bill in its current form, but I am committed to continuing to work with you and the Committee to try to get the bill to the point where I can support it and to encourage the legislative process to move forward.

From my perspective, there are two major criteria by which this bill should be judged: number one, its ability to pay only people who are sick with asbestos-related disease; and, number two, that it provide the exclusive means to do so, completely supplanting the current dysfunctional system. And there are a number of provisions in this very lengthy bill, and, again, this has been a complex, contentious process, I think as Judge Becker said, and we have all tried very hard and will continue to try very hard to deal with some of the challenges here.

I am concerned that we still do not yet have good, solid information that allows us to predict the viability of the fund. I would just note—and I look forward to additional testimony we will have here later—that the CBO, for example, on a previous version of this bill estimated that about 76 percent of the people who apply for benefits will not be eligible for compensation, but will be eligible for medical monitoring. Other estimates, from Goldman Sachs, for example, go up to 82 percent they estimate will be not eligible for compensation but will be eligible for medical monitoring. I think we need to drill down and understand better the basis for those estimates.

And Judge Becker has said in previous testimony—and I again want to extend my appreciation to him for his hard work—we really do not have good information in many respects by which to estimate the number of claims that will actually be made. There are models that we have heard about and we will hear more about today which provide some comfort level, but none of us should be fooled into thinking that we actually know how many claims will be made and what the composition of those claims will be.

We have heard in our previous testimony from representatives, for example, of the Manville Trust that has extensive experience with the claims composition of asbestos trusts who disagrees with the premise upon which this particular trust is made and whether it will be enough money. I worry because there are some who I have heard during the course of our proceedings who said, well, there is plenty of money and we have a cushion, so we should not worry about leakage.

I agree with Mr. Berrington that there are still leakage concerns in this bill. For example, collateral sources, while ostensibly would be deducted from the bill, it makes clear also that there are signifi-

cant exceptions to those collateral sources, statutory funds, and which would provide an opportunity for double-dipping, which I believe could potentially jeopardize the fund.

If you look at the 9/11 fund, it was estimated there that if there were no collateral offset rule there, the fund's cost would be decreased—or the fund's benefits would be decreased by 29 percent. Now, here we have purported to deal with that, but at the same time what one page giveth, the other page taketh away. And that is an area that I think needs to be addressed as well.

I am still concerned about the screening program contained here. There is, over the life of the fund, $600 million set aside for medical screening, and there is no area on this subject that has been more rife with abuse and productive of claims without any real medical or other justification than the medical screening programs that we have heard about during the course of these proceedings. This $600 million will pay for approximately 400,000 medical screenings under the course of this trust fund.

So those are some of my concerns. I want to compliment again—I know it sounds like I am being entirely negative. I am not. I think there has been substantial movement forward with regard to the elimination of Category VII and the holding of attorneys' fees to a modest amount, which is commensurate with a no-fault, non-adversarial application and a trust fund process.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Just to kind of relook at history for just a moment, the bill that came out of Committee sometime ago was $108 billion, with a $45 billion contingent reserve, but that contingent reserve may or may not have been triggered.

Then the Frist bill that went on the floor of the Senate was $104 billion, with a $10 billion contingent reserve.

This bill has no contingent reserve. It is a hard $140 billion. And essentially the affected business communities have pledged to make good that money. As I've said before, it is very important to me that there be transparency with respect to who is contributing what to this fund. It has to stand the test of public scrutiny. So I think that is important.

One of the things that I think Judge Becker knows, and certainly the Chairman and the Ranking Member know, that has concerned me for some time is the possibility of a takings or a due process suit against the bill. There is an ad in this morning's Washington Times which is put there by what I understand to be a coalition, the Coalition for Asbestos Reform, which I am told is a combination of trial lawyers and businesses that are opposed to the bill. And they make the takings argument. Also, a good friend of all of ours from the Chicago School of Law, Professor Chemerinsky makes that argument as well. And he says that he believes that, "The Act would violate the Takings Clause by taking property without just compensation, specifically violating the Constitution because it abrogates rights secured by valid contracts of insurance while requir-

ing the firms that held those rights to contribute to the trust fund. This kind of double exaction requiring firms to contribute to the trust fund as a substitute for tort liability while simultaneously taking from firms the very assets they have accumulated in order to discharge those liabilities cannot, in my judgment, be squared with basic constitutional principles."

As Judge Becker knows, I have had some concern about that and have proposed that in the start-up, instead of taking the $4 billion from the asbestos trusts—Libby, Montana, Western-MacArthur, and I believe two others—that those monies be incorporated on a staggered basis over a 4-year period of time, a billion, a billion, and a billion each year, in the hopes to avoid that problem. But my suggestion was not accepted by others, and I would like to ask particularly the lawyers here—I have no doubt that there is going to be litigation against the fund. And it seems to me we ought to do everything we possibly can to see that the takings and the due process arguments are mooted since they are now being waged as major attacks against the bill.

I would like to ask anyone who would care to answer, beginning with Judge Becker, how likely the takings/due process argument is to be successful, and whether the proposal that I made, which was rejected, might ameliorate it.

Judge BECKER. Well, as all of you know, the $4 billion that is in the trusts has to be turned over to the fund. In the event that a constitutional challenge prevails, business guarantees the $4 billion. There is only $136 billion plus 4, but if that 4 is lost to the fund, business in the bill guarantees the other $4 billion. That is just background.

Now, I have read the briefs, as it were, Senator Feinstein. I have not heard oral argument yet. I have read the arguments on both sides. There is a very convincing letter from Carter Phillips, a leading member of the Supreme Court bar from the Sidley Austin firm who says that there is no constitutional problem. I have also read Professor Tribe's view. As I said, I have read the briefs. I have not heard oral argument.

My inclination is that there is not a takings problem, there is not a due process problem. These trusts are the creations of the bankruptcy courts for the most part. To some extent, they are the creatures of contract. But they are all approved by the bankruptcy court and by Congress. But Congress has the overarching power under the Commerce Clause, it seems to me, to abrogate them. And there are benefits to the victims and benefits to the polity.

Now, will there be a challenge? I suppose there will be a constitutional challenge. I don't know how we can avoid it. The judicial review provisions impose upon the courts, including the United States Supreme Court, the obligation to give it expedite consideration, just as they did in McCain-Feingold. They did give it expedited consideration, and I would assume they would give this expedited consideration.

My view is that the constitutional challenge will fail, and argument has been made that the trusts will not have enough money to fund the constitutional challenge. I don't know how much the legal fees will be. I would be very surprised if you could not get lawyers who would take that case.

Chairman SPECTER. Senator Feinstein has raised an important issue. You have asked for the other lawyers on the panel—Governor Engler, you are a lawyer. Do you want to answer that question?

Governor ENGLER. Well, there are lawyers, and then there are judges who are retired heads of circuit courts. I do not want to add much to that, what I have heard.

I would observe I understand that the Supreme Court in one of those exhortations to the body politic to act on this has even themselves suggested the possibility of a trust fund. But that is unsupported in terms of—that is not a legal brief, obviously, for it, but just a suggestion that came from on high.

Chairman SPECTER. Thank you.

Senator FEINSTEIN. Thank you very much.

Chairman SPECTER. Senator Coburn?

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Well, thank you, Mr. Chairman, and thank you for the work that you and Senator Leahy have done. And I appreciate the work. I was not here through the other 5 years of working on this bill, and I would not know that I would want to be here if it is going to take 5 more years to do this.

I have real concerns about this bill. I have concerns that people who don't have disease are going to get compensated under it, which just means it is going to lessen the compensation that should go to those people who truly have disease related to asbestos. I can tell you that the literature does not support the Section VIIs in anyway, and there will be medical testimony today to that effect.

We have no measure in this bill for—we have exposure, but we have no measure of exposure in terms of particulate matter, which we know is important in terms of causation of disease and asbestos. There are a lot of assumptions in this bill both in Section 6 and in Section 8 where there is not a requirement for particle exposure. And we must not forget that background basic lung cancer is high in this country, a lot of it associated with smoking. We are rewarding former smokers when that most likely was the cause of their lung cancer, and at a very high level. So, in fact, the bill's medical criteria still lacks a lot in terms of where it should be to truly compensate people who have been injured by asbestos. And that is what we ought to be doing.

I think it puts at risk the fund. I think a lot of the things in the bill, the presumed exposure, puts at risk in the fund, the fact that you can have a disease, early disease with asbestos, be compensated for it, and then if you end up with a major disease or malignancy, we pay you that, but we do not deduct the early compensation, which I think is wrong. That is still in the bill. So for a number of reasons, I am not to the point where I can support this bill yet. And more importantly, I worry about the small businesses. I know Governor Engler represents the National Association of Manufacturers. But, you know, I am not sure they are at the table, the small businesses, that they are going to be put out of business by this fund, who have not had any problems but yet might fall into the industry. And who are they? What are their names? How

many people do they employ? And we are going to take from them, when, in fact, they may not have an exposure.

I think we have to know who those people are before we finish up anything on this bill, and they need to be informed. And I would love for Governor Engler to answer the question. Who are these people? And are they members of NAM? Or are they members of the alliance? Or do they not even known this is happening to them? Governor?

Governor ENGLER. Thank you, Senator. I think your argument is best argument for trust fund that has been made to date. The criticism of the medical criteria, because this is where I started. I thought, Why couldn't we use criteria to fix the tort system and let these juries all over America handle the case? And the problem is we can't. I mean, we are struggling with the medical criteria we are writing in this bill, and I think it is a lot better and becomes more of a uniform standard to apply across America than simply letting the tort system work with three-quarters of a million cases.

As to your question about the unidentified businesses, one of the problems that we have out there, as this thing stays in the tort system, as the fees go to the—not to the injured people but to the legal process itself and we get literally hundreds of different standards being decided by different courts and juries out there, as more companies—and we are nearly 80 now. The last one was an Arizona company about 2 weeks ago that when into bankruptcy. It pushes out deeper and deeper. There are 8,400 defendants. We can provide a list of everybody who is a defendant today that we at least have found and identified. But as we send more people into bankruptcy, Senator, we get deeper into the roster of American companies.

And so I am worried about small and large—most of the membership of the National Association of Manufacturers are small, you know, from 20 employees on up. But there are people we cannot identify, but we know they are going to get caught if we do not stop the hemorrhaging on this problem.

Senator COBURN. I want to make another point. Part of my problem with what Congress does too often is they do not pay attention to what real science is. I am just going to put into the record—we have had testimony on pharyngeal and laryngeal cancer associated with asbestos, and the studies that are represented to take care of that show a slight increase in risk. But the science stinks there because the number one cause of both of those in this country is alcohol tobacco, and neither one of those confounding factors were in any of those studies. So the studies mean nothing. And yet we are going to try to put forward to pay people for diseases caused by something else and make those who are suffering from asbestos today not be compensated because we are going to pay for a disease that is not there.

There are big problems with the medical criteria and including expanding that and not compensating—or not deducting for earlier disease against that. And my time is up and, Mr. Chairman, I yield back.

Chairman SPECTER. Thank you, Senator Coburn.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Mr. Chairman, I want to thank you and Senator Leahy not only for your hard work on this bill but also for your courtesy in allowing this hearing. When I suggested it last week, you were prompt to say yes, we should have a hearing, and I am heartened by that. You have been eminently fair throughout this process, and I thank you for that.

Senator Leahy, though we may disagree on this bill, you are my friend and we have had a courteous and constructive relationship, which I am sure is going to continue even as we debate this bill.

I also want to thank Judge Becker. I know you are not on the payroll, but you might as well be. You have done an awful lot of hard work to try to bring us to this day, and though I may disagree with your work product, I certainly respect your contribution and public service in so many different ways.

What troubles me about this hearing is that it is so sterile and so bloodless. It is a hearing about money. Who pays? How much do they pay? I just see this issue so differently. This is about more than money. It is about justice. It is about fairness. And as Senator Kennedy has said, it is about innocent people who, among these victims, knowingly exposed themselves to deadly asbestos. At best, a small, small percentage may have. But most of the people who were victims of this illness did not even know they were being exposed at the time. They are innocent workers, innocent bystanders, innocent family members doing the laundry of workers. Through no fault of their own, they have been exposed to this deadly poison. And we know that companies like Libby and W.R. Grace knew long ago the danger of asbestos, kept mining it, kept producing it, kept making profits on it, willing to take the risk that no matter how much they were sued for, they were going to make more money selling the product. That is what it was all about.

What is unfortunate in the hearing today is we don't see the faces of victims who could tell us stories that may, just may touch the hearts of some of the members of this Committee to think twice, not just about how much companies and insurance companies are going to give to this fund or trust funds are going to give up but, rather, how much victims and their families will recover as a result of what we do today, saying to them that they can no longer go to the courtroom, no longer appeal to their neighbors and friends for fairness and justice but, rather, be turned into this administrative law system.

A couple of those victims are here today, and since I have not spoken to them ahead of time, I am not going to ask them to stand unless they want to. But their stories, one in particular here, Paul Sigelbaum I believe is here today. Paul, if you want to stand up, you are welcome to.

My friends on the Committee, this is the face of a mesothelioma victim, and if you look at it, look at Paul standing here, you may not know that a year ago he went through a surgery in Omaha, Nebraska, that lasted 10 hours, and as a result of that surgery, removing tumors and other organs and things from his body, he weighed 33 pounds less at the end of that 10-hour surgery. He is fighting mesothelioma. His wife is with him today, I believe. Not

with you? But you have said in the statement that you said to me you think there are possibly four different exposures in your life that could have resulted in this mesothelioma. You have recovered some money from some. You are hoping to recover money from others so that your wife can be taken care of, you can be taken care of from this point forward.

Understand what this bill does. Paul, thank you for standing up. But understand what this bill does. It says that whatever Paul has recovered from those who are culpable of exposure will be set off and deducted from the maximum amount he can receive under this bill. It means that even if there are companies still liable to him for what he has gone through, we are cutting off their responsibility to pay him and to pay his family.

Ellen Patton is here from Annapolis, Maryland, and, Ellen, I thank you for standing up. This is the face of a mesothelioma victim, 45 years old. She was exposed to it, she believes, because her father did home repairs and used materials that exposed her to asbestos. She has been through five different bouts of aggressive chemotherapy, struggling at great expense to keep living every day, never knowing if this is going to come back.

Ellen, thank you for being here today, and thank you for sending along this little blue band as a reminder that this debate is about people. Thank you for standing up. It is about what they will recover. And though $1.1 million seems so large and so generous, it is not. The medical bills which these people have incurred are in the hundreds of thousands of dollars.

And so while we are saying that the companies and insurance companies are going to battle one another now as to who is going to pay into this trust fund, I would just say to Judge Becker: You said earlier if you have a meso case in trial, you are okay, finish your trial. But is it not true, Judge—and you know this for a fact—if the defendant has successfully argued to continue the case beyond the date of signing this bill, you are finished. Your day in court is over. No matter how much you have been through, no matter how much you have worked to prepare your case, for companies that are liable for the illness which is slowly taking away your life, your days are over simply because one judge in one court has said, "I will grant the defense motion for a continuance." That is true, isn't it, Judge?

Judge BECKER. Yes, sir.

Chairman SPECTER. Senator Durbin, you are well beyond time.

Judge BECKER. Yes, that is correct.

Senator DURBIN. I don't think there is fairness and justice in that. Thank you.

Chairman SPECTER. Senator Durbin, I am a little surprised by your complaint about victims not being called when you asked for three witnesses and you got three witnesses. If you wanted to call some of the victims, you had people to call. You chose instead to call Mr. Mark Peterson from the American Trial Lawyers Association, Dr. Philip Landrigan from the American Trial Lawyers Association and Professor Eric Green also on my sheet marked ATLA.

Let the record also show that I personally met with Linda Reinstein and with Ellen Patton, and I understand their objections to the bill. And my staff met with them on many other occasions,

and if it is to be testimony from victims, we would have been able to have many, many more than there are spaces for seats in this room. But it does surprise me that when you have three witnesses, you complain that no victims were called.

Senator DURBIN. May I respond, Mr. Chairman?

Chairman SPECTER. By all means. I would like to hear a response.

Senator DURBIN. Well, I would like to give you a response. Thank you for this hearing. But understand we are planning on spending 3 or 4 hours on this bill in a hearing. We should be spending much more time because of the gravity and severity of this issue and because it affects so many people.

I had to choose, and I tried to bring in the expert testimony. But the point I am making to you, Mr. Chairman, is that there are many people who could be called, who should be called. It is interesting to me that the proponents of this legislation are not calling victims either because you understand, as I do, that many of them are disappointed with this legislation.

Now, I could have called a victim. Maybe I should have. But I picked expert witnesses. The point I want to make to you is I wish this was more than just a 3- or 4-hour hearing. I think this bill and its importance and gravity require more.

Chairman SPECTER. Well, Senator Durbin, when you say we should be spending more time on this bill, don't include me.

[Laughter.]

Chairman SPECTER. Don't include me. We had about 40 sessions on this bill. I didn't see you attend one.

Senator DURBIN. I beg your pardon, Mr. Chairman. When you have had hearings on this bill and Senator Hatch before you, I have been in attendance. I sat through the hearings a year or more ago. I will just wager to say with the exception possibly of the Chairman and Ranking Member, I spent more time at the table than any other member. And I wish that you would take a look at the record before you would make a statement like that.

Chairman SPECTER. Well, the statement I heard you make was that we should spend more time on the bill. And the last time I looked, "we" was the plural first person. Don't include me for spending more time. And I am not going to nitpick about how many hearings there have been, but this bill has not suffered from lack of analysis and consideration. And when you ask for a hearing and I give it to you immediately and you have got a lion's share of the witnesses, three witnesses, I think it is just out of line for you to complain about no victims being called.

Senator DURBIN. Mr. Chairman—

Chairman SPECTER. Senator Leahy, do you want recognition?

Senator LEAHY. Just this, and maybe we should get back on the subject at hand. I know the Senator from Illinois is very concerned about the victims. Every Senator here is concerned about the victims. We would not be having these hearings if we were not.

I have met with dozens and dozens of victims, many of whom have testified in previous hearings. My staff has met with them. We have had countless meetings with Judge Becker and others. Victims and those representing victims have been invited and have

been in attendance at most if not all of these meetings, as have the trial lawyers, as have labor and insurance and industry.

Like any piece of legislation, I suppose we could meet with every single person involved. We are talking about tens of thousands of people. But I think throughout I have not heard a single discussion where the question of the victims, especially those victims who are facing in effect a death sentence, have been discussed.

Senator DURBIN. Mr. Chairman, may I say a word?

Chairman SPECTER. You may.

Senator DURBIN. I just want to say I understand the time that you have spent on and put in this bill, Senator Leahy as well. And I am not being critical of that. I think you will concede the fact that many of the meetings which you have had have not been open to the members of this Committee.

Chairman SPECTER. No, that is not true.

Senator DURBIN. Well, I will just tell you that your negotiations that led up to the presentation of this bill did not—there was not an open invitation to members of this Committee to come attend those meetings.

Chairman SPECTER. Well, that simply is not true.

Senator DURBIN. Well, Mr. Chairman, I am sorry, but it is true. And three weeks ago, we were handed this bill and saw it for the first time.

Chairman SPECTER. Excuse me, excuse me, Senator Durbin. I am still the Chairman here.

Senator DURBIN. I understand that.

Chairman SPECTER. And 39 sessions presided over by Judge Becker and attended by me were open. Let's move on.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I want to compliment you and Senator Leahy and all the hard work—

Senator KENNEDY. Mr. Chairman? Mr. Chairman?

Senator FEINGOLD. Mr. Chairman, do I have the floor?

Chairman SPECTER. Senator Feingold is recognized.

Senator KENNEDY. Could Judge Becker answer the last question that Senator Durbin asked? He had gone 52 seconds over. Sessions had gone a minute and a half over. So can't we have Judge Becker answer Senator Durbin's last question?

Chairman SPECTER. Senator Durbin, do you have a question pending for Judge Becker?

Senator DURBIN. I asked the judge for his comment about the 9-month hiatus on these mesothelioma cases, and I want to make it clear—

Judge BECKER. Senator Durbin, I don't really understand Peg Seminario's you have got to wait 2 years. These claims are—the exigent claims, including the meso claims, get priority. And I do not anticipate that it is going to take 2 years to get around to these claims. These claims are going to be expedited. They have the offer for judgment proposal of Senator Feinstein, and there is the contracting out. So these claims are going to be expedited.

The 9 months is if they are not—if the system is not up and running and processing the claims in 9 month, then they go back to the tort system. But that doesn't mean the claims will wait 9 months. I think these claims with the contracting and the offer for judgment will be moved ahead more quickly. And with respect to other sick people who are not exigents, it does not mean that they will wait 2 years. It just means that if the system is not up and running and processing the claim within that period, then they can go back to the tort system. But I would anticipate with an efficient administrative system, these claims will be processed well before the 9 months or well before the 2 years.

Senator FEINSTEIN. Mr. Chairman, can I say one thing on this point?

Chairman SPECTER. Senator Feinstein?

Senator FEINSTEIN. If you would allow me, Senator Durbin, because I wrote this language, we wrote it with the view of trying to get the quickest consideration for the sickest victims. This was the goal of this legislative part of the bill. And I started at lesser months, but the view was that it could not be done, the system could not be gotten up and running in that period of time. So it is my belief that this is the shortest period of time in which the system could be up and running.

Secondly, as Judge Becker pointed out, the private contracting out there is to minimize any chances that a mesothelioma victim will not be dealt with in this 9-month period. So we have got the shortest period and then we have got some additional protection for that. I want it, you know, to be just as soon as possible, and this was my overwhelming concern. And I just wanted to be able to say that to you.

Chairman SPECTER. Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman. I want to thank you and Senator Leahy for all the hard work you have put in on the bill. I know you have put your heart and soul into it and you are trying to accommodate many competing interests and seemingly irreconcilable points of view, and I do appreciate that kind of active leadership from a chairman. And I do want to thank Judge Becker as well for the enormous effort he has put into these negotiations.

Mr. Chairman, you and I had a good conversation on the phone yesterday. I support the concept of a trust fund to pay victims of asbestos disease. I am not unalterably opposed to any asbestos bill that asbestos bill that might be brought forward. But I do find myself in much the same position that I was almost 2 years ago, when Senator Hatch made his proposal and we actually spent 6 weeks marking it up in the committee. I will only support a bill that in my judgment is fair to all parties, all parties involved, including most especially the victims of asbestos disease. That means not only do medical criteria and claims values have to be fair, but the design and funding of the system has to be adequate to pay the victims promptly and completely.

And again, I know you have been working hard on this and so has Senator Leahy. But now that you have agreed on a bill, I don't think that you should rush it through the committee. It is a complicated bill that varies in significant respects from the bill we saw

last year. We need to examine it, we need time to examine it and propose changes to it. We need to have a real markup in this committee so that amendments can be offered. The bill we are considering today, in my view, is a marked improvement from the bill that was taken up on the floor last year, but it is also inferior in a number of respects to the bill that was reported out of committee in July 2003, and I had to vote against that bill because I didn't think it went far enough to fairly and adequately compensate current and future victims of the horrible diseases that asbestos causes.

Mr. Chairman, I want to ask some questions of our witnesses, so I won't discuss all of the concerns I have. But let me mention one. There has been and will continue to be great disagreement about whether the trust fund will be adequate to keep paying victims throughout its life. Everyone is working on estimates and there are many variables that are simply not knowable with any certainty at this time. In some ways, it doesn't really matter whether the fund is $120 billion or $140 billion or $200 billion. Any of these estimates could be too low or too high. So there are two key things we have to do absolutely. First, we have to be sure that there is adequate money right away to pay the approximately 300,000 claims that we know will almost be filed immediately. And second, there has to be a strong sunset provision that will allow victims in the future to file suit if this trust fund isn't able to pay their claims.

The risk that this trust fund will not work because it is not adequately funded at the front end cannot be borne by the victims. I want to say it again: The risk that this trust fund will not be adequately funded cannot be borne by the victims. I will not vote for any bill that does not recognize that basic principle of fundamental fairness.

So let turn to a question that actually relates to the discussion that we were just having. One concern I have with this bill is the treatment of currently pending, including exigent, claims. The bill provides that when the President signs the bill into law, all pending claims are stayed. There are then differing provisions on how those claims are treated, depending on whether they were exigent or not, in other words, if the claimant has a terminal illness. There are very complicated provisions for cases going back to the tort system after a certain period of time if the fund is not up and running.

What I don't understand is why we need to stay any claims where someone is sick. As this bill currently stands, there will be 50,000 people, who are now sick and who have now filed claims in court or through a bankruptcy trust, who have nowhere to go. I would like to hear from everybody on the panel, what would be wrong with a system that says that all the claims where the claimant is sick can continue in court or in the bankruptcy trust until the administrator certifies that the fund is ready for business; that is, that there is sufficient money available to pay claims and that the administrative structure is in place to handle those claims? And if the money is paid in settlements of court cases or by a bankruptcy trust through its claims process between the time the bill is signed and the day of that certification, then the entity making that payment gets a dollar-for-dollar credit against its eventual li-

ability to the fund if the administrator determines that the payments were reasonable.

If we do that, then it doesn't matter whether it takes 9 months or 24 months or 36 months to get this fund up and running. And I would say Judge Becker's reassurances of a few moments ago would be consistent with my point. If he is right, these cases are going to get immediate attention, fine; then there is not a problem. But why shouldn't these cases go forward until we are sure? People whose claims are already advanced can get paid and the defendants are no worse off in their overall liability.

So I would start with Judge Becker and like to hear each of the panelists' comments on this point.

Judge BECKER. First of all, Senator, with respect to the three—you say the 300,000 claims we know will be filed. I addressed that in my testimony. I have discussed that with David Austern. Not only have the claims showed a sharp decline, but the vast bulk of the putative 300,000 are either Level I or people who are maxed out. And the number which, according to the most experienced person in this field, will be filed is considerably less. But there still will be a lot of claims. And I will say to you, Senator, that we have discussed this in our negotiations. And as we all know, this is a compromise. The business folks said that if we do that, the costs in the tort system and, unless you impose tort reform and say that the ones who are the unimpaired cannot get paid in the tort system—

Senator FEINGOLD. You say "do that," you mean not stay the cases?

Judge BECKER. If we don't stay the cases, the tort system will continue. And the predictions as to the cost to the business and insurance folks in the court system are astronomical in terms of the verdicts in the tort system. When you say dollar-for-dollar credit, but the dollar-for-dollar credit would be on the verdicts in the tort system.

The bottom line is, Senator, that in terms of concept and principle, what you say makes a lot of sense. In terms of the kinds of accommodations that are necessary—Senator Durbin says, well, it is a shame that it is all about dollars. And I understand and respect your concern, Senator Durbin, but at a certain level, if there is going to be a bill, it has to be about dollars because there has to be a level of funding that business pays and insurance pays. And unless this can be agreed upon, there simply isn't going to be a bill. And in terms of the give-and-take and the kind of compromise, although what Senator Feingold proposes was suggested, it was simply a non-starter and the negotiations just totally failed.

Senator FEINGOLD. Well, I appreciate that answer. I want to be clear. I am suggesting that only people who are sick can continue.

Mr. Berrington?

Mr. BERRINGTON. Yes, sir, thank you. We have a little bit different view, which is that we believe the trust fund is clearly the way to compensate victims quickly and fairly. Certainly the tort system has not been a great alternative for most victims; it takes years for them to get compensation. So we believe the trust fund will get started quickly, the cases can be taken care of quickly. And to have any incentives in the bill for litigation to continue after-

wards we think are very troubling, and will indeed encourage those who want to keep the tort system—want to keep the new system set up in the legislation from actually taking effect, to have an opportunity to do so. Let me give you an example.

The Department provides operational certification, which doesn't mean that there are not cases being processed prior to operational certification, it is a judgment under the bill that the program is operating sufficiently, that all litigation ought to be cut off. When the Department makes that operational certification judgment, even under the current bill, my guess is that those who want to keep the litigation system going will seek to tie up the Department in court. That is a very big problem with regard to the current version of the bill. The way that the bill works is that we will pay into the trust fund and then we will pay on top of that for all of these cases that will come into the tort system. That just isn't acceptable.

Your comment about having offsets—I didn't read the language or the idea previously as being that the total amount of money that we would have to put into the trust fund would be reduced, but merely that the individual insurer or defendant that was paying would have an offset against its own payments. Well, the result is that that just gets passed around among everyone and we are paying above the $46 billion. I agree that the issue is about victims and about getting them compensation. The trust fund, if you let the trust fund concentrate and this legislation concentrate on getting this thing started, once the bill is enacted, rather than encouraging everyone to try to continue litigation in one way or another, the process will go much faster and victims will get compensation much more quickly.

Senator FEINGOLD. This isn't about discouraging the concept of—

Chairman SPECTER. Senator Feingold, you are almost 4 and a half minutes over. I know the answers you have been wanting. If you have one more question.

Senator FEINGOLD. I am just trying to get answers to the one question that I asked. I haven't asked an additional question. But, Mr. Chairman, if you—I would just like to hear Governor Engler's response and the other responses.

Governor ENGLER. The other point that, I agree with Mr. Berrington, the analysis — but one point that needs to be made if we stay in the tort system, we lose half to 60 percent of the awards. So even in the example the Senator from Illinois used earlier, if you net out at 1.1, you have actually had to win 1.6 or 1.7 in today's system because of the costs going to the lawyers on the other side. Now, maybe if you are suggesting that once this passes, the lawyers would forego the fees in order to pay net dollars, the net award, you know, you have a different ballpark here. But I think you can't—conceptually, you want to move to the trust fund away from the tort system so that you are getting what I think is more money to the plaintiff. If it is about money, how much do they get? Today more than half of it is being lost. How fast can we resolve these? I think when it is up and running, it will be faster. There is that transfer period, but I think it is a bit unfair to suggest that you fund dual systems during that changeover. You have to stop one and start the other. And I think all of the concern about DOL or whatever department—agency, or, if it is independent,

however it is set up—gets this up and going, we are very keen on getting it started very quick.

Chairman SPECTER. Ms. Seminario, would you like to make a comment on that?

Ms. SEMINARIO. Yes, I would. I would just point out that when the bill was reported out of this committee 2 years ago as S. 1125, it included an amendment that Senator Feinstein had offered and it was unanimously adopted by the committee, which said—it allowed that all victims could continue to go in court with their case until the fund was up and running and that there would be an offset by the defendants or the insurers against the money paid out. So the committee considered it, in the interest of justice it was unanimously adopted in the reported bill. The provisions in S. 2290 were ones that were put in by the business people, insurers, who didn't like that provision.

So dealing with the issue of the transition is really, really important. As you said, Senator Feingold, the idea that we don't know—and we don't know exactly how many claimants will come to the fund, what will happen 10 years out, 20 years out. We do know right away that there are thousands and thousands of people who are sick, who have pending claims, and when this fund is up and running, many of them will have nowhere to go as it is currently crafted. We think that is unfair. We think it does make more sense to allow people to go forward. They can make the choice as to whether it is in their interest to wait and go to the fund or continue with the litigation.

And so, again, as a matter of fairness here for victims—and think about it from their perspective. What will they do, how will they pay their medical bills? You are even extinguishing the existing bankruptcy trust where people now have a right to go for no reason at all. And so you are leaving many of these victims with nowhere to go. We know there is going to be litigation from the bankruptcy trust, we know there is going to be litigation from the insurers over their formula of contributions. And so the idea that this will all get up and going very quickly, while we would all like that to happen, there is no certainty that that is the case.

Senator FEINGOLD. Mr. Chairman, 10 seconds just to respond?

I just want to say, I am trying to find a way here to resolve some of my concerns about the bill, and that was a perfect comment we just heard. My comments aren't adverse at all to the idea of a trust fund. It is just at the front end—and these are people that may die before this thing is up and running. It is just making sure they get something. And it is no way an attempt to keep the tort system going. It is just this potential gap. And that is the spirit in which I asked the question. Thank you for the additional time.

Chairman SPECTER. Thank you, Senator Feingold.

Thank you very much, Judge Becker, Governor Engler, and Ms. Seminario, Mr. Berrington, thank you very much.

We will turn now to our second panel, Dr. James Crapo, Professor Eric Green, National Legislative Director Hershel Gober, Dr. Philip Landrigan, Ms. Carol Morgan, Mr. Mark Peterson, Dr. Francine Rabinovitz, Mr. Alan Reuther.

Senator COBURN. Mr. Chairman?

Chairman SPECTER. Senator Coburn.

Senator COBURN. I just want to put something in the record to make sure it is part of our testimony today.

Chairman SPECTER. Go ahead.

Senator COBURN. There is somewhere between 700 and 900 background cases of mesothelioma a year in this country that have absolutely nothing to do with asbestosis. And it is important as we consider all these claims that everybody is aware of that. Because to take away compensation from those that truly have asbestosis-related mesothelioma without making sure that we are not paying for the idiopathic cases that we know are not related to that is important. I just wanted to make sure that that was in the record.

Chairman SPECTER. Thank you very much, Senator Coburn.

Our first witness on Panel II is Dr. James Crapo, professor of medicine at the National Jewish Medical and Research Center in Denver, Colorado. Medical degree from the University of Rochester, magna cum laude from Brigham Young University.

Thank you for joining us, Dr. Crapo, and we look forward to your testimony.

STATEMENT OF JAMES D. CRAPO, M.D., PROFESSOR OF MEDICINE, NATIONAL JEWISH MEDICAL AND RESEARCH CENTER, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER, DENVER, COLORADO

Dr. CRAPO. Thank you, Chairman Specter, and members of the committee. It is an honor to be asked to appear here and comment on this bill. I testified regarding this bill about 2 years earlier and have taken the opportunity to reevaluate the new and revised bill being considered at this time, particularly with emphasis on the medical criteria.

Now, I want to compliment Chairman Specter and Mr. Leahy on changes that have occurred in this bill that I think have significantly strengthened it. The deletion of the old Level VII, exposure-only lung cancers, is a significant improvement of this bill. I also compliment the addition of the concept of substantial occupational exposure as an important concept in this bill.

On reviewing this, it is my opinion that the medical criteria still need to be additionally changed in order to appropriately represent the best scientific and medical evidence today and design this bill so that it will compensate those who are truly injured by asbestos without expending large amounts of the trust fund compensating individuals who are not injured by asbestos, and thus bringing the fiscal stability of the bill into question.

So, now, the primary issues that I want to address are contained in my written statement. I am only going to summarize a couple today. The two areas that I think are major concerns that need to be addressed in the markup of this bill are, first, pleural changes. Pleural disease is really a reaction. Most of it is a small callous on the chest wall that does not involve the lung and, in the vast majority of cases, is not associated with impairment or disability. One of the problems I have with the way the medical criteria in this bill are constructed is that it allows pleural change to be a marker of impairment or injury that extends through seven of the nine levels in this trust.

For example, Level I and Level II. The only difference in those two levels is that pleural disease is present, but in Level II the individual has evidence of mild obstructive lung disease. That is caused primarily by smoking. And one of the changes is to compensate Level II—instead of doing medical monitoring, creating a situation where a smoker with a pleural plaque then suddenly qualifies for substantial compensation under this act. At later stages, at Level IV and V, for example, pleural disease is allowed to be the primary radiographic marker to indicate the presence of severe or disabling asbestosis. And in fact, in Level V, with the changes of this bill, a person with pleural disease only, who smokes and develops a mild decrease in defusing capacity, could qualify as disabling asbestosis.

These are some incongruities that could be easily and properly straightened out. For example, on Level V, it is not appropriate to call disabling asbestosis in the absence of any lung parenchymal changes on radiographic changes or significant pulmonary function changes as indicated by total lung capacity. The gold standards for asbestosis are a significant ILO reading on chest radiographs and a low total lung capacity with functional disability. Those should be the criteria used to look for the high levels of compensation that this trust intends for people with disabling asbestosis.

A second area is in the area of other cancers. The current version of the bill under, I think, Level VI, would compensate a large number of GI cancers. And provided in my written report, on Table 4, when one does a thorough cohort analysis of all the cohorts in which asbestos and colon cancer have been evaluated, the meta-SMR for that, as you will see on Table 4 in my report, is only 0.89. Now, what that means is when you do a meta-SMR, you are looking at all of the cohorts. SMR stands for "standard mortality ratio." And a normal or no-change from control would be 1.0. For colon cancer, that meta-SMR, looking at all the available best medical data, is less than 1, which means there is no associated risk between asbestos exposure and colon cancer. And yet, there are over 50,000 colon cancers in the United States today, and they would qualify, if they have evidence of exposure and some pleural disease, to compensation under the trust. I think that could deplete the values of the trust and I think we should re-look at that.

And then finally, I have identified several areas that should be carefully looked at. Enhanced quality assurance, the use of chest CT scans, for which we don't have the standards today to apply these to the field. And I have also encouraged them to look at the issue of substantial occupational exposure, where our definition is really good to start, but it defines it by exposure duration, not by exposure intensity, and it would allow individuals exposed to products where they have an encapsulated, let's say, product, with very, very trivial exposures, to qualify as a heavy exposure under the criteria. We need to include in the criteria—

Chairman SPECTER. Dr. Crapo, your time is up. Could you summarize, please?

Dr. CRAPO. Sure. Just one word—we need to include in the criteria not only duration of exposure, but intensity of the exposure, to define substantial occupational exposure correctly.

Thank you.

Chairman SPECTER. Thank you very much, Dr. Crapo.

[The prepared statement of Dr. Crapo appears as a submission for the record.]

Chairman SPECTER. We now turn to Professor Green, who is the court-appointed legal representative for future asbestos claimants in the Halliburton case. He is a professor of law at Boston University, graduate of Harvard Law School and, with honors, from Brown University.

Thank you for joining us, Professor Green. We look forward to your testimony.

STATEMENT OF ERIC D. GREEN, PROFESSOR OF LAW, BOSTON UNIVERSITY LAW SCHOOL, BOSTON, MASSACHUSETTS

Mr. GREEN. Thank you, Senator Specter. You are Senator from my native State, and Senator Kennedy, Senator from my home State.

I commend the committee for the work it has done, for all the effort Judge Becker and the rest of you have put in. I am a professor mediator as well as a law professor, and I have been mediating all kinds of commercial and personal injury disputes for 25 years and I have been mediating every aspect of the asbestos litigation—every aspect of it—from single cases to class actions to insurance disputes to reinsurance disputes. I have served as a special master for courts. I recognize the necessity for consensus and compromise in trying to achieve anything. And I also recognize as a mediator the desire of the mediator, of the consensus-builders, to get something done. But one of the criteria for any good result is workability. I am very concerned that this bill as presently constructed will turn out not to be workable and we will be back here in a few years with a bigger problem and we will be sorry that we didn't address the things that need to be addressed if this is going to be workable.

I know you want it to work out. I know your motives and intentions are the highest and honorable. But there is a significant risk in this bill that the funding will turn out to be illusory or highly contested in court, that the actual funding will not be in place on time. Whether claims can be processed in 90 days, Senator Feinstein, or 9 months is not the issue, I think. The issue is when the claims will be processed and paid. And the funding has to be there to pay the claims once they are processed.

I predict that the litigation that I have been struggling with at one level for all these years will simply be shifted to another level once this bill passes, because the funding is not specified and made clear and the commitments aren't there. I have friends in industry, I have friends in the insurance industry, I have friends on the plaintiffs' side. I am in the middle. I am a mediator. But I think this bill presents illusory protection for all of them because the ultimate responsibilities and amounts are not made clear and transparent ahead of time. I think the litigation that could ensue could result in delays of funding of the trust, delays in payment, incurring of huge debts, and ultimately a downward spiral for the trust that will then trigger the sunset provisions. Unfortunately, I think the sunset provisions are subjective, not automatically triggered, as in Senator Biden's amendment, which was in a previous version of

this bill, and will create a limbo which will then only ultimately be resolved by throwing the victims back into a tort system and a trust system that has been essentially annihilated for the asbestos victims.

So I think these problems must be addressed and fixed. They are tough problems. The insurance industry deserves to know what they are going to pay and who is going to pay it. The manufacturers, all of them, the 1,500 small players as well as the 20 or 40 big players, deserve to know exactly how much they are going to be assessed. They deserve to know whether they are going to have to pay supplemental assessments if this trust falls short. The taxpayers of America deserve to know whether there is truly a government backstop here, whether the Federal financing will be backed up by the taxpayers of the United States. All of these issues, I believe, are swept under the rug and the risks ultimately are thrown onto the least able to protect themselves, the individual victims, the people who stood up behind me, to whom I would gladly yield my time at this podium.

Otherwise, my remarks, Senator Specter, with a great deal of respect for the work you have been doing on this, I would submit.

Chairman SPECTER. Thank you, Professor Green.

[The prepared statement of Mr. Green appears as a submission for the record.]

Chairman SPECTER. We turn now to the Honorable Hershel W. Gober, national legislative director for the Military Order of the Purple Heart. Mr. Gober served as deputy secretary of the U.S. Department of Veterans Affairs and then acting secretary for some 8 years, has a very distinguished military career, cum laude graduate from Alaska Pacific University, and someone I worked with extensively when I chaired the Veterans Affairs Committee, a considerably easier job than chairing this committee.

Welcome, Mr. Gober, and we look forward to your testimony.

STATEMENT OF HERSHEL W. GOBER, NATIONAL LEGISLATIVE DIRECTOR, MILITARY ORDER OF THE PURPLE HEART, MCLEAN, VIRGINIA

Mr. GOBER. Thank you, Mr. Chairman. Members of the committee, I am honored to be here on behalf of the Military Order of the Purple Heart in strong support of S. 852.

Tragically, the asbestos litigation crisis has hit veterans extremely hard. Men and women of our Nation's armed forces were unknowingly exposed to asbestos due to its prevalent use by the military during and after World War II, particularly in the insulation products built into ships for the U.S. Navy, bulkheads, pipes, ceiling, floors, and machinery, which were all coated with asbestos. Moreover, those who worked in shipyards and dry docks building and repairing U.S. Navy vessels were also heavily exposed to asbestos.

Due to the long latency period from the time of asbestos exposure to the first signs of symptoms of an asbestos-related disease, veterans who served before the 1980s are still being diagnosed with life-threatening and terminal illnesses. Individuals with military service make up a significant number of the total asbestos victims in the United States. The avenues open to veterans to seek com-

pensation through the tort system, however, are very limited. The Federal Government, as you know, has sovereign immunity, thereby restricting veterans' abilities to recover from the Government, and most of the companies that supplied the asbestos to the Federal Government have gone bankrupt or disappeared, or they are only providing a fraction of the compensation that should be paid to asbestos victims.

Even if there is a solvent company for a veteran or his family to pursue, there remains a lengthy, costly, and uncertain ordeal of filing a civil lawsuit. Moreover, under the current system, far too much money is being diverted to claimants with no illness or injury. Victims too often receive widely divergent recoveries depending simply on where the lawsuit is filed or who their attorney is. And the attorney fees and other transaction costs are consuming far too much money that would otherwise be available to compensate those who are ill.

The Department of Veterans Affairs continues to receive claims for benefits from veterans for illnesses related to asbestos exposure while serving in the military. However, due to the difficulty of proof, less than one-third of the known VA asbestos claimants receives service-connected compensation for those asbestos diseases.

Veterans and their families with asbestos-related diseases desperately need and certainly deserve relief, as the current system is simply not meeting their needs or treating them fairly. The Military Order of the Purple Heart strongly supports S.852, the FAIR Act, because we believe it will provide an immediate and effective solution to the current asbestos litigation problem for victims and will provide many positive benefits for veterans.

First, it will establish a new Federal Office of Asbestos Disease Compensation for the processing and payment of asbestos claims.

Second, it will preserve the benefits currently available to veterans and exclude any recoveries under the Veterans Benefits Program from the requirement that awards under the act be reduced by prior recoveries.

Third, there will be no requirement to prove exposure to a particular defendant's asbestos product. And unlike veterans benefits, there will be no service-related requirement, easing the burden of proof for veterans. The bill will also include heavily weighing for pre-1976 and World War II shipyard exposures.

Fourth, the bill will expressly apply to exposures to U.S. citizens occurring on U.S.-owned or flagged ships occurring overseas while working for U.S. entities.

Fifth, the bill will provide medical monitoring.

Sixth, the bill will establish a claimant and legal assistance program.

And finally, the legislation will provide for $1 million in grant for each of fiscal years 2005 to 2009 for each of up to 10 mesothelioma disease research and treatment centers. These centers will be closely associated with the U.S. Department of Veterans Affairs medical centers to provide research and benefits.

Mr. Chairman, the Military Order of the Purple Heart is joined by 18 other organizations in supporting the issues embodied in this bill. I would like to submit for the hearing record a copy of a letter

sent to the Senate last week by 17 of those veterans organizations in support of the trust fund solution embodied in S. 852.

In closing, Mr. Chairman, I want to thank you and the members of the committee for your hard work on this issue. I know that there may be still some work to do, but you are headed in the right direction. The current system is broke; it ain't working.

Thank you, sir.

Chairman SPECTER. Thank you very much, Mr. Secretary.

[The prepared statement of Mr. Gober and the letter appear as submissions for the record.]

Chairman SPECTER. We turn now to Dr. Philip Landrigan, professor and chair of the Department of Community and Preventive Medicine, Mount Sinai School of Medicine, New York City. A very distinguished career. A degree from Harvard Medical School in 1967 and a master of science in occupational medicine and industrial health from the University of London in 1977.

Thank you for coming today, Dr. Landrigan, and we look forward to your testimony.

STATEMENT OF PHILIP J. LANDRIGAN, M.D., PROFESSOR OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE; CHAIRMAN, DEPARTMENT OF COMMUNITY AND PREVENTIVE MEDICINE; PROFESSOR OF PEDIATRICS, THE MOUNT SINAI SCHOOL OF MEDICINE, NEW YORK, NEW YORK

Dr. LANDRIGAN. Thank you, Mr. Chairman. It is a pleasure to be here and an honor. Senator Leahy and I have worked before on the Food Quality Protection Act. Senator Kennedy, of the State where I grew up, all Senators.

I want to begin by commending you for having worked together to take on a terribly complex issue. Looking at this situation from the perspective of lung cancer, the issue that clouds the whole debate and makes it so difficult is the fact that there is a great deal of lung cancer in the American population. Of course we all know that the predominant cause of that lung cancer is cigarette smoking. Where it gets difficult is that there exists a powerful synergy between cigarette smoking and asbestos in the causation of lung cancer. Let me give you some numbers.

People who smoke who have no exposure to asbestos have 10 or 11 times the background rate of lung cancer. People who have been exposed to asbestos, but who never smoked have about 5 times the background rate of lung cancer. But people who have worked with asbestos and who have also smoked, who are at double jeopardy, have in fact 55 times the background rate of lung cancer. So one way to look at this is you could say that you could prevent 90 percent of those lung cancers by eliminating asbestos exposure and you could eliminate about 90 percent of those cancers by eliminating smoking. And parsing this out in issues of causality is fraught with difficulty, as I do not have to tell you.

Another causal conundrum that confronts you here is the fact that, contrary to what some have said at this hearing, fibrosis is not on the critical pathway to the development of lung cancer. Or to say that in plain English, a person who has been exposed to asbestos, does not need to have asbestosis, to develop lung cancer. The development of fibrosis is one pathological process; the devel-

opment of a cancer is a second pathological process. The occurrence of asbestosis, either parenchymal or pleural, is most certainly a marker of exposure, but it is not an inevitable precursor of the development of cancer. I will come back to that point in a moment.

Finally, it is important to remind us all that duration of exposure is only a surrogate for actual exposure. Actual exposure is a multiple of the duration of time a person was exposed and the intensity of their exposure. So when we talk about duration, I understand it is a necessary shorthand because we mostly lack information on levels of exposure; that is, the lack of exposure information is the Achilles heel of medical research in this arena. But we have to be mindful of the fact that when we are talking about duration, we are talking about an incomplete measure of the total reality.

So that is by way of background.

A couple of specific comments on the bill. First of all, I am worried about the criteria that have been proposed that discount more recent exposures. I have put some calculations into my written testimony indicating that a person who began exposure to asbestos in 1974 would need 52 years of actual work with asbestos to meet the 12-year weighted exposure criterion for lung cancer Level VII. For cancers other than lung, the so-called malignant Level VI, I calculate that for a person who started exposure in 1976, it is going to take him 105 years of work to meet the criterion. For some of us that might be possible, but probably for most of us not. It is a tough barrier to get over.

Finally, coming back to the point that fibrosis is not an inevitable precursor of the development of cancer, I am very much concerned by the elimination of what was previously called Category VII, cases of lung cancer without fibrosis. I feel that setting aside the estimated 40,000 people that fall into that category is going to result in people who truly have lung cancer that was caused by asbestos being denied compensation.

Final point, there is a lot of debate about whether cancers other than lung and mesothelioma are caused by asbestos. The evidence is certainly not so strong as for lung cancer or for mesothelioma, but I would certainly not go so far as my distinguished colleague has done to dismiss those cases out of hand on the basis of one meta-analysis. A meta-analysis is a procedure that lumps many studies together and reduces them to the lowest common denominator. Another way to present those data would be the way that Dr. Crapo presented the data for multiple studies on lung cancer, actually laying out the actual data. If we were to look at the data on, for example, pharyngeal or laryngeal cancer, in that modality we would see that there are some studies that show quite strong relative risks.

Thank you, sir.

Chairman SPECTER. Thank you very much, Dr. Landrigan.

[The prepared statement of Dr. Landrigan appears as a submission for the record.]

Chairman SPECTER. We turn now to Ms. Carol Morgan, who is president and general counsel of National Services Industries. Very distinguished career with that company since 1981. A bachelor's degree with distinction from Rhodes College and a J.D. cum laude from the University of Georgia.

Thank you for coming in today, Ms. Morgan, and the floor is yours.

STATEMENT OF CAROL MORGAN, PRESIDENT AND GENERAL COUNSEL, NATIONAL SERVICE INDUSTRIES, INC., DORAVILLE, GEORGIA

Ms. MORGAN. Thank you, Chairman Specter, and members of the committee. I appreciate the opportunity to be here.

I am actually representing the Coalition for Asbestos Reform, and my focus today is on the issues of concern to smaller businesses. The coalition is actually made up of a very diverse array of businesses and insurance companies. But we all share one passionate interest; we want to reform and resolve the current asbestos litigation crisis. And we are particularly focused on being sure that funds are directed toward those who are truly injured, like the people who have been with us today. We know you share that concern and we applaud your efforts to date in trying to find a solution to this problem.

We believe, though, that the trust fund, the FAIR Act as it is presented, is not the right solution and that in fact it will create more problems than it will solve. I want to cover three main points as it impacts the smaller businesses.

The first point, as Senator Feinstein recognized earlier, is there is an issue about the constitutionality of this bill. We believe that there is an unconstitutional taking of private property. Insurance assets are private property. And smaller businesses have particularly relied on their insurance to pay their claims in the past. And the FAIR Act strips these companies of these assets. Without these assets, many of these companies will not be able to continue to survive. So this unconstitutional taking is much more eloquently explained in a letter that was written to Chairman Specter by Professor Strauss at the University of Chicago Law School, and I commend that letter to you.

My second point, really, builds on the first one. Not only does the FAIR Act strip smaller companies of their insurance assets, but it adds insult to injury and requires disproportionate payments from smaller companies. These payments will force many smaller companies out of business, as Senator Coburn expressed concern earlier, and we appreciate that.

Let me explain this. Because of their prior asbestos expenditures, many smaller companies are going to find themselves in Tier II. Now, they may be at the sub-tier, the bottom sub-tier of Tier II, but even so, their payment will be $16.5 million a year for 30 years. Now, that single payment in one year is more than many of these companies have paid out of pocket during the entire life of asbestos litigation. But more importantly, many of these smaller companies simply can't afford to make that payment.

Now, ironically, in the same tier are some of the largest companies in the world. And these companies will be capped at the top of Tier II at $27.5 million a year. Well, let's do the math. A $50 billion company that pays $27.5 million a year will actually end up paying less than one-tenth of one percent of their annual revenues. And that is a pretty good deal. But a smaller company, say one with $400 million in annual revenues that is paying $16.5 million

a year, will pay 4 percent of their revenues. And in today's economy, that is more profit margin than many small companies make. They simply won't be able to make the payment and they will go out of business.

My question is, is that the kind of rough justice that Judge Becker was referring to earlier. It sounds to me like it is more of a bailout for the larger companies that are maybe less insured, and at the expense of smaller companies which are better insured. There are efforts in the FAIR Act to address this problem through the inequity and the hardship provisions, but they are woefully inadequate. They are discretionary, and there is no guarantee of funding for them. And as Senator Feinstein pointed out earlier, we are not really sure exactly what the source of funds is for the business contribution. We haven't seen that data, and that needs to be scrutinized very carefully. But in any event, we are very concerned there won't be sufficient funds for hardship and inequity to address the problem of the small businesses.

We just don't think these problems are fixable in the current FAIR Act. We believe it would be better to tackle the fundamental problem, which is payments to claimants who aren't injured, and the medical criteria bills that are being passed now in States and being considered by the House of Representatives should address that in a way that actually cures the problem and doesn't create more problems.

