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THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005

JUNE 30, 2005.—Ordered to be printed

Mr. SPECTER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 852]

The Committee on the Judiciary, to which was referred the bill (S. 852) to create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure, and for other purposes, report favorably thereon with amendments, and recommend that the bill, as amended, do pass.

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I. PURPOSES

S. 852, the Fairness in Asbestos Injury Resolution Act of 2005, is important legislation that responds to a badly broken system

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that lacks the capacity to resolve the claims of asbestos victims. The bill will create an alternative compensation system within the Department of Labor to better resolve the claims of these victims and is intended to bring uniformity and rationality to the system of asbestos claims resolution so that resources are directed toward those who are impaired by their exposure. It is also intended to provide economic stability for businesses faced with asbestos liability by stemming the rising tide of asbestos litigation. The Committee believes that it is imperative to address the current asbestos crisis, which has diverted resources from the truly sick, clogged our federal and state courts, bankrupted companies, and endangered the jobs and pensions of employees.

S. 852 has five (5) key components:

First—S. 852 compensates legitimate asbestos victims faster and on a "no-fault" basis. Under the FAIR Act, asbestos victims' claims are resolved under specific time limits that enable claims to be processed expeditiously.

Victims currently face delay and unpredictable results.

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.[1]

Under the tort system, victims bear the burden of identifying a specific product, proving that the specific product caused their illness, and showing culpability of a particular defendant. Moreover, suits by unimpaired claimants have bankrupted companies and diminished the funds available for the truly ill. As a result, victims often face insurmountable obstacles in recovering for their injuries because many times there is no identifiable party for a claimant to sue, either because the culpable party has gone into bankruptcy or because it is impossible to identify the cause of the claimant's exposure. Furthermore, under the current system, there is a lag of several years between the filing and resolution of a suit; and, even then, there is no assurance that the claimant will receive compensation for their injuries.

Under S. 852, victims will receive timely and certain compensation on a "no fault" basis. They will not need to establish the culpability of a particular solvent party in order to be compensated. Rather, they will only need to satisfy the eligibility requirements in the Act to receive medical monitoring or monetary compensation. S. 852 establishes an unprecedented $140 billion privately funded trust fund, identified in the bill as the Asbestos Injury Claims Resolution Fund (the "Fund"), for the purpose of directing compensation to individuals suffering identifiable injuries as a result of as-

[1] Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes, Before the Senate Committee on the Judiciary, 109th Congress (April 26, 2005) (testimony of Mr. Alan Reuther).

bestos exposure. In order to receive compensation from the Fund, claimants must prove that they meet the eligibility criteria outlined in the Act.

The FAIR Act also provides for an expedited claims processing and payment system for the most seriously ill individuals. Further, the Act provides special exceptions for claimants suffering from asbestos-related injuries, but who cannot meet the employment exposure requirements of the Act. Medical monitoring will be available for those who have been exposed to asbestos, but who are not suffering from an identifiable asbestos-related illness. Finally, the streamlined administrative process diminishes the need for large attorney fees, which currently deplete that amount that a claimant receives by as much as forty (40%) percent.

Second—S. 852 provides certainty to asbestos victims. Claimants currently filing asbestos-related claims face a series of problems preventing them from being assured compensation for their injuries. While some may receive high awards, others receive nothing at all depending on their ability to prove culpability of harm that occurred decades in the past. S. 852 establishes a $140 billion fund that is projected to be more than adequate to compensate all present and future eligible claims. The compensation for victims as provided under the bill is based on disease categories and corresponding awards as follows:

Level	Condition/disease	Award
I	Asbestosis/Pleural Disease A	Medical Monitoring
II	Mixed Disease with Impairment	$25,000
III	Asbestosis/Pleural Disease B	$100,000
IV	Severe Asbestosis	$400,000
V	Disabling Asbestosis	$850,000
VI	Other Cancer	$200,000
VII	Lung Cancer with Pleural Disease	smokers: $300,000 ex-smokers: $725,000 non-smokers: $800,000
VIII	Lung Cancer with Asbestosis	smokers: $600,000 ex-smokers: $975,000 non-smokers: $1,100,000
IX	Mesothelioma	$1,100,000

Third—S. 852 provides economic stability and preserves jobs and pensions by offering certainty to defendants and insurers. The FAIR Act ensures that the allocation of payments into the Fund will be fair, rational, and predictable.