Thank you.

Chairman SPECTER. Thank you very much, Ms. Morgan.

[The prepared statement of Ms. Morgan appears as a submission for the record.]

Chairman SPECTER. Our next witness is Mr. Mark Peterson, who has had 20 years of experience in asbestos litigation and mass tort litigation; special advisor to the courts on the Manville Trust Fund and advisor to four district and bankruptcy courts. A Harvard Law School graduate, and a doctorate in social psychology from UCLA.

Thank you for coming in today, Mr. Peterson. We look forward to your testimony.

STATEMENT OF MARK A. PETERSON, PRESIDENT, LEGAL ANALYSIS SYSTEMS, INC., THOUSAND OAKS, CALIFORNIA

Mr. PETERSON. Thank you, Chairman Specter, and thank you also to Senator Leahy for the work that you have done here. I have to say, although obviously I have issues with this bill, I think you have made amazing accomplishments in constructing a matrix and method for dealing with liabilities. I am impressed with the progress and the accomplishments, and hopefully that will continue to be something that can be built upon.

I would also like to thank Senator Feinstein for her interest. She is my Senator. She is the Senator for Dr. Rabinovitz, too.

I want to clear up one thing you said, Chairman Specter. I am not associated with ATLA. I am not here as an ATLA member. My work in this case is—I am not an ATLA member, although I once was because the RAND Corporation's Institute for Civil Justice paid my dues because—

Chairman SPECTER. Did ATLA request your presence as a witness?

Mr. PETERSON. No. Not to my knowledge. It was some Senators that requested my presence here. I have talked with persons from ATLA, but I have also spent time talking with the staffs of Senator Cornyn, previously Senator Nickles. My attempt is to speak to anyone that wants to speak to me.

I would also like to take a bit a discursion and deal with an issue that Judge Becker mentioned about claims and forecasts and claims coming in. It is true that the Manville Trust claims experience in the last year have been reduced substantially because of the new trust distribution procedures and also, frankly, because of the specter of this bill—no pun intended. They have received roughly 120,000 claims, 60,000 claims average per year. The most recent forecast of claims by Manville is that they will receive in 2005 and forward roughly 600,000 claims to 1,600,000 claims. When you add together the claims that they have already dealt with but which will be put in the billion, that brings it up to between 1 million and 2 million, which brackets the numbers that I have used and other people have used. And indeed, the ASG and proponents of the bill have repeatedly and consistently assumed that there were 300,000 claims pending prior to 2003, even when you have taken into account the collateral source rule. Since then, there have been a number of claims filed in 2003 and 2004.

I would also note that although the Manville Trust recent filings are down, the number of mesothelioma claims are up greatly. And within the current claims distribution procedures with which Manville is dealing, fully 6.2 percent of the claims are for mesothelioma—compared to about 2 percent historically and 2 percent that I think we have all assumed here.

So what is happening is that there may be some reduction in the number—it is different from what the judge said—some reduction in the number of less serious claims, but there is an increase in the number of the more serious claims. And there is no evidence that there has been much payment of collateral source in the last 2 years because asbestos defendants who are in litigation now have no incentive to rush to settlement because they are not going to get any credit for the bill. They are paying money that they don't have to pay. And the other consideration is that most of the major asbestos defendants are now in bankruptcy and not paying anything.

Let me turn to the main point i wanted to make. This bill is a bill that transfers asbestos liabilities to the Federal Government. That is what it primarily does. There are going to be a huge number of claims filed initially, as I have just described, against the fund and little money initially, or frankly forever in comparison with the liability, from asbestos defendants in insurance companies. Virtually all of the money that will be paid to claimants from this fund is going to be money from the Federal Government. The relatively small amount of money that will be paid before the fund sunsets, that is paid by defendants and insurance companies, mostly goes to pay interest. When you add the debt load, the interest charges, and the indemnity payments, this fund will fail quickly, probably within 5 years but, even using optimistic assumptions put out by proponents of the legislation, within 10 years. It won't be able to borrow any further because its liabilities exceed all of the income it will ever have.

The fund will pay only a fraction of the claims of asbestos victims. It will pay less than half of the asbestos victims. Instead of being a $140 billion payment to asbestos claimants, only $70 billion will go to asbestos claimants. This is not a $140 billion payment fund for victims, this is a $70 billion—it is a lot of money, but it is a lot different. The remainder will be paid in interest.

The one final thing I want to say is that when this bill sunsets, there will be obligations owed by this fund to the Federal Government of probably $60–70 billion, with little prospect that it will ever be repaid because the companies that will have to pay that over 30 years will now be subject to a double burden of asbestos litigation plus payment under the bills, and the companies that are depended upon to be major providers of funding for the bill, those that are now in bankruptcy will certainly go back to bankruptcy.

Chairman SPECTER. Mr. Peterson, your time has expired. Could you sum up, please?

Mr. PETERSON. The only point I have to say is I admire greatly the liability side of what you have done. If this committee and Congress want to set up a bill that is funded by the Federal Government, it is getting that, but it should recognize that it is doing that. And frankly, if that is the intention, there should be a more careful scrutiny and determination of how defendants and insurance companies would pay off that debt, because they are stiffing the taxpayers.

Chairman SPECTER. Thank you very much, Mr. Peterson.

[The prepared statement of Mr. Peterson appears as a submission for the record.]

Chairman SPECTER. We have about 8 minutes left on the vote, so we will recess briefly to vote. And I shall return immediately, and that would be my request of the other members.

We stand in recess for a few minutes.

[Recess from 11:50 a.m. to 12:04 p.m.]

Chairman SPECTER. Our next witness is Dr. Francine Rabinovitz, executive vice president of Hamilton, Rabinovitz & Alschuler. Extensive experience as an expert witness in administrative and financial management, a court-appointed expert in many asbestos-caused bankruptcies. A B.A. degree from Cornell and a Ph.D. from MIT.

Dr. Rabinovitz, we appreciate your being here today, and the floor is yours.

STATEMENT OF FRANCINE RABINOVITZ, HAMILTON, RABINOVITZ & ALSCHULER, CARMEL, CALIFORNIA

Ms. RABINOVITZ. Thank you, Senator Specter.

I am here today to speak about the reasonableness of the claims projections that support the FAIR Act. I want to address three issues: the starting point for the claims projections, the adjustments of those claims projections to conform with the disease categories under the FAIR Act, and perhaps most important, lessons learned from the claims filing experience over the last 2 years.

At the outset, it must be said that there is uncertainty in forecasting asbestos claims under the fund. It stems from two factors primarily, but not exclusively. First, there is not national database or registry for asbestos claims, and second, there is no past experi-

ence with the National Compensation Fund employing the medical criteria, diagnostic standards, and exposure requirements of S. 852. But that being said, the estimates of future asbestos-related claims expected to be made under the FAIR Act have been calculated by well-accepted methods, are reasonable, in my view, and are likely to be conservative in light of recent experience and changes in the FAIR Act.

First, the starting point. The starting point was the substantial data and forecasts available from the Manville Personal Injury Trust. There is general consensus reflected in court rulings that the Manville Trust will eventually see virtually all of the asbestos personal injury claims in the current system. Because claims filed against Manville represent virtually all asbestos claimants, it is the best and most comprehensive for a future claims estimate.

Second, as to the adjustments of the base figure for the FAIR Act criteria, because the Manville Trust estimate was not conducted with the disease levels and medical criteria of S. 852 in mind—indeed, it was created through a process completely independent of the legislation—the question is how did we adjust the forecast to reflect the FAIR Act's disease categories.

Two studies allow greater precision in the distribution of the claims. The first, with respect to non-malignant claims, is a study conducted by the AFL–CIO of sheet metal workers, which provides information on how the non-cancer claims will be distributed in categories I through V of the bill. The approach is conservative, and by "conservative" I here mean that it produces a higher estimate than I actually expect experience will produce. Because the sheet metal workers were more heavily exposed to asbestos than the population expected to make claims under the act and will be prone to more and more serious diseases.

As to lung cancer cases, data from a study that I myself conducted for the Manville Trust was used to distribute claims in the lung cancer categories. Specifically, that study projects smoking rates and the degree of underlying asbestos-related disease for lung cancer claimants. I should add that eliminating the S. 2290 Category VII claims from a forecasting perspective—that is, the claims for lung cancer without evidence for underlying asbestos-related disease—removes a substantial source of uncertainty for the estimate.

Those studies, thing with the existing Manville Trust claims data, allow us to project the number of claimants who will qualify in each of the categories under S. 852.

Lessons from the past 2 years' experience have to be brought to bear. To me, they suggest that the estimate based on Manville data will prove to be very conservative. The overall forecasts for those years are holding up very well against experience, and the claims are qualifying at Manville now in lower categories than previously. Comparing the Manville Trust overall projections for 2003 and 2004 against its actual experience indicates that the aggregate estimate has been accurate. In addition, the experience of the trust and others in 2004 suggests that overall claim rates may very well be dropping.

As to the distribution of those claims, Manville's recent experience demonstrates the effect of more stringent medical and expo-

sure criteria. In 2002, in the face of escalating claims, particularly by claimants with non-malignant conditions, the trust revised its eligibility requirements to strengthen the medical and exposure requirements. The trust recently completed an analysis of the change in claims filings under the new requirements, and the results are quite dramatic. Only one-third of the claims could meet the new requirements of showing substantial occupational exposure, and there was a significant failure to meet the more stringent medical criteria under the new eligibility requirements.

These two factors operate independently and reduce the number of claimants qualifying in the more severe categories. As an example, under the old requirements, half of the qualified claimants were at the lowest categories. Under the new stricter standards, 84 percent of claimants fall into the lowest categories. In addition, the new requirements would have reduced the claims compensation outflow from Manville by 40 percent. These current results provide evidence that the trust-weighted mean estimate is likely to be conservative.

Chairman SPECTER. Dr. Rabinovitz, you are over time. Could you summarize, please.

Ms. RABINOVITZ. Yes. I think these current estimates and the basis for the prior estimates should provide substantial comfort for those assessing the likely future cost of the FAIR Act.

Thank you.

Chairman SPECTER. Thank you very much, Dr. Rabinovitz.

Our next witness is Mr. Alan Reuther, legislative director of the International Union, United Auto Workers. Held that position since 1991. He is a graduate of the University of Michigan Law School. In 1982, he was transferred to the Washington office here to handle all legislative matters.

Thank you for coming in, Mr. Reuther. I know you were before the Health, Education, Labor, and Pension Committee today. It is a busy day for you testifying.

STATEMENT OF ALAN REUTHER, LEGISLATIVE DIRECTOR, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

Mr. REUTHER. Thank you, Mr. Chairman. The UAW appreciates the opportunity to testify before this committee on S. 852, the asbestos compensation legislation introduced by yourself and Ranking Member Leahy. The UAW supports this legislation and urges the committee to give it prompt, favorable consideration.

This bill provides $140 billion in private money for compensating the victims of asbestos-related diseases. Many of those victims would otherwise get little or no compensation. The bill establishes a system which promises to provide the money to victims more quickly, more consistently, and less wastefully than the current tort system. The bill spreads the cost among defendant corporations and insurance companies more equitably.

There is widespread agreement that the current tort system does not fairly compensate asbestos victims. Most unfair are the situations where victims receive little or no compensation because the defendant company is bankrupt, the source of the asbestos can't be

identified, the workers compensation system prevents them from suing their employer, or where their employer was the government and is immune from any liability. In addition, there are often years of delay before victims receive any compensation. Awards to victims are highly unpredictable, with similarly afflicted individuals receiving vastly different amounts. Transaction costs, including attorney's fees, are extremely high and reduce the amounts actually received by victims.

The UAW represents over a million active and retired employees in the automobile and other industries. Some of our members were exposed to asbestos in plants that produced brakes, in foundries, and among maintenance and service trades working with process insulation. Those members who have or will develop asbestos-related diseases as a result of this exposure may receive some inadequate compensation under State worker compensation statutes, but are barred by those statutes from suing their employer.

As a result of the massive lawsuits filed against companies that produced or used products containing asbestos, a number of auto parts companies have been forced into bankruptcy. In addition, rising claims against major auto manufacturers threaten to expose them to significant liabilities in the future, posing a major long-term threat to their economic health and the jobs and benefits of hundreds of thousands of active and retired UAW members.

The Specter-Leahy bill addressed these serious problems by replacing the current tort system with the National Asbestos Trust Fund to compensate the victims of asbestos-related diseases. This approach would ensure that the victims would receive the full amount of their award regardless of whether a particular company has filed for bankruptcy. By creating a no-fault administrative system for processing claims, this approach would provide victims with speedier compensation while reducing the substantial attorney's fees and other transaction costs in the current adversarial litigation system. By compensating victims pursuant to a fixed schedule of payments for specified disease levels, this approach would also provide predictable awards to individuals with similar illnesses and ensure that the most compensation goes to the most seriously ill victims.

The UAW is especially pleased that the Specter-Leahy bill does not permit any subrogation against worker compensation or health care payments received by asbestos victims. We believe this is essential to ensuring that victims receive adequate compensation. The UAW is also pleased that the Specter-Leahy bill establishes a transparent mechanism for defendant companies and insurers to contribute to the National Asbestos Compensation Fund, thereby spreading the cost of compensating victims across a broad section of the business and insurance community.

Because the Specter-Leahy bill replaces the current adversarial litigation system with a no-fault administrative system for processing claims, the difficulties and costs involved in bringing asbestos claims will be greatly reduced. Thus, the UAW believes the attorney fees provided under the legislation are more than adequate to attract competent representation for asbestos victims.

The UAW believes the Specter-Leahy bill can be improved in two areas. First, while the legislation provides that CT scans showing

asbestosis may be considered as evidence qualifying lung cancer victims for compensation, it does not expressly allow CT scans showing pleural disease to be considered. We believe this distinction is contrary to the current state of medical science, and therefore urge the committee to make CT scans admissible as evidence for all categories of claims.

Second, the criteria for triggering the statute of limitations for bringing claims should be clarified to make sure they are workable, and so individuals with non-malignant diseases that may get progressively worse are not forced to rush to file their claims in order to preserve their legal rights.

In conclusion, the UAW firmly believes that the asbestos compensation system established under the Specter-Leahy bill would be vastly preferable to the current tort system. We therefore urge the Judiciary Committee to promptly approve this important legislation.

Thank you.

Chairman SPECTER. Thank you very much, Mr. Reuther.

[The prepared statement of Mr. Reuther appears as a submission for the record.]

Chairman SPECTER. This is a good point to put into the record the letter from the International Union of Operating Engineers dated April 20th in support of the legislation and a press release from the Asbestos Workers dated April 25th in support of the legislation. They go along with your testimony, Mr. Reuther, from UAW.

Ms. Morgan, I note in this morning's Hill newspaper there is a full-page ad for the Coalition for Asbestos Reform, and I note a representation of representing a coalition of manufacture, construction, energy, and insurance companies. And in your testimony, you commented about the unavailable information on who is in what tier. Are you able to provide to this committee a list of your members and what tier they fall in?

Ms. MORGAN. We can provide a list of some of the members. Some of the members are not wanting to be public, just because they are concerned about being targeted as a defendant. But there are others of us who obviously are willing to be more public.

Chairman SPECTER. So some of your people want to advertise but not tell us who they are?

Ms. MORGAN. There are some members who are not willing to be public, but we are representing them as well.

Chairman SPECTER. Some of them will tell?

Ms. MORGAN. Yes, absolutely. I am here today.

Chairman SPECTER. We would like to know that.

Ms. MORGAN. But as far as knowing what tiers we are in, we really don't know exactly where we will end up in terms of the subtiers until we have more information.

Chairman SPECTER. Well, tell us the companies and perhaps we can tell you the tier.

I note in your advertisement an assertion that "they will be creating the potential for liability for the U.S. Treasury to pay substantial sums in damages." A little hard for me to understand that when we have a figure of $140 billion—which wasn't my idea; that is a figure which was voluntarily suggested by the manufacturers

and the insurers. The AFL–CIO wanted more. And last fall, Senator Daschle, who was leader of the Democrats, and Senator Frist, the majority leader, got together and agreed to the $140 billion figure, which met the amount which had been voluntarily agreed to. Now, if that proves to be insufficient, the bill is explicit that claimants go back to court. Once you take away the right to jury trial, which is a very major right in our society, if the money isn't there, Senator Feingold made the point that it shouldn't be the claimants who bear the burden if the fund doesn't hold up—something I agree with him totally—what is the basis for your asserting that the Government will have a responsibility here?

Ms. MORGAN. Well, I think there are some provisions about going back to companies with a guaranty payment surcharge in the event there are insufficient funds.

Chairman SPECTER. Going back to companies—well, that has nothing to do with going to the Government.

Ms. MORGAN. Well, the next point is if they weren't able to get financing through the Federal Financing Bank that there would be an effort to go back to companies. And our concern is, though, ultimately this could fall on the taxpayers because there may not be enough money generated from the businesses in order to cover this funding.

Chairman SPECTER. Well, that may be a concern, but there is no basis for it.

Dr. Rabinovitz, your testimony about the amount of the fund, as I understand it, is that before the Section 7s were eliminated, your expert projections came in at a total cost to cover all the claims of $125 billion. Is that correct?

Ms. RABINOVITZ. Yes, although the value side of that equation is estimated by Goldman Sachs. But you are right that the claims provided the values.

Chairman SPECTER. And if you took out the Section 7 claimants, it would be down to $118 billion?

Ms. RABINOVITZ. Yes.

Chairman SPECTER. And if you added in the additional monies which we have increased at the request of Senator Kennedy and others on some of the tiers, it would go back to $120 billion?

Ms. RABINOVITZ. Yes, as I understand it.

Chairman SPECTER. Okay, well, we can all do the math. The cushion of a $140 billion contribution, as compared with a projection of a cost of $120 billion.

Professor Green, your critique of the bill was scathing. But when you compare it to the present system, how would you evaluate it? Let me give you a two-part question, because after my red light goes on I meticulously observe it. The two-part question is, however bad this bill is, isn't it a whole lot better than what we have now? And the second part of the question is, what is the answer if this isn't the best possible answer?

Mr. GREEN. Those are fair questions, Senator Specter. I appreciate them. I think it is a myth that this is better than the system we have now, for several reasons. First of all, Congress already established a system which is working pretty well, not perfect, with § 524(g) of the Bankruptcy Code.

Let me give you one example, Senator Specter. It is an example of a company which is kicked around a lot by liberals in my home State of Massachusetts, Halliburton. But they used Section 524(g) of the Bankruptcy Code to stand up to their entire full set of asbestos liabilities, past, present, and future. They negotiated with their insurers, they negotiated with the asbestos victims, and they negotiated with me as the representative of the future victims. And we negotiated a deal which has been completed in less than a year to pay all of those victims 100 percent using stock and insurance proceeds. The stock of Halliburton was given to the future claimants at $19 a share. We sold 59–1/2 million shares at $42.50 a share, making $2.5 billion, creating new money by lifting the asbestos uncertainty overhanging that company.

Today that company has fully met and set up a trust for all of its victims into the future—no delays in payment, Senator Feinstein. They get paid immediately. The insurers have paid their share, by agreement. Halliburton has paid its share. And that stock today—I checked—is trading at $44 a share.

That mechanism is available to lots of companies and would have been utilized by many more companies, especially these big ones, if they didn't have the prospect for 2 years, 3 years of this legislation. This has put the brakes on that.

Now, in the tort system, for a long time we have been processing and paying in the tort system exigent cases, mesotheliomas, in one year from start to finish in most jurisdictions across the country. California and Massachusetts led the way in courts, advancing the mesothelioma cases. Now, this bill, if some of the projections are right, Senator, is going to require $50–70 billion of the $140 billion to go to debt service, to banks. Is that any better than going to tort lawyers, which is some of the criticisms? I don't think we are fixing the problem.

Chairman SPECTER. My time is up, but provide us documentation on that point, would you please?

Mr. GREEN. I am sorry—

Chairman SPECTER. Provide us documentation on that expansive debt service figure you just stated.

Mr. GREEN. It is in Dr. Peterson's projections, Senator Specter.

Chairman SPECTER. Senator Kennedy?

Senator KENNEDY. Thank you very much, and I welcome you, Professor Green. Just on this point, you have had extensive expertise in the field. A number of courts look to you for assistance in highly complex subjects, and we are fortunate to have your comments. But in your testimony, to get back to this point, you state that by its fourth year the fund would need to borrow $50 billion to meet its liabilities, the fund's liabilities will outstrip its revenues. Also, Mr. Peterson, you had a similar kind of a comment. You are telling us the level of borrowing required will actually be huge. Interest rates will consume 40 or 50 percent of the entire fund. The fund would only have between 70 and 85 left to pay the claims. That is not nearly enough to compensate the victims.

How do you get there? Maybe just each one of you respond.

Mr. GREEN. Well, very quickly, Senator, it is not enough to just look at the absolute amounts of funding. You have to look at the

cash flow. You have to look at payments in and what will be available and then payments out.

Even if the trust is fully funded, all these contributions that have not been specifically identified to particular insurers or manufacturers, even if they all came in, if you look at the backlog of mesotheliomas alone at $1.1 million per and the 3,000 additional a year that will continue to come, the cash flow is not adequate. After a few years you have to start borrowing. And the borrowing curve simply goes up. And then, as we all know, when we are caught personally with debt that we are trying to pay off, the money is eaten up by the debt service, and you get further and further into debt.

But it is even worse because the trust is not going to be fully funded by these companies. The insurers are going to sue. The trusts are going to sue. The companies are going to sue. It is going to take time. Even using the liens, Senator Specter, it is going to take—we know it is going to take time. And so there is going to be a delay of—what? Six months? A year? Two years? Three years? The debt service will mount.

Senator KENNEDY. Is there anything you want to add to that, Mr. Peterson?

Mr. PETERSON. Two things I would say. What Professor Green described, looking at cash flow analysis, is precisely what we have done, and we have looked at five different scenarios with regard to claims forecasts, one of which was the CBO forecast done last year, which we have updated for present value.

The other thing I want to say is that fully 40 percent of the liabilities are from mesothelioma, and so when you are looking at this fund, the biggest chunk of money goes to the mesothelioma victims. That is great. That is what this bill should do. But it means these are—when we hear about being expedited claims and pushed forward and wanting rapid payment, they are going to put heavy pressure initially on there that need to be funded.

Senator KENNEDY. Professor Green, in your written testimony, you make the point in the entire history of asbestos, only a handful of industrial firms and even fewer insurers have voluntarily faced up to the cost of resolving the full asbestos liabilities. The rest of the firms and insurers being counted on under this bill to pay their allocated contributions have by and large fought and resisted every attempt to hold them accountable.

What makes anyone think that they will now accept their allocated responsibilities and pay up their shares on time and without any fuss?

Mr. GREEN. Either just willful blindness or hopeless optimism. I think this is a little bit of a "Wizard of Oz" operation here. And I think we have to face the realities that the insurers have not willingly stepped up to pay ever. The companies have resisted for years and years and years. And we have already heard that the smaller companies think that the large companies are getting a bail-out. They are not going to do this willingly.

I know that the trusts are gearing up and have hired Ted Olson to mount a constitutional challenge to the taking of their assets. So there is going to be—

Senator KENNEDY. What is the practical effect of this? How long can this go along? How long can this continued litigation go on?

Mr. GREEN. Well, you know that the American lawyer can continue litigation as long as he is allowed to. There are provisions for the administrator to make interim payment allocations on, say, insurers and so forth, but those can be challenged as well. This can go on for—it will go on for many years.

Senator KENNEDY. Just finally, Dr. Landrigan, particularly on the lung cancer VII, could you just expand on this point that asbestos exposure can be a contributing factor to a patient's lung cancer even if there is no evidence of the bilateral pleural thickening or asbestosis? Can you elaborate on that? Is 15 weighted years of exposure to asbestos a sufficient level of exposure to cause lung cancer?

Dr. LANDRIGAN. Yes, Senator, I would be glad to. The point here is that asbestos—the scarring that asbestos causes in the human lung is typically not symmetrical. Very often it begins on one side and only subsequently, and not in every case, does it spread to the other side. And so I am concerned that an insistence that runs through this bill that evidence of asbestosis be bilateral is creating a very high standard, a very high criterion that is going to serve as a barrier to people that clearly have had asbestos disease, that clearly have suffered lung injury, but by whatever fluke of the circulation of air in their lungs has not produced damage on both sides.

Senator KENNEDY. My time is up. Thank you.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Professor Green's comments reminded me that I asked former Solicitor General Ted Olson to write me a letter expressing his concerns with the takings issue and other constitutional questions that he had with regard to the asbestos trust funds, which would be swept into this larger Federal asbestos trust fund, and I would like, Mr. Chairman, if there is no objection, to make that a part of the record.

Chairman SPECTER. Without objection, it will be part of the record.

Senator CORNYN. Thank you very much.

And I know, Ms. Morgan, you mentioned other constitutional concerns that you have, and as I understood it, it is essentially for those companies who have potential asbestos liabilities but who believe they have adequate insurance to cover it, they would be forced, is it your contention, to basically give up that coverage and then pay a dollar figure into this fund in order to meet their allocation? Is that what your concern is?

Ms. MORGAN. That is correct. The smaller companies are relying on their insurance assets today to pay their claims, and those insurance assets under the FAIR Act would be taken away, and they would be required to pay out of their own pocket for the trust fund payments.

Senator CORNYN. Do you have any concept of how many companies we are talking about? I know a number of Senators have expressed concerns about the fairness of the allocation system with

regard to smaller companies. There is a level below which you are exempted and do not have to pay any money into the fund. But from your standpoint, how clear is it what that cutoff is? And what kind of impact on those companies that do have adequate insurance but, nevertheless, would be forced to pay money under this fund, what kind of impact do you believe that would have on those companies and their ability to keep their doors open and employ people?

Ms. MORGAN. Well, I know about those within the coalition who fall in that category who do have adequate insurance today in the tort system and would not be able to make payments going forward without their insurance assets. I know those that have come forward and are part of the coalition.

We are concerned that there are a number of other companies who rely on their insurance entirely to defend their claims and really have no idea about the dire consequences of this Act. So we have not identified everyone. We certainly know of those that are part of the coalition. And there are a number of companies that are in this position.

Senator CORNYN. Well, I know everyone on the Committee and in the Congress is doing the best they can to solve a very difficult and challenging problem. But I think that is certainly something we need more information on, and I would appreciate any additional information you might have that would shed light on that.

With regard to the adequacy of the fund itself, I know, Mr. Peterson, you and Dr. Rabinovitz have a different view over the adequacy of the fund and in terms of the composition of claims that will actually likely be made against the fund. As I recall, Mr. Peterson, you do not think $140 billion is anywhere near enough, and, Dr. Rabinovitz, you think it is plenty.

Part of my problem is that we have to resolve that difference in this bill and make the best decision we can as to who is right and who is wrong. At the same time, we have to decide between the physicians here, who is right here and who is wrong about matters of science and medicine. And we are not particularly well equipped to resolve those differences although I assure you we will continue to do the best we can.

But if you would, Mr. Peterson, could you just speak briefly to the composition again of the fund? As I recall, you said that we may see a rate of mesothelioma claims that vastly exceeds the prediction that Dr. Rabinovitz has given, thus absorbing a lot of this money very quickly from those very serious claims?

Mr. PETERSON. Yes, thank you. I think that the differences between the forecasts—I have not seen Dr. Rabinovitz's forecast. I have seen earlier ones by ASG consultants and I have seen some by CBO that have used those. I assume that the numbers of mesothelioma claims would be fairly similar and they don't differ much from my forecast. That is not the area of difference.

The standard forecasting—I mean, this is something we do routinely—the standard forecasting for mesothelioma is that they are going to come in at a rate of 2, 2.5 percent of the claims. Manville, even with the reduced volume of claims they are getting—well, probably because of that, they are coming in at 6 percent.

So when you multiply that out, the product of multiplying how many claims they say are going to be coming in, 1 million, 2 million, suggests that there are going to be something like 60,000 mesothelioma claims, if you just do the math on that. ASG's earlier forecasts were somewhere on the order of 40 to 45,000 mesotheliomas. So there is a potential there that there may be a third again as much. That is Manville's experience.

Generally, the perception of what is going on is that the plaintiffs lawyers are concentrating on trying to get mesothelioma claims represented, and indeed they are advertising extensively on the Internet.

Can I comment also on the 140? I think there are two reasons that are there are differences there. One is the underlying forecasts that we have distributed. The other is that I don't believe that Dr. Rabinovitz takes into account interest costs, and let me give you an example.

Last year, CBO estimated for the bill current at the time that there would be $139 billion of indemnity costs and $1 billion of administrative costs. I have taken the new values of the current bill, including the elimination of Category VIIs, just CBO's numbers which derive from ASG's earlier work, and now that 139 becomes 147. So they are already over the 140 just on the liability. You add another $1 billion for administrative costs and that gets in there.

But when you then add in the cost of interest, because the interest is inevitable—the claims are coming in at a big bulk at the beginning; the money is not there and they are going to have to borrow. When you add that in, they get to over $190 billion, with interest.

Dr. Rabinovitz—I mean, I don't know. If she believes there isn't going to be interest, then her number would stick. But if there are going to be interest charges—it is hard to imagine there wouldn't be some—it would add to it.

Senator CORNYN. I know my time is up, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Leahy.

Senator KENNEDY. Can she answer the question?

Ms. RABINOVITZ. Just if I may—

Chairman SPECTER. Dr. Rabinovitz, if you would like to comment on that last question, go ahead.

Ms. RABINOVITZ. Thank you. With respect to the mesothelioma forecasts, I want to straighten out one misconception. The Manville Trust had 100,000 claims in 2003, and last year, in 2004, it had 14,000. From the first quarter of 2005, it suggests they will only have 20,000 this year.

Well, of course, the percentage of mesothelioma claimants has given up. It has gone up because the number of non-malignancy claims has gone down radically. So more of their resources are going to be devoted to the mesothelioma claimants.

If there is anything we have more modest uncertainty about, it is the projection of the mesothelioma claims. Those are projected according to work originally done at Mount Sinai. They are tracked, in actuality, from a series, the survey of epidemiology and end results, which shows what the actual experience of a sample

of weighted sample of hospitals is experiencing with respect to mesothelioma claims.

Those projections have held up extremely well, both based on epidemiology and also based on real-world experience from hospitals and a government series. So there is uncertainty about the projections, but I would say that with respect to the mesothelioma claims, relatively speaking, there is less uncertainty than about almost any other category of claims. Of course, the percentage has gone up, and that is good because the number of non-malignancy claims has gone down.

Chairman SPECTER. Thank you, Dr. Rabinovitz.

Senator CORNYN. Mr. Chairman, could I ask, perhaps, quickly that Dr. Rabinovitz provide us a table of projections over future years and across each claims level? That would be very helpful in resolving some of these questions.

Chairman SPECTER. I think that is a good idea, Senator Cornyn.

Senator CORNYN. Thank you very much.

Chairman SPECTER. Can you do that, Dr. Rabinovitz?

Ms. RABINOVITZ. Yes.

Chairman SPECTER. Thank you very much.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

The hearing has been fascinating. In case you didn't know it, you are on an internal channel here in the Senate, and I was able to follow a lot of your testimony even though I was out of the room for a short while. C–SPAN is carrying it, too.

Mr. Reuther, I want to thank you, and I want to thank you also for what the leadership of the UAW did. They were the first labor union to endorse our bipartisan legislation. I agree with the statement in your testimony where you said, quote, "It is easy for critics who want to maintain the current tort system to point out shortcomings in the legislation." I think we both know that if you craft legislation with some powerful interests involved, it is never easy, but the Supreme Court has called on the Congress many times to do just that. I believe—and obviously you do—that it is time to create a fair and more efficient compensation system for the thousands of people suffering from asbestos-related diseases.

Your testimony alludes to the difficulties that many of your own UAW members face in the current tort system. Can you tell us about some of those problems and why you feel our legislation is preferable to the current tort system?

Mr. REUTHER. Yes, Senator. Because of the worker's comp statutes, most of our members are barred from suing their employers. So they have no recourse whatsoever there and they are limited to the inadequate payments under State worker compensation statutes.

Also, of course, there is the difficulty that they, along with others, face that defendant companies often go bankrupt. So even if a lawsuit is filed against some other company that produced the product, there may be no recourse whatever. Your bill that you and Senator Specter have introduced would solve both of those problems.

Senator LEAHY. I understand from your testimony that the protection against subrogation of victim awards is very important to, I guess, the nearly million members of the UAW. Is that correct?

Mr. REUTHER. Yes. We believe that that is essential in order to assure that the overall amount of compensation received by victims is fair and adequate.

Senator LEAHY. Thank you.

Mr. Gober, I am always pleased when I see the Military Order of the Purple Heart come up here. The members have already proved their sacrifices. They have been awarded the Purple Heart. They have proved their service and sacrifices to our Nation.

Could you tell me about the special problems—and I understand from the material we have received from you the special problems faced by the men and women of our Nation's armed forces in the current tort system if they are trying to seek redress for asbestos-related injuries that they received while they were in the military.

Mr. GOBER. Yes, sir. The reason we got involved in this is people were not looking at the veterans, and if you stop and think about it, all of us served in—particularly people my age served in barracks where you had asbestos around the pipes and when they got ready to remodel, they just came in and knocked it off. They didn't do an abatement or anything else. So we got involved.

It is interesting because the Wall Street Journal says that 26 percent of all meso cases are veterans, 16 percent of all other lung cancer cases are veterans, and 13 percent of all disabling lung diseases are veterans. So we think this is working. I personally know of cases—one, in particular, where a veteran died on Veteran's Day in 2001. The case has not come to court. They haven't even taken depositions, and he was diagnosed with mesothelioma.

Senator LEAHY. With this bipartisan trust fund legislation, do you think we can finally provide our Nation's veterans with the compensation they deserve?

Mr. GOBER. Yes, sir. That is why there are 19 veterans organizations that have signed on. I gave Senator Specter's staff member a copy of the letter listing all of the veterans groups that have signed on. The current system is just not working.

Now, is this the best bill in the world? I am not a lawyer, so I don't know that. All I know is that right now it is not working. Veterans are dying. The World War II guys that were aboard those ships are dying. Their families are not being compensated, and when they are, the lawyers are taking 40 percent of it, plus expenses. That isn't fair. It is not working, it is broke. It needs to be fixed. With all due respect to the legal minds in the house, it is just not working.

Senator LEAHY. Thank you, Mr. Gober, and thank you for your service to our country.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Sessions.

Senator SESSIONS. Ms. Morgan, you represent a group, but what I am curious about—I will be frank with you. Are we dealing with a serious number of individual companies and entities that are openly opposed to this bill, or are we dealing with some people that are leveraging at the last minute to try to get the thing a little fairer for problems that they see in the bill?

Would you be prepared to tell us who objects, who would like to see this bill fail? And do some in your coalition favor some sort of reform, but would just like to see it fixed? Who do you represent and how would you characterize that opposition?

Ms. MORGAN. Well, I think first and foremost, as I said in my statement earlier, we are passionately interested in reforming the system. There is no question about that, and we want the focus to be on making sure that funds and resources are directed to those who are truly injured. That is clearly our focus.

It is a wide variety of folks who range from business, as I said, and also to a very significant number of insurance companies. I think right now our members total somewhere between 30 or 40 different companies that have come forward.

Senator SESSIONS. Are they willing to put their names out and say they oppose this bill?

Ms. MORGAN. Well, we have, we actually have. A number of folks have written letters to this Committee. Exxon is on the list. DuPont and Shell are some of the bigger companies. Some of the smaller companies are like Oglebay Norton, Hopeman Brothers, Foster Wheeler, Iuna Nosroc.

Senator SESSIONS. The figure earlier was 8,000 companies. How many do you have on your list that may be paying into this?

Ms. MORGAN. Well, everyone in the coalition would be paying into this. Everyone is an asbestos defendant.

Senator SESSIONS. Would you agree with that number, about 8,000, total?

Ms. MORGAN. I have heard that. I don't know that for a fact, but I do know that there are a lot of defendants who are being represented by insurance companies in their asbestos litigation and really probably are not aware of the impact of this bill. They have just been able to have all of their claims covered by insurance.

Senator SESSIONS. Well, I have heard that, and this is a serious question that we have got people out here that unless they have been paying asbestos claims, or their insurance company has, they are not going to be covered and have to pay into this fund. Is that correct?

Ms. MORGAN. No. As I understand it, any asbestos defendant, whether their claims have been paid by insurance or whether their claims have been paid out of their own pocket, would be subject to this fund.

Senator SESSIONS. But if you haven't been paying any claims, you are not going to be dragged into this and have to pay.

Ms. MORGAN. No, I am not referring to those defendants. Those are some lucky defendants.

Senator SESSIONS. I am serious about this question. We have been moving this bill for a number of years. The Chairman has had hearings and hearings and hearings. At the last minute, we have some people representing certain groups that object. I would like to see what companies are objecting and precisely what they object to. I think it is a bit late for some of the groups that have come in here to start complaining, frankly.

Ms. MORGAN. Well, to your point about being late, we have actually been very vocal for a long time. In 2003—

Senator SESSIONS. Well, I accept that. Some have not. Who, and what are their claims, what are their objections? Can you give us objections that are fixable or is it to the whole bill that you think is hopeless?

Ms. MORGAN. Well, our concern is as long as the premise is that insurance assets will be taken away, and as long as the premise is that there has to be a $90 billion funding by industry, mathematically we can't get there based on the data we have today.

Now, once we know more about the exact source of funds for that $90 billion, which is not certain right now—that is still a mystery, what companies, what their shares are, and most importantly whether they have the ability to pay. We don't have that information yet. When we do, then we can talk meaningfully about is there a way to fix this.

Senator SESSIONS. What is it that you lack to allow a company that knows the formulas and their own situation and how much they have had to pay so far—why can't they figure out pretty close what their liability would be?

Ms. MORGAN. Well, we can. We can estimate, we can guess.

Senator SESSIONS. Okay.

Ms. MORGAN. And based on that, we know what our personal, individual situations are, and there are a number of us, as I mentioned before, who would simply not be able to make the payments without our insurance assets.

Senator SESSIONS. Well, I don't know how to solve that problem, except I think we need people to step forward to show what they are paying and why they think it is too much, why they think it is unfair, put their names out there, and let's see if we can fix it, Mr. Chairman. If they are not willing to do that, they don't have as much credibility with me as they otherwise would.

Chairman SPECTER. We have got quite a few good cross-examiners, former prosecutors, and Senator Sessions comes at the top of the list today.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Just continuing this line of thinking, Ms. Morgan, I read the ad today in the Washington Times and I was very much struck by it. Now, apparently, there are a number of anonymous companies out there that are prepared to say they won't be able to make the payments.

I would like to ask each one of you to begin reading the bill from page 135 onward, and let me just summarize a few things about what the bill says. The first is that there is a small business exemption. As I understand it, no company with 500 or less employees would have to pay into this fund, period.

Secondly, there is a $300 million—and the wording of the bill is "the aggregate total of financial hardships adjustment under paragraph 2 and inequity adjustments under paragraph 3 in effect in any given year shall not exceed $300 million, except to the extent additional monies are available for such adjustments." So there is ample provision, it seems to me, that the administrator has the power to make certain adjustments as things go on.

Now, I would like to make the offer that any company that is unhappy with this come in and see me specifically with the specifics

of your unhappiness. But, frankly, it doesn't change my mind to read an ad that is filled with generalities that don't have a backup in terms of the wording of the bill. So I would just like to make that statement.

If I might, I wanted to ask a question. Mr. Berrington isn't here, but—

Mr. BERRINGTON. Senator, that is not so.

Senator FEINSTEIN. Well, I wanted to ask you on the exigents—and I guess maybe somebody on the panel can answer this. In California law, and I think to some extent in Massachusetts law, exigents can have their cases heard in court within 120 days, and we have expedited administrative procedures. Even with those, I don't know how you can ask Congress to tell terminal victims that they should be put in a worse position than they are now and have no place to have their claims resolved while the Department of Labor performs the necessary tasks to get the claims facility and the trust up and running.

That was my understanding of what your written comments say, and this is the most important part of the bill for me to get the sickest people paid fairly the quickest on a no-fault trust medical judgment. I don't know how we could do it any quicker.

Mr. BERRINGTON. May I comment?

Senator FEINSTEIN. If you would, and if anybody else would like to comment.

Chairman SPECTER. Step to a microphone, Mr. Berrington.

Mr. BERRINGTON. Thank you very much and I appreciate the opportunity to comment on it. Our goals are absolutely the same. The sickest people need to be compensated the fastest and the fairest. We spent weeks putting together the administrative structure in the bill working with friends from all the stakeholder groups to make sure that the administrative structure in the Labor Department would do that.

I think Judge Becker said earlier, and I would agree with it, that the Labor Department can almost certainly be up and running, prepared to receive claims and to pay claims within just a couple of months. And I think that those are the easiest cases to decide. Those aren't the toughest cases and they should move through very quickly.

I think also I heard earlier that in one of the States—I am not an expert on the State laws that you have referenced—that you can move the mesothelioma cases through in about a year. Well, I don't think that is acceptable in the court system, and the trust fund would have these cases move through much, much more quickly.

I was struck in the offer of judgment provision, which I think was absolutely done in good faith with the effort to move this forward, that it is a 200-day process in the offer of judgment language dealing with these exigent claims. Well, the Labor Department is going to be resolving these cases way before 200 days are up, and I think it doesn't work, therefore, to keep the litigation system going. I think it will work much better for the claimants to have the Labor Department move quickly and smartly ahead consistent with the processes that we have put in.

Senator FEINSTEIN. My time is up, but let me just say if you don't—

Chairman SPECTER. Go ahead, Senator Feinstein.

Senator FEINSTEIN. —if you don't have this weight over the companies' heads, then I think there will be a problem. But I think the fact that these people can return to the courts immediately, as quick as possible, if they don't have satisfaction or if they want to settle and a settlement isn't granted—there is a specific process spelled out here.

Mr. BERRINGTON. I am sorry. Should I respond?

Senator FEINSTEIN. Yes, please, please.

Chairman SPECTER. Go ahead.

Mr. BERRINGTON. The way the bill is set up is that if there is not operational certification within nine months, which means not that claims aren't being paid, but that certification isn't given, people can go back to court. The offer of judgment provision continues litigation. It continues the litigation with regard to the individual claimants. It also continues litigation among potential defendants because the process that is laid out has all the defendants, then, who may be involved with one particular claimant then litigating among themselves as to their shares.

Then, finally, the offer of judgment process that the bill has gets kicked off by an individual filing with the defendants exactly the same information that the plaintiff would file with the Labor Department. Well, filing it at one place, with all the quick procedures in the Labor Department, is going to work a lot better.

I should also add, of course, that these are additional monies outside the trust fund. There is some contribution level, I understand, but these are funds that add to the $46 billion. And I think that clearly the fastest way will be through the Labor Department process. I had some experience with this many years ago.

Senator FEINSTEIN. You are saying don't allow a settlement? Is that what you are saying?

Mr. BERRINGTON. I am saying once the—

Senator FEINSTEIN. Are you saying don't allow—do you favor the ability to settle for a lump sum within 30 days?

Mr. BERRINGTON. I think the bill has a general provision now with regard to settlements that occur prior to the enactment date and that are finalized within 30 days. So I think that is already taken care of in the bill, Senator.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator COBURN.

Senator COBURN. Thank you, Mr. Chairman. I would note for the record that the CBO numbers on asbestosis were about a third less than Mr. Peterson's estimate, and I think that needs to be in the record.

I also would note that I am not a trial attorney and I am not good at cross-examination, but I can take a heck of a history from a patient and I want to do that. I also will note that after we had our hearing in January, I asked CRS to give me every study done in the world in relationship to cancers and asbestos outside of the lung. And I spent the two-week break we had reading 93 scientific articles on that and I want to say I am flabbergasted that if anybody would actually do the research and would ever think that there is a connection between any other area of the body and as-

bestosis, based on what the scientific literature is today, I can't see it and I can't find it.

I have been accused of not being the best doctor, but I have never been accused of being a dumb ringer who can't read a scientific journal. I want to ask Dr. Crapo to refute some of the things that we have heard here today because I just flat don't buy it based on the science I have read.

But I want to make a point. When you talk about cancer of the larynx and you look at the meta-analysis of all the studies it has been done for associated with asbestos, not one of those studies took out the confounding variables that we know cause cancer of the larynx. So those studies have no value in terms of telling us whether or not cancer of the larynx is caused by asbestos.

Now, it may be that we need to have a study, but the fact is that we can't rely on the science that is out there. And for us to have testimony that says that there is a causation when there, in fact, is not any causation is wrong. When we are going to start moving the science to what we want rather than what science really reveals, which happens a lot up here, we are in trouble as a Nation. End of talk.

Dr. Crapo, talk to us about markers, asbestos exposure and lung cancer, because what I have heard here today is something that I just don't buy.

Dr. CRAPO. Well, your question is on markers of asbestos exposure and lung cancer. There is clearly an association between asbestos exposure and lung cancer. That has been well demonstrated in the literature. But it has also been well demonstrated that it is not just exposure; it is those that are very highly exposed that contain the highest risk.

For example, if you look at the cohorts of asbestos workers in which there is not significantly high enough exposures so that there are no deaths due to asbestosis, so these are the kinds of workers who have asbestos exposure, but nobody has died from it, there are at least eight cohorts that have been studied that meet that criteria—no deaths due to asbestosis. In those eight cohorts, there is no increased risk of lung cancer. There is actually a zero increased risk, not even a small one.

What that demonstrates is it is not just exposure that creates the risk, but rather a substantial exposure that is on the very high end. And most of the studies have suggested that the association is with those who have X-ray evidence of fibrotic lung disease that carries the increased risk, and there are a large number of studies that demonstrate that. So it is erroneous to conclude that just exposure alone dramatically increases a person's risk for lung cancer, according to the best scientific evidence as I read it.

Senator COBURN. Some of our testimony today states that there is causation of exposure without evidence of any pleural signs of any asbestosis, any restrictive lung disease and lung cancer. How would you go about proving that? I mean, that is the testimony we have today.

Dr. CRAPO. I don't think you can prove it.

Senator COBURN. I don't either.

Dr. CRAPO. There is no way to prove that. In fact, the proof is the other way. The proof is the medical evidence suggests that

there is not an association in the absence of some other marker of lung disease, and that is only for lung cancer. It doesn't apply to the other cancers.

Senator COBURN. Right, and so you feel comfortable telling this Committee that without signs of significant disease from asbestos either through a marker or restrictive lung disease, or a combination of both of those, that it is highly unlikely that you are going to see—based on the science, you are going to see a primary lung cancer that is associated with that?

Dr. CRAPO. I would agree with what you just said. Based on the science, that would be my conclusion.

Senator COBURN. And, remember, we are not distinguishing the types of lung cancer, are we?

Dr. CRAPO. No.

Senator COBURN. No, and there are multiple types of lung cancer. So there is no association, and we have done nothing as far as the amount of exposure in terms of particle load in this criteria, which is probably something we should do.

Dr. CRAPO. That is true, although in this kind of a trust you probably can't assess particle load. But there is good evidence that the higher the particle load in terms of asbestos particles, the higher the risk of this type of disease occurring.

Senator COBURN. Thank you very much.

Chairman SPECTER. Dr. Landrigan, would you like to comment on what Dr. Crapo just said?

Dr. LANDRIGAN. Thank you, sir. I would. One of the nice things about medicine as compared to economic modeling is you can turn to data. In our very large occupational medicine practice at Mount Sinai, we have seen cases—I can't tell you how many, but I can provide them for the record—of lung cancer in asbestos workers with many years of substantive exposure to asbestos, as defined in the bill here, who have developed lung cancer who had no asbestosis visible on X-ray. I edit the American Journal of Industrial Medicine. I have for more than 15 years been editor-in-chief, and we have published cases of lung cancer in asbestos workers who had no radiographic evidence of asbestosis.

Going beyond our own experience at Mount Sinai, I refer you to the Scandinavian Journal of Work, Environment and Health, arguably one of the three or four best journals internationally in the field of occupational medicine. Back in 1997, they convened an international expert meeting on asbestos to develop the so-called Helsinki Criteria for asbestos, asbestosis and cancer, which were published in the Scandinavian journal in 1997. It says right in here, a direct quote from page 6 of this article, "Heavy exposure, in the absence of radiological-diagnosed asbestosis, is sufficient to increase the risk of lung cancer," a direct quote.

Senator COBURN. Mr. Chairman, might I respond to that?

Chairman SPECTER. Go ahead, Senator Coburn.

Senator COBURN. It is very important because the statements that were just made show no association with the disease. You are trying to prove the negative. The observation that you have seen cases with lung cancer who have asbestos exposure, but don't have asbestos disease does not prove that the asbestos caused the lung cancer. The background rate on lung cancer, we all know, in this

country is high, not counting for those people who have never smoked and never had any exposure.

So the assumption that it is caused by asbestos, with lack of proof, is a false assumption. That is the kind of study that we can't use to make scientific decisions. Now, I have not seen that. I would be happy to read that and look at it, but if it is based on the same assumptions, anecdotal evidence of disease in the absence of true exposure or true markers of disease, you don't know that that is not a background cancer anyway.

Dr. LANDRIGAN. Well, if I may, Senator.

Chairman SPECTER. Go ahead, Dr. Landrigan.

Dr. LANDRIGAN. Senator, in this same article from the Scandinavian journal that I just cited, a couple of lines above the line that I just read you, it does say the following. Let me offer you a partial concession, but by no means a complete yielding to your point of view.

It says, "Because of the high incidence of lung cancer in the general population, it is not possible to prove in precise deterministic terms that asbestos is the causative factor for an individual patient." That is where the rub is, but what epidemiologists do—and I think having served for 15 years in the U.S. Public Health Service and directed epidemiology at NIOSH for 6 of those years, I can tell you that what we epidemiologists do is when we are looking at a population of people that have a cancer such as laryngeal cancer, we take into account the smoking history in those with the disease, the smoking history and the alcohol history in those without the disease.

Though the exercise is no more perfect than the creation of legislation, there are techniques for holding the smoking history and the alcohol history steady and looking at the effect of asbestos. And what we see is very much what Dr. Crapo said that people with a heavier exposure are at the greatest risk of disease, and that is a cause and effect relationship that shines through the inevitable murk of those confounding exposures.

Chairman SPECTER. Thank you.

Senator COBURN. I just would make one comment. In the studies that I have seen that CRS gave to me, those confounding variables were not taken out of the studies to show causation in terms of pharyngeal and laryngeal cancer. I would love to see your studies that have those where that has been taken out as a confounding variable and considered appropriately so that you could see causation.

Senator COBURN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Coburn.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Let me follow up on this, Dr. Landrigan, because even if you concede Dr. Coburn's point that there are some cases without scarring and there is a question as to whether it is related to lung cancer, that is not what this law says; that is not what the bill says.

I have read your testimony and it goes further. If you have evidence of asbestos scarring and lung cancer, but only find the scarring in one lung, then you are disqualified from coverage under

this bill. And you say, and I quote, "Requiring that the damage be bilateral, both lungs, has no basis in biology or medicine."

So even conceding Dr. Coburn's point, I don't see how we came up with a standard that says one lung is not enough; asbestos scarring in one lung is not enough. Can you respond to that?

Dr. LANDRIGAN. I would agree with you, sir.

Senator DURBIN. Well, that troubles me because it means a cohort of people with lung cancer and asbestos scarring in one lung will not have an opportunity to recover under this bill.

Dr. LANDRIGAN. That is my read of the bill, yes, sir.

Senator DURBIN. That is the way I read it, too.

I also want to go to this question that has been raised repeatedly about whether there will be enough money to pay the claims. I am going to offer an amendment here, because it has been stated so often this morning, which says if this program is not prepared to pay meso victims in 60 to 90 days, they can return to court. We have heard that over and over again—60 to 90 days. Judge Becker said that. It has been said by Mr. Berrington from the insurance industry.

Well, let's make that part of this law. Sixty to 90 days—it sounds so simple. But then when I heard the explanations from Ms. Morgan, representing some businesses—Mr. Olson sent us some testimony representing others about the fact that this is going to be contested in court. I mean, it is likely that we are going to have protracted litigation. Professor Green mentioned that earlier.

We are going to have meso victims who are going to be told you cannot even take a deposition in your lawsuit; you can't take your own evidence deposition if you are near death for nine months while we wait and see if this is up and running. This 60 to 90 days, to me, seems like wishful thinking. I think it is going to be, unfortunately, a protracted period of litigation to determine the liability under this case.

Mr. Peterson, let me go to your point. Are you arguing that in order for this fund to pay anything, it is going to have to borrow substantial sums of money at the outset, in the beginning, and start paying interest on that as the years go on? Is that correct?

Mr. PETERSON. Well, that is not precisely true. It will have presumably some small billions of dollars to pay a few claims.

Senator DURBIN. If you assume the trust funds worth $4 billion willingly pay over their money rather than contest it in court.

Mr. PETERSON. Well, they are probably worth $7 billion. That is the current estimate of the values. But, yes, if they came in, but still the liability in the first year could be as high as $60 billion in the first year. Even using conservative estimates the CBO did, I think it is $35 to $40 billion. So there is going to be a shortfall. I did an analysis like this two years ago. If you don't have borrowing, claims will have to wait decades to get paid.

Senator DURBIN. So look at the situation here. You are telling people currently with cases pending in court, sick people with mesothelioma, suspend your court case, take no discovery, no depositions, don't schedule a trail and wait. And if they wait, under the best of circumstances the question is whether or not this fund will have enough money to ever pay them within their lifetime, or certainly within the first several years, based on whether or not the

money can be borrowed, whether there is ultimately going to be enough money in the fund.

Your estimate, Mr. Peterson, is this fund, borrowing this money as anticipated, may only have a life of eight or nine years, maybe ten.

Mr. PETERSON. I don't believe that. I think it is too optimistic. That is using the optimistic assumptions that the proponents of the legislation were using a year ago. I don't know what they are using now. They change from time to time as the law changes.

But using their best estimate, the most optimistic and rosy picture—the rosy picture is you pay less than 25 percent of the claimants. That is the rosy picture. But with that rosy picture, you could get to ten years. If you pay 50 percent of the victims, you can get to maybe 4 or 5 years.

Senator DURBIN. At which point the trust fund is exhausted.

Mr. PETERSON. Yes. That is with the borrowing.

Senator DURBIN. So four or five years from now, if this is signed into law, we may be in a position where there is no trust fund, where people have walked away from their litigation, their right to make a claim in court. And then I guess the theory is either the Federal Government steps in and bails out the fund—

Mr. PETERSON. Well, either that or these people go back in and start litigating again.

Senator DURBIN. Back into the tort system and start all over again.

Mr. PETERSON. More than half of the claimants will be in that position.

Senator DURBIN. Well, that concerns me as we get into this in terms of whether or not this is going to be able to make the payouts.

I see my time is expired.

Chairman SPECTER. Dr. Rabinovitz, would you care to comment on the last exchange?

Ms. RABINOVITZ. Just very briefly, I am not the person who estimates the borrowing and financial situation of the fund. Goldman Sachs is. With our claims projections and their estimation of the financial contributions and the flow of funds based on cash flow analysis, Goldman Sachs seems satisfied that the fund is sound.

Chairman SPECTER. Thank you very much. Well, thank you all.

Senator KENNEDY. Mr. Chairman, could I just include a statement by President Sweeney of the AFL–CIO expressing his concerns about this legislation?

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator KENNEDY. I thank the Chair.

Senator DURBIN. Mr. Chairman, I have a series of statements I would like to ask to be part of the record relative to constitutional issues and rights of victims.

Chairman SPECTER. They will, without objection, all be made a part of the record.

In conclusion, two of the comments I think might bear special scrutiny: Senator Feinstein's comment about reading the bill and finding a lot of provisions in the bill which have answered many of the objections which were raised here today, and Senator Ses-

sions' comments about who is interested in what, what are the interests behind a good bit of the testimony characterized by the Coalition for Asbestos Reform, but other testimony as well.

When we come to the medical evidence, there has been a healthy exchange here. We have had some very, very healthy exchanges with the conferences that we have had. We should be able to come to some sort of terms on what the science portends. We are asking IOM to do a study, and Senator Coburn, who has very extensive medical experience in the field, is going to be adding on some criteria there.

What we are facing essentially is whether the current system, which is racked in ruin, is preferable to go on to what we have in this legislation. And to repeat, Senator Leahy and I have crafted, after a lot of very tough work, the core principles, and we are continuing to work right along to see if we can find accommodations to many, many interests, and we have and we will continue to do that.

Senator Lindsey Graham couldn't be here today, but he just sent some good news. He wants to cosponsor the bill.

Thank you very much, Dr. Crapo, Professor Green, Mr. Gober, Dr. Landrigan, Ms. Morgan, Mr. Peterson, Dr. Rabinovitz and Mr. Reuther.

That concludes the hearing.

Senator LEAHY. Mr. Chairman, I thank it has been a good hearing. I think it has moved the legislation forward.

Chairman SPECTER. It is a good hearing, like a good bill, Senator Leahy.

[Whereupon, at 1:18 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

QUESTIONS OF SENATOR RICHARD J. DURBIN

TO JUDGE BECKER

1. The current analysis of defendant participants lists only the number of companies in each Tier (with the exception of Tier I). Where is the list of companies with potential asbestos liability exposure that was used to estimate the financial impact of the allocation formula in each of the tiers? Who developed the list? How accurate is it to being a comprehensive list of all of the companies likely to be affected by the bill?

2. What analysis have you performed about companies' ability to pay? How can you guarantee that all the companies in your analysis can afford to pay into the fund as required by the bill?

3. When determining what Tier a defendant falls into, I find it odd that some companies are allowed to not disclose their asbestos expenditures or their revenues while other companies are required to fully disclose this corporate information (see section 204(i)(7)) What is the rationale behind this? Why isn't every defendant participant treated the same and be required to disclose exactly how much they paid in asbestos expenditures and exactly how much revenue they have?

4. The way I read the bill, it does not necessarily guarantee that $140 billion will be collected, but merely that no more than $140 will be collected to fully fund the trust? Can you tell me with confidence that $140 billion is a guaranteed figure that the insurers and companies will in fact pay up? What amount can we determine is certain to be collected? How do we know that? Where are those figures from? Does anyone have any documentary evidence?

5. In the event litigation by the bankruptcy trusts is successful, wouldn't the loss of the bankruptcy trust assets create major cash flow problems for the fund because, while the trusts are required to hand over their assets to the national fund within six months, the guarantors are allowed to make their payments over five or ten years? If the trust fund is unable to return the assets taken from the bankruptcy trusts will the Treasury be required to provide the compensation? Could taxpayer dollars be at risk?

6. In an April 20, 2005, letter, Professor David Strauss of the University of Chicago law school contends that the taking of a defendant's insurance contracts, combined with a required contribution by the insurers to the fund could be unconstitutional. How many defendants could this affect? How much money would not be available if the court found this provision is unconstitutional?

7. Can non-U.S. insurers be forced to contribute? What happens if they cannot be compelled? If foreign insurers cannot be made to contribute to this fund, how much money will not be available? What is the affect on the up front funding? Long-term solvency? Will other insurers make up the difference? How will this affect the start up financing of the fund? How will this affect the long term solvency of the fund?

8. If the Administrator must act against foreign and/or offshore insurers who refuse to participate, how will this affect the U.S. insurance and reinsurance markets?

9. Section 204(i) of the bill provides that the Administrator's refusal to grant relief under the financial and inequitable hardship exceptions is subject to immediate judicial review under Section 303. This is in stark contrasts to the judicial review granted to injured claimants whose claims are rejected. Section 303 provides that "any claimant adversely affected or aggrieved by a final decision of the Administrator, awarding or denying compensation," may seek review in the U.S. Court of Appeals. However, under Section 303(c), the court can only overturn the Administrator's decision if it "is not supported by substantial evidence, is contrary to law, or is not in accordance with procedures required by law." In other words, the claimant has to satisfy the "substantial evidence tests" to have an Administrator's decision overturned. This heightened standard of proof is not applied to companies who are paying into the fund who want to seek judicial relief for how much money is assessed against them. Why does the bill impose a higher burden of proof on claimants with respect to appeals of adverse decisions to the appellate court than it does to businesses? Is this fair? What's the rationale for this disparity? Why are we asking claimants, whose legal representatives are capped at how much they can charge for legal fees, to go through heightened legal scrutiny, while we impose no caps on fees that corporate defendant attorneys can charge to litigate their objections in court? Is this fair?

May 10, 2005

Honorable Richard Durbin
United States Senate
332 Hart Senate Office Building
Washington, DC 20510

RE: S.852

Dear Senator Durbin:

I acknowledge receipt of your questions to me, to which I herewith respond seriatim. I note preliminarily that your questions, especially question 2, are premised in part on an inquiry as to whether "I have performed any independent analysis of the companies' ability to pay." I have not. However, I have reviewed the in depth analysis on the subject performed by Andrew Kaiser of Goldman Sachs and, for three days last May, as the delegate of Senators Frist and Daschle, heard extensive discussion not only of the Goldman Sachs figures but also of the other critical aspect of the question, the future claims projections. These were presented at the meetings by the experts of the stakeholders, including the expert, Dr. Fran Rabinowitz, whom I (and Judge John Fullam, Eastern District of Pennsylvania, in his recent *Owens Corning* opinion which I referenced during my testimony on April 26, 2005) found to be the most reliable. My estimates of Fund solvency are based on the Rabinowitz/Goldman Sachs estimates).

1. I was not involved in the development of any list of companies or any estimates of their potential liability. However, RAND has estimated that at least 8,400 companies have been named as defendants in asbestos lawsuits. And Early, Ludwick, Sweeney & Strauss has posted a list of companies that manufactured and distributed asbestos or asbestos-related projects on the internet.

The most important provisions in the bill are those in which the defendants guarantee the full amount of required funding in the aggregate and in each year, regardless of which specific companies end up in a particular Tier or Sub-tier. Moreover, as I stated in my testimony before the Committee on April 26, 2005, I believe that defendants have every motive to pay this money to ensure the solvency of the Fund and to avoid the onerous enforcement provisions in the bill.

Further, to address the concerns raised by several members of the Committee, the bill includes numerous, transparency provisions, which require public notice of the names of the companies and their funding obligations within months of enactment. Given the trends in the tort system and the ongoing addition of more and more companies to the asbestos litigation mill, business is reluctant to disclose this confidential business information before a bill is actually passed. I believe that the provisions in the bill reach a proper compromise to address both concerns. At all events, I understand that representatives of NAM/Asbestos Alliance and the Asbestos Study Group have furnished considerable additional information on this subject in recent days.

2. I cannot, of course, guarantee that all the companies in your analysis can afford to pay into the Fund as required by the bill. However, the ability of a single company of many companies to pay will not impact the viability of the Fund since the entire group of defendant companies jointly guaranty that $3 billion (net of the hardship and inequity adjustments) will be collected per year. (Section 204(h)(2))

3. *See* answer to Question 1. I note additionally that if a company voluntarily agrees to be placed in Tier II (the highest non-debtor Tier) and/or the highest Sub-Tier of Tier II, there is no reason to have any further information. Such a company's payment obligation could, in no case, be any higher. It would be superfluous information.

4. The defendant companies are required to pay $3 billion per year for 30 years (subject to step-downs or payment holidays). (Section 204(h)(1)) As stated above, this amount is guaranteed. Insurance companies are required to pay $46.025 billion in the aggregate. (Section 212(a)(2)(a)) The assets of the existing bankruptcy trusts currently exceed $4 billion. The defendant companies collectively guaranty, if necessary, up to $4 billion of the bankruptcy trust money. (Section 222(d)). This adds up to over $140 billion.

5. The loss of the Bankruptcy Trust payments (which are, at all events guaranteed by business, *see* § 222(d), would not create a major cash flow crisis. Rather the insurers' accelerated payments and borrowing authority will prevent a major cash flow crisis. The Treasury or taxpayers are not at risk, as reinforced by the revisions made in S.852. (Section 406(b))

6. As noted above, the defendant companies have guaranteed the $3 billion per year payment into the Fund, regardless of the reason for any shortfall. Unless American industry collapses, the money will be there.

7. If an off-shore insurer does not contribute they will lose their ability to do business in the United States market (Section 223(e), p. 214). Additionally, there are strong enforcement mechanisms against all concerned to assure the solvency of the Fund:

- If any insurers do not pay, the other insurers are responsible to make up the shares – this is the orphan share provision.

- The Administrator is subrogated to the rights of participants against non-paying insurer.

- A non-paying insurer is barred from asserting defenses to collection action if it failed to raise the defense during assessment process.

- There is no financial accounting credit available for reinsurance purchased from a defaulting reinsurer.

- Whenever an insurer participant's A.M. Best's claims payment rating or Standard and Poor's financial strength rating falls below A-, and until such time as either the insurer participant's A.M. Best's Rating or Standard and Poor's rating is equal to or greater than A-, the Administrator has the authority to require that the participating insurer either –

  (A) pay the present value of its remaining Fund payments at a discount rate determined by the Administrator; or

  (B) provide an evergreen letter of credit or financial guarantee for future payments issued by an institution with an A.M. Best's claims payment rating of Standard & Poor's financial strength rating of at least A+.

- If any participant fails to make any payment, there is a lien in favor of the United States for the amount of the delinquent payment (including interest) upon all property and rights to property, whether real of personal, belonging to such participant.

- In the case of a bankruptcy or insolvency proceeding, the lien imposed under subsection (a) is treated in the same manner as a lien for taxes due and owing to the United States for purposes of the provisions of title 11, United States Code, or section 3713(a) of title 31, United States Code.

- In any case in which there has been refusal or failure to pay any liability imposed under this Act, the Administrator may bring a civil action in the United States District Court for the District of Columbia, or any other appropriate lawsuit or proceeding outside of the United States --
  (A) to enforce the liability and any lien of the United States imposed under this section;
  (B) to subject any property of the participant, including any property in which the participant has any right, title, or interest to the payment of such liability; or
  (C) for temporary, preliminary, or permanent relief.

- In any action under paragraph (1) in which the refusal or failure to pay was willful, the Administrator may seek recovery –
  (A) of punitive damages;

(B) of the costs of any civil action under this subsection, including reasonable fees incurred for collection, expert witnesses and attorney's fees; and
(C) in addition to any other penalty, of a fine equal to the total amount of the liability that has not been collected.

- The Administrator has the authority to require insurer participants to make interim payments to the Fund to assure adequate funding by insurer participants during such period.

- A decision by the Administrator to establish an interim payment obligation is to be considered final agency action and reviewable under section 303, except that the reviewing court may not stay an interim payment during the pendency of the appeal.

8. I believe that passage of the Trust Fund would have a positive impact on the domestic and international insurance market, because it would remove the current uncertainty that is inhibiting M&A and creating a drag on earnings and a distraction for management.

9. The hardship and inequity fund is a finite annual amount and the allocation of that fund must be determined quickly so as to firm up the funding for the given period – a vital matter I am sure you will agree. That said, it is merely a shifting of relief among the companies that apply for it. Therefore, it does not have a negative impact on the viability of the Fund. This is not, however the case with claimants. The award amounts come out of the Fund (it is not merely a shifting of a finite amount). Therefore, the modest burden of proof by a claimant for collection from the Fund on appeal is appropriate. I would be surprised if worthy claimants would be turned down in the administrative process. At all events, a petition for review by a business aggrieved by a hardship or inequity determination would likely be obligated to meet the APA (arbitrary and capricious) standard of review, so that I do not think that business gets an advantage over the claimants. Perhaps this should be clarified.

Sincerely,

/s/ Edward R. Becker

Edward R. Becker

American Insurance Association

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May 11, 2005

The Honorable John Cornyn
United States Senate
Washington, DC 20510

Dear Senator Cornyn:

We are please to respond to the question you submitted following the Judiciary Committee's April 26, 2005 hearing on the "S. 852, a bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure." Your question and our response are set forth below.

Question: Can you please tell us, that of the American Insurance Association members, the percentage or number (or both) of companies / organizations / associations that are supportive of or opposed to S. 852 in its current form?

Response: I am unaware of any AIA member company that can support S. 852 in its current form.

Sincerely yours,

Craig A. Berrington
Senior Vice President
& General Counsel

JOHN J. AMORE
Chairman

MIKE MCGAVICK
Chairman Elect

GREGORY E. MURPHY
Vice Chairman

JOHN D. FINNEGAN
Vice Chairman

ROBERT E. VAGLEY
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May 25, 2005

Senator Arlen Specter
Chairman, U.S. Senate Committee on the Judiciary
Attention: Barr Huefner
Washington, DC 20610-6275

Dear Senator Specter:

I am enclosing my responses to the questions provided to me by Senator John Kyl arising from the United States Senate Judiciary Committee hearing entitled "Asbestos" on April 26, 2005.

Please let me know if I can provide further assistance.

Sincerely,

James D. Crapo, M.D.
Professor of Medicine

JDC/lcs

Room K701 Goodman Building
Tel: (303) 398-1436 Fax: (303) 270-2243 Email: crapoj@njc.org

James D. Crapo, M.D.
May 25, 2005

Response to Questions on Senate Bill S. 852

Question 1: What portion of American industries do you believe operate under conditions that create the possibility of the type of occupational exposure to asbestos that would satisfy the exposure criteria of S. 852? Can you cite examples of common, high-volume-employment industries that would satisfy the bill's exposure criteria?

The asbestos exposure criteria described in S. 852 are sufficiently liberal that they will enable workers in a substantial proportion of American industries to qualify under the bill's exposure criteria. A "substantial occupational exposure to asbestos" is defined in Section 121(a)(14)(iii) as altering, repairing or otherwise working with an asbestos-containing product that involves regular airborne emission of fibers. No minimal fiber release level is required. Thus work with almost any asbestos-containing product would qualify. If the worker directly works with the asbestos-containing product, it is defined as a heavy exposure and each year of exposure counts for two years under the weighting criteria. If the worker works in the vicinity where another worker handles an asbestos-containing product, he would be a bystander and each year of work would count as one year under the weighted criteria.

Asbestos products were used ubiquitously on pipes and in heating facilities in virtually all factories and industrial work places. Asbestos was used as insulation on electrical wire and cable, as fillers in construction materials, adhesives, roofing material and tiles. Asbestos was used for friction materials and for fabrics. All of these materials were common in most industrial work places. Examples of major industries that would satisfy the bill's exposure criteria include all construction trades, factory environments, and automotive service. In addition, sales employees who regularly enter storage or repair facilities could qualify under the criteria in this bill.

Question 2: In addition to the medical criteria required by the bill, S. 852 also requires that a claimant obtain a doctor's diagnosis that his otherwise-compensable condition is caused by exposure to asbestos. Even if the bill's medical criteria are too liberal and would compensate large numbers of people without an asbestos-related injury or illness, wouldn't the requirement of a doctor's diagnosis protect the Fund against successful claims by persons who do not suffer from a condition that is actually caused by occupational asbestos exposure? If not, why not?

The requirement for a doctor's diagnosis would not protect this fund against claims by individuals who do not suffer from an injury caused by occupational asbestos exposure. It is well known that doctors commonly function as patient advocates and often have little experience in the subtleties of legal proceedings independent from the practice of medicine. A physician's natural tendency is to support patients in making application for compensation for work-related injuries. It would be foolish to expect physicians to protect the Trust from having too liberal medical criteria. In the

current litigation setting, plaintiffs have had no difficulty finding large numbers of physicians who will support frivolous claims.

Question 3: Do any of the medical criteria in S. 852 include flaws that pose a substantial risk of bankrupting the Trust Fund?

There are a number of serious flaws in the medical criteria of S. 852 that will likely lead to bankrupting the trust fund. The major flaws I identify are:

1. Exposure criteria that allow workers working with asbestos products that have only a very low fiber release to qualify as a "heavy exposure."
2. Exposure criteria that allow a bystander to the above worker to also qualify as a "moderate exposure."
3. Exposure criteria that allow a take-home exposure to the above bystander to qualify.
4. Allowing smoking-induced airway obstruction to move a claimant from Level I to Level II.
5. Allowing DLCO of less than 40% predicted to show functional disability in Level V.
6. Providing for compensation of laryngeal, pharyngeal, esophageal and stomach cancer to be compensated in Level VI.
7. Allowing CT scans to be used for the diagnosis of asbestosis in Level VIII.

Question 4: Viewed as a whole, do you expect the S. 852 version of the Fund to go bankrupt? If yes, how many years do you estimate that it might take for the Fund to go bankrupt?

In a worst case analysis the trust fund could go bankrupt in three to five years. The greatest risks for anticipated costs against the fund are in Levels V, VI and VIII.

Under Level V compensation for disabling asbestosis ($850,000) is allowed for claimants with only pleural changes (a common finding in minimally exposed asbestos workers), a low DLCO and five years of weighted exposure. DLCO is a highly variable parameter that is decreased in many diseases – and in many smokers – and for which there is high variability between laboratories. Thus, large numbers of people would qualify as having "disabling asbestosis" with only five years weighted exposure, pleural changes and a low DLCO.

Level VI: Colorectal, laryngeal, esophageal, pharyngeal and stomach cancer have not been clearly associated with asbestos exposure. The compensation of these cancers ($200,000) when the individual has evidence of benign pleural changes and 15 years of weighted exposure will allow large numbers of individuals to qualify for compensation under the Trust. This problem is magnified by the fact that both bystander exposure and take-home exposure (which could be to a bystander) will markedly expand the number of individuals who meet the required 15-year exposure

criterion. (Note: Most Americans older than 44 years whose parent was a blue collar worker would meet the exposure criteria.)

Malignant Level VIII: The minimal criteria for compensation ($600,000, $975,000 or $1,100,000) at this level are a diagnosis of lung cancer, a finding of asbestosis by chest CT scan and ten years of weighted exposure. Since most lung cancers are in heavy smokers with substantial inflammatory changes in their lungs, one can expect their CT scans to be read as qualifying under the criteria of this Trust. There are no rigorous criteria for the diagnosis of early asbestosis by chest CT scan. One would expect the diffuse markings seen on chest CT scans of smokers to rapidly become the standard for acknowledging the possibility of early asbestosis in these subjects, qualifying virtually all of them for payment under this Trust.

There are 100,000 lung cancers in the United States today. If one-half of them were blue collar workers in industries with some type of asbestos exposure (or bystanders or families of those workers) and if only half of these lung cancers had the expected "positive" CT scan, 25,000 cases per year would qualify. This would cost the Trust $15 billion to $25 billion per year for this level alone.

Question 5: In his testimony before the Judiciary Committee, Dr. Philip Landrigan cited a Scandinavian study that he says shows that a history of asbestos exposure alone – without evidence that the patient has clinically significant asbestosis, or even physical evidence of exposure such as pleural plaques – can reliably point to asbestos exposure as the cause of a lung cancer. Are you familiar with this study? Can you describe the nature of this study? Do you believe that this study's conclusions are supported by medical literature?

I cannot identify the study cited by Dr. Landrigan. A number of studies have demonstrated that workers in industries with high levels of asbestos exposure have a higher incidence of lung cancer than do unexposed individuals. However, when a study divides the asbestos-exposed individuals into those with asbestosis and those without, the findings have consistently shown that asbestos-exposed individuals without asbestosis have no elevated risk of lung cancer. It is those asbestos-exposed individuals who develop asbestosis who have a substantially increased risk of lung cancer.

Question 6: The attorneys' fee limits in S. 852 have presented as a feature of the bill that will reduce the incentive for large numbers of claims to be filed against the Fund. In light of these fee limits, and in light of other aspects of the Fund, do you believe that a large number of claimants will learn of and choose to file claims against the Fund?

In my opinion the requirements for application for compensation under the Trust are sufficiently simple that large numbers of claimants will choose to file claims on their own. This is particularly true given the increasing access and use of the internet. I would expect simplified, how-to-do-it forms for claims applications to be available on the internet once this Trust is formed. Second, this bill provides for a possible $7 billion of attorneys' fees (5% of $140 billion). Given the simplicity of finding and filing

claims under this Trust, I would expect that a $7 billion incentive will be sufficient to drive that process.

Question 7: How many individuals on an annual basis in the United States today do you estimate contract significant or substantial cases of asbestosis? Do you believe that the annual incidence of asbestosis in the United States has been increasing or decreasing? If you believe that the annual number of cases has been increasing or decreasing, since approximately what years do you believe that increase or decline in the rate of cases has been occurring?

Very few individuals in the United States are developing new cases of asbestosis today. In the 1960s, 1970s and 1980s these cases were common. Most pulmonologists rarely or never see a case of new asbestosis today. The decrease in exposures that occurred as a result of federal regulations in the 1970s and 1980s has virtually eliminated new cases of asbestosis. I would thus state the decline in the incidence of asbestosis to have begun in the mid 1980s (i.e., a few years following the implementation of stricter guidelines for occupational asbestos exposure).

Unfortunately the medical criteria in the bill for severe asbestosis (Level IV) and disabling asbestosis (Level V) are so flawed that many claims will occur by individuals having only benign pleural plaques – a very common occurrence today.

There are a large number of fibrotic lung diseases that look similar to asbestosis. For example, lung fibrosis occurs in non-asbestos-related collagen vascular diseases, rheumatoid arthritis, and idiopathic pulmonary fibrosis. These interstitial lung diseases occur commonly. Under the criteria of the Trust, many of these individuals will qualify for payment under Levels IV and V. Such individuals would have a fibrotic lung disease not related to asbestos exposure but would qualify under the liberal exposure criteria of the Trust.

Question 8: I understand [that] Mr. Irving Selikoff, in his early study of a cohort of asbestos workers with no clinically significant asbestosis, originally did not find that those workers suffered from an elevated incidence of lung cancer. Later, however, reviewing the same dat[a], Selikoff found that those same workers did in fact suffer from an elevated incidence of lung cancer. Do you have a view as to why Selikoff was able to later reach a new conclusion from the same data?

I have not been able to explain why Dr. Selikoff modified his opinions on this subject in his later publications. Numerous subsequent studies that have looked at the incidence of lung cancer in asbestos-exposed workers with and without asbestosis have found that workers without asbestosis do not have an increased incidence of lung cancer.

Question 9: The latest version of S. 852 allows the use of CT scans to identify signs of asbestosis in claimants seeking compensation from the Fund for lung cancer. Do you believe

that this is a reliable technique for identifying asbestos exposure as a cause of lung cancer? What do you believe will be the effect of allowing the use of CT scans to prove that asbestos exposure played a role in a lung cancer?

The addition of the use of CT scans to identify asbestosis in Level VIII is the largest flaw in the medical criteria of S. 852 that makes this Trust vulnerable to rapid bankruptcy. Chest CT scans are far more sensitive than chest x-rays in detecting small changes in the lung. Unfortunately, these small changes are also less specific and the etiology of such small changes is generally not discernible by chest CT scan. Findings on chest CT scan have not been correlated with a risk of developing lung cancer in asbestos-exposed workers. There are no established criteria for using chest CT scans to define early asbestosis in individuals with lung cancer. I believe the effect of allowing a chest CT scan diagnosis of early asbestosis to qualify a lung cancer case to be compensated under this Trust will bankrupt the trust rapidly.

Question 10: S. 852 allows compensation from the Fund to be based on "take home" exposure to asbestos. By how much do you believe that the "take home" exposure provision expands the number of potential claimants who can meet the bill's criteria for "heavy exposure" to asbestos?

The take-home exposure criteria in S. 852 dramatically expand the number of potential claimants who will meet the criteria for both heavy and standard exposure to asbestos. Any individual born prior to 1971 and whose mother or father was a worker or a bystander in a factory or workplace that used virtually any type of asbestos-containing product would have met most of the exposure criteria in this Trust by the time they were five years old.

This criterion is not included in the Manville Trust, whose demographics are used to estimate the financial liabilities under the Trust. It will open up the Trust to large numbers of claims by individuals who do not have an asbestos-related disease. The cohort of individuals who were born in the three decades between 1941 and 1971 are now the primary group developing lung cancer. The majority of these people will have been raised in families where one or more parents worked in an environment that would qualify as either standard or heavy exposure under this Trust. These individuals will require only the diagnosis of lung cancer, and the finding of small changes in the lung parenchyma on a chest CT scan to qualify for payment under the Trust.

To: The Honorable Arlen Specter
Chairman, Committee on the Judiciary

From: Prof. Eric D. Green

Re: The Fairness in Asbestos Injury Resolution Act of 2005 (S. 852) — Responses to Question Posed by Senator Cornyn

Date: May 11, 2005

You have requested that I respond to two questions relating to my prior testimony before the Committee regarding Senate Bill 852 (the "Bill"). I appreciate the opportunity to provide additional information to you and the Committee. Your questions and my responses are outlined below:

QUESTION ONE

> You referenced the problem of interest expense with regard to the fund and your belief that the current analyses we are using may not be adequately accounting for possible debt and interest expense. Could you please explain that?

Any borrowing by the Fund will ultimately reduce the amounts available for compensation to asbestos victims, since borrowed money will not increase the Fund's total resources, while the act of borrowing will increase the Fund's expenses. Additional administrative costs, advisers' fees, lenders' fees, lending covenants, default penalties, and — most importantly — interest will all have to be borne by the Fund according to the Bill. Moreover, the less confidence the market has in the Fund, the heavier those burdens will be. The price of borrowing for the Fund's earlier needs could be so high that the interest payments alone would eat away a substantial portion of the contributions that later victims will depend upon.

Significantly, the April 27, 2005, letter from Banc of America Securities LLC to John Engler does not factor in the costs of borrowing. The bank's letter opines that the national Fund will be able to borrow up to $20 billion in the capital markets to meet its liquidity needs. In making this projection, however, the bank expressly assumes away "the estimated borrowing costs to the Fund[.]" In other words, the bank opines on the Fund's borrowing capacity but does not the question, "At what price?" The bank admits that this vital question cannot be answered unless the identities of the participants and their contribution amounts are known: "[W]ithout specific information regarding the actual named contributing participants and the amounts of their payments, it is not possible to perform [a] credit analysis on the Fund's likely ability to collect its funding commitments." It is simply impossible to say what the market would charge for the projected $20 billion. The usefulness of the bank's $20-billion projection, therefore, is limited. Without knowing the borrowing costs, it is not possible to determine whether those costs will actually hamstring the Fund.

The bank's letter makes numerous other assumptions and qualifications that demonstrate the limited usefulness of the letter as an indication of any willingness in the private markets to buy the Fund's debt. For example:

- "We point out that . . . any views on the ability of the Fund to borrow involve numerous assumptions and uncertainties, many of which cannot be verified or ascertained and are therefore not discussed herein" (emphasis added).

- "Note that the ability of the Fund to borrow will be based on the financial condition of the Fund at the time of borrowing and an impending sunset scenario could adversely impact the Fund's ability to access the markets" (emphasis added). Since the likelihood of a sunset will increase whenever the Fund's resources become low relative to the number of resolved claims, the Fund's ability to borrow will be at its weakest precisely when additional funding will be most needed.
- "The actual borrowing capacity can be affected by many factors that are currently unknown such as prevailing market conditions at the time of borrowing, the ultimate financing structure utilized, average life of the debt issued, the point in time during the life of the Fund in which debt is issued, changes in expected Fund cash flows, ratings levels, etc." (emphasis added).
- "This letter does not constitute a commitment or any other obligation by us to provide or arrange financing or any other financial services or accommodations, with respect to the Fund and any related transaction" (emphasis added).
- "We have assumed that the Fund will be able to collect its full aggregate scheduled payments in a timely manner" (emphasis added).

The many key questions that the letter avoids as unanswerable, including most notably the cost of borrowing, highlight how tough a sell the Fund's debt would be in the markets. It is all the more likely that the Fund's needs will have to be met not by

the private markets, but by the Federal Financing Bank, as the Bill envisions for the first five years that the Fund is in operation.

As the Bill is currently drafted, the Fund's need for cash is likely to be heaviest in its early years, and that need will outstrip the pace of contributions, even assuming that all contributions can be collected on schedule. Borrowing by the Fund will therefore be inevitable under the current Bill. The cost of that borrowing must be reliably estimated before any determination can be made on the feasibility of the Bill. According to the CBO, the cost of the Bill, including interest, will be $200 billion. This far exceeds the amount of contributions under the Bill that are capped at $140 billion.

QUESTION TWO

> You each referenced the possible constitutional infirmities. Could you please explain the net cash flow impact per year if existing trust money is unable to be moved to the Federal Trust?

The existing asbestos settlement trusts currently hold assets worth approximately $7 billion. Under section 203 of the Bill, the assets of existing trusts are to be transferred to the national Fund within six months after the Bill is enacted. Thus, these assets, if transferred in accordance with the Bill, would be among the earliest monies received by the Fund and would exceed the contributions scheduled to be made by industrial entities ($3 billion) and by insurers ($2.7 billion) in the Fund's first year.

If the trust assets are unavailable, then the Fund's operations will be hampered in its earliest years, when its need for cash is expected to be greatest. Under section

222 of the Bill, the Fund is to make up for any shortfall in trust contributions first by borrowing and then, if the necessary amounts cannot be borrowed, by imposing a surcharge on all Fund participants. As noted above in the discussion of question one, borrowing will impose costs on the Fund that cannot be determined without knowing the Fund participants and the likelihood that their contributions will be forthcoming.

If borrowing is not a viable option, the Fund is expected to look to the participants. This option has drawbacks as well, because the Fund's receipt of any surcharges will at best be delayed until well into the life of the Fund. Surcharges cannot even be initiated until after a final judgment barring transfer of trust assets to the Fund is no longer subject to appeal. Since representatives of several trusts have already indicated that they will oppose transfers to the Fund, it is almost certain that protracted litigation and appeals will ensue before any surcharges can be considered. Once the unavailability of trust assets has been finally determined, the Administrator of the Fund must subject any planned surcharges to a notice-and-comment process that may not be completed in fewer than 90 days, and this schedule does not take into account the further delays that will likely be caused by legal challenges to the Administrator's surcharge determinations. Finally, the surcharge payments, which may not exceed an aggregate total of $4 billion, must be spread over five years. The surcharge option thus would replace the early, lump-sum payment of trust assets with a long-delayed series of payments that may never be collected.

The net impact of the unavailability of trust assets cannot ultimately be determined because the cost of borrowing replacement funds cannot be determined, and also because the length of delays until surcharges may be obtained cannot be

determined. At a minimum, any replacement funds will be worth far less than the trust assets, once borrowing costs, litigation costs, and the lost time value of the missing assets are taken into account. For these reasons, and the others expressed in my testimony, it is critical that the real funding needs of the trust be directly and honestly addressed. Either the specific contributions from the individual companies and insurers must be identified and guaranteed, or there must be iron clad assurances of immediate replacement funding from the government or from the private capital market with government guarantees. Otherwise, the funding, and hence the very purpose of the legislation is illusory. If a failure of the fund occurs because of this illusory funding foundation, all involved will be severely disappointed and subject to widespread criticism. But these flaws can be fixed if there is a true commitment to the high purposes and objectives of the sponsors.

Thank you for giving me the opportunity to provide you with additional information concerning the FAIR Act. I am more than happy to respond to any further questions you or the other members of the Committee may have.

National Service Industries, Inc.

4111 Pleasantdale Road
Doraville, GA 30340-3520

Carol Ellis Morgan
President and General Counsel

(770) 510-5716
(770) 510-5971 FAX
carol.morgan@nationalservice.com

May 11, 2005

The Honorable Arlen Specter
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275
Attn: Barr Huefner

Re: Responses to Questions

Dear Chairman:

In response to your letter of May 4, 2005, I enclose my responses to the questions from Committee members in follow-up to my testimony at the hearing on the FAIR Act on April 26, 2005.

If you have further questions or would like to arrange a meeting, please contact either Tom O'Brien, chair of the Coalition for Asbestos Reform, at tobrien@wolffsamson.com, or me.

We look forward to continuing to work with you to find a fair and equitable solution to the asbestos litigation crisis.

Very truly yours,

Carol Morgan

Carol Ellis Morgan
President and General Counsel

CEM:cs
Enclosure
cc: Senator Orrin G. Hatch
Senator Charles E. Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
Senator Patrick J. Leahy
Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin

Senator Specter
Responses to Questions for Carol Morgan, President and General Counsel, National Service Industries, Inc., Doraville, Georgia

1. **Please identify all members of the Coalition for Asbestos Reform who have not specifically asked that their status as members remain confidential.**

See attached list, which consists of those companies/associations which have signed letters to Chairman Specter or otherwise made their concerns known regarding the trust fund legislation. Since at least 2003, individual companies, who now participate in the Coalition for Asbestos Reform, have actively raised issues of concern about the trust fund concept with members of the Judiciary Committee, other Senators, and business organizations such as the National Association of Manufacturers. Such companies wanted to make it clear early in the process that the business community was not united on this issue despite the claims of some other companies. In late 2004, when the current discussions about the Fair Act commenced, a diverse group of manufacturing, construction, energy, and insurance companies with common concerns decided to join together in an effort to be more effective as a group rather than as individual companies. This group has become the Coalition for Asbestos Reform. In January 2005, individual participants in this group signed letters to Chairman Specter dated January 3, 2005 and January 28, 2005 expressing concerns about the trust fund, which the participants on the attached list share.

If the Judiciary Committee has requested other groups representing business interests, such as the Asbestos Study Group, to disclose a list of their membership, how can we obtain a copy?

2. **Please identify the total number of member companies in the Coalition for Asbestos Reform.**

As of this date, the number of confirmed participants is 41. The number of trade associations is 5.

3. **Of all the member companies of the Coalition for Asbestos Reform (including confidential and non-confidential members), please identify the percentage of members likely to be insurer participants in the proposed Fund and the percentage of members likely to be defendant participants in the proposed Fund.**

Number of insurer participants:	18	44%
Number of defendant participants:	23	56%

4. **In the course of your testimony, you allege that "many smaller companies are going to find themselves in Tier II" and that, as a consequence, "their payment will be $16.5 million a year for 30 years." Please explain how such smaller companies will find their way into Tier II.**

Tier II includes all companies which have incurred Prior Asbestos Expenditures in

excess of $75 million per Section 202 of the FAIR Act. "Prior Asbestos Expenditures" is defined to include all payments related to asbestos claims made by a company, whether made directly by a company or by insurance carriers to or on behalf of the company. Sec. 201(7) {page 109]. Contrary to some misconceptions, there is no necessary correlation between Prior Asbestos Expenditures and the size of a company. Smaller companies, including National Service Industries, Oglebay Norton Company, Hopeman Bros., A.W. Chesterton, Kelly-Moore Paint Company, Inc., Foster Wheeler, IU North America Inc., and NOSROC Corporation, find themselves in Tier II because they have Prior Asbestos Expenditures in excess of $75 million. The Okonite Company will be in either Tier II or Tier III (in either case, the required annual payment under the legislation would cause the company severe financial distress to the point where bankruptcy would be probable.) These companies have been involved in asbestos litigation for over two decades and have primarily relied on their insurance assets to pay their claims and expenses.

Even at the lowest subtier in Tier II, a company will be required to pay $16.5 million per year for 30 years, or an aggregate of $495.0 million. The amount of this obligation and the extraordinary rights given the administrator in the event of a default in payment will adversely affect the financial condition of many of such companies, make the obtaining of financing extremely difficult, if not impossible, preclude an acquisition of the company, and, in many cases, result in failure of the business. Because the FAIR Act strips companies of their insurance assets (which we believe is an unconstitutional taking of property), a company must make these payments out of its own funds. Given the limited financial resources in many smaller companies, some companies will simply not be able to make their payments without their insurance assets. In one year under the FAIR Act, some companies are being asked to pay far more than what they have paid out of pocket (net of insurance) during the entire course of asbestos litigation.

As a further inequity, once in Tier II, the amount of the payment obligation for the subtiers is highly compressed. The "spread" between the highest and lowest subtiers in Tier II is only $11 million dollars, even though the highest subtier will include some of the largest companies in the world, while the lowest subtier will include relatively small companies. There is no justification for this highly compressed spread.

The A.W. Chesterton case is a good example of this inequitable result:

> The A.W. Chesterton Company, founded in 1884, is based in Stoneham, Massachusetts and is still privately held by the Chesterton family. The company employs over 1100 workers and supports over 2000 employees of distributorships that rely on Chesterton for the vast majority of their sales. Chesterton's annual revenue is approximately $150 million with annual profits, due to extremely tight margins in the fluid sealing industry, of approximately $5 to $10 million. Since 1980, Chesterton has been sued in over 439,000 asbestos cases and expended, through reliance on its insurance coverage, in excess of $180 million to address its asbestos liabilities. Chesterton's annual indemnity payments are currently

> approximately $12-$15 million, and it has substantial insurance coverage limits remaining. Defense costs are covered in addition to coverage limits. As a Tier II company, Chesterton would be stripped of its coverage and assessed far in excess of its annual profits.

In its current form, the FAIR Act results in an unconstitutional taking of property (insurance assets) and imposes a disproportionate and burdensome payment obligation on smaller companies which is unjustifiable. In addition, companies whose insurance assets are being taken from them are being treated the same as companies who do not have insurance assets which is fundamentally unfair.

If the Judiciary Committee was not already aware that smaller companies are in Tier II, a question arises as to the quality and validity of the information upon which it is relying. Does a comprehensive list exist which identifies the companies which will be asked to contribute to the trust fund, with information as to their tier based on prior asbestos expenditures, subtier based on revenue, and ability to pay? If so, how can we obtain a copy of this list? If not, what is the source of information which currently supports the trust fund allocation?

5. **Please identify the percentage of Coalition for Asbestos Reform members who are likely to be placed in Tier II based upon their past asbestos expenditures.**

More than 75% of Coalition defendant participants will likely be placed in Tier II. One company is a Tier I defendant participant.

6. **Is National Service Industries, Inc. a member of the Coalition for Asbestos Reform?**

Yes

7. **Please identify all non-confidential members of the Coalition for Asbestos Reform "who do have adequate insurance today in the tort system and would not be able to make payments going forward without their insurance assets."**

A.W. Chesterton
Hopeman Bros.
IU North America Inc.
NOSROC Corporation
National Service Industries, Inc.
Oglebay Norton Company

Foster Wheeler, which will also be a Tier II defendant participant, has adequate insurance and expects that its expenditures for defense and indemnity claims will be fully paid by insurance assets at least through 2009. A mandatory contribution of $19,250,000 or more depending upon its sub-tier placement will severely negatively impact its liquidity and profitability.

8. **Is the Coalition for Asbestos Reform in any way connected to, related, or affiliated with the Association of Trial Lawyers of America?**

No

Coalition for Asbestos Reform*

Acuity, A Mutual Insurance Company
AIG
Allstate Insurance Company
A.W. Chesterton
American Re-Insurance
Associated General Contractors of America
BorgWarner, Inc.
Chubb Corp.
DuPont
Erie Insurance
EMC Insurance
Exxon Mobil
Federal-Mogul Corporation
Foster Wheeler, Inc
General Reinsurance
The Hartford
Hopeman Bros.
IU North America Inc.
Joy Mining Machinery
Kelly-Moore Paint Company, Inc.
Liberty Mutual
National Service Industries
Nationwide
NOSROC Corporation
Official Committee of Unsecured Creditors of Federal-Mogul Corporation
Oglebay Norton
The Okonite Company, Inc.
OneBeacon
Royal & SunAlliance
Safeco
Swiss Re
Winterthur North America
Zurich Financial Services

* These companies/associations have signed letters or otherwise made their concerns known regarding the asbestos trust fund legislation, S. 852.

May 11, 2005

Legal Analysis Systems
970 Calle Arroyo
Thousand Oaks, CA 91360

805-499-3572 Direct

Mark A. Peterson

April 27, 2005

The Honorable Arlen Specter,
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy,
Ranking Democratic Member, Vermont
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

I am writing to respond to issues raised by Senators Coburn and Cornyn at yesterday's hearing on Senate Bill 852.

Senator Coburn stated that I forecast 300,000 more asbestos claims than the number used in the CBO forecast. The forecasts actually differ by 210,000 claims, mostly because CBO included no filings in 2003 and 2004, as I discussed in my written testimony. My testimony to the Committee, both written and oral, was based on analysis of five different forecasts of asbestos liability: C.B.O.'s 2004 forecast (adjusted for the new values in eligibility for the 2005 Act), my forecasts (L.A.S.) and three adjustments to the CBO forecasts discussed in my written testimony. I based my testimony on cash-flow analyses and results for all five forecast models. The table on the next page shows the number of asbestos claims forecast for each model and results examining how the Asbestos National Fund would perform under each assumed forecast. As the table shows, and as I testified, the Fund quickly reaches insolvency and sunsets quickly under each forecast model.

S.852 Sunsets Quickly And With Large Debt Under All Five Forecast Models ($ in Billions)

Forecast / Modification	Claims Forecast	Sunset Year	Debt at Sunset	$ Paid as Interest	$ Paid to Claimants
1. CBO	1,659,127	2016	$44	$49	$85
2. CBO / Increase % Qualifying	1,659,127	2010	50	60	74
3. CBO / Increase 2003-04 Claims	1,805,338	2012	49	57	77
4. CBO / Both	1,805,338	2008	59	64	70
5. LAS	1,869,562	2006	67	69	65

Note: Assumes revenues as scheduled in S.852.

Forecast / Modification	Claims Forecast	Sunset Year	Debt at Sunset	$ Paid as Interest	$ Paid to Claimants
1. CBO	1,659,127	2014	$48	$60	$74
2. CBO / Increase % Qualifying	1,659,127	2009	63	69	65
3. CBO / Increase 2003-04 Claims	1,805,338	2011	54	66	68
4. CBO / Both	1,805,338	2006	65	75	59
5. LAS	1,869,562	2006	65	75	54

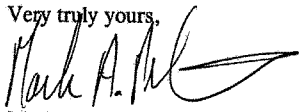
Note: Assumes two year delay in initial funding due to legal challenges and the time schedules for implementing contribution amounts in S.852.

Legal Analysis Systems
970 Calle Arroyo
Thousand Oaks, CA 91360

I have also attached a table prepared and provided by the Manville Trust of its annual claims (summarized at the bottom of that page). Contrary to Dr. Rabinovitz's statement, mesothelioma filings against Manville have increased in number. The 723 claims in 2005 are only for the first quarter and represent 2,892 annual claim rates. The large numbers of 2003 filings (4,222) reflect claimants filing ahead of the deadline when Manville's new Trust Distribution Procedures were implemented. Manville's mesothelioma filings increased by 59 percent after 2002, dividing the 3,203 average for 2003-05 by the 2,013 average for 2000-02. The increase is 34 percent when the 2004-05 average of 2,694 filings is compared to 2000-2002 filings. The actual number of recent filings for mesothelioma is greater than any prior time and greater than levels in forecasts that have been used to estimate costs for S.852. Compensation for mesothelioma, which already accounts for 40 percent of S.852's total, could increase by 34 to 59 percent.

I have also attached a letter by Dr. Laura S. Welch, author of the sheet metal workers study cited by Dr. Rabinovitz as support for her assumption that few asbestosis or pleural claimants would qualify for payment under the criteria of S.852. Dr. Welch states that Dr. Rabinovitz's use of the sheet metal workers "is not a correct inference to draw from this study." Dr. Rabinovitz asserted no other support for her assumption that fewer than 20 percent of nonmalignant claimants would qualify for payment. In fact, there is no such support. Dr. Rabinovitz's conclusions are contrary to the experience of the Manville Trust, as explained in the attached letter from General Counsel David Austern, and to all other evidence.

Very truly yours,



Mark A. Peterson

MAP:ih

cc: United States Senate Judiciary Committee Members

Number of Manville Trust Claims Received by Injury as of March 31, 2005

	Year Received						
Injury	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**Injury Totals**
0	705	3,079	1,597	7,742	-	-	13,123
1	8,056	11,271	5,063	13,051	-	-	37,441
2	18,445	30,144	18,803	31,753	1	-	99,146
3	23,715	35,499	24,330	30,169	-	-	113,713
4	557	663	748	1,091	-	-	3,059
5	271	248	180	628	-	-	1,327
6	2,361	2,396	2,360	4,392	-	-	11,509
7	1,687	1,676	1,983	2,386	-	-	7,732
Asbestosis	20	14	22	39	-	-	95
Colorectal Cancer	1	12	1	-	-	-	14
Disputed Asbestosis	3	-	-	-	-	-	3
L0	6	15	16	753	811	510	2,111
L1	1	10	20	377	559	240	1,207
L2	12	38	43	5,036	7,966	2,785	15,880
L3	2	7	17	698	1,444	463	2,631
L4	-	4	11	102	84	30	231
L5	1	9	2	111	228	91	442
L6	6	27	7	180	372	145	737
L7	3	16	32	361	586	208	1,206
L8	6	20	104	1,570	2,415	709	4,824
Indeterminate LC	-	1	-	-	-	-	1
Non-Smokin LC	8	9	6	33	1	-	57
Smoking LC	117	296	48	121	-	-	582
Mesothelioma	168	305	90	266	81	14	924
No Asb. Related Disease	2	1	-	-	-	-	3
Other Cancer	32	37	2	9	-	-	80
Pleural	6	3	1	1	1	-	12
Special Pleural	-	-	-	-	-	-	-
Year Totals	56,191	85,800	55,486	100,869	14,549	5,195	318,090

Number of Manville Trust Claims Received by Grouped Injury as of March 31, 2005

	Year Received						
Group	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**Group Totals**
Lung Cancer	2,766	2,996	2,635	5,819	1,113	456	15,785
Mesothelioma	1,861	2,001	2,177	4,222	2,496	723	13,480
Non-Malignant	50,259	76,981	48,293	81,056	9,796	3,387	269,772
Other Cancer	592	727	768	1,277	333	119	3,816
Other	713	3,095	1,613	8,495	811	510	15,237
Year Totals	56,191	85,800	55,486	100,869	14,549	5,195	318,090

04-23-2004 02:16pm From- T-215 P 002/003 F-485

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The Center to Protect Workers' Rights

April 23, 2004

To Whom it May Concern;

I understand that some persons assert that my 1994 research study of asbestos disease in sheet metal workers [1] supports the proposition that less than 30 percent of persons who file claims for non-malignant asbestos related disease actually have a disease or, in other words, that over 70 percent of persons who file claims for asbestosis do not have the disease. That is not a correct inference to draw from this study. The study was a research study of a population of workers exposed to asbestos. As of the time the study was conducted, 12.3% had x-ray findings consistent with asbestosis (1/0 ILO), an additional 18.8% had pleural abnormalities alone, and the rest were normal. These rates of disease represent the prevalence of non-malignant asbestos related disease in this specific population. They have no relationship to the prevalence of plaque and asbestosis among individuals *filing claims*.

When one projects the number of potential claimants to an asbestos injury compensation fund, it is useful to remember that not all asbestos-exposed individuals have disease, and not all individuals with disease will file a claim. In essence, there are three different groups. The largest group is that of all persons exposed to asbestos. A subset of the group with exposure is the smaller number who develops an asbestos-related disease. The group that files claims for asbestos-related disease is a still smaller subset of the individuals exposed to asbestos.

Over the course of my career, I have examined hundreds of individuals, and medical records of individuals, who had previously filed a claim for a non-malignant asbestos disease such as asbestosis. On my examination I found that the vast majority of these individuals did in fact have asbestosis.

Scientific study has characterized many of the variables that determine which exposed individuals develop an asbestos-related disease. Exposure intensity and frequency, plus latency, apply to all asbestos-related diseases. Other factors, such as smoking, apply to some and not others. One can predict with a reasonable degree of accuracy how many

[1] Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers. American Journal of Industrial Medicine 25:635-48, 1994

Suite 1000 • 8484 Georgia Avenue • Silver Spring • MD • 20910 • 301-578-8500 • Fax: 301-578-8572 • www.cpwr.com

individuals will get which asbestos-related diseases if the factors of dose and latency are known.

Whether an individual with an asbestos-related disease files a claim depends on a different set of factors. In one example, Biddle at al studied claims filing behavior for occupational illnesses in the state of Michigan [2]. The study estimated the rate at which workers suffering from occupational illnesses file for workers' compensation lost wage benefits and identified some of the factors that affect the probability that a worker with an occupational illness will file. Overall, between 9% and 45% of workers with known occupational illness file for benefits, and workers with asbestosis were not significantly different from than the average. Workers over the age of 46 were less likely to file than younger ones, and workers with some specific diseases filed more frequently. Cases of asbestosis did not differ significantly from the overall study group, and in general the study could not explain the low proportion who filed a claim. Another study looked at claims filing among workers with confirmed silicosis and found a similar result; only 31% of 329 patients filed a workers compensation claim [3]. Dr. Selikoff had described a similar low rate of claims filing among insulators in 1982.

In summary, it is hard to predict which individuals with asbestos-related disease will file claims. Yet we do know that this group is a subset of the larger group of individuals with asbestos-related diseases, even when the person has a known diagnosis of an asbestos-related disease. The vastly higher prevalence of asbestos-related disease in the population filing claims as compared to the sheet metal workers examined in the research study cited above is explained by the factors relating to disease prevalence and claiming behavior: namely, the population of persons who file claims for disease is a subset of the larger population of persons who have a disease which is in turn a subset of the much larger population of persons who were exposed to asbestos.

Sincerely,

Laura S. Welch, MD, FACP, FACOEM

[2] Biddle J, Roberts K, Rosenman KD, Welch EM What percentage of workers with work-related illnesses receives workers' compensation benefits? J Occup Environ Med. 1998 Apr;40(4):325-31.
[3] Stanbury M, Joyce P, Kipen H. Silicosis and workers compensation in New Jersey. J Occup Environ Med 37(12) 1342-7.

David T. Austern
General Counsel

October 9, 2003

BY MESSENGER

Rebecca Seidel, Esq.
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

J. Edward Pagano, Esq.
United States Senate
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Congressional Budget Office Cost Estimate of S. 1125

Dear Rebecca and Ed:

Please forgive the joint letter, but I am almost as busy as I am sure both of you are in the waning days of this year's legislative process, albeit for different reasons.