Currently, companies are unable to plan for asbestos litigation costs because of the unpredictability of the current tort system. Since most of the original asbestos manufacturers have gone into bankruptcy, companies with little relationship to asbestos are targeted with massive suits. As a result, these tangential companies have begun to feel the crushing weight of asbestos litigation. Insurers and reinsurers are affected as well. In sum, the current system has driven many companies to, or on the brink of bankruptcy. This hurts not only employees, but also investors.

S. 852 provides defendant companies and insurers with a means to plan for future asbestos liabilities. By requiring the participants to contribute set amounts of money into the Fund on a predetermined time table, defendant companies and insurers will be able to move forward and plan for the future. By establishing an administrative system that provides for fair, balanced, reasonable, and

predictable allocation of payments by defendant companies and their insurers, the Act will preserve the jobs and pensions of companies that might otherwise be forced into bankruptcy.

Fourth—S. 852 ensures that the fund will be administered simply, fairly, and efficiently. The current tort system is backlogged and unfair to many of the sickest victims. The flood of lawsuits in the tort system, moreover, has led to unacceptable delays. Some seriously ill plaintiffs even die before their suits are resolved.[2] One such victim was Texas resident Ronald Bailey who died of mesothelioma in June of 2000, about two months before his scheduled trial date.[3]

Under S. 852, claims will be processed efficiently and fairly by the Office of Asbestos Disease Compensation within the Department of Labor pursuant to clear standards and statutory timelines. Under this system, the Administrator will determine a claimant's eligibility and compensation award based on fair and balanced criteria, including a sound medical basis for all claims. The awards will be paid out to eligible claimants over a period not to exceed four (4) years from the Fund that will be run by the Administrator solely for the benefit of asbestos victims.

Finally—S. 852 bans harmful asbestos to help prevent future illnesses. Although the use of asbestos has largely been reduced by federal regulations it has not been eliminated. The FAIR Act seeks to eliminate the risks of future injuries from asbestos use by prohibiting any further manufacture, processing, and distribution in commerce of harmful asbestos-containing products, subject to certain exceptions. S. 852 would also require that prohibited asbestos-containing products be disposed of pursuant to federal, state and local requirements within three years of the date of enactment to ensure that such products are no longer in the stream of American commerce.

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.

II. Legislative History

The asbestos crisis has been considered by the Congress for decades. The issue has been evaluated through several hearings and addressed by numerous legislative proposals.

In the 107th Congress, then Chairman Leahy held a hearing on September 25, 2002, entitled "Asbestos Litigation." At that time, the Committee heard testimony from Senator Max Baucus (D–MT) and Senator Ben Nelson (D–NE), as well as witnesses Fred Barron, Steven Kazan, Jonathan Hiatt (General Counsel of the AFL–CIO), David Austern (General Counsel of the Manville Personal Injury Settlement Trust), and former Solicitor General Walter Dellinger, III.

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[2] See Stephen J. Carroll, et al., Rand Institute for Civil Justice, 'Asbestos Litigation Costs and Compensation: An interim Report," 35 (2002). [Hereinafter RAND 2002].

[3] Thomas Korosec, Enough to Make You Sick: In the struggle for a shrinking pot of money from asbestos litigation, the sickest victims are getting nickels and dimes while lawyers get their millions, Dallas Observer, Sept. 26, 2002.