I have received a copy of the Congressional Budget Office Cost Estimate for S. 1125 dated October 2, 2003 (the "Report"). Because some of the Report's conclusions are based, in part, on Manville Trust data, and for other reasons, I wish to submit for your consideration the following comments.

1. Nonmalignant Claims.

The Report estimates that 85% of claims for nonmalignant conditions filed with the Asbestos Fund described in S. 1125 will be eligible only for medical monitoring (Level I). This estimate is based on "available research" involving a sample of the exposed population with malignant history and the history of claims filed with the Manville Trust. (Report at page 12.)

3110 Fairview Park Drive
Suite 200
P.O. Box 12003
Falls Church, Virginia 22042-0683
Phone: 703-204-9300
Fax: 703-205-6249

I disagree. As you will recall, on the two occasions I appeared before the Committee on the Judiciary with respect to asbestos legislation (the first of which did not specifically concern S. 1125), and in my conversations with you and others, my comments have been restricted to issues concerning the Manville history, predicting future claims, and claims processing issues (addressed below). As I have testified, predicting future asbestos claims, even when relying on Manville Trust filing data, is an extremely difficult task and is arguably as much art form as science.

That said, there are data sources that can be relied upon to assist in the claims forecast process even where exposure and medical criteria are new, as in the case of S. 1125. Among these data sources are Manville Trust ("Trust") estimates of claim filing trends based on recent (2000-2003) Trust claim filings. The Trust is, of course, aware of the exposure and medical criteria of these recently filed nonmalignant claims, which number over 200,000. Based on the exposure and the medical criteria of these nonmalignant claims, we believe there is almost no likelihood that as many as 85% of the nonmalignant claims filed pursuant to S. 1125 will qualify only for Level I.

Our best estimate – subject to the vicissitudes of future claims forecasting about which I have previously testified and which I have discussed with you – is that over two-thirds and as many as three-quarters of the nonmalignant claims filed pursuant to S. 1125 will qualify for compensation at Level II or higher.

Obviously, the very large number of nonmalignant claims that I believe will qualify for Level II or higher compensation inexorably leads me to conclude that substantially greater funds will be needed to compensate eligible claimants than the amounts noted in the Report.

2. Malignant Claims.

The Trust – and virtually everyone else – has experienced substantially greater success in predicting future malignant claim filings. In that regard, I agree generally with the total number of malignant claims described on page 7 of the Report. However, at the risk of seeming to quibble, I believe the Report inaccurately allocates claims among the three lung cancer Levels (Level VII, Level VIII, and Level IX) and also inaccurately allocates claims among the payment categories (nonsmokers, ex-smokers, and smokers) for each lung cancer Level.

In summary, I disagree that "a large majority of claimants compensated for lung cancer" will be compensated "near the low end of the range of lung cancer award values." (Report at page 7.)

3. Claims Processing Costs.

Under most circumstances, I believe it is useful for me to remain as neutral as possible when providing technical suggestions as to the operation of a one payor asbestos compensation

system. However, my neutrality utterly fails when assessing the unnecessarily complex and excessively repetitive claims processing procedures mandated by S. 1125.

To be sure, the $700 million estimated in the Report for claims administration costs, based on 100 claims processing employees, is a small portion of the total funds that must be made available to provide compensation to asbestos victims. However, I believe, based on an examination of the claims processing requirements of S. 1125 and my sixteen years of asbestos claims processing experience, that at least 200 and possible 250 people will be required to follow the cumbersome processing procedures mandated by the legislation.

Whether this doubles the funds needed for administrative costs from $700 million to over $1.5 billion is not something I can determine, but in any event, I encourage that consideration be given to simplifying and truncating the S. 1125 claims processing procedures.

If you have any questions concerning this letter, please call me.

Yours very truly,

David T. Austern

David T. Austern

1. Responses to Senator Specter's questions about ATLA

Answer:

My testimony described analyses of the costs and feasibility of S.852 that grew out of my discussion with CBO researchers and staff members for Senator Cornyn and other Republican members of the Judiciary Committee. Both had asked if I had made analyses of the proposed asbestos legislation similar to earlier analyses that I had made and presented in 2004 to a joint meeting of CBO researchers and staff members for Senator Nichols and other Republican members of the Judiciary Committee. In response to the new inquires inquiries I made new analyses of S.852 which I sent to Mr. Chip Roy, counsel on the staff of Senator Cornyn, and also to asbestos trusts and counsel for asbestos claimants' committees in pending bankruptcies of asbestos defendants. The trusts and claimants' committees are my clients for whom I did this work. I summarized and presented the results of this work during a two hour telephone conference with Senator Cornyn, Mr. Roy and staff members for several other Republican Senators on the Judiciary Committee.

During the seven days preceding my April 26 testimony I can recall communications about the testimony with the following persons:

Mr. Nathan Finch Mr. Michael Forscey Mr. Chip Roy Mr. W. D. Hilton Mr. Richard Zimmer Mr. David Austern

I do not believe that Mr. Hilton has any association with the ATLA. I do not know about the others.

I sent copies of the analyses used in my testimony and/or copies of my written testimony to the first four listed gentlemen. I did not receive comments or suggestions from any. I had email correspondence with Mr. Roy about my invitation to testify; he asked if I had yet received a formal invitation. Mr. Zimmer's email informed me that the start for the hearing had been advanced. Mr. Austern participated in the earlier conference with Senator Cornyn and senate staff members. He also faxed and called me about the Manville Trust's recent claims experience, current claims forecasts and said that they materials were prepared at the request of Dr. Francine Rabinovitz. I had brief separate telephone conversations with Mr. Finch and Mr. Forscey about logistics for the hearing. I believe that Mr. Forscey told me that Senator Durbin was requesting my testimony. None of these conversations involved the substance of my written or oral testimony. I had a dinner meeting with Mr. Finch and Mr. Forscey on April 25. Most conversation was social. We did not discuss my testimony, but did discuss the prospects of passage of S.852. At the hearing Mr. Forscey suggested that I respond to Judge Becker's inaccurate testimony about the recent claims experience of the Manville Trust.

Dr. Daniel Relles, my business partner and statistician helped me prepare my written testimony and the analysis discussed in the testimony. Dr. Relles has no association with ATLA.

I received no compensation or reimbursement from ATLA, its affiliates or members related to my testimony and appearance on April 26, 2005.

2. Responses to Senator Cornyn's questions

Question 1: regarding the failure of current analyses to account for possible debt and interest expense.

Answer:

All previous analyses of the costs of S.852 are incomplete because all ignore the Fund's interest costs, which will be tens of billions of dollars. Analyses that exclude interest are incomplete and unreliable.

Dr. Francine Rabinovitz, consultant to ASG and other proponents of S.852, testified that total costs of indemnifying asbestos claimants under the bill would be about $120 billion. Dr. Rabinovitz's testified that this estimate did not consider the S.852 National Fund's costs of borrowing. No publicly available analysis by the bill's proponent or their consultants that I have seen has ever addressed the issue of the Fund's interest costs.

The 2004 CBO forecast of $140 billion for S.1125 did not include interest costs. With the higher values and exclusion of Level VII lung cancer claims, CBO's estimates now reach $147 billion, without interest. With interest CBO's forecast cost for S.852 is about $200 billion.

The omission of interest is critical. The National Fund's borrowing costs will be significant and will cause S.852's funding to be inadequate using even the proponents' $120 billion estimate for costs (that excludes interest).

Under every forecast, including those put forward by ASG, the S.852 National Fund will need to borrow immediately and in substantial amounts to make both the required immediate payments to exigent claimants and payments to the hundreds of thousands of claimants whose claims will arise in the first year or two of the Fund.

All analysts, including CBO and ASG's consultants, agree that the Fund will receive hundreds of thousands of claims in its first year or two. Even assuming that revenues come in as promised by S.852, the Fund will not have enough money for these initial claims. It will need to borrow at least $20 billion in the first year or two. This borrowing will increase quickly even under the optimistic claims forecasts by ASG that were used by CBO.

Borrowing and interest costs will be greater (1) if revenues do not come in as quickly as S.852 suggests or (2) if liabilities are greater than what ASG and CBO have assumed, both of which are likely.

The S.852 Fund's interest costs will be at least $50 billion and could reach $75 billion and will cause the Fund to sunset quickly.

Question 2: regarding the impact on the S.852 Fund's cash flow assuming that constitutional infirmities prevent the movement of asbestos trusts' money to the Fund.

Answer:

Loss or even delay in obtaining the trusts' assets will impair the Fund's problematic financial position during its first several years. Loss of trust assets will add about $5 billion in interest costs. Delay will add about $1 billion in interest costs.

A successful constitutional challenge by asbestos trusts will eliminate $7 billion of revenue that S.852 anticipates would be available in the Fund's first year. S.852 calls for replacement of this loss by increased assessments against defendants and insurers of $.8 billion per year beginning when the constitutional issues are resolve: payments probably in years 3 through 7 of the fund. If this initial $7 billion payment were replaced by the smaller incremental payments in years 3 through 7, the Fund will have to pay an additional $4.73 billion of interest.

Even if unsuccessful, the constitutional challenges would likely delay the Fund's receipt of the $7 billion for several years, which would add about $1 billion of additional interest cost for the Fund.

S.852 requires total payments of $90 billion by asbestos defendants and $46 billion by insurance companies over a 30 year period. In addition the statute would convert the assets of all asbestos trusts which have been assumed to total $4 billion. More likely the trust's assets total $7 billion. The $3 billion excess would reduce payment requirements of defendants and insurance companies.

S.852 depends upon trusts' assets as the initial funding source for the first year or two. While under S.852 trusts must transfer their assets shortly after passage of the act, defendants' assessments cannot be determined for a year and insurers' assessments cannot be determined for two or more years under the timing schedules specified in the act. There is no other reliable revenue source during this initial period. S.852 calls for preliminary contributions by defendants and insurers, but compliance will be questionable because the preliminary contributions are based on companies' assessments which will not be determined until later.

Whether or not the trusts' constitutional challenges succeed, the Fund will likely remove the only reliable source of funding for the Fund's first year or two. Even if the trusts are unsuccessful, the legal challenge will likely delay conversion of trust assets for a year or more.

If the trusts' challenges succeed, S.852 requires defendants and insurers to pay an additional $4 billion to make up for the trusts' assets that were unavailable, payable over five years after a final judicial ruling that prevents conversion of trust assets.

Either way, the trusts' challenge will exacerbate the Fund's initial insolvency, its need for borrowing and its interest costs. At the least, if the challenges are unsuccessful, they will delay $7 billion of revenue for some time until the constitutional issues are resolved. The Fund's revenues for the first year or two will be compromised and uncertain.

If the trusts' challenges succeed, $7 billion of revenue that S.852 proposes for the first year will be replaced with five annual payments of $.8 billion each which will likely begin three or more years after the Fund has started. These replacement payments paid in the third through seventh year have a present value of only $2.27 billion (using the 6.5 percent interest rate assumed for the Fund). This is equivalent to the Fund having to pay an additional $4.73 billion ($7 billion - $2.27 billion) in interest.

Question 3: lists of my asbestos related clients.

Answer:

I have provided consulting and expert services regarding asbestos litigation matters for the following clients:

Academic:

RAND Institute for Civil Justice (1980 - 2000), senior

social scientist and founding member of the Institute for Civil Justice where I studied and published many peer-reviewed reports and articles on asbestos and other mass torts.

Courts and Judges:

Honorable Jack B. Weinstein, U.S. District Courts, Eastern

and Southern Districts of New York

Honorable Robert Parker, U.S. District Court, Eastern District

of Texas

Honorable Thomas Lambros, U.S. District Court, Northern District

of Ohio

Honorable Burton Lifland, Bankruptcy Court, Southern District

of New York

Insurance Companies:

Continental and CNA Insurance (testifying expert in Ahearn Class

action)

Continental and CNA Insurance (confidential matter) Chubb Insurance Zurich Insurance (Bermuda) Insurance companies who challenged the Cigna runoff

Asbestos Defendants:

Fuller-Austin Insulation Porter Hayden E. J. Bartels Mac Arthur and Western Asbestos J. T. Thorpe Skinner Engine Thorpe Insulation Confidential C. E. Thurston Confidential Kelly Moore

Asbestos Trusts:

E. J. Bartels Trust H. K. Porter Trust Eagle-Picher Trust Shook and Fletcher Trust Raytech Trust Keene Trust Fuller-Austin Trust Fibreboard Interim Trust Manville Trust Wallace & Gale Trust National Gypsum Trust

Trustee of the Fuller Austin Settlement Trust Board of Directors of Trust Services Inc.

Representatives of Future claimants:

Celotex and Carey Canada Trust API bankruptcy

Bankruptcy Claimants Committees:

E. J. Bartels Celotex and Carey Canada Eagle-Picher Federal Mogul Raytech Mac Arthur and Western Asbestos Fuller-Austin Narco National Gypsum Owens Corning H. K. Porter Pittsburgh Corning Keene Plibrico Wallace & Gale U.S. Gypsum A.P.Green W.R. Grace Armstrong Burns and Roe Artra G-I Industries (GAF) Babcock and Wilcox Flintkote J. T. Thorpe Oglebay Norton

Question 4: differences between Dr. Rabinovitz and my analyses of trust fund approach

Answer:

Dr. Rabinovitz's approach differs from my analysis in three primary ways.

Number of qualifying nonmalignant claims:

My assumption that 60 percent of nonmalignant claims will qualify for payment is based on the actual experience of asbestos trusts and a study of 220,000 asbestos claims made by insurance companies. Dr. Rabinovitz cannot point to any data about asbestos claimants to support her assumption that 20 percent of nonmalignant claimants would qualify. Instead she claims support from a small and irrelevant study of non-claimants, even though the author of the study says that Dr. Rabinovitz is misusing its results.

Dr. Rabinovitz asserts that few nonmalignant claimants will qualify for payment (ASG's analyses are base on fewer than 20% qualifying). As she testified on April 26, her basis for this assertion is a small, screening study of sheetmetal workers who may have been exposed to

asbestos.

The study does not support Dr. Rabinovitz's assumptions. The author of the sheetmetal worker study, Laura Welch, M.D., has explained that Dr. Rabinovitz is misusing the results of the study and that the percent of qualifying nonmalignant will be substantially greater than what Dr. Rabinovitz has assumed. (A copy of Dr. Welch's statement is attached). Despite knowing this, Dr. Rabinovitz continues to base her assumptions on the Welch study without having addressed the misuse that Dr. Rabinovitz makes of the study.

David Austern, General Counsel of the Manville Trust, cites the Trust's extensive experience in rejecting Dr. Rabinovitz's assumptions, saying:

"Based on the exposure and the medical criteria of (over 200,000 recently filed) nonmalignant claims, we believe there is almost no likelihood that as many as 85% of the nonmalignant claims filed pursuant to S.1125 (which are the same as S.852) will qualify for only Level I" (Austern letter is attached).

In contrast to Dr. Rabinovitz, my forecast that 60 percent of asbestosis and pleural victims will qualify for payment under S.852 is supported by the experience of asbestos trusts and a study by insurance companies of medical information from over 220,000 asbestos claimants.

My forecasts are consistent with the experience of the Manville Trust. Based on that experience, Mr. Austern states:

"Our best estimate ... is that over two-thirds and as many as three-fourths of the non-malignant claims filed pursuant to S.1125 will qualify for compensation at Level II or higher".

Similarly, an insurers' study of 220,000 asbestos claims filed Babcock and Wilcox also supports my forecasts. The insurers' study found that 70 percent of asbestosis and pleural claimants would qualify for payment under criteria similar to those in S.852 (the qualification requirements for the proposed Babcock and Wilcox Trust Distribution Procedures that the insurer's study examined are more restrictive than the requirements of S.852).

Number of qualifying lung cancer claimants:

Dr. Rabinovitz assumes that payment for three of four lung cancer claimants would be rejected under S.852 (Goldman Sachs's analyses assuming that 73% of lung cancers will be in Level VII, which no longer receives payment). Dr. Rabinovitz testified that her assumption comes from her study of medical records for some Manville claims. Dr. Rabinovitz's study was undertaken for Manville's suit against tobacco companies and did not consider how claims would qualify for payment under any claims criteria.

In fact her conclusions are rejected by the Manville Trust. Based on the Trust's actual experience in reviewing tens of thousands of lung cancer claims, Mr. Austern says:

"I disagree that a large majority of claimants compensated for lung cancer will be compensated near the low end of the range of lung cancer values."

Again in contrast with Dr. Rabinovitz, my forecast that three of four lung cancer claimants would qualify for payment is derived directly from the claims experience of the Manville Trust.

Number of forecast future claims:

While forecasts of future claim filings are inherently uncertain, there has been wide agreement that the S.852 would see about 1.5 million future claims. CBO's forecasts, my forecasts and the ASG's original assumptions reported by Goldman Sachs have all been around 1.5 million future claims. This is consistent with recent forecasts by the Manville Trust (which I cited in my testimony), by other asbestos trusts and forecasts in asbestos bankruptcy proceedings.

The only exception is the ASG forecast released on July 11, 2003, the day after the then-current version of the Fair Act was marked up and approved by the Judiciary Committee. That mark-up resulted in substantially increases in previously proposed compensation values, which have been further increased in S.852. Before the higher values of the July 11 mark-up, Goldman Sachs reported a forecast of 1.3 million future claims that was made by ASG's consultants, which included Dr. Rabinovitz. The day after the bill was changed to include new higher values, ASG's consultants cut their forecast almost in half to 736,016 future claims. No explanation was given for this reduction and no other changes from the mark-up, other than the increased claim values, can explain this sharp decrease. Any credible analyst would expect that increased payments would result in more, rather than fewer claims. But ASG's consultants needed to sharply reduce their forecast number of claims in order to prevent their forecast of the Fund's total obligations from exceeding forecast Fund revenues.

I have not seen Dr. Rabinovitz's current forecast of the number of future claims, but this forecast must be similar to or even lower than the forecast of 736,016 future claims in July 2003 Because compensation amounts have been increased again by S.852, Dr. Rabinovitz's current forecast could not result in the estimated total cost of $120 billion that she reports, unless she assumed that few future claims would be filed, fewer than her forecast of July 2003.

Question 5: regarding appropriate rates for forecasting payments to cancer and nonmalignant claimants.

We use the following rates of payment for each disease:

Mesothelioma	100% Lung Cancer	59% Other Cancer	50% Nonmalignant	59.5%

Question 6: regarding recent claim filings and trends

Answer:

Data on recent claim filings do not suggest a reduction in future asbestos liabilities or in the likely indemnity costs of an S.852 Fund, but suggest possible shifts in the types of claims that will be filed in the future. Interpretation of current trends is complicated because the Senate's consideration of an asbestos fund has affected asbestos claims and resolutions.

The facts based on data from defendants' financial statements and trusts' reports:

Across many defendants and trusts the total number of claims filed in 2004 are less than during the immediately preceding years. Filings of nonmalignancy claims are down, but filings of mesothelioma claims have increased to unprecedented levels. Asbestos defendants report that they have settled far fewer claims since the Fair Act has been proposed and considered. Plaintiffs' lawyers report that defendants and insurance companies are now willing to settle few claims because they hope that the legislation will pass, relieving them of their need to pay those claims.

Implications for future trends:

Mesothelioma claim filings will likely continue at their new higher level for the following reasons:

More law firms are concentrating on these high-value claims.

Email and other advertising has increased greatly.

New law firms have been created that concentrate on mesothelioma claims.

Existing law firms have shifted their concentration from nonmalignant to cancer claims.

Consideration of the Fair Act itself may be generating more mesothelioma claims, both from

publicity about Congressional consideration and also because victims and their families could obtain compensation without resorting to the unpleasantness of litigation.

More people may be suffering mesothelioma from exposures in industries that have not been considered in epidemiological studies or because actual exposures since the early 1970s were greater than anticipated.

In any event, there is no reason to believe that either medical incidence of mesothelioma or the rate of claiming will decrease in the future markedly from the current levels.

Nonmalignant claim filings will likely rebound, but may not achieve their earlier levels for the following reason:

Because of uncertainties about passage of the Fair Act, plaintiffs' law firms have reduced their efforts in identifying and recruiting new nonmalignant claims. Investments for such efforts may not be repaid.

This might result in a permanent shift by law firms. Plaintiffs' law firms may realign their concentration, making greater efforts at representing higher-value cancer claims and less effort at representing lower-value nonmalignant claims.

New or proposed legislation in some states might reduce the number of nonmalignant claims that would be paid.

2004 filings of nonmalignant claimants may have dropped because many nonmalignant claimants filed in 2003 in anticipation of federal or state legislation that would affect their opportunities for payment.

Manville Trust's claim filings likely dropped in 2004 because claimants accelerated their filings to avoid the new TDP which reduced the amount that they would be paid. This is mostly a transitory effect.

Even if S.852 does not pass, many nonmalignant claimants would not qualify for payment under the new Trust Distribution Procedures of asbestos trusts or would qualify for only small payments. Because these trusts will represent an increasing share of the amounts that claimants would receive, the new Procedures may discourage filings of the claims with the least serious injuries.

If S.852 passes there would likely be a drop in claims filed among persons who would not qualify for payment. A promise of medical monitoring may be an insufficient incentive to file a claim. Such a drop would not materially reduce the S.852 Fund's indemnity obligations because claimants who do not file would not have been paid compensation in any event and because medical monitoring costs are slight.

To summarize, mesothelioma liabilities have increased and will likely stay at their new higher level. Liabilities for nonmalignant claims dropped with the decline in claim filings. Nonmalignant claim filings will rebound after the Fair Act is resolved, whether or not it passes, but may not rise to their levels in the early 2000s. Given these increases among the most expensive mesothelioma claims and possibly permanent decreases among nonmalignant claims, the overall liabilities of defendants and of an S.852 Fund would likely change little. The number of claims may drop, but the average severity of claims would increase, resulting in little net change.

3. Responses to Senator Kyl's questions: about payments by asbestos trusts

Answer:

The DII trust funded by Halliburton is the only current asbestos trust that was intended to and is expected to pay 100% of values to claimants.

Each asbestos trust pays only a part of the total compensation that claimants receive. A trust created to assume the debt of a particular company, say Fuller-Austin (of which I am a trustee), pays only the company's historic "share" of overall liability. For example, Fuller-Austin values mesothelioma claims at $58,500, clearly not the overall value of mesothelioma claim but rather what the bankruptcy court determined was the amount Fuller Austin would be paying as part of the overall compensation.

Because they are created in bankruptcies, asbestos trust typically pay only a pro rata share of the values of each claim (DII is an exception). Fuller-Austin currently pays about 30%. Bankruptcy code section 524(g) requires asbestos trust to estimate the value of pending and future claims and then pay each claimants only a pro rata share that can be paid to all present and future claimants. In paying about 30% to claimants, the Fuller-Austin Trust has made the determination that we have sufficient assets to pay this percentage to all pending and future claimants. Trusts can and do adjust these percentages as their assets or forecast liabilities change. Fuller-Austin started out paying 2% of values, but increased this as we reached settlements with our insurers.

Few trusts pay as much as 50 percent of the values of claims. The assets placed in trusts simply are insufficient to pay such levels to all pending and future claimants. But payment at some fixed level is not the intention of the bankruptcy process or of Section 524(g) in particular. Rather, these trust are designed to and accomplish several important functions:

they efficiently review and value claims

they separate claims that should be paid from those that should not be paid

they conserve trust assets so that present and future claims can all be paid at the same level.

Unlike S.852, the trusts will assure that assets will be available to pay all claims present and future. While no trust can or is intended the pay the complete value of any claims, i.e. the total that would be receive in payments from all asbestos defendants, together the trusts will pay substantial amounts.

I have estimated that without S.852 existing trusts and trust that will be created in current bankruptcies will together pay mesothelioma claimants over $434,000 about 40 percent of the compensation levels for such claims in S.852. Similarly, the trusts together would pay about 40 percent of S.852 levels for each other disease. Unlike S.852 the trusts will pay these amounts to all pending and future claimants.

As drafted S.852 will eliminate, rather than build on this substantial compensation that already exists under the bankruptcy processes. This compensation could be preserved only if S.852 kept the assets of the trusts with the trusts and allowed completion of the existing bankruptcy cases and establishment of trusts in those cases.

Dr. Francine Rabinovitz
Hamilton, Rabinovitz & Alschuler, Inc.
26384 Carmel Rancho Lane, Suite 202
Carmel, California 93922

May 11, 2005

The Honorable Arlen Specter
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Specter:

Please find enclosed my responses to the questions you forwarded to me from Senators Cornyn and Kyl on May 4, 2005. It was my privilege to address the Committee on April 26. Please do not hesitate to contact me if I can be of any further assistance to the Committee.

Thank you.

Sincerely,

Francine Rabinovitz

Enclosure

cc: Kathryn R. Taylor

FR:cp

Senator John Cornyn – Questions for Witnesses
Asbestos Hearing
April 26, 2005

For Fran Rabinovitz:

Q1: Can you tell us if, in fact, it is your projections on which the Goldman Sachs model has been based in the past and on which it is based today? Can you tell us if the Congressional Budget Office (last year) used your projections or modified them in any way? If they were modified, in what way were they modified, and in your opinion were the modifications warranted?

A1: The projections utilized by Goldman Sachs to run their model are based on projections prepared for the Manville Personal Injury Settlement Trust ("MPIST" or "Manville") in 2001 by ARPC. Due to the widely held belief that Manville claimants represent the universe of asbestos claimants, the ARPC weighted mean claim forecast is the appropriate starting point for S. 852 claim projections.[1] Goldman Sachs also utilized an estimate of pending claims provided by Navigant Consulting. Of course, the ARPC projections were prepared to forecast the claims which would be made under the then-existing eligibility criteria of MPIST. As the requirements of the FAIR Act are quite different, my role has been to provide Goldman Sachs with an ability to assess the effect of these different standards on the number and distribution of future claims which will be paid under the eligibility criteria of the FAIR Act. My efforts to project future claims are predicated on two independent studies: one which relates to cancer claims that I performed for MPIST in the context of its litigation against the tobacco industry, and the other an application of a study of sheet metal workers performed by Dr. Laura Welch, which we utilized to assess non-malignant future claims.

As to the activities of the Congressional Budget Office last year, that question, with respect, may best be answered by the CBO. My general understanding of the CBO methodology is that the analysts there created what was, in effect, a non-weighted average of a variety of projections, including those performed by Navigant, ARPC and Mark Peterson d/b/a LAS. The effect of that approach, which was to provide essentially equal weight to all those projections, was to bias the projections upward, since the Manville weighted mean forecast had already taken into account a series of different projections ranging from low to high and had then weighted each by the probability that each would occur. But, again, the best source of information about precisely what the CBO did and their rationale for those actions is, in fact, the CBO.

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[1] U.S. Bankruptcy Judge, Burton R. Lifland found that: "This unrebutted – indeed, undisputed – evidence of the breadth and length of Manville's asbestos involvement compels the conclusion, as a factual matter, that essentially all potential asbestos claimants . . . have been exposed to Manville asbestos." *In re Johns-Manville Corp.*, Nos. 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665 through 82 B 11673 inclusive, 82 B 11675, 82 B 11676 (Bankr. S.D.N.Y. Aug. 17, 2004).

Q2: Can you please provide to the committee copies of your projections – specifically as they have been used by Goldman Sachs to perform valuation analyses or, at least, as they were given to Goldman Sachs to be used for valuation? In other words and even more specifically, would you please provide the table, in its entirety, across all claims levels (including "old Level 7's") and over 50 years, that shows us the complete projections on which one can determine the projected outflows (in terms of cost) for the proposed Trust Fund?

A2: My understanding is that on May 5, 2005 copies of my projections, including a table showing the projected incidence of claims in each year across all claims levels, was provided to Chairman Specter. In addition, an updated table reflecting the structure of S. 852, and most importantly, its elimination of the "old Level 7's" was also provided.[2] It is my understanding that Goldman Sachs used the projections supplied relative to S. 2290 as a basis for its analytical work in evaluating the total program costs and resultant outflows.

Q[3]: Can you please share with the committee a list of the key assumption you used to make your projections? Specifically, can you tell us what overall percentage of claims you presume will be paid by the fund (exclusive of level 1 medical monitoring)? Can you tell us what percentage of non-malignant claims you presume will be paid by the fund (exclusive of level 1 medical monitoring)? Can you tell us what percentage of malignant claims you presume will be paid by the fund (exclusive of level 1 medical monitoring)?

A3: The question asks for assumptions and then goes on to specifically request what percentage of claims will be paid by the fund. To be precise, my findings as to what percentage of claims will be paid by the fund are not a matter of assumption or presumption, they are the outcome of an analytical process whereby the medical criteria and requirements of the Act are applied to the Manville Trust weighted mean claim forecast with the adjustments noted as to malignancies and non-malignancies. This analysis suggests that approximately 84% of the claimant population will not receive monetary compensation. It should be noted that the recent assessment of how historical claims would have qualified under the new Manville eligibility criteria requirements produces an almost identical rate of qualification. The percentage of malignant claims paid by the fund is, of course, substantially impacted by the inclusion or exclusion of what was Category 7 in S. 2290, that is, the "exposure only" lung cancer claims. Elimination of the "old Level 7" category is projected to eliminate approximately 41,000 cases from those which would be compensated under the Act.

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[2] The tables for S. 852 provided to Chairman Specter do not reflect the impact of exceptional medical claims by Libby, Montana residents under section 121(f)(8), special adjustments for FELA cases under section 131(b)(4), or revised exposure criteria.

Senator John Kyl
Written Questions
Asbestos Hearing
April 26, 2005

For Fran Rabinovitz:

1. The latest version of S. 852 allows the use of CT scans to identify signs of asbestosis in claimants seeking compensation from the Fund for lung cancer. Does your estimate of the number of claims that will qualify for compensation under the Fund include an estimate [of] the effect of allowing the use of CT scans to qualify for compensation under malignant levels VII and VIII?

A. My estimate does not address the use of CT scans; they have not been a diagnostic tool used in other claim facilities other than in the context of exceptional medical claims. Therefore, we have no data by which to assess the precise impact of the allowance of CT scans.

2. Of the scores of asbestos bankruptcy trust funds that have been created since the 1980's, how many have not gone bankrupt – *i.e.*, have remained able to pay the full value of qualifying claims? How many have remained able to pay 70% of the value of qualifying claims over the life of the fund? How many have remained able to pay 50% of the value of qualifying claims over the life of the fund?

A. To my knowledge, none of the bankruptcy trusts created prior to 2002 have been able to pay over their life anywhere close to 50% 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% (Manville) to a high of 31.7% (Western McArthur). The only currently operating Trust to pay 100% of its scheduled values is 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% payout first to 10% and then to 5% of liquidated value. There will be a reevaluation 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.

SUBMISSIONS FOR THE RECORD

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Veterans Fight to Keep Their Rights in Court

By James G. Zumwalt

Death will come prematurely for some World War II veterans who, having fought for their country, now fight imminent death from asbestos poisoning. Tragically, the same end awaits younger generations of Americans unaware fate has dealt them a similar hand.

Surprisingly, asbestos use still remains legal today in the U.S., despite all that is known of its hazards. Some members of Congress continue to actively champion the rights of companies responsible for having exposed millions of people to this poison and, ultimately, an early death.

Exposure to asbestos fibers has been linked to a variety of respiratory diseases, including mesothelioma, an aggressive cancer that can lie dormant in the system for up to 40 years but which, once active, can lead to death within 18 months. Fire retardant and inexpensive, asbestos was used extensively in building Navy ships during World War II; today, tens of thousands of American Navy veterans and ship workers suffer from asbestos-related diseases due to heavy exposure. Additionally, in years to come, we will see an untold number of 9/11 victims develop mesothelioma and other asbestos-related diseases – as the World Trade Center and Pentagon both were built using asbestos.

Asbestos-related cancers cause one of the most painful and prolonged deaths of all cancers. Each day becomes a fight for survival to avoid drowning, as an ever-enlarging tumor compels the lungs to continuously fill with fluid. I have seen the daily struggle of mesothelioma firsthand; for the disease claimed the life of my father, Adm. Elmo Zumwalt, Jr., just five years ago.

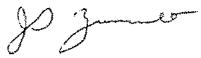
Despite the fact asbestos-related health risks go back to the days of the early Egyptians, Congress has been slow to take action to protect American citizens. Currently, Senator Patty Murray seeks to impose an asbestos ban--a very important step in curtailing the health risk. Senator Arlen Specter, however, has designed a bill that curtails litigation by asbestos victims while benefiting asbestos companies and insurers.

If passed, Specter's bill will establish a $140 billion trust fund, to which asbestos manufacturers and insurers will pay a lump sum – far less than what they should pay and what is currently needed to adequately provide for the fund. Historically, trust funds established for an uncertain number of claimants have not fared well. The Black Lung Fund, established for

coal miners, was bankrupt from the date it was established; the Agent Orange Trust Fund, established for Vietnam War victims, was insufficient to provide for all those affected.

Recognizing the historical track record of previously failed trust fund efforts, Specter's bill provides a "sunset provision," which enables claimants to return to the court system if the trust fund runs dry, causing major tactical, financial and time-consuming setbacks for victims. Moreover, the bill excludes many claimants, including the as-yet-unaware victims of 9/11, as it establishes an arbitrary date for which they must be exposed. The bill fails to recognize the existence of asbestos in our environment today - where millions of tons of this product contaminate our homes, schools, churches and office buildings. Hence, the class of victims will continue to grow.

It is estimated that 27 million Americans are at risk for mesothelioma. This disease alone has a potential death toll so high that any act of terrorism would pale in comparison. The government should not bail out the irresponsible corporations, giving them a financial slap on the wrist while leaving untold numbers of victims uncompensated for medical costs, pain and suffering and lost wages.



James G. Zumwalt served in both the Navy and Marine Corps, retiring after 26 years as a Lieutenant Colonel. He is the former Senior Advisor to the Assistant Secretary of State on Human Rights and Humanitarian Affairs under former President Bush and currently serves as Vice President of Admiral Zumwalt & Consultants, Inc. an international consulting and defense technology development firm in Reston, VA.

To publish, please contact Mollie Turner at 202-448-3147 or mturner@qorvis.com.

UNITED STATES SENATE JUDICIARY COMMITTEE
Hearing Regarding: "A Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos, and for Other Purposes "

Linda Reinstein, Executive Director and Co-founder
Asbestos Disease Awareness Organization
April 25, 2005

My name is Linda Reinstein and I am Executive Director of the Asbestos Disease Awareness Organization. I am not an attorney, doctor, or lobbyist, just a volunteer.

My husband, Alan, has pleural mesothelioma, a progressive cancer caused only by asbestos fibers. We are here today because we know first-hand, along with our 12-year-old daughter Emily, the pain and suffering that asbestos-related diseases cause individuals and their families.

Asbestos litigation and legislation is complex. But the simple truth is asbestos kills. Preventing exposure would have eliminated disabilities, diseases and deaths we are discussing today.

As victims, we unanimously opposed the so-called Fairness in Asbestos Injury Resolution Bill, S. 852, and believe the ineligibility, compensation delays, lack of transparency and faulty medical criteria are anything but fair.

Americans are paying the ultimate price for being exposed to asbestos - their health and their lives.

The truth is the asbestos industry is responsible for the most lethal man-made disaster in history.

The truth is Corporations and insurers are not the victims, we are.

As victims groups, we have compiled our Top Opposition Points to this bill and they must be addressed in any legislation that is going to be labeled "fair."

Number One – The bill eliminates a person's basic right to have their grievances heard in court. This bill would disallow asbestos victims from suing the companies that – in many cases – knowingly contaminated them. For many sick and dying victims, their last wish is to be heard and to face those responsible for their sickness. It is a basic American right to seek justice through the court system.

Number Two - We believe the Trust is vastly under-funded. We are not alone in this. In the 1980s, the Johns-Manville Company, which at that time was the largest asbestos manufacturer in the United States, created such a fund for its thousands of sick and dying workers.

International data supports our U.S. estimations and predictions for future victims are more than double current forecasts.

Linda@asbestosdiseaseawareness.org
www.AsbestosDiseaseAwareness.org

Number Three: The bill includes unwarranted ineligibility and exclusion of claims. For example, a provision in S. 852 requires a person to be exposed to asbestos for at least 15 months to 15 years to qualify. Medical research has established that any exposure to asbestos can result in asbestos related diseases. In addition, the bill makes victims who have been exposed under environmental or non-occupational circumstances ineligible for coverage. This exclusion must be eliminated. As we know from Libby, Montana this kind of restriction is absurd.

Number Four: The medical criteria in the bill are faulty. Essentially, it would give the government the power to tell victims whether or not they are sick and whether or not they will get compensation. Under the medical criteria as it is now written, tens of thousands of people sick with asbestos diseases will be excluded from gaining compensation for one erroneous reason or another.

According to the Mount Sinai medical experts, quote: "It is apparent that the bill's medical criteria have absolutely no support in the medical or scientific literature."

Number Five: The bill provides extremely burdensome claims processes designed to discourage and exclude victims. This is anything from no-fault for victims. For example, the cap of 5% on attorneys' fees will realistically preclude any victim from obtaining legal counsel.

Number Six: The bill is insufficiently funded up front lack of transparency will result in almost immediate depletion of the fund and cause further delays for sick and dying victims. Many will not receive full compensation under the bill for 6-8 years and many simply do not have that long to wait.

Number Seven: The bill unfairly, and without justification, provides no transition to cases that are close to being settled. Victims' must be able to continue to pursue litigation until the trust fund is funded and fully operational. Judgments are already being delayed or disputed, as defendants "wait" for the passage of the bill.

Number Eight: There is relatively little money in the bill for research into potential treatments and cures of asbestos diseases or for education, prevention and outreach. The victims know, prevention is the only cure.

Although the asbestos industry has known for at least 75 years that its products are lethal to its workers and consumers, it has never attempted in any meaningful way, to find treatment or cures for these diseases. If we had a cure, none of us would have to be here today.

Number Nine: The bill does not properly define financial aspects of awards. For example, the cost of living adjustment clause ignores the rapid rise in health care costs, so victims lacking health insurance will rapidly use up their compensation in paying medical bills.

Finally, **Number Ten:** the bill lacks certainty, giving the Administrator, at his or her sole discretion, the ability to make alterations that can be devastating to the victims.

Let me tell you what others have to say about this bill:

"United for Asbestos Disease Awareness, Education, Advocacy, Prevention, Support and a Cure."

Linda@asbestosdiseaseawareness.org

www.AsbestosDiseaseAwareness.org

The Advisory Board at the Mt Sinai Medical Center – one of the world's leading asbestos disease facilities – said this about S. 852....

"This legislation is deceptively named the Fairness in Asbestos Injury Resolution Act. We believe that there is nothing about this proposed legislation that could correctly be characterized as "fair" to people who have been harmed by asbestos. It will, if enacted, adversely affect the welfare of the tens of thousands of people who have been exposed to asbestos."

The bottom line is that Senate Bill 852 was written without the voice of the victims. At the same time, it protects the asbestos industry and cuts its liability at every turn.

A bill must be crafted to address the needs of victims, particularly since the asbestos crisis is only getting worse. Millions of homes, schools and buildings are contaminated with asbestos. More than 250,000 tons of asbestos – which is a fairly light substance – was used in American products between 1991 and 2001 and its use continues to increase annually, despite the fact that the United States and Canada remain virtually the only industrialized countries in the world that have not yet banned it. This terrible fact insures that there will be asbestos victims in America for decades to come.

We cannot compete with the kinds of financial contributions from the special interest lobbying groups of the industry --- which spent millions lobbying last year.

On behalf of many victims' organizations – and the thousands of victims we represent across the country – we would support an asbestos resolution bill --- if it was fair and equitable for all present and future victims.

There are solutions to this problem. But, they are not represented in this bill.

Asbestos companies are not victims. One life lost to an asbestos related disease is tragic; hundreds of thousands of lives lost is unconscionable.

Today, victims and their families united and represent the 5th Stakeholders at the table. The Asbestos Disease Awareness Organization stands ready to work with the other four stakeholders, yes the Manufacturers, Insurers, Labor and Attorneys, in the asbestos trust fund legislation debates and discussions as we work to craft a truly FAIR Act for all Americans.

"United for Asbestos Disease Awareness, Education, Advocacy, Prevention, Support and a Cure."
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ASBESTOS STUDY GROUP

April 18, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
SH-711 Hart Senate Office Building
Washington, DC 20510-3802

Dear Chairman Specter:

The Asbestos Study Group, a group of U.S. companies representing over 1.5 million workers, is greatly appreciative of the Chairman's tireless efforts in working with all interested Senators and private stakeholders to reach a bipartisan consensus that can bring a much needed solution to the nation's asbestos litigation crisis. We are very pleased and encouraged that the revised April 12th draft has earned bipartisan support. We believe it brings us considerably closer to a long-overdue resolution. While our analysis of the new draft is continuing, we look forward to working with the Chairman and other Senators to obtain final passage of this critically important legislation as soon as possible.

In the last two decades Congress has debated asbestos litigation reform, the opportunity now before us represents our best chance for success. Too much progress has been made and too much is at stake for our nation to miss this unique opportunity to finally solve the asbestos problem.

Thank you for your continuing leadership and commitment to this critically important issue.

Sincerely,

Barry B. Direnfeld
Counsel, Asbestos Study Group

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING ON "THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT"
April 26, 2005

Testimony of
Craig A. Berrington, Senior Vice President and General Counsel,
American Insurance Association

Chairman Specter, Ranking Member Leahy, and members of the Committee, I appear here today on behalf of the American Insurance Association and the Reinsurance Association of America. Our members write insurance and reinsurance in every state and around the world. As major stakeholders in the asbestos litigation reform process, we very much appreciate the opportunity to testify about S. 852, the Fairness in Asbestos Injury Resolution Act of 2005 (FAIR Act).

Mr. Chairman, we would like to commend your leadership on, and commitment to, asbestos litigation reform. Senator Leahy, we also appreciate your long-standing commitment to resolving this crisis. As you know, insurers remain deeply committed to seeing real reform enacted – reform that is fair both to victims of asbestos-induced disease and to those entities that are compensating claimants.

Done correctly, a national trust fund for asbestos victims could provide the most comprehensive answer to our nation's asbestos litigation nightmare. A well-constructed trust fund could live up to the best aspirations of such an undertaking. It would provide not only an efficient and exclusive remedy for victims, but equity, certainty and finality for all stakeholders. While S. 852 as introduced does contain important improvements over prior proposals, we believe it still falls significantly short of these laudable, core goals for reform.

Let me first speak to the improvements in the current version of the FAIR Act.

The major enhancement is removal of the so-called "Level VII" claims made by smokers and ex-smokers who have never developed any underlying asbestos disease. As we noted in our January 11, 2005, testimony before the committee, allowing such claims to come to the trust fund would have grievously misdirected precious asbestos compensation dollars in order to pay lung cancer victims generally, rather than compensating only lung cancers caused by asbestos exposure. This was one of the features that caused our concern that the earlier version of the trust fund was being "designed to fail."

Another improvement in S. 852 is the addition of language making it clear that individual claimants at all levels only are eligible for trust fund compensation if asbestos has been a substantial contributing factor to their illness or impairment. This will further the critical need for the bill to appropriately link asbestos exposure to compensable illness under the Act. In

this way, it also will help to direct the fund's assets to individuals who actually have an asbestos-induced disease.

Unfortunately, while improved in these ways, S. 852 still retains many provisions that are dangerous for insurers, and falls well short of our threshold for supporting trust fund legislation – a threshold which we have consistently articulated over the past couple of years.

Specifically, a national trust fund must provide an exclusive remedy for resolution of all asbestos claims. Otherwise, there is no real certainty or finality for insurers or other funding participants; in fact, we could find ourselves paying both substantial sums into the fund and in the tort system for claims permitted to "leak" outside the fund. In S. 852, leakage would occur before the fund is operational (during the start-up period), while the fund is up and running, and in the event the fund sunsets. This could well present insurers with an even more untenable, expensive situation than that posed by the current, highly dysfunctional litigation system.

We are particularly concerned about leakage during the fund's start-up, and the potential it provides for gamesmanship by the trial bar and others as they seek to keep the fund from obtaining "operational certification," while at the same time requiring insurers and defendant corporations to pay into it. This will give us the worst of all possible worlds: simultaneous trust fund financing obligations and litigation system liabilities.

This issue did not exist in the trust fund as laid out in S. 2290, introduced by Senator Frist last year. However, S. 852 permits certain cases in trial or on appeal on the date of enactment to continue moving forward in the tort system. We believe the policy choice in S. 2290, which would have applied the exclusive remedy provisions to any litigation action outstanding upon date of enactment, was the much better approach. It would have established an understandable bright-line test, making it clear that the moment the President signed the new law, the old litigation system ended and the new trust fund system began, cutting off the opportunity for litigation game playing.

These same types of concerns arise with respect to exigent claims, i.e., those claims from individuals who have mesothelioma or whose other asbestos illness is at such a critical stage that they likely have less than a year to live. Our hearts go out to these people, and we believe the trust fund – not continuing the litigation system – would work best for these cases. However, S. 852 does not guarantee establishment of the trust fund as the immediate sole venue for handling exigent cases. Instead, it keeps current exigent claims going in the litigation system after the bill is enacted and even allows new exigent claims to be filed in court.

The bill creates a new "offer of judgment" provision for exigent claims. While obviously created in good faith to speed review and payment for exigent claims, the provision not only provides opportunity for new litigation, but with its 200-day process is likely to be substantially slower than the Labor Department's processing of these types of claims under the bill's expedited administrative procedures provision.

Beyond this, the bill provides for the reemergence of litigation for all claims if the Labor Department does not grant "operational certification" for the fund, or is tied up in court fighting off litigation brought by those who never want to see the trust fund supplant the litigation system.

With all of these specific concerns in mind, I would like to say a few more words about the start-up issue in general. Simply put, if the new law does not have a fast and effective start-up, it will fail – and with that failure will come recriminations all around. So this is no small matter. In our judgment, to make the start-up happen, all of the bill's incentives must be aimed toward obtaining that fast, efficient implementation.

S. 2290 met this test by having a legislative "red light-green light" approach, with the President's signature resulting in an immediate red light for the old litigation system, and an equally immediate green light for the new trust fund. Embedded in this approach was language giving the Labor Secretary all the authority she would need to enable the program to review and decide claims quickly, including the use of outside contractors and a priority for exigent claims. Moreover, S. 2290's "red light-green light" approach made it crystal clear to everyone (including the trial bar) that once the bill was enacted, it was time to quit fighting and get to work implementing the Act.

S. 852 adopts a very different approach, therefore jeopardizing the ability of the new law to be quickly and efficiently implemented. Indeed, S. 852 actually provides incentives to those who believe that the loss of the legislative battle on this bill need only be a skirmish in the longer-term war over keeping the litigation system going. The result would be stress on this new law of enormous proportions, which should be avoided at all costs.

Another problem that occurs during the fund's lifetime is caused by the bill's prohibition on workers' compensation subrogation. In earlier drafts of the bill, compromise language on this topic had been included; we urge that this language be reinstated. We have been surprised at the opposition to the subrogation concept, because subrogation in this bill merely would mirror what occurs in every state under state workers' compensation systems – to prevent double recoveries.

The bill's sunset provision also is troubling. As we have previously testified, we do not think there should be any opportunity for asbestos litigation to ever return to the same state court system that is closely identified with the current crisis. Therefore, in the event that the trust fund should sunset, we believe that proper jurisdiction would be federal courts, not state courts. Yet S. 852 would allow individuals to bring tort action in either federal or state court, although subject to certain venue limitations.

Turning to another critical issue for insurers, I would like to state clearly for the record that the $46.025 billion (nominal) in trust fund financing that has been assigned to our industry will present great financial burdens for the relatively few individual insurers and reinsurers required to participate. This burden is not only exacerbated by the leakage issues noted earlier, but by the requirement that there be an orphan share obligation for annual funding

shortfalls. This is very problematic, because it likely will result in the U.S. insurance and reinsurance industry assuming funding obligations for our nonpaying foreign competitors.

My comments today do not reflect an exhaustive list of our concerns with S. 852, but are illustrative of the many problems posed by this new bill in our view. As you know, these and other substantial concerns leave us unable to support S. 852 as currently constructed.

Again, we deeply appreciate the time and effort you have invested in finding a solution to the asbestos litigation crisis. We remain committed to staying at the table and continuing our joint work toward a true, much-needed resolution to our nation's asbestos litigation crisis.

Thank you very much for the opportunity to present our industry's views here today.

APR-25-2005 17:12 P.02/03

BLINDED VETERANS ASSOCIATION
477 H STREET, NORTHWEST • WASHINGTON D.C. 20001-2694 • (202) 371-8880

April 25, 2005

Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

On behalf of the Blinded Veterans Association (BVA) and millions of veterans across the country, we would like to follow up on our April 13 letter and offer our strong support for the Fairness in Asbestos Injury Resolution Act (FAIR Act), S. 852, which will fix our broken asbestos litigation system and ensure that veterans with asbestos-related diseases receive fair and prompt compensation. Thank you for your hard work and leadership on an issue that is critical to veterans.

Thousands of veterans were exposed to asbestos during their service in the military. Asbestos was widely used by the military during World War II through the Vietnam War. Potentially, many WW2 veterans blinded while serving aboard U.S Naval ship, may be or will suffer from Asbestos related illness.

Because of the long latency period associated with some asbestos-related illnesses, many veterans are still being diagnosed today with illnesses linked to exposure that occurred years and even decades ago.

Sadly, obtaining compensation is very difficult for these sick veterans. The law prevents veterans from seeking compensation from the U.S. government – their "employer" while they were in the military – through the courts. And most of the companies that supplied the government with asbestos are bankrupt. Even if a victim could find a solvent defendant company to sue, the courts are flooded with victims who end up waiting years before getting their day in court. And frankly, many of these victims don't have that kind of time to wait for compensation.

Without a major fix, the current crisis will only get worse. Consider this: the average number of new claims filed per year has dramatically accelerated since the late 1990's. It has been estimated that up to 90% of the current asbestos claims have been filed on behalf of unimpaired claimants.

The FAIR Act will stop the flow of resources to unimpaired claimants, and it will ensure that the truly ill are compensated quickly and fairly. The FAIR Act specifically benefits veterans by creating a no-fault system, freeing veterans from the need to prove exposure to a particular defendant's asbestos product. In addition, the bill would expressly cover injuries resulting from exposures on U.S. ships and during military service overseas.

Recognizing that military exposures occurring prior to 1976 were more significant than exposures occurring after 1976 – particularly for those workers exposed in military shipyards – the bill gives greater weight to pre-1976 military exposures.

The FAIR Act also includes protections for the benefits now available to veterans for their injuries under existing federal programs. In today's tort system, payments received by an individual from Veteran's Benefits Programs could be reduced from any recovery by a defendant. This is known as the "collateral source" rule. Although the FAIR Act generally requires reductions for recoveries from collateral sources, the requirement excludes any recoveries under Veterans' Benefits Programs. Veterans could also seek reimbursement for medical monitoring and may be eligible for a medical screening program.

Finally, the bill would provide $1 million from the trust fund for each of fiscal years 2005 through 2009 for each of up to 10 mesothelioma research and treatment centers. These centers will be closely associated with the U.S. Department of Veterans Affairs, in order to provide research benefits and care to sick veterans who have suffered excessively from mesothelioma.

Our asbestos litigation system must be overhauled. Sick veterans and other victims can't afford to wait any longer for reform. The FAIR Act, S. 852, is our nation's best chance to ensure that sick veterans receive the compensation they deserve. Thank you for your support on this vitally important veterans issue.

Very Sincerely,

Thomas H. Miller
Executive Director

April 25, 2005

The Honorable Arlen Specter
Chair
Senate Judiciary Committee
Washington DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
Washington, DC 20510

Dear Senators:

We write to express our opposition to S. 852, legislation that would create a federal asbestos trust fund. The bill is unfair to workers and communities who were knowingly exposed to asbestos.

For decades, asbestos manufacturers and their insurers deliberately hid the dangers of asbestos from their own workers, poisoning hundreds of thousands of Americans and creating a massive public health crisis, a fact learned from their own internal documents.

S. 852 first and foremost seeks to limit the liability of these very companies, resulting in legislation that is unfair to workers and their families who are now suffering the health consequences of that exposure.

- Once this bill becomes law, the courthouse door is closed to all current and future victims who were exposed to asbestos.
    - Their only remedy will be this new federal trust fund that is inadequately funded, provides less compensation to workers than they currently get in the courts and leaves many workers with no compensation, even though they have asbestos-related illnesses.
- The bill sets up roadblocks for victims but smoothes the way for asbestos defendants and their insurers to have their liability capped.
    - For example, the liability of each of these companies is not set forth in the bill and won't be known until after the bill becomes law. Litigation contesting decisions about their liability is permitted and expected and will force delay in setting up the trust fund.
    - Workers with pending claims will lose their right to a jury trial right away, however, even though the new asbestos trust fund will not be up and running for at least two years.
    - Even victims with Mesothelioma, whose life expectancy is rarely more than 18 months after diagnosis may have to wait at least nine months before their claims are processed. Sadly, many of them will die during that period without knowing if their families will be cared for.
    - The bill ignores medical consensus that individuals with heavy asbestos exposure are at substantially increased risk for lung and other cancers

even if they do not also have asbestosis or pleural disease. The Specter bill would give them no compensation.

- A new report, by Professor Peter Barth of the University of Connecticut[1] reviewed three federal compensation programs and found that proponents of each of these programs dramatically underestimated the number of claims the program would be required to process, resulting in delays in compensation for victims and higher costs than expected, which taxpayers then had to cover.

- The findings of this study make clear that Congress needs to better understand the breadth of the asbestos health crisis in order to assure that claims and funding projections are not "dramatically underestimated" as they have been for previous programs .

- Victims of community asbestos exposure -- such as families living near asbestos processing plants in Hamilton, NJ and Sacramento, CA – would receive nothing under this proposal, and the courts will be closed to them and everyone else in the future.

- People exposed to asbestos after the collapse of the World Trade Center will also have no recourse.

- The sunset provisions of the bill are confusing, creating a sense that the trust fund administrator can change variables in the program to make sure the sunset is never triggered.

- Asbestos is still legal and in use today throughout the United States, so thousands more workers, families and communities will develop asbestos-related diseases in the decades to come. The bill stops far short of banning asbestos, guaranteeing that this asbestos health crisis will continue for decades. If the judicial system is closed to these future asbestos victims, will there be sufficient monies in the trust fund to compensate them?

These and other concerns lead us to conclude that workers, their families and communities knowingly exposed to asbestos will not be fairly served by this asbestos trust fund. Please oppose S. 852.

For more information, contact Helen Gonzales, Policy Director at USAction, at hgonzales@usaction.org.

Sincerely,

Center for Justice & Democracy	USAction
United Church of Christ Justice & Witness Ministries	U.S. PIRG

Cc: Members, Senate Judiciary Committee

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[1] "Commentary on the Creation of a Fund for Victims of Asbestos Caused Diseases," February 15, 2005.

Summary of New Report

"Commentary on the Creation of a Fund for Victims of Asbestos Caused Diseases"

By
Peter S. Barth, Professor Emeritus
The University of Connecticut
February 15, 20005

Proposed legislation to address the "asbestos crisis" has been modeled on earlier Congressional programs to compensate individuals for diseases caused by toxic or radioactive exposure. These include the Black Lung program, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), and the Radiation Exposure Compensation Act (RECA).

Certain problems were common to each of these programs creating significant difficulties for persons that the programs were designed to aid. If similar problems were to develop in the proposed asbestos compensation legislation, the outcomes would be calamitous for injured victims.

- There would be significant delays in compensation for victims
- Funding shortfalls could force the federal government to step in.

In each of these existing programs, Congressional and administration proponents of compensation for diseases dramatically underestimated the number of claims the program would be required to process.

- Though supporters of the Black Lung law argued that there would be several thousand claimants, in the first 2 years of the law 350,000 claims were submitted.

- In the case of EEOICPA, approximately 3,000 successful claimants were forecast when the law was advocated in 2000. By December 31, 2004 over 60,000 claims had been submitted to the U.S. Department of Labor, almost 13,000 claims had been paid, and many others were in the process of adjudication.

- Similar underestimation of claimants has led to inadequate budgets to pay RECA benefits.

Another consequence of underestimating the number of claims likely to be filed with the program was that forecasted costs made by proponents of these compensation programs seriously underestimated both the federal government's share of compensation for each program and the total costs for each compensation fund.

- Proponents of the Black Lung two-part program estimated the maximum annual benefit costs to be in the neighborhood of $100 million.

- In the first 10 years of the program, the Social Security Administration's portion of the law alone had expended $8 billion.
- The Department of Labor's section of the law has a debt to the U.S. Treasury that currently exceeds $8 billion.

- Program budgets for RECA have at times been so inadequate as to prevent accepted claims from being paid.

The underestimation of the number of claims contributed to the delays in victims receiving compensation, resulting in some cases of payments made after the applicant had died from the disease for which payments were to be made.

- Delays resulted from other causes also including the process of developing the regulations that spelled out the criteria for the acceptance of claims, and the evaluation of evidence submitted by claimants or their survivors.

- Disease compensation has consistently proven to be extremely difficult to administer.

- Compounding the difficulty for the administrative agency and for the claimants, each of the programs has had its coverage widened, in some cases multiple times as Congress reconsidered its original scope.

- With more persons and more diseases added to coverage, claims volume, costs and administrative challenges increased.

In all three cases the federal government had to step in with taxpayer money to ensure that the funds were kept alive and that victims were compensated.

- The proposed asbestos trust fund releases defendants and insurers from having to pay any future claims.

- As such, there will be nothing to support payments to worthy claimants if the fund has been exhausted, as it will be if a greater volume of successful claims materializes than is forecast.

- Congress must recognize that any repetition of this practice of inadequately forecasting the numbers of successful claimants would result in another asbestos crisis, unless the federal government does step in to make up the funding shortfall.

Professor Peter Barth has been with the University of Connecticut since June, 1973, and retired in 2002. He received his B. A. in economics from Columbia University and his Ph. D. from the University of Michigan. His research expertise is in workers' Compensation, employment and training Programs and labor markets. Professor Barth has long expertise in federal compensation programs, and authored the classic study of the Black Lung Program, "The Tragedy of Black Lung: Federal Compensation for Occupational Disease (Upjohn Institute) in 1987.

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April 21, 2005

Hon. Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Hon. Patrick J. Leahy
433 Russell Senate Office Building
Washington, DC 20510

RE: Constitutionality of Section 8(b) of S. 852, the "Fairness in Asbestos Resolution Act of 2005"

Dear Senator Specter and Senator Leahy:

I have been asked for my opinion regarding the constitutionality of Section 8(b) of S. 852, the "Fairness in Asbestos Injury Resolution Act of 2005." I am the Alston & Bird Professor of Law at Duke University School of Law. Prior to joining the Duke faculty, I spent 21 years at the University of Southern California Law School, where I was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. I have written four books about constitutional law, including a one-volume treatise, and over 100 law review articles.

In my view, Section 8(b) is unconstitutional, as it arbitrarily and irrationally guarantees a $400,000 award exclusively to asbestos claimants who live in Libby, Montana, absent any medical proof – or even investigation – regarding the sources and severity of injuries actually suffered by those residents. This sum is at least four times that allotted to individuals who have suffered identical injuries but who happen to live in other states (and, indeed, in other towns in Montana). What is worse, the vast majority of non-Libby residents who have suffered injuries indistinguishable from those suffered by Libby residents -- but who are unable to prove five years of occupational exposure -- are arbitrarily and irrationally ineligible for any compensation at all.

Although a high percentage of Libby residents have suffered from asbestos-related disease – a fact which understandably has received much media coverage in recent months – the same sad fate has befallen other individual Americans and other communities in different parts of the country.

Furthermore, insofar as the stated purpose of the Asbestos Trust Fund Bill is to provide a standardized and objective administrative scheme for compensating asbestos victims -- with compensation dispassionately tied to proof of employment and evidence of injury – Section 8(b) stands

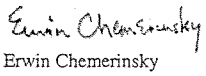
that goal on its head, with Libby residents who never worked with asbestos automatically entitled to $400,000, while similarly situated non-Libby residents are ineligible for any compensation whatsoever. This, too, is irrational and arbitrary. Consequently, I believe that the courts would invalidate this provision as violating the Fifth Amendment guarantees of equal protection and due process.

The Supreme Court has been clear that for "[s]ocial and economic legislation" like Section 8(b), the traditional "presumption of rationality . . . can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981). Yet, Section 8(b) is exactly the kind of law that will be struck down as arbitrary and irrational. Without any apparent justification, it vastly favors one group of individuals over all others.

As the Court recently emphasized, the Equal Protection Clause "commands" that "'all persons similarly situated should be treated alike.'" *Tennessee v. Lane*, 124 S.Ct 1978, 1988 (2004), quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). As *Cleburne* observed, legislative distinctions between groups of individuals violate that constitutional "command[]" if those distinctions lack a rational relationship to a legitimate governmental purpose. 473 U.S. at 446. Rather than treating asbestos claimants alike, on the basis of their occupational history and demonstrated degree of injury, Section 8(b) treats them quite differently, solely on the basis of their residence.

There is no question that Congress has enormous latitude, especially with regard to spending programs. Nevertheless, the Supreme Court often has stressed that Congress' authority is cabined by the Constitution and that any statutory provision which is as arbitrary and irrational as Section 8(a) of S. 852 violates both the Due Process and Equal Protection Clauses. Thus, it is my conclusion that Section 8(b) would, if enacted, be declared unconstitutional.

Sincerely,



Erwin Chemerinsky

cc: Hon. Orrin G. Hatch
Hon. Charles E. Grassley
Hon. Edward M. Kennedy
Hon. Jon Kyl
Hon. Joseph R. Biden, Jr.
Hon. Mike DeWine
Hon. Herbert Kohl
Hon. Jeff Sessions
Hon. Diane Feinstein
Hon. Lindsey Graham
Hon. Russell D. Feingold
Hon. John Cornyn
Hon. Charles E. Schumer
Hon. Sam Brownback
Hon. Richard J. Durbin
Hon. Tom Coburn

Written Statement of Dr. James D. Crapo, Professor of Medicine, National Jewish Medical and Research Center and University of Colorado Health Sciences Center Before the Senate Committee on the Judiciary Concerning S.852, "FAIR Act of 2005"

Introduction

My name is James Crapo, M.D. I am certified in Internal Medicine and Pulmonary Diseases. I am currently Professor of Medicine at the National Jewish Medical and Research Center in Denver, Colorado. National Jewish is a specialty hospital that is the nation's top ranked hospital in pulmonary disease. I am also a Professor of Medicine at the University of Colorado Health Sciences Center. I am a Past President of the American Thoracic Society. I am the current President of the Fleischner Society, a leading international society of selected specialists in radiology and pulmonary medicine. A copy of my curriculum vitae is attached. I have more than 25 years of experience with asbestos-related issues, including medical research and clinical treatment of patients suffering from asbestos-related diseases. I have published in the field of environmental toxicology, including the basis of asbestos-induced lung injury. My research involving asbestos was funded by the National Institute of Environmental Health Sciences. My current research is funded by the National Heart Lung and Blood Institute, and I currently serve on the Board of External Advisors for this Institute. I have previously served as an expert witness on behalf of defendants involved in asbestos litigation.

This written statement is intended to supplement the statement I provided to the Senate Committee on the Judiciary on June 4, 2003, related to S.1125, The "FAIR Act of 2003." I have reviewed the Medical Criteria in S. 852 and will confine my comments to assessment of these Medical Criteria.

Medical Criteria for Identifying Asbestos-Related Diseases

Occupational exposure to significant levels of inhaled asbestos causes a number of diseases including:

- Mesothelioma
- Lung Cancer
- Nonmalignant Lung Conditions
  - Asbestosis
  - Pleural Reactions

The challenge in writing medical criteria for a national trust is that the above conditions are not always related to asbestos exposure and some do not involve functional impairment. Individuals may develop similar diseases but without contributory causation from asbestos exposure. Distinguishing non-asbestos-related cases from those caused by asbestos exposure, based on scientific and medical standards, is an important element in setting up a valid trust.

One of the Primary challenges for this trust is to ensure that those individuals with a significant injury and impairment from exposure receive an appropriate compensation while minimizing inappropriate compensation of individuals who have no impairment due to asbestos exposure including those whose disease or injury is similar to, but not caused by asbestos. If large amounts of trust funds are distributed to individuals who do not have an asbestos related injury it puts the entire trust at risk and could lead to those with asbestos related injury not being compensated.

I have review the medical criteria in the current version of S. 852. There are a number of changes from S. 1125 that lead to my comments below. To begin, two important changes that strengthen S. 852 are the addition of the concept of requiring a "substantial occupational exposure" to asbestos, and the deletion of compensation for Exposure-only lung cancers (old Level VII).

There remain two major areas in the proposed bill that in my opinion will lead to high level compensation for large numbers of individuals who do not have an asbestos related injury or impairment. These involve those with pleural reactions and those with "other cancers."

Pleural Reactions and Diseases

S. 852 should include medical criteria for payment of claims for pleural reactions only when there is evidence of significant impairment related to extensive pleural disease.

Pleural reactions in the lungs are different than asbestosis. Most pleural reactions are asymptomatic (i.e., do not have any discernible physical effect). For example, a pleural plaque can be characterized as a callus on the chest wall. It does not involve the lung. Pleural plaques are a marker of asbestos exposure but do not cause impairment. Pleural plaques or thickening, unless extensive, do not affect lung function. In medical textbooks these are most commonly referred to as "benign pleural plaques" and not "pleural disease."

In certain rare cases, very extensive pleural thickening can lead to entrapment of the lung and cause impairment. This is called diffuse pleural thickening and is properly termed a disease. Fortunately, new cases of asbestos-induced diffuse pleural thickening are extremely rare since high-level occupational exposures have been virtually eliminated for almost 20 years.

In addition, the presence of pleural plaques or pleural thickening due to asbestos exposure does not increase the risk of developing either asbestosis or lung cancer. When compared to other individuals with similar asbestos exposure but no pleural manifestations, patients with pleural plaques have not been shown to be at increased risk of more serious asbestos-related diseases.

I would recommend deleting bilateral pleural disease as a qualification for compensation in the following Levels:

- Level II: Pleural plaques do not cause the airway obstructive disease that would meet the PFT requirements in Level II. A smoker with mild airway obstruction and who has

pleural plaques would qualify for Level II, but would not have an impairment due to asbestos exposure.

- Levels III, IV and V: These Levels describe increasing levels of restrictive impairment due to asbestosis. To qualify for these levels the claimants should have asbestosis as defined by radiographic and clinical data. Bilateral pleural disease does not cause this type of impairment and should not be used to meet the radiographic criteria for these levels.
- Level VII: Pleural plaques and pleural thickening are not independent risk factors for enhancing the risk of lung cancer. This level will primarily compensate smoking induced lung cancers.

Other Cancers

S. 852 should not include claims for cancer other than lung cancer and mesothelioma because current medical science does not establish a causal relationship between asbestos exposure and these other cancers.

At least 69 cohorts have been studied for the risk of lung cancer from occupational exposure to asbestos. Of those, nine cohorts were larger than 5,000 persons. The lung cancer risk of those nine cohorts is shown in the table below. Note that two of the cohorts showed no increase of lung cancer risk (Relative Risks (RR) of 0.84 and 1.03). Five of the cohorts showed modest increases in lung cancer risks (RR's ranging from 1.25 to 1.96), and two cohorts showed high lung cancer risk (RR's 2.64 and 3.7).

Table: Lung Cancer Risk in Asbestos Cohorts >5000

	N	Observed	Expected	RR
Rossiter and Coles, 1980	6,292	84	100.0	0.84
Newhouse and Sullivan, 1989	8,404	229	221.4	1.03
McDonald *et al.*, 1980	11,379	230	184.0	1.25
Hughes *et al.*, 1987	6,931	154	115.5	1.33
Clemmesen *et al.*, 1981	5,686	47	27.3	1.72
Raffin *et al.*, 1989	7,996	162	89.8	1.80
Acheson *et al.*, 1984	5,969	57	29.1	1.96
Armstrong *et al.*, 1988	6,916	91	34.5	2.64
Selikoff *et al.*, 1991	17,800	1,008	269	3.7

Goodman *et al.* in 1999 did a meta-analysis on all 69 cohorts to determine the magnitude of association between asbestos exposure and lung cancer. He found that overall the increased risk of lung cancer associated with asbestos exposure was about 50%, as shown in the table below. (A RR (Relative Risk) of 1.00 means no increased risk over that of a non-exposed population.)

Table: Lung Cancer Mortality – Asbestos Cohorts Meta-Analysis

Asbestos Exposure 69 Cohorts	RR = 1.48 – 1.63

M. Goodman *et al.*, Cancer Causes and Control 10:453, 1999

While it is well accepted that exposure to asbestos is associated with mesothelioma and lung cancer, no meaningful association with other cancers has been established. In the past, several epidemiological studies suggested a relationship between asbestos and malignancies at sites such as the gastrointestinal tract, larynx, kidney, liver, pancreas, ovary and hematopoietic systems. Many of those studies involved case-reports or case-control studies. The best assessment of risk association is done with cohort studies and not case-control studies since exposure assessment in case-control studies is usually derived from questionnaires and is frequently inaccurate. Since those early studies, a substantial number of additional studies of this issue were undertaken, and the weight of current medical and scientific information suggests no clear association between asbestos and cancers other than lung cancer and mesothelioma.

As of 1999, fourteen cohorts had been evaluated for various aspects of gastrointestinal cancer and its relationship to asbestos exposure. In addition, three cohorts evaluated kidney and/or bladder cancer. Two cohorts evaluated prostate cancer and one cohort has evaluated leukemia and other lymphatic or hematopoietic malignancies. A recent meta-analysis of these cohorts shows that for these cancers there is either no evidence of a significant association with asbestos exposure or no dose-response effect. The table below shows the results of that meta-analysis. Besides lung cancer and mesothelioma the only cancer for which a possible association with asbestos exists is laryngeal cancer where the meta-analysis showed an SMR of 1.57. However, variance in these studies was large and there was no evidence of a dose-response effect, raising serious question as to whether cancer of the larynx has a true correlation with asbestos exposure. (Note: A Standard Mortality Ratio (SMR) is similar to Relative Risk with the normal or control value being 1.00 and a 50% increase in death due to that disease being expressed as 1.50.)

Table: Pooled Analysis of Studies of The Risk of Cancer in Asbestos Exposed Cohorts

Cancer Sites by Systems and Organs	With Latency of at Least 10 Years		
	No. of Cohorts	Meta-SMR	95% CI
Respiratory			
Lung	37	1.63	1.58-1.69
Larynx	4	1.57	0.95-2.45
Gastrointestinal			
Esophagus	2	–	–
Stomach	9	0.92	0.77-1.10
Colorectal	9	0.89	0.72-1.08
All gastrointestinal	14	1.03	0.95-1.11
Urinary/Reproductive			
Kidney	3	1.20	0.88-1.60
Bladder	3	0.98	0.73-1.78
Kidney and Bladder	3	1.07	0.87-1.30
Prostate	2	–	–

Goodman *et al.*, Cancer in asbestos-exposed occupational cohorts: a meta-analysis. Cancer Causes and Control 10:453-464, 1999.

With regard to "Other Cancers" I would recommend the following:

- Delete Level VI since this level would result in large compensations to large numbers of individuals who develop a cancer for which there is no established causal relationship to asbestos exposure.

Other Recommendations on Changes to the Medical Criteria to Improve the Function of the Trust to be Established under S. 852

- **Make the requirements for Quality Assurance more rigorous.** Reliable data is the cornerstone to ensuring that claims under S. 852 correctly meet the medical criteria. Currently S. 852 provides only for random audits. A comprehensive audit procedure to review all claims, including an independent B read of chest films would significantly strengthen the function of this proposed trust. No Quality Assurance is specified for Pulmonary Function testing. The medical criteria state that PFTs should substantially conform to the ATS criteria. These criteria are quite rigorous and many screening PFTs fail to meet these standards. The PFTs to be used by the proposed trust need a standardized audit procedure to ensure quality.

- **Expand the definition and requirement to demonstrate "Substantial Occupational exposure."** The definition of this term needs to include a requirement that the regular exposure to asbestos fibers must also be to a substantial concentration of airborne fibers. As written a claimant could qualify by doing repair or other work using a product with encapsulated asbestos fibers and which has fiber release under work conditions that are equivalent to or even an order of magnitude less than the current OSHA PEL. I would recommend that a minimum exposure fiber concentration be specified using a time weighted average. This exposure level should be on the order of 2-5 fibers per cc if it is to apply to work durations as short as 5 weighted years. This concept should also be included in the definitions of Moderate and Heavy exposure.

- **Delete the use of DLCO in Level V** – The gold standards for demonstrating functional disability in severe asbestosis (Level V) are decreases in TLC and in FVC. DLCO is more highly variable, non-specific and is not closely correlated with functional disability. It should not be used as a substitute for decreases in TLC and FVC to qualify for Level V. Keeping DLCO as an alternated criteria for PFT changes in Level V will result inappropriately qualifying individuals for Level V that should be Level IV.

- **Delete the use of Chest CT scans** – Level VIII appropriately recognizes the enhanced risk for lung cancer in individuals with asbestosis. The use of Chest CT as a diagnostic criteria is problematic because it is highly sensitive and there are no scientific standards or criteria for reliably using subtle CT findings to define individuals with enhanced risk for lung cancer. The chest radiograph should remain the standard for defining this relationship.

Conclusions

S. 852 is an appropriate approach to address the arbitrary and wasteful manner in which our current court system operates to compensate asbestos victims. The medical criteria in the current form of the bill will offer compensation to all individuals have an asbestos related disease or impairment, but unfortunately will also expend a large portion of the proposed trust's assets compensating individuals with pleural plaques and no impairment or with cancers that are not caused by asbestos exposure. These issues should be addressed to preserve the assets of the trust to compensate those who are truly impaired by a occupational exposure to asbestos.

James D. Crapo, M.D.

Testimony of
John M. Engler
President and CEO
National Association of Manufacturers
On behalf of The Asbestos Alliance
Before the
Committee on the Judiciary
United States Senate
On
Asbestos Legislation

April 26, 2005

Chairman Specter, Senator Leahy, and members of the Judiciary committee: thank you for the opportunity to testify. Today I am speaking on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. Last week's introduction of the bipartisan S.852 represents a major step forward in the decades-long push for asbestos legislation. I commend the two of you, along with Majority Leader Frist, Senator Hatch and others who have been involved, for strong leadership and incredible persistence in dedicating yourselves to crafting a bill that takes care of victims, provides fairness and certainty to companies and delivers a major boost to our nation's economy. We will submit for the record detailed comments on S.852, but today I would like to focus on the latter point—why passage of trust fund legislation is so vital to our economy.

In the last few years we have seen numerous studies documenting the negative economic impact of asbestos litigation. I will summarize those in a

moment. But first I would like to talk about a study, to be released shortly by NERA Consulting, which for the first time quantifies the tremendous benefits of a legislative solution like S.852. Here are some of the key findings:

- Enactment of trust fund legislation will reduce administrative costs (such as legal fees) and bankruptcy costs (including impacts on workers) by $85 billion. According to NERA, these costs and the cost to the economy of lost productivity have reached a staggering $343 billion.
- To date, productivity losses due to litigation represent $303 billion. This means that companies involved in asbestos litigation pay more to borrow money to expand and create jobs. They also devote significant resources to fighting lawsuits, lose opportunities for mergers and acquisitions and are less attractive to investors. A trust fund bill will eliminate these drags on productivity and substantially reduce productivity losses that have in the past been as high as $50 billion a year.
- Another plus cited by NERA is the near elimination of the transaction costs (such as legal fees), which have eaten up almost 60% of the billions spent on litigation. RAND previously reported that claimants are only getting 43 cents of ever dollar today. NERA reports that the reduction in transaction costs means that with a $140 billion trust

fund, claimants will receive up to $65 billion more in compensation than they would if we allowed the status quo to continue.

- Finally, NERA quantified the expected value of asbestos reform on Wall Street using stock market valuation of defendant companies. They note that Wall Street would value enactment of an asbestos trust fund bill at as much as $137 billion. A bounce in the stock market from asbestos legislation would benefit millions of workers, retirees and other investors who are building nest eggs for their future or enjoying their retirement years.

These new findings from NERA clearly demonstrate that passage of asbestos trust fund legislation will provide an immediate and long-lasting boost to the economy. I request that the full study be made part of the record.

As I said earlier, other studies have also detailed the significant economic effect of asbestos litigation. The impact on workers is particularly worth noting. According to a 2002 study by Nobel laureate Joseph Stiglitz, about 60,000 jobs, many in the manufacturing sector, have been lost due to asbestos bankruptcies. Many of those lost jobs were union jobs, and I note that earlier this month, the United Autoworkers, which represents many workers and retirees, including thousands in my home state of Michigan, strongly endorsed the draft that formed the basis for S.852.

The direct job losses reported in the Stiglitz study tell only part of the story. Communities are also affected as laid-off workers tighten spending or

even move away in search of new jobs and bankrupt companies cut operations and reduce purchases. This has a significant impact on a wide range of local businesses. In fact, another NERA study estimated that for every 10 jobs lost to an asbestos bankruptcy, a community will lose as many as 8 more jobs.

The scope the asbestos litigation scourge is quite clear. More than 8,000 companies have been dragged into this litigation, from the Fortune 100 to small, family owned businesses. For thirty years these companies have been paying an asbestos tort tax, expending an estimated $70 billion. Nearly 60% of that money went to the asbestos trial bar, defense lawyers and court costs. This tax has come randomly. While defendants will certainly pay into a trust fund, they will at least get a clear picture of their liability, now and in the future. That certainty provides a huge advantage over the status quo.

The trial bar has already driven more than 70 companies into bankruptcy and they are in a continuous search for "the next solvent bystander." A trust fund bill will stop the flood of bankruptcies.

In closing, Mr. Chairman, let me summarize some of the major advantages of a trust fund solution of the sort S. 852 would establish. It would:

- Provide sure, fair and timely compensation of medical victims of asbestos exposure;
- End the scandal of asbestos litigation by getting the problem out of the courts and into a no-fault system;

- Comply at long last with repeated Supreme Court exhortations that Congress step in and solve the problem as only it can;
- By getting it out of the courts, limit and in many cases eliminate the flow of funds to lawyers instead of victims;
- End the random assessment of asbestos tort taxes on companies, a tax that has already taken more than $70 billion out of the economy and bankrupted scores of companies, and replace it with a knowable and predictable assessment that will go mainly to victims, not to lawyers;
- Encourage growth of individual companies freed from the cost and uncertainties of the asbestos litigation scandal and encourage therefore the growth of the economy as a whole.

Mr. Chairman, I want to again thank you for your hard work and determination. For the sake of asbestos victims, America's workers and our economy, we must all work together to pass comprehensive and fair legislation that resolves the asbestos problem once and for all.

Testimony of
Hershel W. Gober
On Behalf of The Military Order of the Purple Heart

Before the
United States Senate
Committee on the Judiciary
"The Fairness in Asbestos Injury Resolution Act"(S. 852)
April 26, 2005

The Honorable Chairman Specter, Ranking Member Leahy, and other distinguished Members of the Committee, my name is Hershel W. Gober. As its National Legislative Director, I am appearing today on behalf of the Military Order of the Purple Heart. The Military Order of the Purple Heart is unique among all veterans service organizations in that our membership is comprised entirely of combat veterans who suffered wounds or injuries in service to our country for which they were awarded the Purple Heart Medal.

I am honored to have this opportunity to testify on behalf of the Military Order of the Purple Heart in support of S. 852, the Fairness in Asbestos Injury Resolution Act or "FAIR Act."

Tragically, the asbestos litigation crisis has hit veterans especially hard. Men and women of our nation's armed forces were unknowingly exposed to asbestos due to its prevalent use by the military during and after World War II, particularly in insulation products built into ships for the U.S. Navy and bulkheads, pipes, ceilings, floors and machinery, which were all coated with asbestos. Moreover, those who worked in shipyards and dry docks, building and repairing Navy vessels, were also heavily exposed to asbestos. As late as 1979, the U.S. government continued to claim that asbestos use remained necessary "for purposes of national defense."

Due to the long latency period from the time of asbestos exposure to the first signs of symptoms of asbestos-related disease, veterans who served before the 1980's are still being diagnosed with life threatening and terminal illnesses. Individuals with military service make up a significant number of the total asbestos victims in the United States. In November 2003, the *Wall Street Journal* reported that data has shown that claims from individuals exposed in military and shipyard construction accounted for 26% of all mesothelioma cases, 16% of all other lung-cancer cases, and 13% of all disabling lung-disease cases.

The avenues open to veterans to seek compensation through the tort system, however, are very limited. The Federal government, as the members of this committee know, has sovereign immunity, thereby restricting veterans' ability to recover from the

government; and most of the companies that supplied asbestos to the Federal government have either disappeared or are bankrupt and, therefore, are only able to provide a fraction of the compensation that should be paid to asbestos victims, if anything at all. Even if there is a solvent defendant company for a veteran or his/her family to pursue, there remains the lengthy, costly, and uncertain ordeal of filing a civil lawsuit and going through discovery and trial, where the plaintiff bears a heavy burden of proof and often has the very difficult to impossible task of establishing which defendant's product caused their injuries. Moreover, under the current system, far too much money is being diverted to claimants with no discernable illness or injury, victims too often receive widely divergent recoveries depending simply on where their lawsuit is filed or who their attorney is, and attorneys' fees and other transaction costs are consuming far too much money that would otherwise be available to compensate those that are ill.

The U.S. Department of Veterans Affairs continues to receive claims for benefits from veterans for illnesses related to asbestos exposure while serving in the military; however, due to the difficulty of proof, less than one-third of the known VA asbestos claimants receive service connected compensation for their asbestos disease.

Veterans and their families with asbestos-related diseases desperately need and certainly deserve relief as the current system is simply not taking care of their needs or treating them fairly.

The Military Order of the Purple Heart supports S. 852, the FAIR Act, because it believes it will provide an immediate and effective solution to the asbestos litigation problem for victims and will provide many needed benefits for veterans, including the following:

(1) Establishment of a Streamlined, No-fault, Administrative System (Section 101(a)(1)-(2); Section 114(b),(c),(d)(1)(a) & (d)(2); Section 102) The FAIR Act will establish a new federal Office of Asbestos Disease Compensation (Office) for the processing and payment of asbestos claims. Administrative review of claims will occur through an efficient, streamlined, and no-fault process, with strict time lines on when eligibility determinations must be made. The new administrative system is expressly designed to ensure that eligible claimants will receive timely, fair and certain compensation based on clearly defined eligibility criteria.

(2) Protection of Veterans' Benefits (Section 3(3)(B); Section 3(6); Section 134(b)) The FAIR Act will preempt all claims for asbestos-related injuries, but will preserve claims brought under Workers' Compensation and Veterans' Benefits Programs. It, therefore, will keep intact all of the benefits currently available to veterans if they choose to pursue those benefits. The FAIR Act will also exclude any recoveries under Veterans' Benefits Programs from the requirement that awards under the Act be reduced by prior recoveries.

(3) Reduction of Evidentiary Burdens (Section 121(a)(16) & (c)) Unlike the tort system, there will be no requirement under the FAIR Act to prove exposure to a particular defendant's asbestos product. And, unlike Veterans' Benefits, there will be no "service-related" requirement, easing the burden of proof on those individuals who were exposed while in the military. The FAIR Act will also include heavier weighting for pre-1976 and World War II shipyard exposures and provide special provisions for take-home exposures. The Act will further reduce the burden on claimants through simplified claims requirements and the requirement that exposure presumptions for certain industries, occupations and time periods be developed. It is well known and documented that certain individuals in some occupations within the military had high exposures to asbestos. Current asbestos bankruptcy trusts, which have used exposure presumptions for military service and occupations, will be looked to as a model by the Office's Administrator. These presumptions should help ease the burden of proof for veterans.

(4) Application to Exposures on U.S. Ships and Overseas (Section 121(c)(1)(B)) The FAIR Act will expressly apply to exposures to U.S. citizens occurring on U.S.-owned or flagged ships and occurring overseas while working for U.S. entities.

(5) Allowance of Recoveries by Dependants (Section 113(a)) Under the FAIR Act, claimants will include family members of the victim, allowing spouses or children to recover in place of the victim. The Act will provide a definition of "personal representative" to ensure that the Office will not become embroiled in disputes over who is the proper beneficiary.

(6) Providing Medical Monitoring (Section 132), Education and Medical Screening Programs (Section 225) The FAIR Act will provide medical monitoring, including reimbursement of an individual's costs for physical examinations in addition to x-rays and pulmonary function tests. Such examinations and tests could be conducted every three years. In addition, the FAIR Act will establish a medical screening program for claimants considered to be at high risk of asbestos-related disease and provide an outreach and education program about asbestos-related medical conditions.

(7) Establishment of a Claimant and Legal Assistance Program (Section 104) The FAIR Act will establish a claimant and legal assistance program to assist claimants in submitting claims or to find free legal representation to help file their claims. Among other things, the Act will require that the claimant assistance program include outreach, training of individuals providing assistance, and resource centers established in areas with a high concentration of potential claimants. The Administrator will also be authorized to contract with local community and labor organizations to provide such assistance.

(8) Providing $1,000,000 Grants to Mesothelioma Research and Treatment Centers (Section 222(c)) As noted above, an estimated 26% of mesothelioma cases involve individuals exposed to asbestos at military and shipyard constructions sites. Recognizing the need for more research on mesothelioma, the FAIR Act will provide $1

million in grants for each of fiscal years 2005 through 2009 for each of up to 10 mesothelioma disease research and treatment centers. These centers will be closely associated with U.S. Department of Veterans Affairs medical centers to provide research benefits and care to veterans. These research grants will help advance the current treatments available for mesothelioma, especially for veterans, which the legislation recognizes as having "suffered excessively from mesothelioma."

As the Committee Members know, in addition to the Military Order of the Purple Heart, there are many other veterans service organizations that support the trust fund solution embodied in the FAIR Act, including the Veterans of Foreign Wars of the United States, the Non-Commissioned Officers Association, the Jewish War Veterans, the National Association for Black Veterans, the Paralyzed Veterans of America, the National Association for Uniformed Services, the Veterans of the Vietnam War, the Pearl Harbor Survivors Association, the Women in Military Service for America, the Marine Corp League Fleet Reserve Association, the Military Officers Association of America, the Blinded Veterans Association, the American Ex-Prisoners of War, the Retired Enlisted Association, the Arkansas Veterans' Coalition, the Florida Veterans of Foreign Wars, the Louisiana Veterans of Foreign Wars, the Texas Veterans of Foreign Wars, the West Virginia Veterans of Foreign Wars, the West Virginia American Legion, and the National Association of State Directors of Veterans Affairs.

Again, thank you for providing me this opportunity to testify today on behalf of the Military Order of the Purple Heart and our nation's veterans in support of the FAIR Act.

TESTIMONY OF PROFESSOR ERIC D. GREEN BEFORE THE SENATE COMMITTEE ON THE JUDICIARY ON S. 852, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005, Scheduled for Tuesday, April 26, 2005, at 9:30 a.m.

INTRODUCTION

I would like to thank Senator Specter and Senator Leahy as well as the other members of the Judiciary Committee for giving me the opportunity to appear before you today to talk about the Fairness in Asbestos Injury Resolution Act of 2005.

My remarks will address the impact of the Bill primarily on the rights of asbestos victims but also highlight some of the dangers that the Bill as currently drafted poses for companies, insurers, and, possibly, the taxpaying public. My testimony is based on my own experience with resolving asbestos claims and on the collective views of myself and other individuals who have been appointed by federal courts to represent the interests of future claimants in asbestos-related bankruptcy proceedings. Although I speak for myself, I know that my views are shared by most of the other court-appointed individuals who represent future claimants.

I am currently the court-appointed Legal Representative for future asbestos bodily-injury claimants in the Halliburton (or Dresser Industries), Fuller-

Austin, Federal-Mogul, and Babcock & Wilcox bankruptcy cases, a position often referred to as a "futures representative." I also am a professor at Boston University School of Law, and I operate a firm specializing in alternative dispute resolution. I have served as a Special Master to several state and federal courts in asbestos litigation matters, and as a mediator I have settled tens of thousands of personal injury asbestos cases and resolved numerous asbestos insurance disputes. However, I have never directly brought or defended an asbestos personal injury lawsuit and have no personal stake in the outcome of any asbestos litigation or legislation.

At present, the rights of future asbestos claimants, along with current claimants, are protected by the bankruptcy trust and "channeling injunction" structure that Congress created and codified at 11 U.S.C. § 524(g) in a 1994 amendment to the Bankruptcy Code. The mechanism provided pursuant to section 524(g), which requires the participation of a futures representative, is currently the only means through which a company can fully resolve all of its present and future asbestos liabilities.

Since the purpose of section 524(g) is to preserve the assets of companies faced with mass asbestos liability <u>and</u> to protect the claims of asbestos victims, the futures representatives have an appreciation for the economic issues that underlie the trust mechanism and the competing needs and rights of

businesses, insurers and tort victims. I and the other futures representatives are intimately familiar with the issues that arise in creating a limited fund to satisfy an as-yet-unknown number of asbestos claims. I am familiar with the enormous logistical and administrative challenges that go with setting up even a single trust for the victims of one company's asbestos liabilities. From this perspective and experience, I would like to offer the Committee some realistic thoughts on what actually is involved in setting up a single national fund to review, administer, process, and pay millions of claims involving hundreds or thousands of manufacturers, distributors, and their insurers, especially when the allocated contributions expected from the manufacturers, distributors, and insurers are not clearly defined, agreed upon, and ready to be paid by those firms.

Futures representatives bring a unique perspective to the subject of asbestos litigation and legislative reform, because they are non-partisan participants in the world of asbestos litigation. They include judges, law professors and practicing lawyers, all of whom have substantial experience with asbestos personal injury litigation and asbestos-related bankruptcies. None of us, however, is an asbestos personal injury plaintiff's lawyer or an employee of a defendant company or insurance company. We are:

- dedicated to the equitable distribution of scarce resources in the face of substantial uncertainty;

- concerned with the sustainability of companies and insurers — not only to provide for current and future asbestos claimants, but to provide employment and a livelihood for current and future workers and value for shareholders;
- unbiased and not motivated by any contingent fee arrangement or duty to preserve and maximize shareholder value; and
- grounded in detailed, practical experience in coping with an unknown but overwhelming number of claims.

DISCUSSION

The enactment of federal legislation to manage the tide of asbestos personal injury claims is a commendable goal, so long as it can be realistically carried out with the knowing support of all the essential participants: companies, insurers, claimants, regulatory and administrative bodies, and other affected parties. A national plan without that support cannot succeed, and if pursued, it will place efforts to resolve asbestos claims on a worse footing than they are now. The claims-resolution systems that are already in place, including bankruptcy trusts established under section 524(g), should not be abandoned unless their replacement is reasonably certain to produce results for asbestos victims at least as good as what they are currently likely to receive. My backing for any legislation is therefore tempered to the extent that the legislation does not clearly, realistically,

fairly, and definitively provide up front, at the time of its passage, for allocation and collection of the contributions necessary to fund payments to claimants on a reasonably timely basis.

This is critical. Any legislation that replaces the current system must protect asbestos victims from the risks of error and uncertainty associated with the limited national Fund contemplated by Senate Bill 852. If a single national Fund is to be the sole source of compensation for asbestos victims, it must have access to sufficient resources to pay all current and future claims and be designed to operate in a way that will ensure that asbestos victims will be paid in full and in a timely manner. In short, we must be certain that the Fund will not run out of money before all the victims of asbestos have been identified and paid, and that the Fund will not run short of money and make victims of asbestos wait longer for payment than they would under the current system.

Thus, I have two main areas of concern about Senate Bill 852: First, whether the Fund will have the resources to timely pay claims; and second, whether claimants will be fairly and sufficiently provided for if the Fund becomes unable to meet its obligations.

Unfortunately, the Bill in its present form falls short of meeting these concerns. The tough issues avoided in the current Bill must be addressed if we are not to replace the legal rights and viable compensation trusts that victims already

have with an underfunded system that at best, will be gamed and litigated to death, and, at worst, will lead to widespread chaos, failure, delays, and unanticipated demands for a government bailout or massive infusion of additional funds from already otherwise compliant insurers and companies.

I. FUNDING

My greatest concern about the Bill is its lack of certainty and clarity regarding whether, and when, the necessary contributions will be made by industry and insurers. In its current form, the Bill sets forth total contribution amounts but fails to address the resistance that will stand in the way of ever collecting those amounts. Based on statements that persons in the industry and insurance sectors have already made with respect to this Bill and prior versions, the resistance to collection will be as stubborn and as time-consuming to overcome as possible.

It is wishful thinking and a major mistake to underestimate this problem. In the entire history of asbestos litigation, only a handful of industrial firms and even fewer insurers have ever voluntarily faced up to the cost of resolving their full asbestos liabilities. The rest of the firms and insurers that are being counted on under this Bill to pay their allocated contributions have by and large fought and resisted every attempt to hold them accountable. What makes anyone think they will now accept their allocated responsibilities and pay up their

shares on time and without a fuss? Indeed, only those firms that know they are getting the deal of the century will do so. In the case of one such firm, for example, it is estimated that the amount of money the company has agreed to pay into the 524(g) trust versus what it will pay into the national Fund will drop from $750 million to a meager $2.5 million. Only companies in that position will cooperate; the rest will resist, as they have done for years. The litigation won't diminish; it will only shift in focus.

The Bill places industrial firms in tiers and subtiers based on whether or not they are in bankruptcy, how much they have spent responding to asbestos liability, and what their revenues were in 2002. For each subtier, the annual contribution amount is stated. But the actual receipt of funds will have to wait until the firms have submitted their information, the Fund Administrator has reviewed that information to place the firms in subtiers, and the firms have actually made their contributions. Along the way, the firms will have ample opportunities and incentives to challenge the system and delay the day of reckoning.

The Bill's treatment of insurers offers further opportunities to create delay. The Bill states only the total contributions expected from insurers, with no criteria for tiers or subtiers. How the total contributions will be allocated among the insurers will not even be known until after a full-blown rulemaking process, with hearings and public comment and an opportunity for judicial review. Then,

once the allocation criteria have been established, the insurers will have another chance to comment on and seek judicial review of how the criteria are applied to each of them in particular. Although the Fund Administrator is authorized to seek "interim payments" from insurers while those procedures are being worked through, the Bill is silent as to how the interim payments will be collected from unwilling participants. Likewise, although the Bill foresees the need to increase contribution amounts if some insurers default on their payments, it says nothing about how those increases are to be made and enforced.

Moreover, the Trustees of several of the bankruptcy trusts that are set up and running, funded with hard-won assets and approved by federal courts, receiving, processing and paying claims, are already making plans to mount serious legal challenges to the confiscation of their property under the Bill. These legal challenges are likely to throw the critical initial funding of the national Fund into question for a significant and critical period of time.

Frankly, it is just plain irresponsible to essentially "punt" on the issue of the contributions expected from specific insurance companies and defendant firms. I fear that this approach is designed simply to sweep under the rug until after passage the sharp reality that the insurance industry and defendant firms must face and accept if this scheme is to have any hope of actually succeeding.

The delays that are all but built into the Bill are especially troublesome because the Fund will face a tremendous backlog of claims and a correspondingly burdensome payment obligation in its early years. Judge Fullam estimated in the Owens Corning bankruptcy case that there are $7 billion in valid claims against that defendant alone. Given the number of estimated pending claims against all companies, by its fourth year the Fund would need to borrow $50 billion to meet its liabilities — an amount that is approximately $10 billion more than the maximum permitted under the Bill. Such a loan would cause all future contributions — assuming they are timely made — to go to debt service. The Fund's liabilities will outstrip its revenues from the beginning.

For the Fund to be economically feasible, the precise contributions must be determined before its enactment, and binding commitments must be obtained from the contributing firms. Currently, these do not exist. A substantial number of expected contributors from industry and insurance are on public record as rejecting any commitment to fund the legislation. Their resistance will result in years of post-enactment rancor, controversy, and litigation. The delay and uncertainty that will dog the Fund under the current Bill should not be accepted, since the intended beneficiaries of the Bill, asbestos victims, will be made to wait still longer for compensation, while their conditions worsen, their medical costs increase, and their number escalates.

Absent a federal guarantee, the Bill's uncertain funding and weak enforcement provisions shift onto the backs of the sick and needy asbestos victims, especially those in the future, the risk of delay and failure. While the Bill does provide for a sunset if the Administrator concludes that the funding under the Bill is insufficient, the sunset remedy is flawed in many ways and fails entirely to address the burden on asbestos victims created by delay and uncertainty. One solution, and perhaps the only solution under this version of the Bill, would be for the federal government to provide the money to bridge the payment gap caused by delay and uncertainty. Alternatively the payment gap will have to be closed by supplemental assessments to other companies and insurers upon whom the risk of reallocation would fall. This alternative, however, is probably unworkable and will only exacerbate the uncertainty companies and insurers already face on the payment side.

II. CHAOS IN THE EVENT OF SUNSET

Given the problems I have just outlined, there is a real likelihood that the Fund will find itself unable to meet its obligations and will therefore sunset according to the provisions in the current Bill. When that happens, the Fund's remaining assets, if any, will be redistributed in some unspecified fashion to the bankruptcy trusts that were disbanded when the Fund was created. Asbestos

claimants will then be shunted back to filing claims against those resurrected trusts. This attempt to revive the status quo that existed prior to the Bill's enactment is a recipe for disaster.

In its current form, the Bill requires that all the monies now held in trust for current and future claimants be transferred to the national Fund. This transfer would cause the existing trusts, with assets in the billions, to be shut down. The hundreds of skilled employees around the country who have been processing claims would be fired. In some cases, those trusts and their claims processing units have been adjusting claims for nearly twenty years with considerable expertise. For the sake of efficiency and economies of scale, many of the trusts have combined facilities.

The Bill would require all claimants, present and future, to come to the national Fund for payment of claims. The initial monies for the national Fund would come from established and funded asbestos trusts that are operating now and paying victims pursuant to court order. The Bill requires that these working trusts be abandoned in favor of a system that will not even begin paying claims until many months after the Bill takes effect, and that will not reach the trusts' level of efficiency and stability until years later, if ever.

If the national Fund's projected shortfall becomes a reality, then the trusts that exist today are to be revived. But it will take tens of millions of dollars

to recreate what already exists in the private sector today. The trusts' claims adjustment facilities will have been dismantled, their claims adjusters fired, their trustees discharged, and their final tax returns filed. The Bill provides no practical transition plan to enable claimants to go back to the tort system or to the trusts.

Moreover, the operation of the Bill's sunset provisions is vague at best. The Administrator is to report annually on the financial condition of the national Fund. If the Administrator determines that the Fund will not be able to pay all of the then-resolved claims if it resolves any additional claims, the Bill sunsets, and the national claims-resolution system terminates. The Bill does not require, however, that the Administrator determine that the claims will be paid at all timely. Given the backlog of claims and demand for payment at the outset of the life of the national Fund, the Administrator may fall many years behind in making payments. Nevertheless, based on his or her forecasts, the Administrator may predict that all claims will be paid someday and therefore opt to keep the Fund in operation, postponing the day of reckoning indefinitely while the sick and dying are left without compensation.

The Bill is speculating with victims' money by taking funds dedicated to them; spending much of those funds on establishing, defending, and administering a system that at best will merely replace the claims facilities that already exist; and if that effort fails, using still more of those funds to recreate the

existing system. Although these flaws can be remedied by guaranteeing that there will be no failure under the Bill, that solution has not been proposed.

CONCLUSION

In conclusion, while I support the motives behind this legislation and its ostensible objectives, I cannot support the overly optimistic creation of a scheme that does not spell out clearly the specific sources and amounts of funding and guaranty collection. My experience tells me that such a program will not work. A national legislative resolution to the asbestos litigation crisis is in the national interest and can be a benefit to all concerned — if it has the necessary, advance support of industry and insurers in the most critical area -- specific and knowing pledges of funds. I would like to assist the Committee in any way that I can be of service in achieving a solution that satisfies the concerns of all parties in interest.

I am happy to answer any questions the Committee may have.

Mon, 04/25/05 04:50:50PM Senator Patrick Leahy :

INTERNATIONAL ASSOCIATION OF
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PRESS RELEASE

Regarding S. 852
the "Fairness in Asbestos Injury Resolution Act of 2005 (FAIR Act)"

Monday, April 25, 2005

The International Association of Heat and Frost Insulators and Asbestos Workers supports a legislative solution to the asbestos compensation crisis...**if the legislative solution is truly fair and equitable and properly funded.**

We commend Senator Arlen Specter of Pennsylvania and Senator Patrick Leahy of Vermont who have worked during the past two years in a bi-partisan and courageous effort alongside a dedicated group of AFL-CIO representatives to draft an Asbestos Compensation Bill that reflects the concerns of working men and women—union and nonunion alike.

There is much in the current proposal we agree with. Yet, there are some important changes that need to be made in order to make the bill fair and equitable.

Unlike some, we do not propose changes to defeat the Bill. Instead, we have and will continue to make constructive suggestions so that a bi-partisan bill can be passed into law.

We support the following:

1) We believe the practice of giving tens of billions of dollars to people who are not sick, that is, they have no breathing problem or impairment from asbestos exposure, must be stopped. Compensation for non-malignant asbestos disease must be limited to those who have some breathing problem or impairment from asbestos exposure.

2) There must be some objective medical evidence or markers of asbestos exposure in order for a lung cancer claim to qualify for payment under any trust fund established by legislation—whether it be pleural thickening, calcification, underlying asbestosis or some elevated asbestos count in lung tissue. If lung cancer claims without markers

Affiliated with the AFL-CIO, Building and Construction Trades Department, Metal Trades Department and Canadian Labour Congress

are to be considered in some cases, they should each be individually reviewed to determine the threshold question of whether asbestos exposure was a cause of the lung cancer. CT scans should be able to be used in making this determination.

3) Since mesothelioma is a signal cancer for asbestos exposure, and unrelated to tobacco or other industrial carcinogens, no pleural markers are required.

4) Since every previous estimate of asbestos liability has drastically under-estimated the amount of asbestos liability, claimants must be allowed to return to the tort system without delay if a trust fund established by the Bill is unable to pay asbestos claims in a timely manner. Access to appropriate state court forums must be preserved and representation of victims by counsel of their choice must be allowed.

5) To be truly fair and equitable, asbestos legislation must contain adequate upfront levels of funding and include adequate safeguards to ensure the solvency of the Trust Fund for both current and future victims of asbestos exposure.

6) The identities of the parties and their participation levels must be disclosed.

Victims of Asbestos disease must not be victimized again by passage of legislation that is unfair.

There may be more than a few special interest groups—including those who refuse to participate in the trust fund—seeking to derail the bi-partisan effort of Senator Leahy and Senator Specter to bring some sense of proportion and equity to the asbestos crisis. To be sure, the Bill needs some additional and important work that could be addressed during and after initial markup.

We will continue to work in a constructive way to see if a fair, equitable and adequately funded Bill can be passed. If not, we will fight for the right of any asbestos victim—union or nonunion—to a trial by a jury of their peers in an appropriate state court.

Fundamental fairness demands no less, and neither do we.

James A. Grogan

James A. Grogan, General President
International Association of Heat and Frost
Insulators and Asbestos Workers

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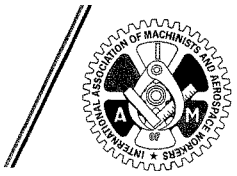
International Association of Machinists and Aerospace Workers



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OFFICE OF THE INTERNATIONAL PRESIDENT

GL-2 Legislative

April 26, 2005

To All Senate Members

Dear Senators:

The International Association of Machinists and Aerospace Workers (IAM) oppose the Specter-Leahy Asbestos Bill. Railroad workers, whom this legislation will affect, founded the IAM, and today we continue to support a large portion of railroad workers and their families. While we acknowledge the good spirit and intent of Senators Specter and Leahy to offer permanent resolve for those workers and their families, at a minimum this legislation leaves them behind.

The Bill contains improvements over those incorporated into Senate Bill 2290 of the 108th Congress; however, we feel all categories still are insufficient and remain limited. The specific areas that we object to are victims awards, total funding; front end funding; funding guidelines; high-risk worker medical screening; fund contributor identification; start up as well as timetable provisions; guaranteed funding; enforcement of criminal violations of workers rights; and access to CAT scan examinations. Our main concern and belief is that all victims should be entitled 100% access to CAT scan examinations. At a time of technological advances in non-evasive diagnostic imaging, the Specter Asbestos Bill encompasses only 50% of the entire population affected.

This legislation is wrongly based on the "no fault" concept - one group loses life while the other sustains life. We disfavor bankruptcies or company dissolution, but these companies intentionally place workers and their families in harm's way.

This issue is not only a liability case but also one of corporate crime and cover up. The same corporations jeopardize good faith in their quest to take claims out of the court system and set up a corporation funded system to severely limit the amount of money exposure victims can expect to collect for damages.

Corporate irresponsibility places good faith in serious jeopardy. For example: Halliburton's corporate executives, among others, moved their registry to foreign countries to evade taxes owed. In contrast, asbestos victims and their families have no option but to pay taxes; however, due to ill health, their time is running out.

Under the Specter Asbestos Bill, Railroad workers must meander through a maze of bureaucratic red tape. Due to this complex process they require legal representation to determine whether or not they meet complicated medical criteria as set forth as well as to

correctly process those claims. Without access to competent counsel and reasonable expenses, many railroad employees will be unable to complete the claims process. Many railroad workers, whose rights to both the Federal and State Courts under FELA have been abolished, will cease participation in the claims process.