During the 108th Congress, then Chairman Hatch followed up with another hearing on March 5, 2003, entitled "The Asbestos Litigation Crisis: It is Time for Congress to Act." The Committee heard testimony from Senator Max Baucus (D–MT) and Senator George Voinovich (R–OH) and witnesses Melvin McCandless, Brian Harvey, David Austern, President-elect of the American Bar Association Dennis Archer, Steven Kazan, and Jonathan Hiatt.

On May 22, 2003, Chairman Hatch introduced S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003 (FAIR Act)—legislation co-sponsored by Senator Ben Nelson (D–NE), Senator Mike DeWine (R–OH), Senator Zell Miller (D–GA), Senator George Voinovich (R–OH), Senator George Allen (R–VA), Senator Saxby Chambliss (R–GA) and Senator Chuck Hagel (R–NE). After its introduction, Chairman Hatch held another hearing on S. 1125 on June 4, 2003, entitled "Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Claims Resolution Act of 2003." The Committee heard testimony from Senator Patty Murray (D–WA), Senator Chuck Hagel (R–NE) and from witnesses Professor Laurence H. Tribe, Dr. James Crapo, Dr. Laura Stewart Welch, Dr. John E. Parker, Jennifer L. Biggs (FCAS, MAAA), Dr. Mark A. Peterson, Prof. Frederick C. Dunbar, Prof. Eric D. Green and Dr. Robert Hartwig.

The Committee then considered S.1125 during Executive Business meetings held on June 19, 24, 26, 2003 and on July 10, 2003 discharged S. 1125 by a roll call vote of 10 yeas, 8 nays and 1 pass.

In August of 2003, Senator Specter convened a series of meetings that were moderated by Third Circuit Senior Judge Edward Becker with the key stakeholders, including representatives of the defendant companies, insurance and reinsurance companies, the AFL–CIO, and the American Trial Lawyers Association (ATLA). The purpose of these meetings was to provide stakeholders a forum to express their views on the legislation and resolve contentious issues that the Committee identified during markup on S.1125.

On April 7, 2004, Senator Hatch introduced S. 2290, the Fairness in Asbestos Injury Resolution Act of 2004, with Majority Leader Bill Frist (R–TN), Senator Zell Miller (D–GA), Senator Mike DeWine (R–OH), Senator Saxby Chambliss (R–GA), Senator George Voinovich (R–OH), Senator George Allen (R–VA), Senator Chuck Hagel (R–NE), and Senator Pete Domenici (R–NM). On April 20, 2004, the Majority Leader moved to proceed to the consideration of S.2290. That motion, however, drew objections whereby a Cloture Motion was filed on April 20, 2004. The Senate failed to invoke cloture on April 22, 2004, by a vote of 50–47.

After the unsuccessful cloture vote, Senator Specter reconvened the stakeholder meetings again under the stewardship of Judge Becker and in an effort to encourage progress on the bill. During these meetings, which were also attended by Republican and Democratic staff, the stakeholders expressed their concerns on a litany of issues involving many of the bill's core provisions. Between August of 2003 and January of 2005, Senator Specter convened a total of thirty-six (36) meetings with Judge Edward Becker and the stakeholders.

During the 109th Congress, Chairman Specter held a hearing on January 11, 2005, entitled "The Fairness in Asbestos Injury Resolution Act." In the hearing, the Committee heard testimony from

the Honorable Judge Edward R. Becker (U.S. Court of Appeals for the Third Circuit), the Honorable John Engler (President and CEO of National Association of Manufacturers), Peg Seminario (Director of Occupational Safety and Health, AFL–CIO), Craig Berrington (Senior Vice President and General Counsel of American Insurance Association), Mike Forscey (American Trial Lawyers Association), Mary Lou Keener, Billie Speicher, and Jeff Robinson (Partner, Baach, Robinson, and Lewis).