If passed, the Specter Asbestos Bill would be severely biased against railroad workers compared to other workers in the United States. Claimants would be forced to wait at least two (2) years before being able to access the claims process offered. Railroad workers will be without workmen's compensation benefits during this time, while all other workers will be able to access their State Worker's Compensation system and continue to receive benefits. Railroad workers will be singled out to wait for the claims process to begin with no access to an alternative compensation system previously provided in FELA claims, lost by this legislation.

Railroad employees need, and deserve, the right to skilled legal representation in order to assist them through this complicated process. However, attorney fees as prescribed by the Specter Bill are so low at 5% that no existing, competent attorney will be available to represent railroad union members with a potential asbestos claim; and, as such, railroad workers will be denied legal representation. In order to guarantee railroad workers access to union-approved FELA attorneys, the Bill's prescribed attorney fees, in addition to reasonable expenses, must be fair and reasonable and comparable with State Workers' Compensation, The Manville Trust, and other no-fault compensation systems.

To legislate otherwise will deny the right to fair representation and frustrate the intent of the bill, rather than create a solution.

Please contact Director Richard Michalski, phone 301/967-4575, to further discuss our position on this important legislation that not only affects our members, but also all workers that had exposure to this known carcinogen.

Very truly yours,

R. Thomas Buffenbarger

R. Thomas Buffenbarger
International President

MOUNT SINAI
SCHOOL OF
MEDICINE

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TESTIMONY BEFORE

United States Senate
Committee on the Judiciary

by

Philip J. Landrigan, MD, MSc, DIH

Professor of Occupational and Environmental Medicine
Chairman, Department of Community and Preventive Medicine
Professor of Pediatrics
The Mount Sinai School of Medicine

on

"A Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos, and Other Purposes"

Washington, D.C.
April 26, 2005

Mr. Chairman and Members of the Committee on the Judiciary,

I am pleased to appear before you today to review the impacts that asbestos has had on the health of American workers, and to discuss the legislative remedies that have been proposed for dealing with the asbestos epidemic.

My name is Philip J. Landrigan, MD, MSc, DIH. I am a physician, a board-certified specialist in occupational medicine, and Chairman of the Department of Community and Preventive Medicine in the Mount Sinai School of Medicine in New York. I am Editor-In-Chief of the *American Journal of Industrial Medicine*. I am President of the Collegium Ramazzini, an international scientific society in occupational and environmental medicine. I have had many years of experience of dealing with the clinical manifestations and studying the epidemiology of the diseases caused by asbestos. A copy of my biographical sketch is appended to this testimony.

The late Irving J. Selikoff, MD, the "Father of Asbestos Research in the United States", was one of the founders of the Department that I now chair at Mount Sinai. This Department contains New York's largest clinical facility in occupational medicine and one of the nation's largest research and training programs in occupational health, a program that Dr. Selikoff established 30 years ago. We have been designated by the National Institute for Occupational Safety & Health (NIOSH) as the major provider of diagnostic services to the men and women who worked at Ground Zero, the site of the World Trade Center in the terrible days and weeks that followed the attacks of September 11, 2001. We have now examined over 12,000 of those workers - police officers, firefighters, construction workers, paramedics, and building cleaners. Many of them were exposed in their work to asbestos.

The testimony that I shall be presenting today reflects the collective knowledge and experience of our occupational medicine group at Mount Sinai, and most especially the thoughts of my colleague, Stephen Levin, MD, Director of the Selikoff Center for Occupational and Environmental Medicine.

The Asbestos Epidemic

Asbestos has been and continues to be an occupational and environmental hazard of catastrophic proportion. Asbestos has been responsible for over 200, 000 deaths in the United States, and it will cause millions more deaths worldwide. The profound tragedy of the asbestos epidemic is that all illnesses and deaths related to asbestos are entirely preventable.

Clinical and epidemiologic studies, many of them initiated by Dr. Selikoff at Mount Sinai, have established incontrovertibly that asbestos is a human carcinogen. All forms of asbestos are carcinogenic. Asbestos has been shown to cause cancer of the lung, malignant mesothelioma of the pleura and peritoneum, cancer of the larynx and certain gastrointestinal cancers. Asbestos also causes asbestosis, a progressive fibrotic disease of the lungs.

Asbestos has been declared a proven human carcinogen by the Environmental Protection Agency (EPA) and by the International Agency for Research on Cancer of the World Health Organization.

Asbestos and cigarette smoke are powerfully synergistic in the causation of lung cancer. Nonsmoking asbestos workers have five times the background risk of lung cancer. Smokers who have had no exposure to asbestos have 10 times the background risk of developing lung cancer. But asbestos workers who also smoke have 55 times the background risk of lung cancer. This is the classic and best-studied example in the medical literature of a synergistic interaction between two proven human carcinogens.

New use of asbestos has almost completely ended in the United States and in most other developed nations as a result of government bans and market pressures. Those forces were stimulated by the epidemiologic studies that I have noted above and by the release of information on the carcinogenicity of asbestos that previously had been suppressed by the asbestos industry. By contrast, extensive and aggressive marketing of asbestos continues in the developing world, where sales remain strong and worker protections are too often weak.

Problems with the Proposed Fairness in Asbestos Injury Resolution Act

The proposed Fairness in Asbestos Injury Resolution Act contains serious scientific problems as currently written. It creates criteria for assessing the causation of disease by asbestos that are not based on scientific evidence and that are not consistent with current knowledge in occupational medicine.

Difficulties with the proposed exposure criteria

The bill contains medically unsupported requirements for minimum duration of exposure to asbestos.

Contrary to the requirements for minimum duration of exposure set forth in the bill, there is clear evidence from carefully conducted epidemiological studies that exposures to asbestos for even one month under heavy exposure conditions can increase the risk of lung cancer two-fold and also increase the risk of death from asbestosis.

The requirement for 5 or more weighted years of exposure to asbestos to establish a diagnosis of asbestosis is not supported by scientific evidence.

Also unsupported by the published medical literature are the minimum requirements set forth in the bill of 8, 10 or 12 years of exposure for establishment of asbestos causation in a case of lung cancer.

The bill contains a medically unsupported proposal for discounting exposures to asbestos.

The bill establishes three exposure classifications:

- Moderate exposure for persons who worked in areas that experienced "regular airborne emissions of asbestos fibers",
- Heavy, for persons who worked in direct installation, repair or removal of asbestos, and
- Very heavy for those who worked in primary asbestos manufacturing or a WWII shipyard

Each year worked in these categories counts as 1, 2 and 4 years respectively.

However, these years of work are discounted depending on when they occurred. Every year of exposure that occurred after 1976, no matter what was the level or circumstance of occupational exposure, counts as only one half of a year. Every year of exposure that occurred after 1986 counts as only one tenth of a year.

The plan to discount exposures from 1976-1986 by half is without medical or scientific basis. Many workers had exposures during this period that were no different in intensity from those that preceded 1976.

Similarly, discounting post-1986 exposures to 1/10 the accumulated years is without medical or scientific basis. Removal or other disturbance of asbestos in place has yielded exposure levels in the past two decades that are no different from those encountered before 1986 or 1976.

It may be illustrative to see how application of this proposed discounting formula will work when applied to the situation of individual cases. It would appear, for example, that no claims for lung cancer level VII (with bilateral plaques, without asbestosis), will be paid for anyone with "moderate" exposure to asbestos prior to 1972. Or put another way, a person with lung cancer could have worked in areas with "regular airborne emissions of asbestos fibers" since 1973 and still not quality for compensation under this bill because he or she would fail to meet the substantial exposure criteria set forth in the bill.

Specifically, for lung cancer level VII (with bilateral pleural disease) a claimant would need 12 years of weighed exposure (pg 82). Only those exposures that occurred before 1976 would count at full value. If exposure for a lung cancer victim with pleural disease started in 1972, it would take 30 years of exposure to meet this 12-year exposure requirement. For every year later that the person started occupation exposure (1973, 1974 etc) it will take an extra 10 years of occupational exposure to meet the criteria for compensation in the bill. Thus a person with lung cancer and pleural plaques who began occupational exposure to asbestos in 1974 would need 52 years of work exposure (through 2025, or "until" 2026) to meet the 12-year weighted exposure criteria in the bill.

For cancers other than lung (malignant level VI) the proposed situation is still more difficult. A person with colorectal, laryngeal, esophageal, pharyngeal or stomach cancer would need 15 years of weighted occupational exposure to asbestos to qualify for compensation under this bill for any of those diseases. If all of that person's exposure occurred after 1976 it would take 105 years to meet the criteria. This would seem an unattainable goal.

Difficulties with the proposed diagnostic criteria
The bill contains medically unsupported criteria for diagnosis of non-malignant disease.

The requirement that pleural disease be bilateral to be considered the consequence of exposure to asbestos is not warranted by medical evidence. Asbestos-related scarring often develops unevenly and almost always begins unilaterally. Miller and Lilis showed a clear relationship

between degree of pleural scarring and loss of FVC independent of whether the pleural changes were bilateral.

The criteria set forth in the bill require that there be no evidence of obstructive airway disease (i.e. that the FEV1/FVC ratio be >= 0.65) in order to compensate for loss of FVC is not consistent with the medical literature. There are many cases of combined restrictive and obstructive disease in workers with airway disease and asbestos-related scarring.

The bill contains medically unsupported criteria for diagnosis of cancer
I am deeply troubled by the requirement that no lung cancer case will receive compensation without evidence of "bilateral pleural plaques, bilateral pleural thickening, or bilateral pleural calcification" (pg 82), or grade 1/0 asbestosis (pgs 83-84). In other words, lung cancer in a person who has been exposed to asbestos but who does not have asbestos-related scarring in both lungs will not be compensated, even if there is unilateral scarring/calcification. This is problematic for two reasons; one, is that many cases of lung cancer caused by asbestos occurs without any radiographic evidence of pleural plaques or asbestosis; asbestosis is not a necessary precursor to asbestos-induced lung cancer. Moreover, requiring that the damage be bilateral, has no basis in biology or medicine.

In summary, the proposed Fairness in Asbestos Injury Resolution Act establishes barriers to the diagnosis of asbestos-related disease that are arbitrary, that are not based in science, that are not based in medical knowledge, and that would appear, almost without exception, to make extremely difficult – indeed, well nigh impossible - any diagnosis of causation of disease by asbestos.

The approach to the diagnosis of disease caused by asbestos that is set forth in this bill is not consistent with the diagnostic criteria established by the American Thoracic Society. If the bill is to deliver on its promise of fairness, these criteria will need to be revised.

I shall be pleased to answer questions.

9/11 Environmental Action
Asbestos Disease Awareness Organization
Committee to Protect Mesothelioma Victims
White Lung Asbestos Information Center
White Lung Association
Michael Bowker, *Fatal Deception*

April 25, 2005

The Honorable Arlen Specter
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

As leaders of several major asbestos victims' and advocacy groups - 9/11 Environmental Action, Asbestos Disease Awareness Organization, Committee to Protect Mesothelioma Victims, White Lung Asbestos Information Center and White Lung Association plus *Fatal Deception* author Michael Bowker - we are compelled to inform you and all Members of Congress of our strong and unequivocal opposition to your legislation (S. 852). This legislation is not good for victims and clearly has been written for the benefit of the business community.

The bill imposes upon asbestos victims the most severe of tort reform measures - the elimination of their constitutional right to a jury trial. It does so without providing guaranteed, adequate or fair compensation. The CBO similarly concluded that the proposed total funding is far less than what is needed to adequately compensate current and future asbestos victims. To compound the problem, the legislation only contemplates up front funding of approximately $42 billion in the first five years. By the time the administrative apparatus of the fund is established, there will likely be between 400,000 and 600,000 pending claims. These claims would require at least $30 billion in awards by 2006, money the fund will not yet have accrued.

Additionally, the bill provides no clarity on who pays what regarding the monies that businesses are required to pay. The bill merely sets forth a number and then leaves the entire payment provisions in the dark. We believe that if the Congress is going to take the drastic action of eliminating individuals' legal rights, it has an obligation to ensure that individuals receive fair and timely compensation, an assurance of adequate funding and clarity of that funding. Your legislation fails to meet all of these standards. Sen. Dianne Feinstein (D-Calif.), who is a co-sponsor of the asbestos bill, said at the committee meeting last week that she wants to see a list of companies that would pay into the trust fund before the committee approves it: "It's difficult to put together a bill that's $140 billion and not know where the money is coming from," she said. "We need to know before a bill passes through committee." In response to the transparency issue, you stated that **"candidly, companies are reluctant to say how much they are paying."** We believe that this response is insufficient, but it is consistent with the purpose of this legislation: to overwhelmingly favor the wrongdoers over the wronged.

Your legislation also includes very restrictive medical criteria standards that, according to physicians' groups, are faulty and without a sound scientific and medical basis. These extreme

standards will be difficult for many victims to meet. Moreover, not only will the standards be problematic based on the draconian substantive requirements, the Administrator and other program officials will have every incentive to apply the criteria in the most stringent manner in order to address the bill's funding shortfalls: the more claims that are denied, the less monies that will have to be paid out. The bill even encourages the Administrator to recommend taking such action prior to a sunset as a means of salvaging the solvency of the program.

Even more troubling is that the legislation on its face excludes specific classes of victims. These include: (1) individuals with Level VII lung cancer who have a history of smoking as well as other groups that have any connection to smoking, notwithstanding warnings by medical experts that this is not a valid basis for determining and dismissing an asbestos-related disease; (2) individuals who have been victims of industrial and environmental exposures, similar to victims of Libby, Montana, but without similar protections; and (3) and those exposed by the 9/11 World Trade Center disaster. The fact is that there are communities of people all across the nation that have been victimized by mass asbestos exposure who will be denied coverage because of the restrictive criteria and the absence of any provisions to address their particular situation.

The Libby, Montana exception highlights the stringent nature of the medical criteria. Without the exception, Libby, Montana residents would have been excluded from the bill. This will be the fate of the other exposed communities and neighborhoods across the nation who have not been extended the exception.

As a result of this legislation, tens of thousands of persons will be denied coverage and compensation – on a regular basis. However, it will also leave them without any legal recourse for their injuries as they will be prevented from seeking redress under any other legal theory because the asbestos nature of their injuries.

The asbestos disease crisis represents the greatest mass tort in American history. Yet, your legislation imposes the harsher burdens on the victims. If it were to become law, it would represent one of the most contradictory and tragic public policies ever enacted by Congress.

We wholeheartedly believe that a federal solution to asbestos claims is warranted and we continue to stand ready to work with you and all Committee Members on this important issue. However, we are strongly opposed to your legislation and will do all that we can to advocate against it.

Sincerely,

Kimberly Flynn, Co-coordinator
Rachel Lidov, Co-coordinator
9/11 Environmental Action

Barbara Zeluck, Secretary and Editor
White Lung Asbestos Information Center

Linda Reinstein, Executive Director
Asbestos Disease Awareness Organization

James Fite, National Secretary
White Lung Association

Susan Vento, Chairperson
Committee to Protect Mesothelioma Victims

Michael Bowker, author of *Fatal Deception* and activist

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing on S. 852, the FAIR Act of 2005
April 26, 2005

I am pleased to join the Chairman at this hearing on our bipartisan legislation to address the serious problem of asbestos-related disease, the FAIR Act of 2005, (S. 852.)

This bipartisan bill is the product of years of difficult and conscientious craftsmanship and negotiation. Chairman Specter, with whom I have worked so hard on this legislation, rightly calls this one of the most complex issues we have ever tackled. It is not the bill that I would have written, were I alone responsible for its drafting, nor is it the bill that Senator Specter might have produced were he solely responsible for drafting a bill. Nor should anyone be surprised to hear that the interested groups – the labor organizations, the industrial participants in the trust fund, their insurers, the trial bar – are each less than pleased with some portion of the bill or another.

That is the essence of legislative compromise: We have worked hard to advance and protect the ultimate goal of fair compensation to victims as the lodestar of our efforts, and we have all had to make sacrifices on a variety of subsidiary issues as we worked together to resolve this emergency. What we have achieved is a significant step toward a better, more efficient method to compensate asbestos victims.

Asbestos is among the most lethal substances ever to be widely used in the workplace. Between 1940 and 1980, more than 27.5 million workers were exposed to asbestos on the job, and nearly 19 million of them had high levels of exposure over long periods of time. We even know of family members who have suffered asbestos-related disease from washing the clothes of loved ones. The ravages of disease caused by asbestos have affected tens of thousands of American families.

The economic harm caused by asbestos is also real, and the bankruptcies that have resulted are a different kind of tragedy for everyone -- for workers and retirees, for shareholders, and for the families that built these companies. In my home State of Vermont, the Rutland Fire Clay Company is among the more than 70 companies nationwide to have declared bankruptcy.

As Chief Justice Rehnquist noted several years ago, "the elephantine mass of asbestos cases cries out for a legislative solution." In another Supreme Court opinion, Justice Ginsburg declared that "a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure." I agree, the Chairman agrees, Senator Feinstein agrees, Senator Hatch – who I worked with earlier in formulating some of the initial elements of this bill -- agrees, and we hope that many others in this Committee and in the Senate will agree.

We are encouraged by the favorable reception that this bill has already generated from a wide array of interested parties. In the past week, I have received letters of support from the United Automobile Workers (UAW), the Asbestos Workers Union, the Veterans of Foreign Wars of the United States (VFW), the Asbestos Study Group, Blinded Veterans Association and others. I ask unanimous consent that the texts of these letters be printed in the record.

The UAW notes in its April 13th letter, "[The Specter-Leahy Proposal] will provide more equitable, timely and certain compensation to the victims of asbestos-related disease." I am pleased that Alan Reuther, the Legislative Director of the UAW, is testifying today.

The VFW letter of April 14 says this: "The national trust fund that you are proposing offers our members who are sick and dying the opportunity to secure timely and fair compensation for the injury they suffered in the course of serving their country." I look forward to the testimony of Hershel Gober, the former Acting Secretary of the Department of Veterans Affairs and the current National Director of the Military Order of the Purple Heart on the benefits of our bipartisan legislation for veterans exposed to asbestos.

The National Association of Manufacturers also released a statement expressing their hope that this legislation will engender broad support. I thank Governor Engler for NAM's support and look forward to his testimony today.

These statements in many ways tell the story of what we have already accomplished: the bipartisan efforts of the last two years have been productive. With the dedicated efforts of Judge Edward Becker and under the Chairman's leadership, the disparate interests have reached consensus on many issues such as overall funding of $140 billion and a streamlined administrative process within the Department of Labor. I look forward to Judge Becker's expert testimony today on our bipartisan legislation.

Last Congress I was disappointed by the bill reported by the Judiciary Committee and by the partisan bill, S.2290, that was subsequently introduced as a substitute for that legislation. As compared to those efforts, our bipartisan bill includes significant and necessary improvements: Our bill provides higher compensation awards for victims, with $1.1 million for victims of mesothelioma, $300,000 to $1.1 million for lung cancer victims, $200,000 for victims of other cancers caused by asbestos, $100,000 to $850,000 for asbestosis, and $25,000 for what we call "mixed disease cases."

All unimpaired asbestos victims are eligible for medical monitoring, and, unlike last year's bills, this bill provides for medical screening for high-risk workers, a relatively low-cost way to help make sure that those most likely to be harmed are properly diagnosed and treated. I want to thank the hard-working staff of the AFL-CIO for their expertise in drafting this medical screening program. I look forward to the testimony of Peg Seminario from the AFL-CIO on the improvements we have made and on their suggestions for further refinements to this bipartisan legislation.

Another essential improvement, and one strongly supported by organized labor, is the provision ensuring that victims' awards under the new trust fund will not be subject to subrogation by insurance companies. This means that victims will not have to give up any of their much-deserved compensation just because they received workers' compensation or other insurance benefits in the past.

The initial funding of this trust is both more realistic and more substantial than the partisan bill from the last Congress, providing for almost $43 billion of the total $140 billion in the first five years. And, unlike the earlier bill, this bill ensures that the contributors into the fund will be a matter of public record, as are their obligations to the fund.

Our bill also guarantees that court cases that have reached judgment or obtained verdicts will not be upset by the new trust fund, unlike last year's legislation. Similarly, last year's bill would also have overridden all civil settlements that had any remaining conduct outstanding. Our bipartisan asbestos bill protects those settlements between named defendants and named victims, and also protects settlements that provide for health insurance or health care.

In improving the way the asbestos legislation handles exigent claims -- those victims who are sickest and may not have long to live -- Senator Feinstein was instrumental in developing a creative solution. I thank the senior Senator from California for her tireless efforts on behalf of sick and dying asbestos victims. Under Senator Feinstein's approach, which we adopted, exigent cases may receive an immediate lump-sum payment, and, if the fund is not operational in nine months, these sickest victims will be able to continue their cases in court.

The problems we are addressing are complex, this bill necessarily reflects these complexities, and its drafting was not easy. The compromises we forged were difficult but necessary to ensure that we created a trust fund that would provide adequate compensation to the thousands of workers who have suffered, and continue to suffer, the devastating health effect of asbestos.

The history of asbestos use in our country must come to an end. Under a provision authored by Senator Murray that we have included, this bill will ban its use. We must halt the harm asbestos creates, and ameliorate the harm it has already caused. The industrial and insurer participants in the trust fund will gain the benefits of financial certainty and relief from the stresses of litigation in the tort system, and the victims will have a quicker and more efficient path to recovery.

Through years of coping with and examining this problem, there now is general consensus that a remedy is needed. Those who have been coping directly with these complex problems know this, and those of us in Congress who have spent nearly three years examining these issues and forging solutions know it, as well. We also know that the legislative terrain that lies ahead for such a bold and complex initiative as this bill exemplifies is fraught with obstacles. As legislators with more than half a century of experience between us, Chairman Specter and I know that what we are attempting here rates off the charts in legislative degree of difficulty, and neither of us was born yesterday. But all of us who have worked long and hard in reaching this point also believe that this is not only worth doing, it also needs to be done.

I thank Chairman Specter, Senator Feinstein, Senator Hatch, and others for working so hard with me on this bipartisan legislation. I look forward to the testimony today on our compromise legislation which will, at long last, help solve the asbestos problem by providing fair compensation to victims of asbestos exposure.

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TESTIMONY OF CAROL MORGAN,
PRESIDENT AND GENERAL COUNSEL,
NATIONAL SERVICE INDUSTRIES, INC.
On S. 852, the FAIR Act
Before the Committee on the Judiciary
United States Senate
April 26, 2005

Mr. Chairman and members of the Judiciary Committee: My name is Carol Morgan. I am President and General Counsel of National Service Industries, Inc. in Atlanta, Georgia. I am speaking to you today on behalf of the Coalition for Asbestos Reform. I am grateful for this opportunity.

The Coalition for Asbestos Reform is comprised of a diverse array of businesses and insurance companies which share a passionate interest in resolving the current asbestos litigation crisis. Most asbestos claims today involve plaintiffs who do not have any impairment. The Coalition is focused on addressing the fundamental problem of a system which allows claims by those who are not impaired and diverts resources from those who are truly injured.

The Coalition applauds the tireless commitment of this Committee to craft a solution to the asbestos litigation crisis. However, we are absolutely convinced that the proposed FAIR Act is not the right solution and would create far more problems than it would solve. While we have a number of concerns about the legislation, I'll focus on three main points that particularly impact smaller companies.

1) First, the proposed FAIR Act results in an unconstitutional taking of property. Insurance assets are private property, just like a person's home. The FAIR Act would strip companies of their insurance assets without compensation. This is an unconstitutional taking of private property, just as though a person's home were taken away. I commend to the Committee the recent letter to the Chairman from Professor David Strauss of the University of Chicago Law School. (Professor Strauss, among his other qualifications, was Special Counsel to this Committee for the confirmation hearings on Justice David Souter.)

2) Second, the FAIR Act imposes disproportionate payment obligations on smaller companies and will force smaller companies out of business. Based on prior asbestos expenditures, many smaller companies will be in Tier II. Even if these companies are in the lowest subtier of Tier II because their revenues are relatively small, annual payment obligations will start at $16.5 million per year for 30 years. Without their insurance assets, many of these smaller companies will simply not be able to make their payments. Ironically, some of the largest companies in the world will also be in Tier II but with annual payment obligations capped at $27.5 million. For a company in Tier II with $50 billion in annual revenues, the $27.5 million payment obligation will be significantly less than one-tenth of one percent of its revenues. In contrast, for a company with $400 million in annual revenues, the $16.5

million payment obligation will be four percent of its revenues, which exceeds the profit margin for many smaller businesses. This bill begins to sound like a bail-out for big, underinsured companies at the expense of smaller companies, many of which had the foresight to adequately insure themselves. This disproportionate burden on smaller companies is not only unaffordable, it is unjustifiable, and will force many smaller companies out of business. This result is entirely inconsistent with the original intent of the bill to avoid further asbestos-related bankruptcies.

3) Third, the hardship and inequity adjustment provisions will not protect smaller companies. The Administrator of the trust fund, purely as a matter of discretion, may reduce a company's payment obligation, but only to the extent that actual payments from all other companies **exceed** $3 billion in any given year. We understand that a secret study exists which claims that the Fund will receive at least $3 billion each year, but this study has not been made available to the public, or to companies like those in the Coalition, or even to the Senate. It appears to be based on assumptions and hopes that companies will be able to pay their shares, but there is no proof that there will be sufficient funding from day one, much less for 30 years. Even if the secret study is correct - which I question - there will likely not be sufficient funds available for hardship and inequity adjustments. In addition, the hardship and inequity provisions are so vague and general, and leave so much to the pure discretion of the Administrator, that smaller companies have no real protection.

The great irony is that many smaller companies want to be able to meet their asbestos obligations and have taken extraordinary steps to be sure that they have sufficient insurance in place. However, by stripping these companies of their insurance assets and imposing payment requirements that are beyond their means, this bill will take away their ability to meet their asbestos obligations.

This bill may be a salve for big companies, but it destroys a portion of the American economy- well insured smaller companies - that are currently fully willing and able to pay their asbestos obligations but will no longer be able to do so - and will no longer exist - if this bill is enacted. We are concerned that a number of smaller companies who rely on their insurance to defend their claims may not even be aware of the FAIR Act's dire consequences.

The notion that the FAIR Act provides "certainty" and "a final solution to the asbestos crisis" is fallacious. There is no guarantee of sufficient funding. In the event of a shortfall, there are risks of surcharges and reversion to the tort system. Funding uncertainty will make it difficult for companies to borrow funds or otherwise access the capital markets – further undermining the economy and resulting in bankruptcies. Quite frankly, those of us with insurance are more confident in the solvency of our insurance companies than in the solvency of the trust fund.

We do not believe these problems are fixable in the current structure of the bill. Instead, we favor tackling the fundamental problem in the asbestos crisis – payments to claimants who are not impaired. We support medical criteria legislation similar to the approach being taken in a number of states, like Ohio and Georgia, and being considered in Texas and Florida and a number of other states, as well as the United States House of Representatives. We need to cure the problem. We don't need to create more problems with a trust fund.

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April 18, 2005

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Client No.

The Honorable John Cornyn
SH-517 Hart Senate Office Building
Washington, DC 20510

Dear Senator Cornyn:

Thank you for affording me the opportunity last week to explain my concerns, and those of my clients, regarding the pending Fairness in Asbestos Injury Resolution Act ("FAIR Act"). As you suggested, I am summarizing my analysis in this brief letter, and enclosing a somewhat more detailed explanation of the constitutional problems posed by the bill.

The trusts that my firm represents were created by courts, pursuant to § 524(g) of the Bankruptcy Code, solely to resolve the claims of victims of asbestos exposure. Section 402(j) of the current draft of the FAIR Act would require the surrender of substantially all the assets of those judicially-created asbestos trusts to a national fund. This national fund would then be used to pay some claimants to whom the trusts have no obligation, but would be unavailable to pay some claimants to whom the trusts do have obligations. In addition, even for those claimants who would be entitled to compensation under the national fund, this compensation would often be less than that which they are entitled to receive under the existing trusts, or would be provided to them on a wholly different timetable. In short, the FAIR Act would take resources belonging to victims of asbestos exposure and alter, often in material ways, their rights to recover for their injuries.

In the event the bill is not modified – by allowing asbestos trusts to opt out of its coverage – the trustees whom we represent would seem to have no choice but to bring a lawsuit challenging these provisions as unconstitutional. First, such an action would assert that the FAIR Act violates the Takings Clause of the Fifth Amendment by extinguishing the vested property rights of the trusts' beneficiaries without providing just compensation. Second, the FAIR Act violates separation-of-powers principles by tampering with final judgments of the judicial branch. Third, the Act violates equal protection principles by specifically excluding bankruptcy-related recoveries from the Act's general protection of recoveries arising out of prior settlements and final judgments – thus irrationally distinguishing between (a) individuals who secured a

recovery for their asbestos claims through a typical settlement or civil action and (b) individuals who secured a recovery through a bankruptcy-related settlement or final judgment. Finally, the FAIR Act violates the Due Process rights of the trusts and their beneficiaries by stripping the trusts of the financial resources necessary to assert a legal challenge to the Act.

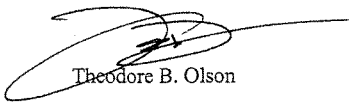
At least as important as the constitutional infirmities of the bill are the profoundly harmful public policies that these provisions would enact: confiscating private property, upsetting final court decrees, disturbing settled expectations, undoing years of conscientious work by courts and litigants, and doing damage and causing emotional distress to sick and deserving claimants.

Needless to say, if this challenge is successful, the assets of the trusts will be unavailable to the national fund. The current draft of the FAIR Act provides for other stakeholders to indemnify the national fund in the event that such litigation is successful, but the practical shortcomings of that provision are serious. The guarantee is capped at $4 billion even though the assets of all existing asbestos trusts currently exceed $7.6 billion. Moreover, the loss of the trusts' assets would create major cash flow problems for the national fund because, while the trusts are required to hand over their assets to the national fund within six months, the guarantors are allowed to make their payments over five years. If the national fund is unable to return the assets taken from the asbestos trusts, the United States Treasury will be required to provide the just compensation required by the Takings Clause. Many Senators are understandably adamantly opposed to using taxpayer dollars to fund the FAIR Act, but this is precisely what could happen if the constitutional challenge were to be successful.

My firm's clients take no position on the provisions of the FAIR Act that do not affect them, but as fiduciaries they would have no choice but to challenge the provisions of the Act that would deprive their beneficiaries of their constitutionally-protected rights. This is especially true in light of the tremendous investment represented by these trusts. Not only are they the product of years of effort on the part of the bankruptcy courts and the stakeholders, but they also represent the settled expectations of numerous victims of asbestos exposure who have surrendered their legal claims solely in return for the establishment and maintenance of these trusts.

I hope that you and your colleagues will feel free to contact me if you would like me to elaborate on any of the issues raised in this letter.

Very truly yours,



Theodore B. Olson

TBO/ejs
Enclosure(s)

CONSTITUTIONAL DEFECTS OF THE FAIR ACT

Pursuant to § 524(g) of the Bankruptcy Code, various asbestos trusts have been created over the past decade for the sole purpose of resolving the claims of victims of asbestos exposure. Sections 202(f)(2) and 402(j) of the current draft of the FAIR Act would require the transfer of substantially all the assets of the trusts to a national fund within six months of enactment. The draft further provides that the beneficiaries' rights to the trusts' corpuses would be "superseded and preempted as of the date of enactment." § 402(j)(2)(E).

I. The FAIR Act Would Confiscate Private Property in Violation of the Takings Clause

The Act would violate the Takings Clause by expropriating the private property of the trusts and their beneficiaries "for public use, without just compensation." U.S. Const., amend. V. Specifically, by requiring existing asbestos trusts to transfer nearly all of their assets to a national fund and nullifying nearly all beneficiaries' rights to be compensated by the trusts for their asbestos-related injuries, it would take away rights that became vested in the trusts, their trustees, and their beneficiaries through the issuance of judicial confirmation orders in chapter 11 reorganization cases.

A. The Beneficiaries' Vested Property Interest in the Trust Assets

The process by which the trusts were established makes it clear that their beneficiaries possess a constitutionally-protected, or "vested," property interest in the right to receive compensation from the trusts. In brief, the beneficiaries' property interest arises by virtue of (a) the settlement of irrevocable trusts that created a fixed scheme of compensation for their asbestos-related injuries and (b) the final judicial decrees that approved and cemented these trusts and their terms. Under established precedent, the beneficiaries of a trust have a constitutionally-protected property interest in its corpus. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It is an equally well-established principle that final judicial decrees create vested property rights entitled to constitutional protection under the Takings Clause. *See McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by a judgment.").[1]

To understand the nature of the beneficiaries' property interests, it is necessary to understand the process by which they came into existence. The trusts were established as the result of bankruptcy reorganization plans under which the reorganizing companies (or their affiliates or agents) funded the trusts in exchange for immunity from all current and future liability for asbestos-related claims. Under these plans, all individuals with present and future

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1 *See also Tonya K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("The 'vested rights' doctrine starts from the proposition that a judgment, like a deed, is (or identifies) a species of property [and that o]nce the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other.").

claims against the reorganizing companies exchanged their right to seek recovery for their injuries through the tort system in return for the right to be compensated from the trusts. As part of the bankruptcy process, the terms of these plans were negotiated by representatives of the claimants and then submitted to the claimant class for approval. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2004) (requiring the approval of 75% of voting claimants). Moreover, future claimants were represented by a court-appointed "futures' representative," whose principal responsibility was to protect the interests of the future claimants and ensure that the plan treated them on a par with similarly-situated current claimants. Finally, the trusts and their terms were embodied within reorganization plans approved and confirmed by final confirmation orders entered or affirmed by federal district courts in compliance with the provisions of § 524(g) of the Bankruptcy Code.[2]

In short, by approving these reorganization plans, the beneficiaries effectively converted what was merely a potential cause of action (and, thus, not a constitutionally-protected property interest) into a vested property right. Moreover, because these reorganization plans were effectuated by final chapter 11 confirmation orders, the terms of these plans bind all parties. Just as the *res judicata* effect of the confirmation orders forever bars the beneficiaries from asserting their legal claims against the reorganized entities, so also does it confer on them vested and enforceable property rights.[3]

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2 The courts have consistently held that chapter 11 confirmation orders, such as those that established the trusts, confer vested rights. *See, e.g.*, *United States Trustee v. Craige (In re Salina Speedway, Inc.)*, 210 B.R. 851, 855 (10th Cir. B.A.P. 1997) ("Under section 1141 [of the Bankruptcy Code], a confirmed plan becomes a binding contract which creates vested substantive property rights and binds the debtor, any creditor, and any entity acquiring property under the plan."); *In re Burk Dev. Co.*, 205 B.R. 778, 796 (Bankr. M.D. La. 1997) (holding that "Section 1141 of the [Bankruptcy] Code ... establishes that an important effect of a confirmed Chapter 11 plan is the creation of a contract which creates *vested substantive property rights*") (emphasis in the original) (other emphasis omitted). If it were otherwise, chaos would ensue throughout the U.S. economy given that investors and the market rely on the finality of these orders to trade billions of dollars of debt and equity securities that have been issued or restructured through confirmed chapter 11 plans.

3 In fact, section 524(g) of the Bankruptcy Code, which was invoked in each of the reorganization cases that created the trusts, ensures that both current and future claimants are bound and enjoy this vested property right. *Cf. County of Suffolk v. Long Island Lighting Co.*, 14 F. Supp. 2d 260 (E.D.N.Y. 1998), *rev'd on other grounds sub nom. County of Suffolk v. Alcorn*, 266 F.3d 131 (2d Cir. 2001) (holding that judicially-approved class action settlements bind future as well as past and present plaintiffs). The court noted:

> Class actions are predicated on the notion that the interests of all class members are fully represented through the class representatives and through class counsel. It is as if each sues individually in a consolidated action. All party-members, including absent members and future members, are equally bound by the

[Footnote continued on next page]

B. The FAIR Act Would Take the Beneficiaries' Property Without Providing the Requisite "Just Compensation"

There is no real debate that the FAIR Act would expropriate the trusts' assets and extinguish the beneficiaries' rights to compensation from the assets. However, some proponents of the Act have urged that, because a national fund will be created to compensate certain asbestos victims, the beneficiaries have suffered no actual "taking" – or, at least, will receive "just compensation" through the national fund.

The facts, however, tell a different story. In reality, the vast majority of the trusts' beneficiaries who are entitled to compensation by the trusts – those who suffer from asbestos-related disease but who show no current signs of impairment – would receive little, or no, compensation from the national fund.[4] And, even for those select beneficiaries who would qualify for payment by the national fund, most of them would receive proportionally less under the FAIR Act than they would have received from the trusts.

Moreover, experts have estimated that the national fund will be exhausted long before resolution of all of the claims that will be asserted against it – perhaps as early as within the first ten to twelve years of its existence. In fact, the sunset provisions of the Act, which permit a return to the tort system, contemplate the possibility that the national fund could be exhausted within a mere five years of enactment. And, unlike the trusts, the FAIR Act's national fund has no requirement that its funds be rationed and administered so that similarly-situated claimants – regardless of when they assert their claims – will be treated similarly.[5] This means that, unless the national fund far outlives its expected lifespan, the Act effectively will be taking funds that the trusts would have paid to those beneficiaries who do not manifest diseases until, say, 2015 or 2020 and instead using them to pay claimants whose diseases arise earlier. This would be consistent with the net effect of the above-discussed provisions of the Act: to take vested

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[Footnote continued from previous page]

> strictures of the class action judgment. Since they are bound by the *res judicata* effect of the judgment to the same extent as the class representatives, each class member is entitled to the full legal benefits which flow to him, her, or it from the judgment.

Id. at 265-66 (internal citations omitted).

4 The sole compensation that the national fund would provide for such beneficiaries is a nominal "medical monitoring" reimbursement, which would reimburse claimants for the costs of "an examination by the claimant's physician, x-ray tests, and pulmonary function tests," but only once every three years and only to the extent such costs are not covered by health insurance. § 132(b).

5 The trusts accomplish this "similar treatment" by adjusting the payment percentage to ensure that the claims, which are allowed throughout the term of the trust according to the same criteria, are paid based on the available assets, rather than on a first come, first served basis.

property from the beneficiaries of the trusts (trusts that were funded solely for their benefit by the entities that were causally linked to their asbestos exposure) and to transfer it to a nation-wide class of victims whose illnesses by and large have no causal connection to the entities that funded these trusts.

II. The FAIR Act Would Tamper with Final Judgments in Violation of the Separation of Powers

We believe the FAIR Act is also susceptible to constitutional challenge on the grounds that it violates the separation of powers by effectively nullifying the final judgments of the federal district courts establishing the asbestos trusts. It is a venerable principle that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898) ("Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."). The Supreme Court has recently reaffirmed the principle, holding that once a judicial decision has become final, it cannot be reopened, nullified, or otherwise tampered with by the legislature. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

By divesting the trusts of their assets and thus dismantling their entire distribution scheme, the FAIR Act would effectively nullify the final court orders by which the trusts were established. In doing so, it would upset the settled expectations of the beneficiaries and other parties who have relied upon the finality of these orders. The time for appeal of these orders has expired, or any appeals of these orders have been resolved; and their reorganization plans have been substantially consummated (in some cases, years ago) – making them final and immune to modification. *See* 11 U.S.C. § 1127(b). For Congress now to reorder the scheme of rights and liabilities established by these final orders would clearly raise serious separation-of-powers issues (to say nothing of the practical problems that would attend such an attempt to unscramble the egg). *See Plaut*, 514 at 239 (noting that the "nub" of the separation-of-powers violation consisted of "the Legislature's nullifying prior, authoritative judicial action").

III. The FAIR Act Would Violate Equal Protection Principles by Treating Bankruptcy-Related Recoveries Differently

Even as the FAIR Act retroactively abolishes the trusts and the beneficiaries' interests therein, it expressly *preserves* the prior recoveries of many other asbestos victims. The Act specifically provides that its provisions will not preempt or supersede any civil action in which a verdict, final order, or final judgment has been rendered (or in which the trial has reached the presentation of evidence stage), with the exception of filings in a bankruptcy court. It also protects from abrogation all previously entered written settlements, provided that all conditions precedent to payment have been fulfilled within 30 days of enactment. Again, however, it excludes bankruptcy-related agreements.

The Act's non-abrogation of prior final judgments and settlements is, standing alone, a fair and sensible idea. The fairness and equal protection problems arise when the Act excludes, without any compelling rationale, final judgments and settlements that were part of a bankruptcy proceeding. Under equal protection principles, legislation must provide similar treatment for

similarly-situated individuals, absent a legitimate state interest in doing otherwise. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 506-07 (1999). Here, there is no apparent justification for distinguishing between (a) individuals who secured a recovery for their asbestos claims through an individual settlement or an ordinary civil action and (b) individuals who secured a recovery through a bankruptcy-related settlement or final judgment. Although one *explanation* might be the ease with which the trusts' centralized assets could be confiscated, such a rationale is unlikely to qualify as a legitimate state interest.

IV. The FAIR Act Would Strip the Trusts of the Financial Means to Vindicate Their Constitutional Rights in Violation of Due Process

By confiscating all of the trusts' assets and thereby depriving the trusts of the means to redress this injury, the FAIR Act offends the Due Process Clause. The FAIR Act as presently drafted would require the trusts to transfer substantially all of their assets into the national fund within six months of enactment. It would also prevent any court from enjoining that transfer prior to final adjudication of any challenges to the Act. These provisions effectively strip the trusts of the financial ability to pursue any challenge to the Act and thereby protect their property interests. The Supreme Court has long recognized that basic principles of due process mandate that legislation may not be enforced when its practical effect would be "to preclude a resort to the courts . . . for the purpose of testing its validity." *Ex Parte Young*, 209 U.S. 123, 146 (1908). In addition, the Due Process Clause requires the availability of injunctive relief against a statutory scheme where such relief is necessary, as a practical matter, to the effective vindication of constitutional rights. *See Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920).

V. Conclusion

The preceding discussion in no way questions Congress's ability to create a national fund to compensate the victims of asbestos-related injuries. Given the challenges of funding the Act, it is understandable that Congress would look for creative solutions to the problem, but these solutions must also be constitutional. Expropriating the assets of existing trusts in order to provide start-up funding for a national fund takes property from some victims in order to compensate others. Such a solution not only is unfair, but is no solution at all: the current draft provides for other stakeholders to indemnify the national fund in the event that the transfer from the trusts is found to be unconstitutional, but the guarantee is capped at $4 billion even though the assets of all existing asbestos trusts currently exceed $7.6 billion. Moreover, the guarantors' obligation is spread over five years, whereas the transfer from the trusts is supposed to occur within six months of enactment.

The constitutional defects in the FAIR Act involve its means, not its ends. With that in mind, attached are two proposed amendments that would cure the constitutional defects addressed above. Specifically, the proposed amendments would allow existing funded asbestos settlement trusts to opt out of the Act's coverage, thus avoiding any question as to the constitutionality of the Act and, consistent with the intention of the Act, protecting the U.S. Treasury from being depleted.

PROPOSED AMENDMENTS

Revised Section 402(c) "Sec. 402. EFFECT ON OTHER LAWS AND EXISTING CLAIMS . . .

(b) Superseding Provisions. –

(1) In General. – Except as provided under paragraph (3) and *except with respect to persons not covered by the Act pursuant to Section 402(f)*, any agreement, understanding, or undertaking by any person or affiliated group with respect to the treatment of any asbestos claim that requires future performance by any party shall be superseded in its entirety by this Act."

New Section 402(f) "Sec. 402. EFFECT ON OTHER LAWS AND EXISTING CLAIMS . . .

(f) Exemption of Certain Existing Trusts. –

(i) In General. Notwithstanding any other provision of this Act, if an election is made in accordance with subclause (ii), this Act shall not apply in any way to any partially or wholly funded trust (as defined in Section 201(8)) in existence pursuant to a plan of reorganization under chapter 11 of title 11, United States Code, that has been confirmed by a duly entered order or judgment of a court that is no longer subject to any appeal or judicial review on the date of enactment of this Act or to any person, the majority of whose voting shares are owned directly or indirectly by such trust.
(ii) Election. – A trust described in subclause (i) may elect not to be subject to the Act by providing written notice of such election to the Administrator within six months after enactment of the Act."

Statement of Mark A. Peterson Before the

Senate Judiciary Committee Hearing on S.852

"Fairness in Asbestos Injury Resolution Act of 2005"

April 26, 2005

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Mr. Chairman and Members of the Committee, my name is Mark Peterson, and I am submitting this statement to provide data, quantitative analyses and comments that I hope will aid the committee in its consideration of the "Fairness in Asbestos Injury Resolution Act of 2005".

1. My Background and Expertise

First let me describe my background and knowledge about asbestos injuries and litigation. For over twenty years I have studied, written about and participated as an expert in asbestos litigation and other mass tort litigation. I have worked for four U. S. District and Bankruptcy Courts as the Courts' expert on how asbestos claims are valued and on asbestos claims procedures and trusts. For 14 years I have been the "Special Advisor to the Courts" regarding the Manville Trust, serving Judges Jack Weinstein and Burton Lifland for five years and the Manville Trust and all of its beneficiaries for the past nine years. I am a consultant and expert for ten asbestos trusts. I have developed claims procedures for ten asbestos trusts. I am a trustee of an asbestos trust. I am a director of a nonprofit corporation that administers the process for allowing and paying claims for four asbestos trusts. I have worked as an expert on asbestos litigation for defendants, insurance companies, actuarial firms, other businesses, law firms and claimants' committees in bankruptcy. I have participated as an expert on asbestos liabilities in over 20 bankruptcies of asbestos defendants.

I studied asbestos litigation for over twenty years as a founding member of the RAND Corporation's Institute for Civil Justice. I have published peer-reviewed scholarly articles on mass torts, asbestos litigation, claims facilities for paying asbestos and other mass tort claims, workers compensation and how medical and legal issues determine the values of asbestos bodily injury claims and other subjects related to asbestos litigation. I have taught courses on mass torts at UCLA Law School and the RAND Graduate Institute. I am a lawyer, a graduate of Harvard Law School and have a doctorate in social psychology from UCLA. I have been recognized by courts as an expert on all areas that I address in this statement and all of my comments come from scholarship and work as an expert on asbestos litigation.

2. The S.852 National Fund Will Quickly Fail

For two years now I have run many analyses examining how a Fund set up by the successive "Fair" Acts would perform. I have met frequently with Senate staff and Senators about results of this work, both Republicans and Democrats, and with unions, asbestos trusts and others.

Although projections for a national fund are inherently uncertain, this uncertainty can be addressed through sensitivity analyses that systematically vary alternative assumptions about the number of claims, their rates of qualification and the revenues available to pay claims. I have performed such analyses using assumptions put forward by supporters of the Fair Act and by those opposed. These sensitivity analyses show that despite disagreements about details, under any set of realistic assumptions (including those offered by proponents of the legislation) there is no uncertainty about the overall conclusions. Under every set of plausible assumptions, the National Fund to be established under Fair Act is grossly underfunded, will quickly fail, and will leave a likely debt to the U. S. Treasury of tens of billions of dollars with little prospect for repayment.

Some details about how Fair Act's National Fund would work are uncertain and disputed between proponents and opponents of these asbestos bills. As CBO noted in an October 2003 letter to Chairman Hatch, "the revenue stream that would be generated by the legislation is highly uncertain" (p. 10). CBO notes:

- "The amount the fund would collect from defendant companies depends on a number of unknown factors:
  - the number of subject companies and the tiers into which each would fall;
  - which of these companies would be subject to exemption or modification ...;
  - the number and characteristics of subject firms that may go into bankruptcy during the assessment period ... ." (p. 7)
- "The total contributions collected from insurers would depend on many of the same factors that would apply to the defendant companies. But the estimate is even less certain because of the lack of any specificity in the bill with respect to the assessments." (p. 7)
- "The discretion make(s) flows into the fund hard to predict with much reliability." (p. 9)
- "Receipts to the Asbestos Fund would depend on the continued viability of the firms required to pay into it, and that is uncertain as well." (p. 10)
- "Normal attrition will be exacerbated by the costs of dealing with asbestos liability." (p. 10)
- CBO warns that there is "some risk that the minimum assessment might not be collectible." (p. 12).

There is uncertainty as well about claims and liability costs. CBO describes uncertainties about forecasts of the number of claims, identifying its primary concern that "There is a risk that the actual number of claims could exceed our estimate." (p. 1):

- "Estimates of future claims ... contain a number of potential sources of error in forecasting." (p. 10)
- "Forecasts of asbestos claims ... have failed to accurately predict the magnitude, scope and evolution of asbestos claims." (p. 10)
- "Projections ... in recent decades of the number of asbestos claims ... were, in hindsight, much too low, suggesting that there is a significant risk of underestimating the number of future asbestos claims." (pp. 9-10)

Furthermore, there is uncertainty about how claims would qualify under the criteria of the legislation:

- "Various projections of the number of nonmalignant cases and their distributions among the categories specified in the bill vary greatly." (p. 5)

To understand the impact of these uncertainties and the divergent assumptions made by proponents and opponents of the Fair Act, I simulated the financial performance of the Fund, accepting for alternative analyses the assumptions made by each side. Different simulation runs used each side's assumptions (and combinations of assumptions) of the number and timing of forecast claims, the Levels of payment, if any, for which they would qualify and the amount and timing of revenues to the Fund.

Under every simulation run using every combination of assumptions, the Fund immediately faced more liability than it could fund through its revenue. Under every simulation, the Fund borrowed immediately and heavily and continued to fall further into debt. The Fund's subsequent revenues were never sufficient to cover the newly arriving liability and interest costs.

The results were the same using any and all of the assumptions put forward by proponents and opponents:

- Interest costs will be huge: between $49 and $76 billion (6.5% interest rate).
- Costs for indemnity and interest will greatly exceed $140.
- The Fund will be quickly insolvent:
  - lasting no more than five years under most assumptions;
  - lasting only ten years even under the proponents' optimistic assumptions.
- The Fund's sunset occurs between 2006 and 2016.
- Within 1 to 5 years Congress would be notified that the Fund cannot pay claimants.
- At sunset the Fund will owe $44 to $68 billion:
  - that could be paid off only after 21 to 28 years;
  - and at great risk that the debt would not be repaid.
- Asbestos victims would likely receive about $70 billion of the promised $140 billion Fund; at most claimants would receive only $85 billion again under proponent's assumptions.

3. Illustration of CBO's Optimistic Forecasts

Simulation of CBO's assumptions in its April 2004 forecast for last year's bill demonstrates these conclusions. CBO made optimistic assumptions that were extremely favorable to the success of the Fair Act: accepting ASG's assumption that fewer than one in four claimants would qualify for payment, ignoring all asbestos claims that arose in 2003 and 2004. To account for differences between the current version of the Fair Act, S.852, and earlier bills I modified CBO's 2004 assumptions to reflect terms of S.852:

- new, higher values promised by S.852;
- eliminate old Level VII, lung cancers without asbestosis or pleural disease;
- new revenue schedules;
- current sunset provisions that include repayment of asbestos trusts.

Even under CBO's optimistic assumptions, which eliminated about 180,000 claims that arose in 2003 and 2004, CBO forecast that the National Fund would face 475,000 claims when it starts in 2006 and would pay over $34 billion in liability for those initial claims. According to the CBO's forecasts, the Fund would receive another 81,000 claims in 2007 and this large claim volume would continue with 57,000 new filings eight years later. CBO's forecast show that the Fund would owe another $48.5 billion for these next ten years of claims, payments totaling $83 billion through 2015.

Immediately, the Fund would have to borrow because its revenues could not pay for such liabilities. For example, the Fund would have only $20 billion in revenue through its first 3 years, but would be obligated to pay $40 billion to claimants and another $1.5 billion in interest. By 2015 the Fund will have paid claimants $78 billion and owe claimants another $4.5 billion. It will then have a debt load of $33 billion and will have already paid over $12 billion in interest.

And then the Fund will die. When it becomes insolvent the Fund will still expect another $78.5 billion in revenue over the next 21 years. But that will not be enough to pay its present liabilities to claimants, repay its debt and pay the $36 billion in current and future interest on its debt. At sunset the Fund will owe a $44 billion debt. Assuming that it can honor its debt obligations, total interest charges will be $49 billion or 35% of the $140 billion fund.

This is the Fund's best case based on optimistic but implausible assumptions. CBO's

assumptions are unsupported. First, neither CBO nor ASG (the source of the assumption) have provided evidence for ASG's assumptions that only 15 percent of nonmalignant claims and fewer than one in four of all claimants would qualify for payment. Instead, good evidence refutes the assumption. Based on the experience of the Manville Trust, David Austern, the Trust's General Counsel, has testified and written "there is almost no likelihood that as many as 85% of the nonmalignant claims filed pursuant to S.1125 will qualify only for Level I (the non-paying medical monitoring category). Our best estimate ... is that over two-thirds and as many as three-quarters of the nonmalignant claims filed pursuant to S.1125 will qualify for compensation at Level II or higher" (David T. Austern, October 9, 2003 letter to Rebecca Seidel, Esq. and J. Edward Pagano, Esq. of the Untied States Senate Committee on the Judiciary).