A little over a week later, on January 19, 2005, Chairman Specter circulated a discussion draft of the bill. In an effort to flush out outstanding concerns on the bill, Chairman Specter held a hearing entitled "Asbestos: Mixed Dust and FELA Issues" on February 2, 2005. At the hearing, the Committee heard testimony from Dr. Laura Welch (Medical Director, Center to Protect Worker Rights), Michael B. Martin (Partner, Maloney, Martin and Mitchell, L.L.P.), Dr. David Weill (Associate Professor of Medicine, Division of Pulmonary and Critical Care Sciences, Lung Transplant Program at the University of Colorado Health Sciences Center), Professor Lester Brickman (Professor of Law, Cardozo Law School of the Yeshiva University), Dr. Theodore Rodman (Retired Professor of Medicine, Temple University), Dr. Paul Epstein (Clinical Professor of Medicine and Chief of Pulmonary and Critical Care Medicine, Penn Medicine at Radnor), Paul R. Hoeferer (Vice President & General Counsel of BNSF Railway Co.), and Donald F. Griffin (Director of Strategic Coordination and Research, BMWED-Teamsters). Thereafter, Chairman Specter circulated another discussion draft on February 7, 2005, to reflect agreements reached in negotiations and to encourage further progress on the bill.

On April 19, 2005, S. 852, Chairman Specter introduced the Fairness in Asbestos Injury Resolution Act of 2005, with Ranking Member Patrick Leahy (D–VT), Senator Orrin Hatch (R–UT), Senator DeWine (R–OH), Senator Dianne Feinstein (D–CA), Senator Max Baucus (D–MT), Senator Charles Grassley (R–IA), and Senator George Voinovich (R–OH). On April 26, 2005, and at the specific request of Senator Durbin, Chairman Specter held yet another hearing entitled, "A Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Cause by Asbestos Exposure, and for Other Purposes." The Committee heard testimony from Judge Becker, the Honorable John Engler (President and CEO of National Association of Manufacturers), Craig Berrington (General Counsel of the American Insurance Association), Peg Seminario (Director of Occupational Safety and Health, AFL–CIO), Dr. James Crapo (Chairman of the Department of Medicine, National Jewish Medical Research Center), Carol Morgan (President and General Counsel, National Services Industry, Inc.), Hershel Gober (Military Order of the Purple Heart), Dr. Fran Rabinovitz, Mark Peterson, Prof. Eric Green (Boston University Law School), Dr. Philip Landrigan, (the Mount Sinai Irving J. Selikoff Center for Occupational and Environmental Medicine), and Alan Reuther (United Automobile, Aerospace and Agricultural Implement Workers of America).

The Committee considered S. 852 during Executive Business meetings held on April 28, 2005, and May 11, 12, 19, 25 and 26, 2005. On May 26, 2005, the Committee discharged S. 852 favorably by a roll call vote of 13 yeas and 5 nays.

III. Votes of the Committee

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of roll call votes taken in any meeting of the Committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on April 28, 2005, and May 11, 12, 19, 25 and 26, 2005 at 9:30 am to markup S. 852. The following votes occurred on S. 852:

A Kennedy Amendment offered on May 11, 2005, to restore Level VII cases relating to lung cancer. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Manager's Package offered on April 28, 2005, by Chairman Specter (R–PA) and Ranking Member Patrick Leahy (D–VT). Accepted by voice vote.

A Feinstein Amendment offered on April 28, 2005, to clarify that expedited judicial review of constitutional challenges shall be modeled after the McCain-Feingold campaign finance law. Accepted by voice vote.

A Durbin Amendment offered on April 28, 2005, to provide for equal treatment of spouses and children of deceased exigent claimants. Accepted by voice vote.

A Feinstein Amendment offered on May 11, 2005, to modify the processing of claims and procedures relating to the stay of claims and return to the tort system, to establish timely payments for asbestos claimants, and for other purposes. Accepted by voice vote.

A Specter/Leahy Amendment offered on May 11, 2005, to provide for the expedited resolution of claims brought by the spouses and children of deceased exigent claimants. Accepted by voice vote.