More refutation comes from a study conducted by insurance companies themselves, who commissioned a detailed study of 225,000 claims filed in the Babcock and Wilcox (B&W) bankruptcy. This study found that 70 percent of nonmalignant claims would qualify for payment under the criteria of S.852, Level II or higher (Expert Report of Charles E. Bates, Ph.D., Prepared for B&W Insurers Joint Defense Group, August 18, 2003).

Second, CBO's forecast assumptions inexplicably ignore asbestos claims that have arisen in 2003 and 2004. CBO assumes that the National Fund will receive 300,000 claims arising before 2005, the same number of claims that all parties have accepted as pending at the end of 2002 in their analyses made since early 2003 (and used in analyses by Goldman Saches and Navigant consultants for the ASG). CBO's 2004 forecasts include no new claims filed in 2003 and 2004 even though substantial numbers of claims arose in those years. The Manville Trust received about 120,000 claims in those two years including over 6,700 new claims for mesothelioma. CBO does not explain its omission of 2003 and 2004 claim filings, although it may have been CBO's attempt to reflect payments from collateral sources that would reduce the Fund's obligations. But it cannot be that all of the 2003 and 2004 claimants were fully paid by collateral sources in amounts that would remove them from the Fund.

4. Assumptions of the Sensitivity Analyses

So far I have discussed CBO's forecast to illustrate the fundamental insolvency of the Asbestos Fund and to show the best that might be expected for the National Fund. We get a broader and more reasonable sense of how the Fund will operate by using a range of liability and asset assumptions through a sensitivity analysis. Table 1 below shows five alternative sets of liability assumptions that we examined, four based on the CBO forecast each of which changes one or two assumptions.

CBO has assumed that only 15 percent of nonmalignant claimants would qualify for payment and that only 23 percent of all claimants would qualify (model 1, labeled the "CBO" model on Table 1). Alternatively based on the experiences of the Manville Trust and results of insurers' study of the 225,000 B&W claims, my previous forecasts assume that 66 percent of nonmalignant claims would qualify for payment and 68 percent overall (model 5, "LAS"). One alternative assumption examined in the sensitivity analysis splits this difference, assuming that half of all claimants and 45 percent of nonmalignant claimants would qualify for payment. We use this compromise estimate of qualification percentages for Model 2 (CBO-Increase % Qualifying) which is otherwise identical to the CBO forecast.

The second alternative assumption adds forecast 2003 and 2004 filings that had been omitted from the CBO forecasts and assumes that collateral sources will have paid 20 percent of the total value of 2003 filed claims and 15 percent of the total value of 2004 filed claims. For two reasons, this probably overestimates payments by collateral sources: most major defendants have now entered bankruptcy and have paid nothing (companies still in bankruptcy) or little (where trusts

are in place) to claimants filing in 2003 and 2004; defendants who are not in bankruptcy and their insurers have paid few settlements during 2003 and 2004 in anticipation of possible federal legislation. Model 3 (CBO-Include 2003-04 Claims) adds 71,000 claims in 2003 and 75,000 in 2004 (80% and 85% respectively of CBO's 88,612 forecast for 2005 claims), but is otherwise the same as the CBO forecast. Model 4 (CBO-Both) uses both alternative assumptions. For my forecast (model 5, LAS) I also reduced the number of claims from 2003 and 2004 by 20 percent and 15 percent respectively to estimate (conservatively) the effects of collateral source payments.

Table 1: Alternative Claims Assumptions

	Percent of Claims Qualifying for Payment		Percent of 2003-04 Claims in Forecast	
Model/Modification	**Nonmal**	**All**	**2003**	**2004**
1. CBO	15%	23%	0%	0%
2. CBO-Increase % Qualifying	45	50	0	0
3. CBO-Include 2003-04 Claims	15	23	80	85
4. CBO-Both	45	50	80	85
5. LAS	66	68	80	85

As CBO repeatedly noted, the amounts and timing of the National Fund's revenues are also highly uncertain. I use three alternatives of the timing of Fund revenues, but assume full payment of $140 billion for each alternative. Alternative R1 accepts the timing for revenue stated in S.852, using the specific schedule for insurance payments in the act, assuming that defendants payments will be $3 billion per year beginning in the second year (which follows the act's schedule alloted for steps leading to assessments and payments) and assuming that trusts' assets are converted six months after the fund starts. The second revenue model (R2) assumes a two year delay in the insurance and defendant payments to reflect complexities to the allocation process and also assumes that trust payments would arrive in the third year after a two year legal challenge. Thereafter payments would then following the timing sequence stated in S.852 lagged by two years. Based on statements of intended legal challenges by some defendants, insurers and asbestos trusts, the third revenue model (R3) assumes a two year delay in first payments and that half of scheduled payments by insurers and defendants will be delayed another year. This third model also assumes that trusts will successfully challenge the act's taking of their assets: it provides for no payments by trusts and assumes no repayment of trusts at the time of Fund sunset.

5. The Fund Will Sunset Early

Even using the CBO's most optimistic assumptions about claims liabilities (model 1), the fund will sunset after ten years even if all revenues called for under the Act are paid in full and on time. If there are delays in the Act's revenue schedules, as CBO itself has suggested might occur, sunset will be sooner, after eight or nine years.

With changes to any of the optimistic CBO assumptions, the Fund's performance deteriorates quickly. As Table 2 shows, under any set of assumptions other than the unmodified CBO assumptions, the Fund will likely sunset within the first five years.

Table 2: Year of Sunset for Alternative Model Assumptions

	Revenue Models		
Model/Modification	**R1**	**R2**	**R3**
1. CBO	2016	2014	2015
2. CBO-Increase % Qualifying	2010	2009	2010
3. CBO-Include 2003-04 Claims	2012	2011	2012
4. CBO-Both	2008	2006	2007
5. LAS	2006	2006	2006

As Table 2 shows, when the CBO model is changed to include more plausible assumptions, that 50 percent of claims would qualify and inclusion of claims filed in 2003 and 2004, (model 4 CBO-Both),the Fund will sunset during the third year assuming the revenue schedule in the Act, but during the Fund's first year if revenues are delayed. Even if we change only one of the two implausible CBO assumptions (models 2 and 3), the Fund would likely sunset within three to five years. Under my forecast of liabilities, based on the experiences of the Manville Trust and the findings of the insurers' of B&W claims, the fund would become insolvent in the first year (model 5, LAS).

6. The Fund Will Incur Large Interest Costs

As discussed above, the Fund will immediately face large liabilities but will have revenues inadequate to pay those liabilities. As a result the Fund will pay many tens of billions of dollars in interest under every set of assumptions (Table 3). The total amount of interest differs somewhat among the models, but is always great. Claims models that assume greater or faster liabilities and revenue models that assume delayed payments imply greater and more rapid borrowing, which in turn increases interest costs.

Table 3: Fund's Interest Payments for Alternative Model Assumptions ($Billions)

	Revenue Models		
Model/Modification	**R1**	**R2**	**R3**
1. CBO	$49	$60	$62
2. CBO-Increase % Qualifying	60	69	70
3. CBO-Include 2003-04 Claims	57	66	67
4. CBO-Both	64	75	73
5. LAS	69	75	76

The Fund's interest costs exceed $57 billion for all models except CBO's original, optimistic forecast when it is coupled with the assumption that revenues will arrive precisely on time and in the amounts specified in the Act. Except for this single, extremely optimistic model, over 40 percent of the $140 billion that is supposed to be paid asbestos claimants would instead go to service the Fund's enormous indebtedness. For seven of the fifteen simulations, half or more of the $140 billion fund will be spent on interest (i.e. the seven results with interest payments of $69 to $76 billion).

7. Only About Half of the $140 Fund Will Be Paid to Claimants

Under every set of assumptions, claimants will receive far less than the $140 billion that the Act promises. At best, using the implausible CBO assumptions (model 1) and assuming a flawless revenue schedule, claimants would receive only $85 billion. Under most other sets of assumptions, claimants would receive about $70 billion (Table 4). For most of the combinations of assumptions, more money will be paid to lenders in interest than to asbestos victims.

Table 4: Amounts Paid to Claimants ($Billions)

	Revenue Models		
Model/Modification	**R1**	**R2**	**R3**
1. CBO	$85	$74	$78
2. CBO-Increase % Qualifying	74	65	70
3. CBO-Include 2003-04 Claims	77	68	73
4. CBO-Both	70	59	67
5. LAS	65	59	64

8. After Sunset, the Fund Will Be Left with a Staggering Debt

The Fund will have indebtedness ranging from $44 billion to $68 billion when it becomes insolvent and sunsets. Even minor delays in the Act's proposed revenue schedules will sharply increase the Fund's indebtedness (revenue model R2). Based on the more probable assumptions that 50 percent to 68 percent of claimants would qualify for payment under the Act and the inclusion of most 2003 and 2004 filed claims (models 4 and 5), it is likely the Fund's debt will be nearly $70 billion at sunset (Table 5).

Table 5: Fund's Debt at Time of Sunset ($Billions)

	Revenue Models		
Model/Modification	**R1**	**R2**	**R3**
1. CBO	$44	$48	$47
2. CBO-Increase % Qualifying	50	63	63
3. CBO-Include 2003-04 Claims	49	54	50
4. CBO-Both	59	65	68
5. LAS	67	65	64

9. Comments on Interest and Indebtedness

Clearly the Fund's borrowing and its cost to borrow are critical to the Fund's failure. Because the Act's revenue stream so poorly tracks the Fund's liabilities, a great fraction of the money that is supposed to compensate asbestos victims will instead be spent on interest. This is true under every set of assumptions. This is true if we increase or decrease the assumed rate of borrowing.

The Fund will quickly collapse because it is not designed to withstand the combination of high interest costs on top of the increased indemnity levels promised by the Act.

The Fund's final debt is particularly troubling because its repayment is highly questionable. The debt can be repaid only through an additional 20 to 30 years of payments by asbestos defendants and insurers, who will not be protected from asbestos litigation. The many defendants who are now in bankruptcy, the very high tier defendants who are supposed to make the largest revenue payments for two or three more decades after sunset, will certainly return to bankruptcy. Like every other defendant and insurer subject to the Act, they will face increased obligations after the Fund sunsets--facing both costs of renewed asbestos litigation and decades of payments under the act. Being insolvent before the Act, they will be even more insolvent when the National Fund dies. They will certainly be joined in bankruptcy by other defendants and insurers. As CBO notes, normal attrition would claim some of the defendants and insurers over the course of two or three decades jeopardizing the Fund's expected future revenues. As CBO also notes, this normal attrition will be aggravated by the double obligations that companies will bear, making payments required by the Fair Act while bearing the costs of renewed asbestos litigation.

Under the Act's present level and schedule of revenues, the National Fund must borrow. Without borrowing, claimants would wait decades for payment. But, although borrowing is critical to the Fund, little attention has been paid so far either to the staggering costs of borrowing or to the mechanism through which borrowing might occur. Private lending seems unlikely given both the revenue uncertainties that CBO warned of and the questionable viability of revenue payments after sunset. Competent private lenders would recognize these risks.

Although neither the statute nor its proponents have specified a realistic lending program, such a program would certainly have to involve either lending by the Federal Treasury or Federal guarantees in order reassure private lenders. In either case, the Treasury would assume the risk of asbestos litigation, a risk of bad debt running to $70 billion payable over a 20 to 30 year term to be paid by businesses that would be subject to a double dose of asbestos liability.

To summarize, under the assumptions of both supporters and opponents, using realistic and rosy assumptions, the Fair Act will fail. In failing the Act will impose great risks and costs on taxpayers, it will exacerbate the circumstances for asbestos defendants and insurers and will provide no compensation for the vast majority of asbestos victims. The Act is an empty promise to both sides of the asbestos litigation and it is fiscally irresponsible.

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April 25, 2005

The Honorable Arlen Specter
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: S. 852 Fairness in Asbestos Injury Resolution Act

Dear Senator Specter:

At your request, I submit this letter in response to the letter of Professor David Strauss dated April 20, 2005. My analysis of the Fairness in Asbestos Injury Resolution ("FAIR") Act differs substantially from that offered by Professor Strauss. I foresee no problems under the Due Process or Takings Clauses of the Fifth Amendment arising from the provisions of the Act mandating contributions from asbestos defendant firms and providing for erosion of their insurance policy limits.

1. Professor Strauss argues that (1) an insurance contract creates property rights; (2) the FAIR Act imposes a "double exaction" of requiring asbestos defendant firms to both pay a contribution and have its insurance policy limits drawn down; and (3) that such exaction is a "per se" taking of contract rights no different from the seizure of a firm's money. Strauss Letter at 1-2. That argument does not withstand scrutiny.

First, Professor Strauss is wrong to claim that "[t]he proposed FAIR Act, by abrogating contracts of insurance, takes private property – just as if the government confiscated bonds, stock certificates, or cash." *Id.* at 1. Professor Strauss misconceives the congressional power to abrogate private contracts. As the Supreme Court has stated,

> [c]ontracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity.

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> Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 307-08 (1935). Every contract is inherently subject to the supervening right of Congress to regulate the relations between the parties pursuant to its Article I powers. There can be no doubt that Congress has plenary power under the Commerce Clause to preempt state law and to abrogate private contracts in order to effectuate a solution to the asbestos litigation crisis, which has had and will continue to have a pervasively deleterious effect on interstate commerce and on the national economy as a whole. Congressional modification of the contractual rights and duties of private parties pursuant to its enumerated powers is not a *per se* taking.

Second, Professor Strauss's claim that the FAIR Act's treatment of insurance contracts is equivalent to the seizure of cash is not only legally wrong, but it is particularly inapt in this circumstance. An insured does not have a property right in policy limits equivalent to a property right in its cash assets. Instead, if it incurs asbestos liability, the insured simply has a contractual right, subject to policy terms and exclusions, to have the insurer indemnify it for covered liabilities up to the policy limits. But the FAIR Act removes the very asbestos liability that would cause the firm to seek indemnification under its insurance policy by preempting state tort law and substituting a federal administrative remedy funded by asbestos defendant firms and participating insurers. Furthermore, the Act not only extinguishes the asbestos defendant firms' tort liability, but also provides that insurers (not just the defendants) shall contribute about a third of the funding of asbestos compensation, in the amount of over $46 billion. S. 852, 109th Cong. § 212(a)(2)(A)(2005). In return for shifting a large share of compensation liability to the insurance industry (based on a methodology that will "reflect, on an equitable basis, the relative tort system liability of the participating insurers in the absence of this Act," *id. at* § 212(a)(3)(B)(i)), the Act allows insurers to draw down the remaining aggregate policy limits of asbestos defendant firms by 38.1% of the firm's scheduled payment amount. *Id.* § 404(a)(2)(A). Thus, the insurance contract itself is not abrogated; it remains in force under the FAIR Act, but federal law modifies the contractual bases for erosion of the policy limits to reflect the burdens and benefits that the law allocates to insurance companies and their insureds.

Professor Strauss brushes aside the Act's extinction of the asbestos defendant firms' tort liability (and does not even advert to the imposition upon insurers of substantial direct liability for funding compensation for asbestos victims). Instead, he says that the key defect in the Act is that it imposes upon defendant firms both a contribution to the Trust Fund and the erosion of their policy limits (which he erroneously calls a "confiscation of insurance assets"). Such a "double exaction," he says, offends the Takings Clause. Strauss Letter 2. This analysis is flawed.

As an initial matter, Professor Strauss's premise that the Act imposes a double exaction is inaccurate. As stated above, no insured has a property right in an insurer's funds up to the policy limits. The insured suffers no financial detriment from the erosion of policy limits

until the point where the limits are exhausted and the insured has to pay liabilities for that policy year out of pocket. Whether that will occur depends on the dollar amount of remaining limits, the amount of the erosion of a given policy under the Act, and the actual and expected liabilities for that policy year. Even if the Act modifies a contract right, it is not necessarily an exaction; there will be many instances where the erosion of the policy limits will have no financial effect on the firm. Furthermore, even if limits are exhausted in a given case, the Act can only be fairly deemed to impose an "exaction" on the firm if the erosion authorized in section 404 exceeds that which would have occurred under state tort law in the absence of the Act. Any "excess" insurance that a participant possesses on the date of enactment of the FAIR Act may simply be a windfall created by the timing of the proposed legislation itself, not "property" that the participant could use or dispose of absent the Act. The elimination of windfalls created by federal legislation plainly does not give rise to an unconstitutional taking. *See Brown v. Legal Found.*, 538 U.S. 216, 235-36 (2003) (no taking where the owner has suffered no loss).

More fundamentally, there is no rule against "double exactions" under the Takings Clause. The Takings Clause is not concerned with the manner in which Congress structures legislation, but whether it takes property for a public purpose without just compensation. U.S. Const. Amend. V. Contrary to Professor Strauss's claims, *Webb's Famous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), does not establish a rule that "'exact[ion of] two tolls'" (alteration in original) *ipso facto* violates the Takings Clause. Strauss Letter at 2, (quoting 449 U.S. at 159). In *Webb's*, the issue was whether a Florida statute that both exacted a fee for a court interpleader fund and appropriated the interest in excess of $100,000 on deposited funds violated the Takings Clause. The Supreme Court held that interest is the property of the owner of the principal, 449 U.S. at 162, and, because the state statute separately exacted a fee for court services rendered in setting up the fund, the appropriation of interest was "a forced contribution to general governmental revenues, and ... not reasonably related to the costs of using the courts." *Id.* at 163. Moreover, the Court noted that "[n]o police power justification [wa]s offered for the deprivation." *Id.* Thus, because the interest did not compensate the government for its costs and was not justified by exercise of the state's police power, the Court held "under the narrow circumstances of this case" that the appropriation of the interest violated the Takings Clause. *Id.* at 164-65. The "two tolls" inquiry was only to show that the interest did not serve as a user fee. The Court did not state a general rule, contrary to any prior Takings jurisprudence or the purpose of the Takings Clause, that any legislation that imposes dual exactions is *per se* invalid.

The FAIR Act is far different from the statute at issue in *Webb's*. Here, there is no naked appropriation of property for general government revenues. Congress in the exercise of its Commerce Clause powers is dealing with a massive asbestos crisis for which the participating defendant firms have been found liable. It is replacing an unworkable system of state tort liability that has "driv[en] companies [with asbestos liability] into bankruptcy, divert[ed] resources from those who are truly sick, and endanger[ed] jobs and pensions," S. 852, § 2(4), and that results in the bulk of expenditures being absorbed in the transaction costs of

individualized litigation and in compensation of the unimpaired. The Act's exactions upon defendant firms are to compensate the asbestos injuries for which the participating defendant firms bear some responsibility. Even though there will no longer be individualized judgments and settlements for which claims of indemnification are traditionally made against insurance policies, Congress has substituted new methods for allocating compensation liability among asbestos defendant firms and insurers.

The "double exaction" issue is thus a red herring. The real question is whether an asbestos defendant firm would have a viable constitutional challenge because of the burdens imposed by the Act, relative to the benefits the firm receives from the Act's elimination of the prior regime of state tort liability. I do not think that any substantial constitutional challenge could be brought under either the Due Process or Takings Clause.

A. Due Process. The substantive component of the Due Process Clause "secur[es] the individual from the arbitrary exercise of the powers of government" and "prevent[s] governmental power from being used for purposes of oppression." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (internal quotation marks omitted). When challenged under the Due Process Clause, "[l]egislat[ion]. . . adjusting the burdens and benefits of economic life" is afforded a "presumption of constitutionality," and a litigant who seeks to overcome that presumption generally must "establish that the legislature has acted in an arbitrary and irrational way." *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)). With respect to challenges premised on congressional interference with private contractual arrangements, the Supreme Court articulated the general standard for review of federal legislation in *Norman*, which rejected a Fifth Amendment challenge to a measure preventing the enforcement of "gold clauses" in otherwise valid private contracts. The Court upheld Congress's power to nullify the contractual provisions because the measure was neither "arbitrary [n]or capricious," but bore "a reasonable relation to a legitimate end." 294 U.S. at 311.

The proposed legislation would be a quintessential exercise of Congress's power to adjust the benefits and burdens of economic life and, as such, would enjoy a presumption of constitutionality. *Turner Elkhorn*, 428 U.S. at 15; *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993). To overcome that presumption, participants would have to show that Congress's decision to tie funding obligations to past asbestos litigation costs and relative company size, and to provide for uniform rules of drawing down policy limits, is an "arbitrary and irrational way" of spreading the costs of the legislative "cure" for the asbestos crisis. *Turner Elkhorn*, 428 U.S. at 15; *Concrete Pipe*, 508 U.S. at 637.

Under the deferential standard of review applicable to economic legislation, such claims will not succeed. In *Turner Elkhorn,* the Court rejected similar challenges to the Black Lung Benefits Act, which required mine operators to compensate former employees who terminated their work in the mining industry before the Act was passed. Operators challenged the Act's cost-spreading scheme as irrational because operators whose work force had declined

"may be faced with a total liability that is disproportionate to the number of miners currently employed," and because the Act gave a "competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities." 428 U.S. at 18. The Court declined to question whether Congress's scheme fairly apportioned burdens among operators: "It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical is not a question of constitutional dimension." *Id.* at 18-19; *see also Concrete Pipe*, 508 U.S. at 639 ("under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means"). Here, there is a clear and rational nexus between the problem Congress seeks to solve—a national asbestos litigation crisis—and the conduct of those upon whom it seeks to impose liabilities—companies whose conduct has already rendered them subject to suit in asbestos cases. The Court has never required more than this type of nexus when applying rational basis review to economic legislation.

The same presumption of rationality and rule of minimal judicial scrutiny applies to any claim that the FAIR Act impermissibly abrogates insurance contract rights.

> To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations. If an impairment is found, the reviewing court next determines whether the impairment is of constitutional dimension. If the alteration of contractual obligations is minimal, the inquiry may end at this stage; if the impairment is substantial, a court must look more closely at the legislation. When the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.

National R.R. Passenger Corp. v. Atchison, Topeka & Santa Ry., 470 U.S. 451, 472 (1985) (internal citations and quotation marks omitted).[1]

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[1] Repeating an observation it had made just a year earlier in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984), the Court also rejected the notion "that the principles embodied in the Fifth Amendment's due process guarantee are coextensive with the prohibitions against state impairment of contracts under the Contract Clause," U.S. Const. art. I, § 10, cl. 1. *Atchison*, 470 U.S. at 472 n.25. "[T]o the extent the standards differ, a less searching

Congress certainly has rational reasons for its mandatory contribution scheme and its insurance erosion provisions. By completely extinguishing all future asbestos liabilities and litigation costs, the proposed legislation would eliminate any need for "highly insured" participants to seek insurance indemnification of asbestos liabilities and defense costs. Moreover, drawing down existing general liability coverage to reflect the funding contributions of insurers is necessary to prevent inequities to insurers, who would otherwise make substantial contributions to help eliminate asbestos liabilities only to find themselves paying claims that would not have been paid (due to coverage exhaustion) had the proposed legislation not been enacted.

Indeed, Congress might reasonably conclude that the abrogation and erosion of insurance coverage is necessary to eliminate a fortuitous windfall to "highly insured" participants. The fact that, on the date of enactment, some companies in a given tier possess substantial insurance coverage while other companies in the same tier have little or none may reflect nothing more than an accident of timing. Asbestos litigation has been characterized by shifts in the types of defendants targeted by plaintiffs over time. *In re Joint Eastern & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 305 (E.D.N.Y. 2002); Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Court's Duty to Help Solve the Asbestos Litigation Crisis* 24 (National Legal Center for the Public Interest, June 29, 2002). Given the unpredictable nature of asbestos litigation and the ever-evolving nature of liability theories, it is possible that many companies with substantial insurance on the date of enactment would possess little insurance if enactment were delayed several years. Conversely, it is possible that many companies with no insurance on the date of enactment would have possessed substantial coverage had Congress intervened several years earlier. Congress could therefore reasonably view the amount of insurance a company possesses on the date of enactment as a fortuity that should not affect funding contributions, and could conclude that granting funding offsets or credits based on this fortuity would confer an unfair advantage on some companies. *Cf. Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416-17 (1983) (preventing windfall recoveries due to changes in federal regulatory policy is not a significant impairment of private contracts).

But even assuming that "highly insured" participants will effectively "pay" more than others under this system, that fact would not render the proposed legislation irrational or arbitrary. In the realm of economic legislation, where a classification "has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations . . . ." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980) (internal quotation marks and citations omitted)[2]; *Concrete Pipe*, 508 U.S. at 639 (in the case of economic legislation,

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inquiry occurs in the review of federal economic legislation." *Id.*

[2] Although *Fritz* arose under the Equal Protection Clause, its analysis is relevant here, because equal protection challenges to economic legislation, like due process challenges, require

"there is no need for mathematical precision in the fit between justification and means"). Provisions eroding general insurance coverage to reflect the contributions of insurers are plainly rational in that they are necessary to prevent double payments by contributing insurers. The fact that these provisions, together with the rational tiering system, may result in some financial inequality among industrial participants does not render the proposed legislation irrational and arbitrary.

Indeed, the very nature of the asbestos problem Congress seeks to solve necessitates a solution of "'rough accommodations.'" *Fritz*, 449 U.S. at 175. Any claim about the amount of insurance a company possesses on the date of enactment will likely be based on a number of contestable assumptions, such as the nature, number, and severity of claims that will be brought against the firm, the likelihood that the firm will reach favorable settlements of pending claims, the extent to which its claims will actually be paid by its insurers, and its likely future liabilities. For example, when the Manville Trust was established, it was expected to receive 83,000 to 100,000 claims, *see In re Joint Eastern & Southern Districts Asbestos Litigation*, 878 F. Supp. 473, 479 (E.D.N.Y. 1995), *aff'd in part, vacated in part on other grounds, 78 F.3d 764 (2d Cir. 1996)*; by 2002, it had received some 591,000. *See* Letter from Robert A. Falise, Chairman and Managing Trustee, Manville Personal Injury Settlement Trust, to Hon. Jack B. Weinstein and Hon. Burton R. Lifland 2 (Feb. 28, 2003), *available at* http:/www.mantrust.org/FILINGS/q4_02/4thqtr02. pdf. There is very little sure basis for firms to make a showing that they would be better off under the tort system. The virtual impossibility of devising a workable system that allocates funding obligations based on individualized adjudications of liability confirms the constitutional permissibility of the proposed legislation's funding scheme. In seeking to solve the asbestos litigation crisis, Congress is not required to adopt a cost allocation scheme that replicates many of the complexities of proof that have caused the crisis in the first place.

Moreover, the FAIR Act does not simply deprive asbestos defendant firms of property; it affords them substantial benefits. Claims of unfairness to "highly insured" companies would, in reality, be claims that the legislation distributes *benefits* unevenly. Given the scope and magnitude of the asbestos litigation crisis, Congress can reasonably conclude that all participants, regardless of their levels of insurance, will be better off under the proposed legislation than they would be under the tort regime. Again, because the Court has thus far never based a finding of irrationality on claims of relative inequities, it seems especially unlikely that it would do so where the challenge is based on the relative degree of overall benefit received—particularly where, as noted above, any claim of relative benefits will depend on inherently speculative assumptions.

The very magnitude, unpredictability and imponderables of the litigation crisis mean that there is no perfect solution, and that any system is open to charges of unfairness based on different underlying factual assumptions. In these circumstances, Congress should enjoy the

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a showing of irrational or arbitrary legislative action.

greatest lattitude to choose between cost-spreading mechanisms. Because the proposed FAIR Act spreads costs among those with a direct connection to the litigation crisis Congress seeks to solve, it is rational.

B. Takings. As noted above, Professor Strauss's analysis of the FAIR Act as a *per se* taking equivalent to a seizure of money assets is unfounded, and the Supreme Court has held that imposition of a mandatory contribution is not itself a *per se* taking. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-24 (1986) (rejecting *per se* takings challenge). There is substantial question whether the Takings Clause would even apply to the FAIR Act. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality), five Justices concluded that takings analysis does not apply where a statute imposes a mandatory financial obligation, but does not specify how the regulated entity must comply or the property it must use to do so. *See id.* at 540-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-58 (Breyer, joined by Stevens, Souter and Ginsburg, JJ., dissenting). Justice O'Connor, writing for herself and three others, concluded that "the regulatory takings framework is germane to legislation" that imposes such financial obligations. *Id.* at 529. There is likewise some question whether most contractual rights, even if fully vested as a matter of ordinary contract law, should be considered "property" at all for purposes of applying the Takings Clause to a general federal statute that affects their value or enforceability. *See Connolly*, 475 U.S. at 224 ("the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking," although "[t]his is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation"); *Concrete Pipe*, 508 U.S. at 641-42 (citing *Connolly* in rejecting reliance on contractual rights as basis for takings claim); *but see, e.g.*, *United States Trust v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.") (citing *Contributors to Pa. Hosp. v. Philadelphia*, 245 U.S. 20 (1917)).

Even if it is assumed that the Takings Clause applies, the proper framework is whether the FAIR Act constitutes a regulatory taking. This question involves '"essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 322 (2002) (citations omitted). In evaluating regulatory takings claims, the Court has identified three factors of "'particular significance'": "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental regulation.'" *Connolly*, 475 U.S. at 225 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

First, regarding economic impact, this regulation indisputably confers benefits as well as burdens on asbestos defendant firms, and "the Just Compensation Clause 'has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of benefits received' in determining whether a 'taking' has occurred." *See United*

States v. Sperry Corp., 493 U.S. 52, 61 n.7 (1989)) (quoting *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) (omissions in original). Moreover, it is doubtful that any asbestos defendant firm can show with any certainty that its liabilities under the FAIR Act will necessarily (much less substantially) exceed its future tort liability. There is no arbitrary exaction; the assessment on a particular firm "is not made in a vacuum, ... but directly depends on" the participant's experience with asbestos litigation under the tort regime. *Connolly*, 475 U.S. at 225; *see also Concrete Pipe*, 508 U.S. at 645 (economic impact is severe only if it is shown "to be 'out of proportion to [the party's] experience with the [pension] plan'" it must fund) (quoting *Connolly*, 475 U.S. at 226). The proposed legislation, moreover, includes provisions "that moderate and mitigate the economic impact of an individual [participant's] liability." *Connolly*, 475 U.S. at 225-26.

Second, the deprivation of insurance coverage does not interfere with any reasonable investment-backed expectations. A participant's reasonable expectations concerning its insurance coverage is that the insurance will be available to cover its future asbestos liabilities. These expectations are not frustrated by a law that erodes insurance coverage at the same time that it eliminates the liabilities the insurance was purchased to cover. *Cf. Energy Reserves*, 459 U.S. at 411 ("regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment" for purposes of Contract Clause analysis). Even assuming that "highly insured" participants are effectively compelled to contribute more than other participants, they have no investment-backed expectation that, if Congress passes legislation preempting the entire tort system for asbestos claims, they will receive some offset or credit against statutory funding obligations based on any excess coverage they possess on the date of enactment.

Finally, with respect to the nature of the governmental action, the government will "not physically invade or permanently appropriate any of the [contributors'] assets for its own use." *Connolly*, 475 U.S. at 225. Nor does the proposed legislation "singl[e] out certain" entities and impose liabilities "unrelated to any . . . injury they caused." *Eastern Enters.*, 524 U.S. at 537 (plurality) (describing the "quite unusual" nature of the governmental action under the Coal Act). Instead, as discussed above, the proposed legislation will allocate costs based on contributors' pre-enactment involvement with asbestos litigation, and will do so as part of a comprehensive solution that accords significant benefits to contributors and injured parties alike. Thus, any interference with the property rights of contributors "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking requiring Government compensation." *Connolly*, 475 U.S. at 225.

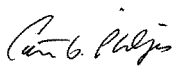
2. For the above reasons, I am confident that the FAIR Act will not be vulnerable to constitutional challenges. But, if there were any question, the Act's provision of a specific mechanism to redress inequitable burdens on certain asbestos defendant firms should allay all doubts. Professor Strauss questions whether such a provision could remedy "a fundamental constitutional flaw" in the legislation, Strauss Letter at 3, but there is no such flaw.

Furthermore, the concerns he raises about funding pressures and Administrator discretion are wholly speculative.

3. Finally, on questions of remedy, I reject Professor Strauss's premise that every adequately insured defendant has a *per se* taking claim against the Fair Act. His parade of horribles – insolvency of the Fund resulting from massive exemption of firms with adequate insurance from their Fund obligations, contribution refunds, or large damages awards against the United States Treasury, *id.* – is pure fantasy. On the highly dubious assumption that *any* asbestos defendant firm could prove a constitutional violation, the proper remedy would be for a court to order the Fund Administrator to make an equitable adjustment to eliminate the unconstitutional burden. I cannot foresee any judicial relief that would put the Fund or the federal fisc in jeopardy.

The Supreme Court has repeatedly called upon Congress to implement a comprehensive federal scheme to solve the morass of individualized asbestos liability adjudication in the nation's courts, which is a fundamental premise of the FAIR Act itself. S. 852 § 2(6). No federal scheme would be fair or tenable that did not involve imposition of funding liability on both asbestos defendant firms and insurers. It is impossible to enact a federal scheme that does away with individualized adjudications of defendant liability to specific plaintiffs but still permits traditional indemnification of defendants under the terms of applicable insurance policies. The only way for this critical national objective to be accomplished is if Congress invokes its Commerce Clause powers to modify contractual relations between insureds and insurers, and to devise alternative ways of allocating asbestos injury liability between those parties. The FAIR Act accomplishes that fairly and comprehensively, based on extensive consultation and negotiation with asbestos defendant and insurance interests. In all events, it easily meets the deferential tests for economic regulation under the Due Process and Takings Clauses.

Sincerely,



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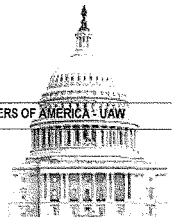

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April 13, 2005

Dear Senator:

Senators Specter and Leahy recently put forward a compromise asbestos compensation proposal, and have indicated that they intend to introduce legislation incorporating this proposal early next week. The UAW supports the Specter-Leahy asbestos compensation proposal because we believe it will provide more equitable, timely and certain compensation to the victims of asbestos-related diseases.

There is widespread agreement that the current tort system fails miserably in compensating asbestos victims. There are often years of delay before victims receive any compensation. Awards to victims are highly unpredictable, with similarly situated individuals receiving vastly different amounts. Too often compensation goes disproportionately to the less sick at the expense of the most seriously ill victims. The transaction costs, including lawyers' fees, are very high and reduce the amounts received by victims. And even when victims are awarded substantial compensation by the courts, these judgments are often not collectable because the defendant companies have filed for bankruptcy, leaving the victims with little effective recourse.

The Specter-Leahy proposal would address these serious problems by replacing the current tort system with a national asbestos trust fund to compensate the victims of asbestos-related diseases. By creating a no-fault administrative system for process claims, this approach would provide victims with speedier compensation, while reducing the substantial lawyers' fees and other transaction costs in the current adversarial litigation system. By compensating victims pursuant to a fixed schedule of payments for specified disease levels, this approach would also provide predictable awards to individuals with similar illnesses, and ensure that the most compensation goes to the most seriously ill victims. Perhaps most importantly, by providing compensation through a national asbestos trust fund, this approach would ensure that victims will receive the full amount of their award regardless of whether a particular company had filed for bankruptcy.

The UAW is especially pleased that the Specter-Leahy proposal does not permit any subrogation against worker compensation or health care payments received by asbestos victims. This will ensure that awards are not largely offset by worker compensation or health care payments to which victims are otherwise entitled. In our judgment, the provisions barring any subrogation are essential to ensuring that victims receive adequate compensation.

The UAW also is pleased that the Specter-Leahy proposal establishes a mechanism for defendant companies and insurers to contribute to the national asbestos compensation fund, thereby spreading the costs of compensating victims across a broad section of the business and insurance community. We believe this broad-based, predictable financing mechanism is vastly preferable to the current tort system, which has driven most asbestos manufacturers into bankruptcy and is threatening the economic viability of many other companies that used products containing asbestos, thereby jeopardizing the jobs of tens of thousands of workers.

The Specter-Leahy proposal provides for reversion of asbestos claims to the tort system in the event the national asbestos trust fund does not have sufficient funds to pay all claims, or in the event the compensation system does not become operational quickly enough. Although the UAW hopes that these reversion provisions will never be triggered, we believe these provisions are essential to ensure that victims will always have some effective recourse for receiving compensation, and to give all stakeholders an incentive to help make the compensation system operate properly.

The UAW recognizes that the Specter-Leahy proposal represents a compromise that reflects countless hours of negotiations with the key stakeholders in this issue. We commend Senator Specter and Senator Leahy for their leadership and persistence in moving forward with efforts to fashion this compromise. We also understand that some issues are still under discussion as the Specter-Leahy proposal is translated into legislative language that will be introduced next week. We look forward to reviewing the final details of the legislation when it is available.

It is easy for critics who want to maintain the current tort system to point to flaws or shortcomings in the Specter-Leahy proposal. But the issue before the Senate is not whether this proposal is perfect or solves all problems. Rather, the issue is whether the Specter-Leahy proposal is better than the current tort system. The UAW believes that the answer to this question is clearly yes. In our judgment, the Specter-Leahy proposal will provide the victims of asbestos-related diseases with speedier, more equitable and more certain compensation than the current tort system. For this reason, we urge you to support the Specter-Leahy proposal when it is considered by the Senate.

Thank you for considering our views on this important issue.

Sincerely,

Alan Reuther

Alan Reuther
Legislative Director

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STATEMENT OF

ALAN REUTHER

LEGISLATIVE DIRECTOR

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

on the subject of

THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005 (S. 852)

before the

COMMITTEE ON JUDICIARY

UNITED STATES SENATE

April 26, 2005

The UAW appreciates the opportunity to testify before the Senate Judiciary Committee on the proposed "Fairness in Asbestos Injury Resolution Act of 2005" (S. 852), which has been introduced by Chairman Specter and Ranking Member Leahy. The UAW supports this legislation, and urges the Committee to give it prompt, favorable consideration. We commend Senators Specter and Leahy for their leadership and persistence in fashioning this legislation.

This bill provides $140 billion in private money for compensating the victims of asbestos-related diseases. Many of those victims would otherwise get little or no compensation. The bill establishes a system which promises to provide the money to victims more quickly, more consistently, and less wastefully than the current tort system. The bill spreads the cost among defendant corporations and insurance companies more equitably.

There is widespread agreement that the current tort system does not fairly compensate asbestos victims. Most unfair are the situations where the defendant company is bankrupt, where the source of the asbestos can't be identified, where the workers' compensation system prevents suing the employer, or where the employer was the government and is immune from any liability. Primary asbestos suppliers also are largely immune to further judgments because of bankruptcy.

There are often years of delay before victims receive any compensation. Awards to victims are highly unpredictable, with similarly afflicted individuals receiving vastly different amounts. Transaction costs, including attorney fees, are extremely high and reduce the amounts actually received by victims. Defense costs, where multiple asbestos companies try to blame each other, drain corporate treasuries. Even when victims are awarded compensation by the courts, these judgments often are not collectable because the defendant companies file for bankruptcy, leaving the victims with little effective recourse.

The UAW represents 1,150,000 active and retired employees in the automobile, aerospace, agricultural implement and other industries. Some of our members were exposed to asbestos in the workplace, especially in plants that produced brakes, in foundries, and among maintenance and service trades working with process insulation. Those members who have or will develop asbestos-related diseases as a result of this exposure may receive inadequate compensation under state worker compensation statutes, but are barred by these statutes from suing their employer.

As a result of the mass of law suits filed against companies that produced or used products containing asbestos, a number of auto parts companies have been forced into bankruptcy. In addition, rising claims against major auto manufacturers threaten to expose them to significant liabilities in the future, posing a major threat to their long-term economic health and the jobs and benefits of hundreds of thousands of active and retired UAW members.

The Specter-Leahy bill (S. 852) would address the serious problems described above by replacing the current tort system with a national asbestos trust fund to compensate the victims of asbestos-related diseases. Perhaps most importantly, by providing compensation through a national asbestos trust fund, this approach would ensure that victims will receive the full amount of their award regardless of whether a particular company has filed for bankruptcy. By creating a no-fault administrative system for processing claims, this approach would provide victims with speedier compensation, while reducing the substantial lawyers' fees and other transaction costs in the current adversarial litigation system. By compensating victims pursuant to a fixed schedule of payments for specified disease levels, this approach would also provide predictable awards to individuals with similar illnesses, and ensure that the most compensation goes to the most seriously ill victims.

The UAW is especially pleased that the Specter-Leahy bill does not permit any offset of awards (subrogation) against worker compensation or health care payments received by asbestos victims. These offsets are now permitted by some state laws. We believe the provisions barring any subrogation are essential to ensuring that victims receive adequate compensation.

The UAW also is pleased that the Specter-Leahy bill establishes a transparent mechanism for defendant companies and insurers to contribute to the national asbestos compensation fund, thereby spreading the costs of compensating victims across a broad section of the business and insurance community. We believe this broad-based, predictable financing mechanism is vastly preferable to the current tort system, which has driven most asbestos manufacturers into bankruptcy and is threatening the economic viability of many other companies that produced or used products containing asbestos, thereby jeopardizing the jobs and benefits of hundreds of thousands of workers and retirees.

The Specter-Leahy bill provides for reversion of asbestos claims to the tort system in the event the national asbestos trust fund does not have sufficient funds to pay all claims, or in the event the compensation system does not become operational quickly enough. Although we hope these reversion provisions will never be triggered, the UAW believes these provisions are essential to ensure that victims will always have some effective recourse for receiving compensation, and to give all stakeholders an incentive to help make the compensation system operate properly.

Some critics of the Specter-Leahy bill have complained that the limitations on attorney fees are too low, and have asserted that this will undermine the ability of victims to get compensation because lawyers will refuse to take the cases for such low fees. It is critically important to recognize that the legislation replaces the current adversarial litigation system with a no-fault administrative system for processing claims. This means that employers and insurers will no longer be contesting and throwing roadblocks in the way of claims. Also, the issue of which defendant's asbestos caused the damage, which currently is a major part of bringing an asbestos lawsuit, will no longer have to be litigated. As a result, the difficulties and costs involved in bringing

asbestos claims will be reduced. Indeed, most of the work can be done by paralegals. Thus, the attorney fees provided under the legislation are more than adequate to attract competent representation for asbestos victims.

It is also important to recognize that labor unions and other groups can help provide free or lower cost representation for asbestos victims by hiring staff attorneys and other professionals to process the claims under the no-fault administrative claims processing system. Pre-paid legal services plans can also help provide representation for such claims. In both cases, asbestos victims can receive competent representation with little or no attorney fees being deducted from their awards.

The UAW believes that the Specter-Leahy bill can be improved in two areas. First, while the legislation provides that CT scans showing asbestosis may be considered as evidence qualifying lung cancer victims for compensation, it does not expressly allow CT scans showing pleural disease to be considered. This distinction is contrary to the current state of medical science and consensus recommendations. If this diagnostic technology demonstrates that individuals actually satisfy the criteria for compensation under any of the categories, there is no reason to ignore this evidence and thereby deny compensation to the asbestos victims. Thus, we urge the Committee to make CT scans admissible as evidence for all categories of claims.

Second, the criteria for triggering the statute of limitations for bringing claims should be clarified to make sure they are workable. We are particularly concerned that, as currently drafted, the criteria may force individuals with non-malignant diseases that may get progressively worse to rush to file claims in order to preserve their legal rights. In our judgment, this would be counterproductive and contrary to the objectives of the no-fault administrative system created under the legislation.

The UAW recognizes that the Specter-Leahy bill represents a compromise that reflects years of negotiations with the key stakeholders in this issue. It is easy for critics who want to maintain the current tort system to point to shortcomings in the legislation. But the standard for judging S. 852 should not be whether it is perfect or solves all problems. Instead, the standard should be whether this legislation is better than the current tort system.

The UAW firmly believes that the no-fault asbestos compensation system established under the Specter-Leahy bill would be vastly preferable to the current tort system. It would ensure that tens of thousands of victims have adequate recourse and can receive compensation, regardless of whether particular defendants have gone bankrupt or are otherwise immune from lawsuits. It would provide more equitable, timely and certain compensation to the victims of asbestos-related diseases. It would ensure that claims are processed more rapidly. It would ensure that the most compensation is directed to individuals with the most serious illnesses, and that individuals with similar diseases receive similar amounts of compensation. It would ensure that attorney fees and other transaction costs do not greatly reduce the amounts received by victims.

In addition, the system established under the Specter-Leahy bill would ensure that the costs of compensating victims of asbestos-related diseases are spread broadly across defendant companies and insurers in a rational, predictable manner. This will help to reduce business bankruptcies, thereby protecting the jobs and benefits of hundreds of thousands of workers and retirees.

For all these reasons, the UAW supports the Specter-Leahy asbestos compensation bill (S. 852). We urge the Judiciary Committee to move forward promptly to approve this important legislation. Thank you.

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Testimony of Margaret Seminario,
Director, Safety and Health Department,
American Federation Labor and Congress of Industrial Organizations
Before the Senate Judiciary Committee
on the
Fairness in Asbestos Injury Resolution Act of 2005 (S. 852)

April 26, 2005

The AFL-CIO appreciates the opportunity to testify on the Fairness in Asbestos Injury Resolution Act of 2005 (S. 852). Senator Specter and Senator Leahy, I would like to acknowledge and recognize your tireless efforts and the efforts of many others including Senator Feinstein, Senator Hatch and Judge Edward Becker to attempt to develop a fair and effective asbestos compensation bill.

As you are well aware, the AFL-CIO has a long involvement in the asbestos issue and for the past three years we have been deeply engaged in the discussions and process that have led to the current proposal (S. 852). We have done so because we believe that many victims are not being well served by the current system, and that the hundreds of thousands of victims who will develop asbestos diseases in the future could be better served by an alternative system that provides compensation to sick individuals in a more efficient and equitable manner.

The AFL-CIO has consistently supported the establishment of a federal asbestos trust fund to fairly compensate asbestos victims for their injuries through a no fault system. At the same time we have made clear that we cannot accept a substitute to the current civil litigation system unless it would provide a means by which victims could obtain fair compensation on a timely basis.

The Fairness in Asbestos Injury Resolution Act of 2005 (S. 852), introduced last week, includes a number of important improvements over past proposals, and again, we want to acknowledge the work of Senators Specter and Leahy, and your staffs, in securing these changes. Unfortunately, in the AFL-CIO's view, the bill still fails to ensure victims just and timely compensation and would leave tens of thousands of individuals with no remedy at all. That is why we oppose the legislation as introduced.

Over the past three years, as we have worked on this legislation, we have listened to the concerns and proposals put forward by business and insurers, and have attempted to be responsive. In the interest of reaching agreement on legislation we have compromised on our initial position that all claimants deserve a monetary award. We have accepted a much lower level of overall funding for the program than we think will be actually required to meet anticipated claims. And, while we have pushed for full transparency on the funding mechanisms and participant contributions, we have not made such disclosures a condition of our endorsement.

But on the fundamental issue of ensuring that the legislation will create a system that will, in fact, deal with victims fairly and pay timely compensation to those who are sick from asbestos disease, we can accept no compromise that does not achieve this basic objective. It is not in victims' interests to trade one flawed system for another that has serious identifiable problems and deficiencies and threatens to leave many individuals worse off. These serious problems include the exclusion of thousands of asbestos-related lung cancer claims, leaving most victims with no remedy during the start-up period, the inclusion of restrictions preventing individuals with both asbestos and silica disease from obtaining access to the courts or fair compensation from the fund, unworkable statute of limitations provisions that could bar tens of thousands of worthy claims, and program sunset provisions that could leave claimants in limbo should the fund run out of money.

We continue to believe that the major problems with the bill can still be corrected, and we have put forward proposals to do so. Moreover, we believe that a primary reason that they have not been addressed is due to objections by some business and insurer groups who want to limit claims and costs by making it difficult or impossible for individuals who are sick to receive compensation. If the goal is truly to enact a bill that provides prompt and fair compensation to claimants who meet the eligibility requirements, then there is no valid reason not to fix the problems we have identified.

We have prepared detailed comments on the legislation that are included as an attachment to this testimony.

Let me now turn to our major concerns with the legislation.

Compensation for Thousands of Asbestos Lung Cancer Victims is Eliminated
In response to objections from some Senators and others, the bipartisan medical criteria agreed to in the last Congress have been changed and the former Level VII lung cancer category has been eliminated from the bill. This category provided compensation for individuals with lung cancer who had 15 years of substantial occupational exposure to asbestos, but no signs of underlying non-malignant asbestos disease. Let me be clear: with 15 years of demonstrated substantial occupational exposure to asbestos, lung cancer can be attributed to that exposure. Based on CBO claims projections, the elimination of Level VII potentially removes more than 40,000 asbestos-related lung cancer victims from coverage under the bill.

Provisions have been added that allow some of these lung cancer victims to use CT scans to show that they have asbestosis, but the bill does not specify that victims with pleural disease can use this more sensitive and specific diagnostic test to show their disease and exposure. Thus, the net result of the bill as introduced is that 25,000 – 30,000 asbestos lung cancer victims previously covered may not be eligible for compensation.

The AFL-CIO believes that any asbestos-related lung cancer victim who can demonstrate significant asbestos exposure should be compensated for this fatal disease. At a minimum, the bill must permit claimants to use CT scans to document underlying non-malignant asbestos disease ("markers" of asbestos exposure) for all lung cancer

categories (i.e. Level VII and VIII in S. 852 as introduced). Otherwise, tens of thousands of asbestos lung cancer victims will be denied coverage under the bill.

Tens of Thousands of Asbestos Disease Victims Left in Limbo
There are currently hundreds of thousands of claims pending in the tort system. Tens of thousands of these claims are for victims who have life threatening or serious asbestos diseases. Earlier asbestos legislation (S. 1125) included an important amendment adopted unanimously by the Judiciary Committee that preserved the right of asbestos victims to litigate their claims in court until the trust fund was up and running. But S. 852 has eliminated this important protection, and leaves most asbestos victims with no remedies for as long as two years while the fund gets up and running.

Provisions are included for terminally ill victims to seek an offer of judgment during the start-up period and to return to court within 9 months if the fund is not up and running. But all other asbestos claimants are left with no remedy during the start-up period. Any right to go to court is stayed for up to 24 months.

According to CBO estimates, there are at least 60,000 – 80,000 asbestos claimants with serious asbestos diseases who may have no remedy during the first two years after enactment. Many of these individuals have already been waiting for years while companies like Halliburton and Babcock and Wilcox have used the bankruptcy law to stay claims.

Asbestos victims should not be required to bear the burden of the start-up of this program.

The AFL-CIO believes there should be no stay of claims for terminally ill victims, and that the maximum stay for all other claimants should be one year. Moreover, we believe that the bankruptcy trusts should remain in place to pay all qualifying impaired victims until the national trust fund is up and running, with any subsequent trust fund awards offset for these payments.

Legal Rights for Victims with Silica Disease are Restricted
The bill establishes medical criteria for lawsuits by individuals who have both asbestos-related disease and silica-related disease, which will bar many of them from seeking redress in the courts for their silica-related injury. While we understand concerns of defendants and insurers that some plaintiffs seeking to avoid the fund will convert their asbestos claims into silica claims, we believe S. 852 handles the issue by unfairly restricting the rights of victims of silica exposure.

The bill bars individuals with silica disease from seeking compensation for that disease in court if they either have previously filed an asbestos suit or would be eligible for a monetary award from the fund. The only exception is for those individuals who suffer "functional impairment" from their silica disease and can demonstrate that asbestos exposure did not substantially contribute to their impairment. The only recourse for

victims of both diseases who cannot make this showing will be to seek compensation for "mixed diseases" (Level II) from the asbestos fund – an award of only $25,000.

We believe this issue can be fairly addressed by allowing all victims with silica related disease, including those who also have asbestos disease, to seek redress in the courts for their silica injury, but to limit any damages to the injury attributable to their silica exposure.

The Statute of Limitations for Filing Claims and Sunset Provisions are Unclear and Problematic

The bill fails to establish clear and workable criteria to trigger the statute of limitations for bringing claims for specific disease levels, particularly for victims of non-malignant diseases that get progressively worse. As drafted, the statute of limitations begins to run not just when the claimant actually receives a diagnosis of an asbestosis-related condition but earlier, when he or she *should have* received such a diagnosis – a point in time that is surely beyond the competence of either the claimant or the Administrator to identify. Moreover, what sort of diagnosis triggers the statute of limitations: is it a general diagnosis of pleural disease or asbestosis, or is it a diagnosis accompanied by test results and other evidence that meet the criteria for a particular disease level?

As drafted, the statute of limitations provisions may bar claims by deserving victims who did not file a claim with the Fund when they were first diagnosed with asbestos disease but no impairment but whose disease has since progressed to a more serious level, thus forcing unimpaired individuals to file claims immediately to qualify for later compensation if their disease worsens. We believe that the bill should be clarified to tie the statute of limitations to the date on which the individual first received a diagnosis of an eligible disease or condition of a level of severity that would qualify for a monetary award under the Act. Further, the provision that triggers the statute of limitation by the discovery of facts that should lead to obtaining a medical diagnosis, as opposed to the medical diagnosis itself, should be eliminated. It serves no purpose other than to make it more difficult for qualified claimants to receive compensation.