A Coburn Amendment offered on May 11, 2005, to provide guidance to the Institute of Medicine in their study of Level VI cancers. Defeated 7–9, 2 pass.

YEAS	NAYS	PASS
Hatch	DeWine	Schumer
Grassley	Leahy	Graham
Kyl	Kennedy	
Sessions	Biden	
Cornyn	Kohl	
Brownback	Feinstein	

YEAS	NAYS	PASS
Coburn	Feingold	
	Durbin	
	Specter	

A Feingold Amendment offered on May 11, 2005, to eliminate the limitation on the amount of certain exigent health claims. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Manager's Package offered on May 11, 2005, by Chairman Specter (R–PA) and Ranking Member Patrick Leahy (D–VT). Accepted by voice vote.

A Kennedy Amendment offered on May 19, 2005, to provide for an Institute of Medicine Study to determine whether there is a causal link between asbestos exposure and lung cancer for individuals who have had substantial occupational exposure to asbestos but have no evidence of pleural disease or asbestosis. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Manager's Package offered on May 19, 2005, by Chairman Specter (R–PA) and Ranking Member Patrick Leahy (D–VT). Accepted by voice vote.

A Kennedy Amendment offered on May 25, 2005, to allow persons with lung cancer who had substantial exposure to asbestos

but are not eligible for compensation from the Fund to pursue their asbestos claims in Federal or State court. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Biden Amendment offered on May 26, 2005, to ensure that asbestos claims are not stayed until the Administrator has met its public notice requirements, defendant participants have made their initial payments, and the Administrator has certified that defendant participants have made sufficient minimum annual payments to the Fund. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Biden Amendment offered on May 26, 2005, to provide that if the Act is stayed that asbestos claims shall continue in the court system. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	

YEAS	NAYS	PASS
	Feinstein	
	Specter	

A Biden Amendment offered on May 26, 2005, to provide that settlement agreements between plaintiffs and defendants are not abrogated, if the settlement agreement was authorized by the settling defendant, and confirmed by, or with, counsel for the settling defendant, and to clarify the rules for settlement agreements dealing with 1 or more asbestos claims. Defeated without a quorum, by rule of the Chairman and consent of Senator Biden, 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Feinstein	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Kohl	
	Specter	

A Manager's Package offered on May 26, 2005, by Chairman Specter (R–PA) and Ranking Member Patrick Leahy (D–VT). Accepted by voice vote.

A Kennedy Amendment offered on May 26, 2005, to extend benefits for claimants of Libby, Montana to certain other residents subject to community exposure to asbestos. Effectively vitiated by acceptance of substitute amendment presented by Senator Specter and Senator Leahy.

A Graham Second Degree Amendment to the Kennedy Amendment offered on May 26, 2005, to create provide for Libby, Montana recovery model for future sites of community-wide contamination. Defeated 6–11, 1 pass.

YEAS	NAYS	PASS
Graham	Hatch	Schumer
Kennedy	Grassley	
Biden	Kyle	
Kohl	DeWine	
Feingold	Sessions	
Durbin	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Specter/Leahy Substitute Amendment to the Kennedy Amendment offered on May 26, 2005, to create a Libby, Montana recovery

model for future sites of community-wide contamination. Accepted 11–6, 1 pass.

YEAS	NAYS	PASS
Hatch	Graham	Schumer
Grassley	Kennedy	
Kyl	Biden	
DeWine	Kohl	
Sessions	Feingold	
Cornyn	Durbin	
Brownback		
Coburn		
Leahy		
Feinstein		
Specter		

A Kennedy Amendment offered on May 26, 2005, to provide that certain exposure presumptions shall be based on asbestos exposure being a contributing factor and not a substantial contributing factor, and for other purposes. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Kennedy Amendment offered on May 26, 2005, to provide for exigent health claims to continue in court until the Fund is operational, and for other purposes. Defeated 5–12, 1 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Schumer
Biden	Grassley	
Kohl	Kyl	
Feingold	DeWine	
Durbin	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Biden Amendment offered on May 26, 2005, to revise and strengthen the sunset provisions. Defeated 4–12, 2 pass.