It is also unclear what circumstances will trigger the sunset of the Fund, which claims will be allowed to go forward in court if the Fund sunsets, and what statutes of limitation will apply. As drafted, the AFL-CIO believes the bill does not provide the kind of ongoing oversight, planning and mechanisms necessary to anticipate and hopefully avoid termination of the fund. At the same time, the bill seems to force drastic actions on time frames that are premature, perhaps even years before the fund cannot meet its obligations.

The legislation should provide a rational, workable process for sunset and reversion. There must be a clear and unambiguous rights for victims to pursue their claims in court in the event the fund cannot pay qualifying claims on the terms set forward in the Act, and statute of limitations should be set that ensure that victims indeed have a remedy in the event of reversion.

The victims of asbestos disease deserve to have all of these issues clearly and squarely addressed, and not left to be resolved through years of litigation in the courts.

Other Key Problems and Deficiencies

S. 852 has a number of other key problems and deficiencies which will impede the ability of claimants to receive fair compensation.

We remain deeply concerned that there is not adequate upfront funding to cover the large volume of claims that will be filed in the early years of the program. Absent sufficient funding or guarantees that needed funds can be borrowed at a reasonable interest rate, the fund may face a very real threat of collapse within several years.

The definition of asbestos claim contained in S. 852 is overly broad, and may well preempt many types of claims that the legislation is not intended to bar. The bill attempts to deal with this problem by listing specific actions that are exempted from the definition and therefore not preempted. We believe that it is better public policy, and makes far more sense, to have a clear and specific definition of what claims are covered by the bill, than to define the bill's scope through a series of exemptions.

Compensation awards for Level II non-malignant disease have been reduced from $35,000 – an amount agreed to last year in bipartisan discussions -- to $25,000. This low level of compensation is unfair. Many of these individuals will be very sick or disabled from their asbestos disease. This is also the disease level and award that will apply to individuals who have both silicosis and asbestosis and who S. 852 precludes from seeking a tort remedy for their silica-related injury.

S. 852 fails to provide supplemental awards for individuals with exceptional circumstances, such as those who are young or have dependent children. The simple fact is that both the economic and the non-economic impacts of a life threatening or disabling asbestos-related disease are much greater for a 45year-old with young children than they are for an 85 year-old with the same disease. While there are discretionary provisions that allow for adjustments in awards for mesothelioma victims, no adjustments are permitted for any other disease category.

S. 852 caps attorneys' fees at 5% for all claims, which applies to the initial filing and any administrative review. The AFL-CIO believes that fees in the current tort system are too high and that there should, in fact, be a cap on attorneys' fees. But we are concerned that the current level is so low that it will hinder the ability of claimants with more complicated claims from obtaining adequate legal assistance.

Improvements in S. 852 Over Earlier Proposals

As noted above, the current bill does include a number of important provisions that are significant improvements over past proposals. The AFL-CIO recognizes that there has

been strong opposition to some of these measures, and we thank the sponsors for their diligent efforts to include them in the legislation.

S. 852 has increased the award values for certain disease categories. Specifically, the award values for mesothelioma victims and non-smoking lung cancer victims with asbestosis have been increased to $1.1 million. In addition, the awards for some other categories and subcategories of diseases have been increased.

The bill prohibits the subrogation of trust fund awards by workers' compensation insurers, health insurers or other parties that provide such benefits. This prohibition, which the AFL-CIO strongly supports, will prevent the awards from the trust fund from being diminished or eliminated as a result of payments that are not related to the fund.

S. 852 includes significant improvements that clarify how a claimant may prove or document exposure. It makes clear that an affidavit, which has been permitted in earlier proposals, will be accepted as validation of exposure, if credible. The bill also instructs the Administrator to adopt exposure presumptions developed by the Manville Trust, which will greatly facilitate the evaluation and processing of claims.

The bill includes a medical screening program that the AFL-CIO has advocated and strongly supports. Such a program is important to provide high-risk workers the opportunity for high quality medical assessments, so that disease can be detected early and appropriate interventions made. We are concerned, however, that the bill sets no minimum level of funding for the program. In addition, the bill links reimbursement for services to Medicare levels, which may be too low to ensure participation by qualified providers.

S. 852 includes a compromise provision for handling of asbestos claims for rail workers. FELA rights for asbestos claims are preempted, but claimants who would qualify under FELA will receive an additional award as a substitute for the "workers compensation" payment they would have received under FELA.

Provisions are included to enhance the penalties for violations of workplace asbestos standards, to permit the criminal prosecution of willful violations of OSHA asbestos rules where it is warranted. In addition, the bill requires that employers or other parties that violate OSHA or EPA asbestos rules make contributions to the asbestos fund. These provisions will help maintain an incentive, which will no longer be present from the threat of a tort suit, for employers and others to limit future asbestos exposures for workers and the public.

The bill clarifies that claimants whose tort claims are stayed at the effective date of the Act, but who return to the tort system due to delays in getting the fund up and running, will have the option of seeing their court cases through to completion, rather than being pulled out of court once again when the fund is operational.

Conclusion

The AFL-CIO has spent years working on this legislation and believes that we have played a constructive and responsible role in this process. We intend to keep working to address the major problems with the bill with the hope that changes will be made that will enable the Federation to support the bill. However, in its present form the AFL-CIO must oppose S. 852, since it fails to ensure asbestos disease victims the just and timely compensation they deserve.

Attachment
AFL-CIO Critical Issues (April 26, 2005)
S. 852 – "Fairness in Asbestos Injury Resolution Act of 2005"
Key Concerns and Improvements

Key Concerns

Eliminates Compensation for Thousands of Asbestos Lung Cancer Victims and Reduces Compensation Awards for Individuals with Mixed Disease (Level II)
Earlier versions of this legislation provided three levels of compensation for victims of asbestos-related lung cancer: Level VII, for lung cancer victims with fifteen years of substantial occupational exposure, but whose x-rays showed no "markers" of non-malignant asbestos-related disease; Level VIII, for victims with lung cancer who have pleural disease; and Level IX for lung cancer victims with asbestosis. S. 852 has eliminated Level VII and, according to the CBO projected claims estimates, potentially removed more than 40,000 asbestos-related lung cancer victims from coverage under the bill.

Provisions have been added that allow some of these lung cancer victims to use CT scans to show that they have asbestosis, but the bill does not specify that victims with pleural disease can use this more sensitive and specific diagnostic test to show their disease and exposure. Based upon the opinion of our medical experts, we estimate that CT scans may identify pleural disease or asbestosis in approximately half of individuals without such findings on x-rays, and that about half of these identified by CT scans will have asbestosis and half will have pleural disease. Thus, the net result of the bill as introduced is that 25,000 – 30,000 asbestos lung cancer victims previously covered may not be eligible for compensation.

The AFL-CIO believes that asbestos-related lung cancer victims who can demonstrate substantial asbestos exposure should be compensated for this fatal disease. With 15 years of demonstrated substantial occupational exposure to asbestos, lung cancer can be attributed to that exposure. At a minimum, the bill must provide for the use of CT scans to document underlying non-malignant asbestos disease ("markers" of asbestos exposure) for all lung cancer categories (i.e., Levels VII and VIII in the bill as introduced). Otherwise, tens of thousands of lung cancer victims may be denied compensation for their asbestos-related diseases.

In addition, S. 852 has reduced the compensation for Level II disease -- individuals who have both a restrictive lung disease caused by asbestos and an obstructive lung disease from other causes. The bill reduces the compensation for this level from $35,000 to $25,000, despite earlier bipartisan agreements to the higher award level. This level of compensation is unfair. Many of these individuals will be very sick or disabled from their asbestos disease. This is also the category for individuals whose mixed disease includes silicosis and who – as discussed below -- S. 852 bars from seeking a tort remedy for their silica related injury. At a minimum, compensation awards for Level II should be returned to the $35,000 level previously agreed upon.

Tens of Thousands of Asbestos Disease Victims Left in Limbo
There are currently hundreds of thousands of claims pending in the tort system. Tens of thousands of these claims were filed by victims who have life threatening or serious asbestos diseases. Earlier asbestos legislation (S. 1125) included an important amendment, adopted unanimously by the Judiciary Committee, that preserved the right of asbestos victims to litigate their claims in court until the trust fund was operational. But S. 852 has eliminated this important protection, and would leave most asbestos victims with no remedies for as long as two years while the fund gets up and running.

The bill stays all pending and new asbestos claims, except those that are in trial on its enactment date. During the start-up period, the bill permits exigent claimants (those with a terminal asbestos-related illness) to seek an offer of judgment from defendants for an award in the scheduled amount for that disease level. Where no offer or an inadequate offer is made, these claimants can go to court. After the later of nine months from enactment or from the date the claim was filed, if the fund is still not operational, all terminally ill claimants can go to court.

S. 852 also directs the administrator to contract with a claims facility "to facilitate the prompt payment of exigent claims." (Section 106 (c) (4)). It is unclear how claims will be resolved by such a facility, under what terms and for what period of time (i.e. start-up only or during the entire life of the fund). It is also unclear whether the claims facility will process claims before interim regulations are issued by the Administrator, or what is envisioned by the provisions to allow the claims facility to "enter settlement with claimants. " The AFL-CIO believes that the provisions for contracting out the processing of claims in earlier proposals were much clearer and provide sufficient authority to the Administrator to contract out claims processing under the terms of the Act and implementing regulations.

But the bill leaves all other asbestos claimants with no remedy during the start-up period. Any right to go to court is stayed for up to 24 months. Moreover, as drafted it is not clear that claims that arise after enactment have any right to go to court, even after 24 months, if the fund is not up and running.

According to CBO estimates, there are at least 60,000 – 80,000 asbestos claimants with serious asbestos diseases who may have no remedy during the first two years after enactment. Many of these individuals have already been waiting for years while companies like Halliburton and Babcock and Wilcox have used the bankruptcy law to stay claims. Just as many of these claimants are finally about to receive compensation from newly formed private asbestos bankruptcy trusts, the legislation proposes to eliminate these trusts and again stay these claims.

The AFL-CIO believes there should be *no* stay of claims for terminally ill victims, and that the maximum stay for all other claimants should be one year. Moreover, we believe that the bankruptcy trusts should remain in place to pay all qualifying impaired victims

until the national trust fund is up and running, with any subsequent asbestos fund awards offset by these payments.

Limits Legal Rights for Victims with Silica Disease
Defendants and insurers have raised concerns that plaintiffs seeking to avoid the fund will convert their asbestos claims into silica claims. While we understand the concern and believe it can be fairly addressed, S. 852 handles the issue by unfairly restricting the rights of victims of silica exposure.

The bill essentially rewrites tort law for individuals with both silica and asbestos-related diseases. As a general matter, the bill bars individuals with silica disease from seeking compensation for that disease in court if they either have previously filed an asbestos suit or would be eligible for a monetary award from the fund. The only exception is for those individuals who suffer "functional impairment" from their silica disease and can demonstrate that asbestos exposure did not substantially contribute to their impairment. The only recourse for victims of both diseases who cannot make this showing will be to seek compensation for "mixed diseases" (Level II) from the asbestos fund – an award of only $25,000.

While the overall number of individuals who have disease from both silica and asbestos may not be large, it is not a rare occurrence in certain groups of workers who have been exposed to both substances. (e.g foundry workers and refractory bricklayers). Indeed, a study of cases of occupational lung disease reported to the Michigan State Surveillance System from 1985 – 1996 found that among 697 workers confirmed to have silicosis, 166 (24%) also had asbestos disease or pleural changes. One hundred twenty one (121) of the individuals with both silicosis and asbestos- related disease were foundry workers who had significant occupational exposures to both silica and asbestos. (Rosenman KD, Reilly MJ (1998): Asbestos-Related X-Ray Changes in Foundry Workers. Am J Ind Med 34: 197-201).

Individuals with silica related disease should not be barred from seeking redress for their silica injury in court. The AFL-CIO does not object to requiring individuals who file silica claims to provide sufficient documentation to make a prima facie showing that they, in fact, have a silica- related injury. Where an individual has injuries attributable to both silica and asbestos, we propose that any recovery in the tort system be limited to damages resulting from the silica exposure. This approach would allow non-meritorious claims to be evaluated and dismissed at an early stage and, in cases involving mixed disease impairment or mixed causation, damages to be limited to the silica-related injury.

The Definition of Asbestos Claim is Overly Broad
The definition of asbestos claim in the bill is too broad. It encompasses "*any claim, premised on any theory, allegation, or cause of action...directly, indirectly, or derivatively arising out of, based on, or related to, in whole or part the health effects of exposure to asbestos....*" Since the bill would preempt any action defined as an "asbestos claim," the AFL-CIO has long been concerned about the extremely broad range of legal actions falling within that definition. We note that this definition is much broader than that included in S. 1125, the asbestos compensation bill reported out of the Senate

Judiciary Committee in 2003, which expressly limited an "asbestos claim" to "any *personal injury* claim" arising out of, based on, or related to, the health effects of exposure to asbestos.

S. 852, as introduced, has attempted to rein in the scope of preempted claims by expanding the list of actions *excluded* from the definition of asbestos claim. But, we remain very concerned that the overly broad definition of "asbestos claim" may still capture and preempt other types of claims that have nothing to do with the issues in this bill. We believe it would be better to provide a narrower, clearer definition, limiting "asbestos claims" to claims for personal injury.

The Statute of Limitations for Filing Claims is Unclear and Problematic
The statute of limitations in S. 852 is set at 5 years (versus 4 years in S. 2290). This period begins to run when an individuals receives a diagnosis, or discovers facts that should have led the individual to obtain a diagnosis of an eligible disease or condition. This statute of limitations has several problems. First, it is not clear exactly what condition or disease triggers the statute of limitations. Is it a general diagnosis of a disease such as asbestosis or pleural disease, or is it the diagnosis, accompanied by documentation establishing that the individual has a condition that qualifies at a disease level specified in the bill?

This is an important issue since many cases of asbestos disease are progressive and, as the disease's characteristics change, the individual may qualify for a different disease level. Take, for example, an asbestos insulation worker who was diagnosed with asbestosis, but no lung impairment (equivalent to Level I under the bill) in 1999. In 2005, his condition would still be diagnosed as asbestosis, but he now has suffered a loss of pulmonary function that meets the bill's criteria for Level III. Does the 5-year statute of limitations permit or bar this individual's claim for level III compensation? The AFL-CIO believes the bill should indeed permit this claim, but as drafted, it is not clear.

Similarly, as drafted the bill may require individuals diagnosed with pleural plaques or asbestosis but no impairment to file with the fund to hold their place in line so that they qualify for compensation if they later develop more serious non-malignant disease. In our view this makes no sense. It will force all claimants to immediately file a claim, even those with no impairment, putting unnecessary stress on the system, particularly during the early, start-up years.

An additional problem is the bill's provision that the statute of limitations is triggered not only a diagnosis, but also by the claimant's discovering facts that would have led a "reasonable person" to obtain a medical diagnosis. It is the AFL-CIO view that this provision – which inappropriately presumes that all claimants will have had the kind of ready access to medical care that would have encouraged them to seek a care whenever they felt ill – will prove almost impossible to interpret and implement, and could only be intended to eliminate what would otherwise be valid claims.

We propose that, to ensure that the statute of limitations is workable and fair and that deserving claimants are in fact eligible for compensation, the statute of limitations be tied to the date on which the individual first received a diagnosis of an eligible disease or condition of a level of severity that would qualify for a monetary award under the Act. Further, the provision that triggers the statute of limitation by the discovery of facts that should lead to obtaining a medical diagnosis, as opposed to the medical diagnosis itself, should be eliminated. These modifications would relieve claimants from having to file level I claims upon diagnosis and also clarify that individuals who are diagnosed with a serious asbestos-related disease within the 5 year statute of limitation, are not barred from filing compensation simply because they did not file a claim for an earlier asbestos disease that did not involve impairment. They would also eliminate the unnecessary traps that may be imposed by the unclear language that links the statute of limitations to some unspecified knowledge requirement.

The Sunset and Reversion Provisions are Unclear

The AFL-CIO hopes that if the fund is established, it will be successful, and our efforts throughout this process have been aimed at achieving that goal. However, in the absence of an "evergreen" provision to guarantee on-going funding, it is absolutely necessary to preserve the rights of asbestos victims to return to the tort system if the fund proves unable to pay all meritorious claims.

As drafted the sunset provisions of S. 852 are confusing and counter productive. The bill calls for a shortfall analysis if the Administrator determines based on the annual report that the fund *may* not be able to pay claims as they become due at any time during the next 5 years. This analysis is to include recommendations for alternative action to address this situation, which may include termination or reform of the program. If recommendations are made, they are automatically referred to a special commission, which has 180 days to review the Administrator's recommendations, and taking into account public comment, make its own recommendations to Congress. The referral to this commission for immediate action is required even if the possibility of a shutdown is remote and 5 years away.

In addition, the bill includes a further provision that requires that if as part of the review conducted to prepare an annual report, the Administrator determines that if additional claims are resolved, the Fund will not have sufficient resources to pay 100 percent of all resolved claims and to meet other obligations, the fund will terminate 180 days after this determination.

The AFL-CIO believes the bill does not provide the kind of ongoing oversight, planning and mechanisms necessary to anticipate and hopefully avoid termination of the fund. At the same time, as drafted, it seems to force drastic actions on time frames that are premature, perhaps even years before the fund can not meet its obligations.

The AFL-CIO has proposed that there be an ongoing review of the fund's operation, and that at any point that the administrator determines that *it is more likely than not* that the

fund will be unable to meet its obligations at anytime within the next five years, the Administrator conduct a full sunset analysis. The analysis should include the Administrator's recommendations as to what steps should be taken to address the problem, which may include termination or reforms, and should should specify the date on which the fund will no longer have adequate funds to pay qualifying claims that are received and resolved. That date, which may be several years in the future, should be the date after which no further claims will be accepted, and the date that after which, in the absence of reforms or modifications in the Act or a change in predicted circumstances, all new claims will be filed in the tort system. In addition, there should be a provision that if, in the event of unanticipated extreme circumstances, there are insufficient funds to pay all qualifying claims under the terms of the legislation, any individuals with unresolved claims pending in the fund or future claims will have a right to proceed in the tort system.

The post-sunset statute of limitations provisions are also problematic. Under the bill, individuals with unresolved claims pending in the fund at the time of termination have two years to go to court. The bill has no provisions, however, for individuals whose claims arose before sunset, but who did not file before reversion. Since many state statutes of limitations may be shorter than the five-year limitations period applicable during the life of the fund, there may well be victims who will find themselves without a right to go to court if the fund sunsets. The AFL-CIO proposes that the bill create a special statute of limitations in the event of reversion, which will give individuals diagnosed with an asbestos-related disease before reversion five years from diagnosis to file a tort suit. All subsequent claims would be governed by the applicable state statutes of limitations.

Adequate Upfront Funding is Uncertain

The trust fund must have sufficient funding to pay the large numbers of claims that will be filed during the earlier years, when the stresses on the system will be the greatest. Based on the numbers of pending claims and projected cases of future disease, the AFL-CIO believes that $60 billion will be needed in the first 5 years of the program. The draft bill provides $42.625 billion in the first 5 years (including $7 billion from the existing bankruptcy trusts, which will be liquidated). We believe this level of funding is insufficient. Adequate upfront funding should be provided, and at a minimum, there must be a guarantee that needed funds can be borrowed at a reasonable interest rate so that the fund will not collapse immediately. The certainty that funds can be borrowed at a reasonable interest rate is particularly important since there is certain to be litigation by the bankruptcy trusts, insurers and some defendant participants over their required contributions, with no guarantee that the expected contributions will in fact be made.

Funding and Reimbursement Limitations for Medical Screening May Hinder Effective Implementation

S. 852 includes a medical screening program that we strongly support. However, problems in the bill could undermine the program. First, the bill sets no minimum level of funding for the program, but instead specifies a maximum of up to $30 million per year in funding, meaning that much less than this modest level of funding may be provided. Second, the bill ties reimbursement for providers of screening to levels of

reimbursement provided under Medicare, which are very low. At these specified levels, it is questionable whether quality providers will participate in the screening program.

The AFL-CIO believes that the funding for the medical screening program should be set at a minimum of $30 million a year, and up to a maximum of $50 million. Moreover, we propose that the Medicare reimbursement rates for services be applied only to the extent that, at these levels of reimbursement, qualified providers will participate in the program. Given the great concerns about the quality of asbestos screening programs conducted in the past, it is in everyone's interest to guarantee that highly qualified providers conduct the medical screening program.

No Supplemental Awards for Asbestos Victims with Exceptional Circumstances
As the AFL-CIO has consistently made clear, we believe that the legislation must provide for upward adjustments in compensation for those victims and the families of victims on whom the burdens of asbestos disease fall most harshly. The simple fact is that both the economic and the non-economic impacts of a life-threatening or disabling asbestos-related disease are much greater on a 45- year-old with young children than they are on an 85- year-old with the same disease.

S. 852 includes a provision that allows the Administrator to enhance awards for mesothelioma victims who are less younger than 51 and have dependent children, but in our view, this provision is too limited. It leaves all adjustments totally to the discretion of the Administrator, requires that the claimant both be younger and have dependents, and is available only to mesothelioma victims.

The AFL-CIO has proposed that supplemental awards be provided for all victims who are unusually young or have dependent children. We have developed proposals that base such supplemental awards on objective measures, and implement them in a manner that is cost neutral to the fund. We see no reason why these proposals for equitable treatment of victims with exceptional circumstances should not be included in the legislation.

Limits on Attorneys Fees Deny Some Claimants Assistance of Counsel
S. 852 caps attorneys' fees at 5%. We understand that this cap is intended to apply to claims within the fund, and not to appellate court review. We believe that fees in the current tort system are too high and that there should, in fact, be a cap on attorneys' fees in the bill. But we are concerned that the 5% cap may hinder claimants with more complicated claims from obtaining adequate legal assistance, and believe that provisions for higher attorneys fees or upward adjustments should be made for complex cases and/or claims that undergo administrative appeal.

Improvements in S. 852 Over Earlier Proposals/Drafts

Increase Award Values for Certain Disease Categories
S. 852 has increased the award values for certain disease categories. Specifically, the award values for mesothelioma victims and non-smoking lung cancer victims with asbestosis have been increased to $1.1 million. In addition the awards for other

categories and subcategories of lung cancer have been increased by approximately $25,000 over levels proposed last year by Majority Leader Bill Frist.

Prohibits Liens Against Trust Fund Awards by Workers' Compensation and Health Insurers
S. 852 includes a key provision that prohibits the subrogation of trust fund awards by workers' compensation insurers, health insurers or other parties that provide such benefits. This prohibition, which the AFL-CIO strongly supports, will prevent the awards from the trust fund from being diminished or eliminated as a result of payments that are not related to the fund.

Clarifies Proof of Exposure and the Includes Initial Presumptions for Occupations/Industries with Substantial Occupation Exposure
S. 852 includes significant improvements that clarify how a claimant may prove or document exposure. It makes clear that a credible affidavit will be accepted as validation of exposure. Affidavits are subject to the penalty of perjury and may be rebutted by the Administrator based upon other evidence. The bill also instructs the Administrator to adopt exposure presumptions the Manville Trust developed based on years of litigation and evidence, which identify occupations and industries where there was significant occupational exposure to asbestos. These presumptions, which may be modified by the Administrator based on new evidence, will greatly ease administration of the program and ensure more timely compensation of qualifying claimants.

Includes a Medical Screening Program for High-Risk Workers
As noted above, S. 852 includes a medical screening program for high-risk workers that the AFL-CIO strongly supports. While we have concerns about funding and reimbursement provisions of the screening program, with the changes that we have suggested, we believe the program will be sound and beneficial. The medical screening program will help detect disease early, so that interventions can be made to lessen the impacts and/or prevent the disease from progressing. The program is consistent with the recently issued American Thoracic Society Guidelines on the Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos, which recommend both medical screening and medical monitoring as part of the medical management of asbestos-related diseases (Am J Respir Crit Care Med, Vol. 170. pp 691-715, 2004). In addition to providing early detection, treatment and management of asbestos-related diseases, a high quality medical screening program can provide individuals at high-risk with access to medical evaluations that meet accepted medical standards, conducted by qualified medical professionals. Patients can have confidence in the results and medical advice provided through such evaluations.

Includes an Acceptable Compromise Provision for FELA Claims
S. 852 includes a compromise provision for handling of asbestos claims for rail workers. FELA rights for asbestos claims are preempted, but claimants who would qualify under FELA will receive an additional award as a substitute for the "workers compensation" payment they would have received under FELA.

Provides for Enhanced Penalties for Workplace Asbestos Violations and Contributions to the Fund by OSHA and EPA Violators.
The bill includes provisions to enhance the penalties for violations of workplace asbestos standards to permit the criminal prosecution of willful violations of OSHA asbestos rules where it is warranted. In addition, it requires employers or other parties that violate OSHA or EPA asbestos rules to make contributions to the asbestos Fund in amounts linked to the level of penalties assessed for such violations. With the bill's elimination of the threat of a tort suit, these provisions will help maintain an incentive for employers and others to limit future asbestos exposures for workers and the public.

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March 5, 2004

The Honorable Orrin Hatch
United States Senate
Washington, D.C.

Re: S. 1125

Dear Senator Hatch:

I have been retained by National Service Industries, Inc., to offer an opinion on what is, in my judgment, a potentially fatal constitutional defect in S. 1125, the proposed Fairness in Asbestos Injury Resolution Act. In my view, there is a substantial likelihood that S. 1125, if enacted in its present form, could be declared unconstitutional, as applied to certain defendants, under the Takings and Due Process Clauses of the Fifth Amendment to the United States Constitution. This problem, however, could be remedied by a relatively minor amendment to S. 1125—an amendment that would all but eliminate the chance that such an as-applied constitutional challenge could succeed.

I have reviewed testimony submitted by other constitutional scholars on the constitutionality of S. 1125, including Professor Laurence Tribe's detailed memorandum. Professor Tribe, while generally concluding that S. 1125 would be constitutional, carefully qualified his opinion to allow for the possibility that, in a case like the ones that I will discuss, S. 1125 might be successfully attacked in court.[1] In my view, the potential constitutional problem that Professor Tribe envisioned is indeed a most serious one, as the bill now stands.

1. The cases that give rise to this constitutional issue were described by Senators Grassley, Kyl, Sessions, Craig, and Cornyn in their Additional Views included in the Senate Judiciary Committee Report on S. 1125. The Senators explained:

> The bill * * * has the potential to create hardships for companies who adequately insured themselves against asbestos litigation exposure. Certain companies could have expected minimal out-of-pocket exposure but, by virtue of previous litigation expenses that insurance covered, will qualify for a more expensive tier. One company, which expected only ten million dollars in out-of-pocket expenses,

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[1] See Testimony of Laurence H. Tribe on the Fairness in Asbestos Injury Resolution Act of 2003 at 12 (June 4, 2003).

calculates that its obligation under the bill would be $500,000,000 over the 27 year life of the fund. During the markup, the Chairman committed to working to resolve this problem prior to floor action because of this type of gross unfairness. Resolution of this issue is critical.[2]

In particular, as I understand the facts, some defendants in the asbestos litigation have substantial insurance assets in the form of both insurance policies and settlement agreements that have resolved disputes over coverage for defense and indemnity expenses in that litigation. These policies and settlement agreements are contracts between the insurance carriers and the asbestos defendants. For these defendants, as I understand the facts, the insurance policies and settlement agreements have provided for payment by insurance of most expenses relating to the asbestos litigation.

Thus, the "prior asbestos expenditures" for these companies under S. 1125 may have been quite substantial, but their out-of-pocket expenditures have been modest. Under S. 1125, however, the level of annual contribution to the fund is determined by these companies' "prior asbestos expenditures" not their prior out-of-pocket expenditures. Moreover, S. 1125 would abrogate the contracts these defendants have entered into with their insurance carriers: their insurance assets, no matter how substantial, will not cover any portion of their annual contributions to the fund. The example cited by Senators Grassley, Kyl, Sessions, Craig, and Cornyn suggests that S. 1125, if enacted in its present form, would increase the costs to at least one company 50-fold by abrogating its insurance contracts.

2. It is my judgment that under existing Supreme Court case law, this effect of S. 1125 would, if left uncorrected, result in the FAIR Act's being declared unconstitutional as applied to firms that are in the position that I have described above. The principal case in this area is *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). *Eastern Enterprises* involved an Act of Congress, the Coal Industry Retiree Benefit Act of 1992, that required firms that had employed retired coal miners to pay premiums to finance the health care benefits of the retirees and their dependents. The Supreme Court declared the Act unconstitutional as applied. Four Justices concluded that the Coal Act violated the Takings Clause; Justice Kennedy concluded, for essentially the same reasons, that the Act violated the Due Process Clause.

As applied to firms in the position that I described above, S. 1125, if enacted in its present form, would have the same constitutional defects that prompted the Supreme Court to strike down the Coal Act in *Eastern Enterprises*; indeed S. 1125 has those defects to a significantly greater degree. Like the Coal Act, S. 1125 imposes retroactive liability, that is, liability based on actions taken before the statute was enacted. The Court has identified various factors that determine when such retroactive legislation is unconstitutional: "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature

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[2] Senate Report No. 108-118, 108th Cong., 1st Sess. 76 (July 30, 2003).

of the governmental action." *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225 (1986); see *Eastern Enterprises*, 524 U.S. at 523-24 (plurality opinion). Specifically, the Supreme Court in *Eastern Enterprises* explained that an Act of Congress would be constitutionally suspect "*if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.*" Id. at 528-29 (emphasis added); see id. at 548-550 (opinion of Kennedy, J.).

S. 1125, if applied in the way that I described above and that the Senators' Additional Views envisioned, would—without question, in my opinion—transgress this standard established by the Supreme Court. (To my knowledge, no expert who has spoken to the constitutionality of S. 1125 has made an argument to the contrary; as I noted above, Professor Tribe explicitly identified this potential constitutional defect.) These firms form a narrow, "limited class of [defendants]"; exempting them from disproportionate retroactive liability would not jeopardize the FAIR Act's principal mission. Very importantly, this liability quite clearly "could not have [been] anticipated": the firms in question had established a portfolio of insurance coverage that protected them from liability of this magnitude. And the liability is "substantially disproportionate to the[ir] experience": the firms' out-of-pocket expenditures, to this point, have been (as the Senators' Additional Views pointed out) a small fraction of the liability that S. 1125 would impose.

For at least three reasons, this is, as I have said, an even clearer case of as-applied unconstitutionality than the Supreme Court confronted in *Eastern Enterprises*. First, the liability here is very substantial. The firm identified in the Senators' Additional Views faced a liability of $500 million—five to ten times more than the retroactive liability that led the Court to declare the Coal Act unconstitutional as applied. See *Eastern Enterprises*, 524 U.S. at 530 (plurality opinion).

Second, S. 1125, unlike the Coal Act, would abrogate existing contract rights. The firms in the class I am considering have fully secured rights, under insurance contracts, that protect them from the liability that S. 1125 would impose. The Constitution specifically forbids State governments from enacting legislation that impairs existing contractual obligations. U.S. Constitution, Art. I, Sec. 10. While Congress is not subject to the same strict constitutional prohibition as the States are, a contractual right is a form of property protected from congressional abrogation by the Takings Clause. See, *e.g.*, *Lynch v. United States*, 292 U.S. 571, 578 (1934) (Brandeis, J.).

Moreover, S. 1125, by abrogating firms' existing contract rights against insurance carriers, plainly "interferes with * * * reasonable investment-backed expectations"—nowhere more dramatically than in the class of cases I am addressing, where firms reasonably believed that their insurance contracts protected them from liability on this scale, and structured their investment decisions accordingly. This is one of the most important criteria for determining whether federal legislation is unconstitutional under the Takings and Due Process Clauses. See, *e.g.*, *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (citing cases). When Congress enacted the Coal Act, it was seeking to enforce what it believed were implicit contractual understandings that firms had undertaken (see *Eastern Enterprises*, 524 U.S. at 560-65 (Breyer, J., dissenting)); the

Supreme Court nonetheless declared the application of the Coal Act to be unconstitutional. The case for unconstitutionality is far stronger here, where S. 1125, far from enforcing contractual rights, instead explicitly abrogates such rights.

Third, unlike the situation in *Eastern Enterprises*, the imposition of retroactive liability on the class of firms I am considering here does not appear to be centrally related to the purposes of the FAIR Act. "Above all, the purposes of this legislation are to ensure that people who become sick as a result of exposure to asbestos are compensated surely, fairly, and quickly, while protecting the economic viability of defendants, and the employees, investors, and the communities that depend on them." S. Rep. No. 108-111 at 4. Plainly these purposes are defeated, not served, by the imposition, on a small class of firms, of liability that vastly exceeds both those firms' previous expenditures and their reasonable, contract-based expectation of future liability.

3. Section 204(d) of S. 1125 permits a defendant to "seek adjustment of the amount of its contribution based on severe financial hardship or demonstrated inequity." It is conceivable that this provision could be implemented in a way that would satisfy the constitutional requirements of the Takings Clause and the Due Process Clause in the cases I am considering. But relying on Section 204(d) would be a very high-risk strategy. It is far easier to envision circumstances in which Section 204(d) would leave the FAIR Act open to the potentially fatal constitutional challenge I have described.

For example, Section 204(d) leaves the determination of whether to grant an adjustment, and the amount of the adjustment, to the sole discretion of the Administrator; judicial review is explicitly precluded. §204(d)(1). "Severe financial hardship" is not defined; "demonstrated inequity" must be "exceptionally inequitable" as compared to, among other things, the defendant's likely future liability or past expenditures. §204(d)(2) and (3)(A)(i). These provisions leave the Act's ability to survive an as-applied constitutional challenge to the fortuitous exercise of unreviewed discretion by an Administrator acting under vague and restrictive criteria.

Moreover, under Section 204(d), adjustments are capped at certain aggregate amounts, and S. 1125 appears to provide no mechanism for determining how the limitations imposed by those caps will be allocated among firms that are entitled to adjustments. As a result, even a firm that conclusively demonstrates its right to an adjustment may be foreclosed by the cap. Indeed, as I understand S. 1125, it is possible that "inequity" adjustments will be disallowed entirely. See, *e.g.*, §204(d)(3)(D)(ii) (providing that inequity adjustments may be made "only to the extent that * * * the Orphan Share Reserve Account is sufficient to cover such adjustments for that year"). Of course, if adjustments are not allowed—or if they are capped in a way that does not permit relief to be afforded to firms in the position I am addressing—then the constitutional defect in S. 1125 will be completely unremedied and, if my analysis is correct, the Act would be unconstitutional as applied.

4. While the constitutional defect in S. 1125 is severe, the remedy for that defect is, I believe, relatively easy to specify. The principal source of the constitutional problem in S. 1125 is that certain firms are deprived of the value of their insurance assets and are exposed to unexpected, and unwarranted, out-of-pocket liability. In the Supreme Court's words,

these firms are subject to "severe retroactive liability" that "is substantially disproportionate to [their] experience" and that "interferes with * * * reasonable investment-backed expectations."

This defect could be remedied if the bill provided some assurance that the value of a firm's insurance assets would not be destroyed by the enactment of the FAIR Act, and that a firm's future out-of-pocket liability under the FAIR Act would be roughly commensurate with the out-of-pocket liability it would have faced if the statute were not enacted. Needless to say, the Constitution does not require that firms be left in precisely the same position after the enactment of the statute that they were in before; the courts have well understood the need for legislation to employ approximations and proxy measurements in these circumstances, and to adjust liabilities in order to achieve the purposes of the Act. If the bill were amended to incorporate a bona fide and reasonably effective effort to address the problem that Senators Grassley, Kyl, Sessions, Craig, and Cornyn identified, and that I have discussed, then I believe the FAIR Act would be all but certain to survive the as-applied constitutional challenge I have described. Without such an amendment, my judgment is that such a challenge would have an excellent chance to succeed.

I hope these remarks are of some help. I look forward to discussing these issues with members of your staff on March 8, and I would be happy to provide anything further that might assist you in your consideration of the constitutional questions raised by S. 1125.

Sincerely,

David A. Strauss

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David A. Strauss
Harry N. Wyatt Professor of Law

April 26, 2004

The Honorable Orrin Hatch
United States Senate
Washington, D.C.

Re: Proposed Fairness in Asbestos Injury Resolution Act of 2004

Dear Senator Hatch:

I am writing in response to Professor Laurence Tribe's March 29, 2004, letter on behalf of the Asbestos Study Group. Professor Tribe's letter responds to a letter I wrote on March 5, 2004, on behalf of National Service Industries, Inc. In my letter I had suggested that S. 1125, the proposed Fairness in Asbestos Injury Resolution Act of 2004 (and the predecessor of S. 2290) would be vulnerable to an as-applied constitutional challenge. Because Professor Tribe's letter disagrees with my analysis, I thought that a short response might be useful.

My earlier letter, like Professor Tribe's, concerns firms in the position described by Senators Grassley, Kyl, Sessions, Craig, and Cornyn in their Additional Views included in the Senate Judiciary Committee Report on S. 1125:

> The bill * * * has the potential to create hardships for companies who adequately insured themselves against asbestos litigation exposure. Certain companies could have expected minimal out-of-pocket exposure but, by virtue of previous litigation expenses that insurance covered, will qualify for a more expensive tier. One company, which expected only ten million dollars in out-of-pocket expenses, calculates that its obligation under the bill would be $500,000,000 over the 27 year life of the fund. During the markup, the Chairman committed to working to resolve this problem prior to floor action because of this type of gross unfairness. Resolution of this issue is critical.[1]

My conclusion was that firms in this position would be able to bring a successful as-applied constitutional challenge to S. 1125.

1. Although Professor Tribe's analysis seems, at first glance, to diverge sharply from mine, Professor Tribe's carefully-worded conclusions suggest that his disagreement with me is narrower than may at first appear. In particular, Professor Tribe is careful—quite properly so, in my view—not to offer any assurance that S. 1125 would survive an as-

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[1] Senate Report No. 108-118, 108th Cong., 1st Sess. 76 (July 30, 2003).

applied constitutional challenge of the kind my letter describes. Rather, Professor Tribe's view seems to be that only a relatively few firms will be in a position to raise such a claim.

In his March 29 letter, Professor Tribe states that, in his view, "the odds are overwhelming that very few, if any, participants would prevail on such an as-applied claim" and that "the total loss in revenues from successful * * * claims would be far less than the cost to the fund of including a[] provision * * * to address" the problem.[2] In earlier testimony before the Committee, Professor Tribe was similarly unwilling to state unequivocally that an as-applied constitutional challenge would fail: his conclusion was that S. 1125 would meet the constitutional standard "in the vast majority of (if not all) cases."[3]

I do not have sufficient information to address Professor Tribe's conclusions either about the number of firms in this position or about the amount of revenue that would be lost if this issue were addressed in the bill; Professor Tribe's letter does not identify the factual basis for the judgments that he makes. Ordinarily one would suppose that, if the problem is indeed confined to a few firms, the cost of remedying the problem will not be substantial; and that it is better to attempt to cure a constitutional defect, rather than going forward with a bill that is vulnerable to a constitutional challenge. But in any event, as I read Professor Tribe's letter, his stated conclusions are not inconsistent with my view that an as-applied challenge of the kind I described would be successful.

2. If I understand Professor Tribe's letter correctly, the core of his argument is twofold: first, that the firms that are required to make contributions under S. 1125 will receive benefits in return, and are therefore not treated unfairly; and second, that the Supreme Court has repeatedly upheld legislation that retroactively adjusts liabilities in the way this bill does. The first argument, I believe, rests on a simple misunderstanding of the facts concerning firms like those described in the Additional Views. The second argument ignores a feature of S. 1125 (retained in S. 2290) —the abrogation of insurance contracts—that is integral to the constitutional issue.

a. Professor Tribe's first argument—that firms like those described in the Additional Views receive benefits that roughly compensate them for the obligations imposed by the bill—rests, I believe, on a proposition that is simply erroneous. Professor Tribe twice states that the bill would benefit such firms by relieving them of the "need to continue payment of insurance premiums."[4] "S. 1125 confers a significant benefit on participants by * * * eliminat[ing] the need to continue to purchase insurance to cover asbestos liabilities."[5]

This argument is mistaken. Firms in the position of those described in the Additional Views have insurance assets that have already been purchased. They are no longer

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[2] Letter from Laurence H. Tribe to Senator Orrin G. Hatch, March 29, 2004, at 2.

[3] Testimony of Laurence H. Tribe on the Fairness in Asbestos Injury Resolution Act of 2003 at 12 (June 4, 2003).

[4] Tribe letter of March 29, 2004, at 4.

[5] Id. at 2.

paying premiums and have no future obligation to pay premiums. Indeed, my understanding—confirmed by the Summary of Changes that accompanied S. 2290—is that it is no longer even possible to purchase insurance, of the usual form, against asbestos-related liabilities.[6] Thus, contrary to Professor Tribe, the abrogation of insurance contracts imposes a burden on these firms without the supposed compensating benefit of relief from the obligation to pay insurance premiums.

b. Professor Tribe's letter cites and discusses, at some length, cases holding that Congress has latitude retrospectively to readjust liabilities, and that in doing so Congress may impose liability greater than what some firms would have expected under the tort system. I have, of course, no quarrel with this general principle. Professor Tribe's argument, however, nowhere takes account of the feature of the bill that most directly gives rise to the issue raised by the Additional Views. The bill does not just impose obligations related to asbestos liability; it simultaneously abrogates the insurance contracts that certain firms would otherwise have been able to use to discharge asbestos-related liabilities.

A simple analogy might clarify this point. Suppose a firm, instead of purchasing insurance against asbestos liabilities, instead self-insured by setting aside a reserve to be used for that purpose; and suppose further that that reserve, having been invested effectively, contained sufficient funds to cover all of the firm's expected future tort liabilities for asbestos-related injuries. As part of a statute that extinguished all tort liability, Congress could require such a firm to contribute to the trust fund, even in amounts that exceeded its expected future liabilities, so long as those amounts were reasonable—and so long as Congress allowed the firm to use its reserve to make those contributions. Alternatively, the firm might be required to contribute its entire reserve to the trust fund, as a plausible approximation of the firm's future liabilities, if the firm were immunized from tort liability and from any requirement to make further contributions.

But what Congress could not do, in such a case, is to seize the reserves and *also* require the firm to contribute its full share to the trust fund, as if the reserves had not been confiscated. That kind of double exaction would be an obvious unfairness that could not be justified; it would violate the either the Takings Clause or the Due Process Clause, or both. This hypothetical situation is exactly parallel to what the proposed legislation would do: it imposes a liability for contributions to the trust fund, in lieu of tort law liability, while at the same time confiscating assets that would have been used to discharge the tort liability. The fact that the confiscated assets take the form of contracts with insurance companies instead of some other financial instruments (such as certificates of deposit or shares of stock) is immaterial, so far as the Takings and Due Process Clauses are concerned.

3. Professor Tribe places great emphasis on the provisions of the bill that allow for "inequity adjustments." Professor Tribe acknowledges that the availability of such adjustments will depend on the exercise of the Administrator's discretion. Professor

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[6] S. 2990, The Fairness in Asbestos Injury Resolution Act of 2004, Summary of Changes from S. 1125 as Reported, at 14.

Tribe's letter, however, does not mention the other problems with the inequity adjustment process that were discussed in my earlier letter—the overall limits placed on inequity adjustments, and the possibility that there will be no funds for such adjustments at all. These difficulties with the inequity adjustment provision of the bill may make that provision entirely unavailable to deal with the constitutional problem identified by the Additional Views. The inequity adjustment process therefore cannot be relied upon to any degree unless these difficulties have been addressed.

I do note that S. 2290 has modified S. 1125 in certain ways that may increase the likelihood that the constitutional concerns identified in the Additional Views will be dealt with through the inequity adjustments process. Notwithstanding these valuable modifications, it is important to recognize that the inequity adjustment process—depending, as it does, on both the exercise of the Administrator's discretion and the uncertain availability of the necessary funds—remains a contingent and uncertain way of addressing the constitutional issues raised by the application of the bill to firms like those described in the Additional Views.

I hope these remarks are helpful. I would be happy to provide anything further that might be of assistance.

Sincerely,

David A. Strauss

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David A. Strauss
Harry N. Wyatt Professor of Law

April 20, 2005

The Honorable Arlen Specter
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C.

Dear Senator Specter:

I have been retained by the Coalition for Asbestos Reform to offer my opinion on a serious constitutional defect in the proposed Fairness in Asbestos Injury Resolution Act of 2005 (FAIR Act).* If the proposed FAIR Act were enacted in its current form, this defect, in my judgment, has the serious potential of either rendering the Act unworkable, or forcing the Treasury to pay substantial sums in damages, or both.

In brief, the proposed FAIR Act would violate the Takings Clause of the Fifth Amendment of the United States Constitution, and most likely the Due Process Clause as well. The Act would do so by taking property without just compensation. Specifically, the proposed Act would violate the Constitution because it abrogates rights secured by valid contracts of insurance while requiring the firms that held those rights to contribute to the Trust Fund established by the Act. This kind of double exaction—requiring firms to contribute to the Trust Fund, as a substitute for tort liability, while simultaneously taking from firms the very assets they have accumulated in order to discharge those liabilities—cannot, in my judgment, be squared with basic constitutional principles.

1. The Takings Clause of the Fifth Amendment prohibits the government from taking private property without just compensation. Insurance policies, or settlement agreements establishing insurance coverage, are valid contracts and are therefore property within the meaning of the Fifth Amendment. As Justice Brandeis explained long ago, for purposes of the Fifth Amendment's Takings Clause, "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Lynch v. United States*, 292 U.S. 571, 579 (1934). The proposed FAIR Act, by abrogating contracts of insurance, takes private property—just as if the government confiscated bonds, stock certificates, or cash. See, *e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Armstrong v. United States*, 364 U.S. 40 (1960).

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* I described a closely-related constitutional problem in S. 1125 and S. 2290 (introduced in the last Congress), the predecessors of the current FAIR Act, in letters to Senator Hatch. A copy of those letters is attached.

At the same time, the FAIR Act would require the firms whose contract rights were abrogated to contribute very substantial sums to a Trust Fund that is designed to compensate asbestos claimants. The defenders of the proposed FAIR Act, as I understand their position, urge that the government may require these contributions in exchange for protecting firms from potential tort liability. Even assuming that position is correct—which it may or may not be, depending on the reasonableness of the formulas used to determine the required contributions—the defenders of the FAIR Act, to my knowledge, have never advanced any adequate justification for *both* requiring contributions to the Trust Fund *and* confiscating insurance assets that would have covered asbestos-related liabilities. In my view, no such justification exists.

A simple analogy illustrates this point. Suppose a firm, instead of purchasing insurance against asbestos liabilities, instead set aside a reserve to be used for that purpose; and suppose that reserve, having been invested effectively, contained a sufficient amount to discharge all of the firm's future liabilities. Under the approach taken by defenders of the FAIR Act, Congress could, as part of a statute that restricted tort liability, seize the entire cash reserve—and then, having deprived the firm of its reserves, *also* require the firm to make substantial contributions to the trust fund. Such an uncompensated seizure of property would be an obvious violation of the Fifth Amendment. The only difference between that hypothetical situation and the current draft FAIR Act is that the FAIR Act seizes not cash but a different form of asset. And as Justice Brandeis's statement shows—and numerous Supreme Court decisions, as well as common sense, confirm—this difference in the form of the asset that is seized is immaterial for purposes of the Takings and Due Process Clauses.

The Supreme Court has, in fact, directly spoken to an analogous situation. When local courts resolve disputes over the ownership of a sum of money that is being held by the court, it is common, and unobjectionable, for the clerk of the court to assess a reasonable fee. The fee might, typically, be a percentage of the money involved; or it might be the interest that the money accumulated while it was being held by the court. In *Webb's Famous Pharmacies, Inc. v. Beckwith*, 449 U.S.155 (1980), however, a county in Florida *both* charged a percentage fee *and* claimed the interest. The Supreme Court unanimously held that this "exact[ion of] two tolls" (*id.* at 159) violated the Constitution. "This is the very kind of thing," the Supreme Court said, "that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 164. The same is true of the double exaction imposed by the draft FAIR Act.

In fact, the scheme created by the proposed FAIR Act is even more constitutionally defective than this. Under the proposed Act, as I understand it, firms that have substantial insurance assets—assets that are effectively confiscated by the Act—are subject to the same assessments as firms that have no such assets. This shows graphically that firms with insurance assets are receiving no quid pro quo for the abrogation of those assets, and that the provisions of the FAIR Act abrogating insurance contracts simply cannot be squared with the Takings Clause of the Fifth Amendment. I should add that the disparity in treatment between the two categories of firms probably constitutes an additional, independent violation of the Due Process Clause.

2. The defenders of the proposed FAIR Act have, in the past, relied on the provisions of the Act that permit the Administrator to make adjustments in cases of "inequity." It is, I believe, a mistake to enact legislation that contains a fundamental constitutional flaw, in a central provision of the legislation, in the hope that those charged with administering the legislation will somehow be able to dispose of an issue that Congress itself was unable to resolve.

Beyond that, as I discussed in my letters on earlier versions of the FAIR Act, the "inequity adjustment" provisions provide only an uncertain and highly contingent way of addressing the constitutional concerns. This is true for at least two reasons. First, the Administrator has discretion to decide whether to make an inequity adjustment and, as I understand the proposed Act, an adjustment, if granted, will be reviewed annually and cannot last more than three years without being renewed. If the amounts in the Trust Fund begin to seem inadequate to satisfy claims, the Administrator will predictably be under great pressure not to recognize claims of inequity.

Second, it is far from clear that there will be adequate funds to permit the adjustments that will be, in my view, required by the Constitution. The proposed FAIR Act, as I understand it, provides only a limited fund for inequity adjustments and provides no assurance that even those funds will certainly be available. For these reasons, the inequity adjustment provision seems an wholly inadequate way of addressing the grave constitutional problems presented by the proposed Act.

3. Because of its serious constitutional flaws, the FAIR Act will, if enacted, surely be challenged in litigation. If the challenge succeeds, as I believe it would, the results will likely be highly damaging to the scheme that the Act seeks to establish, to the federal Treasury, or to both.

A court that concluded that the abrogation of insurance assets constituted an unconstitutional taking might provide various forms of relief. It might excuse the firms with adequate insurance from all or part of their obligation to contribute to the Fund, thereby potentially putting the Fund's solvency at risk. It might, alternatively or in addition, require that those firms' contributions be refunded; if the fund did not contain adequate amounts, the refund would have to be provided by the Treasury. Or a court, in such a case, might require that the firms whose insurance assets were seized be awarded damages—from the Treasury—commensurate to the value of those assets. In any of these scenarios, what I understand to be the central mission of the FAIR Act—to provide compensation to victims of asbestos-related injuries without imposing substantial financial burdens on the federal government—would be critically undermined.

For all of these reasons, the constitutional defect of the proposed FAIR Act seems to me to present a most serious issue that should not go unaddressed.

I hope these remarks are helpful. I would be happy to provide anything further that might be of assistance.

Sincerely,

David A. Strauss

c:

The Honorable Orrin G. Hatch
The Honorable Charles E. Grassley
The Honorable Jon Kyl
The Honorable Mike DeWine
The Honorable Jeff Sessions
The Honorable Lindsey Graham
The Honorable John Cornyn
The Honorable Sam Brownback
The Honorable Tom Coburn

The Honorable Patrick J. Leahy
The Honorable Edward M. Kennedy
The Honorable Joseph R. Biden, Jr.
The Honorable Herbert Kohl
The Honorable Dianne Feinstein
The Honorable Russell D. Feingold
The Honorable Charles E. Schumer
The Honorable Richard J. Durbin

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VETERANS OF FOREIGN WARS OF THE UNITED STATES

THE EXECUTIVE DIRECTOR

April 14, 2005

Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the 2.4 million members of the Veterans of Foreign Wars of the United States and our Auxiliaries, I would like to applaud your positive efforts as Ranking Member of the Judiciary Committee in helping to reach a bi-partisan compromise on asbestos reform legislation. This legislation is critical to our members and we strongly support it.

Numerous veterans were exposed to asbestos while on active duty and many others after they returned home and transitioned into civilian occupations. These men and women while fighting off potentially life-threatening illnesses now must endure the arduous and often slow judicial process by filing their claims for compensation individually. Those dying from asbestosis or other asbestos-related diseases cannot afford to wait.

The national trust fund that you are proposing offers our members who are sick and dying the opportunity to secure timely and fair compensation for the injury they suffered in the course of serving their country. It will provide a fair and efficient system to ensure equitable treatment for all who suffer from these diseases.

We thank you again and urge you to continue your steadfast support in securing passage of this most important legislation.

Sincerely,

ROBERT E. WALLACE
Executive Director

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