YEAS	NAYS	PASS
Kennedy	Hatch	Kohl
Biden	Grassley	Schumer
Feingold	Kyl	
Durbin	DeWine	
	Sessions	
	Graham	
	Cornyn	
	Brownback	
	Coburn	
	Leahy	
	Feinstein	
	Specter	

A Motion to Report Favorable S. 852 offered on May 26, 2005. Accepted 13–5.

YEAS	NAYS
Hatch	Kennedy
Grassley	Biden
Kyl	Feingold
DeWine	Schumer
Sessions	Durbin
Graham	
Cornyn	
Brownback	
Coburn	
Leahy	
Kohl	
Feinstein	
Specter	

IV. Background and Need for Legislation

I first saw the asbestos issue back in 1984, more than 20 years ago, when then-Senator Gary Hart of Colorado brought in Johns-Manville. And this very tough issue has been very elusive for more than two decades, and it has mounted in problems, reaching a situation where we now have some 74 companies which have gone into bankruptcy, thousands of individuals who have been exposed to asbestos, with deadly diseases—mesothelioma and cancer—and who are not being compensated. And about two-thirds of the claims, oddly enough, are being filed by people who are unimpaired.

The number of asbestos defendants has risen sharply from about 300 in the 1980s to more than 8,400 today, and most are users of the product. It spans some 85 percent of the U.S. economy. Some 60,000 workers have lost their jobs. Employees' retirement funds are said to have shrunken by some 25 percent. And beyond any question, the issue is one of catastrophic proportions.—Chairman Arlen Spec-

ter, at a January 11, 2005, Senate Judiciary Committee Hearing.

We have tried to protect the ultimate goal of fair compensation to the victims. That is the lodestar of our efforts. * * * 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.—Ranking Member Patrick Leahy, at a April 26, 2005, Senate Judiciary Committee Hearing.

Each year, 10,000 victims will die of mesothelioma as a result of occupational asbestos exposure and tens of thousands of victims will suffer from lung conditions which make breathing so difficult that they cannot engage in the routine activities of daily life. Many have become unemployable due to their medical condition. These are the real victims of the asbestos nightmare and must be the first and foremost focus of our concern. And, because of the long latency period of these diseases, not only will the damage done by asbestos continue for decades but many of the exposed live in fear of a premature death due to asbestos-induced disease.

Not only do the victims of asbestos exposure continue to suffer, and their numbers to grow, but the businesses involved in the litigation, along with their employees and retirees, are suffering from the economic uncertainty created by this litigation. More than 70 companies have filed for bankruptcy because of their asbestos-related liabilities. As Senator Leahy observed at the Committee's March 5, 2003, hearing on asbestos litigation: "These bankruptcies created a lose-lose situation. Asbestos victims deserving fair compensation do not receive it and bankrupt companies do not create new jobs nor invest in our economy."

The testimony presented at multiple hearings on the asbestos issue and studies written by independent research organizations confirm the fact that the asbestos crisis in the United States is real. It has failed the victims of occupational exposure. The current system forces claimants to wait years for their claims to be resolved. Even when their claims are resolved, many of these claimants are faced with the ultimate denial of compensation because the defendant responsible for their injuries has become bankrupted by previous lawsuits brought by unimpaired claimants. In the event that claimants do receive compensation, that compensation is often arbitrary and inequitable. For example, compensation can be dependant on a matter as arbitrary as the jurisdiction in which the suit is filed. People who bring their claims in certain jurisdictions can receive huge awards, even when they are not sick—while people fatally injured by asbestos exposure may receive far less and often nothing. Further, only a small percentage of the amount of money defendants and insurers spend on asbestos litigation actually reaches the claimants suffering from the ill effects of exposure

to asbestos. In fact, statistics from the 2005 RAND report reveal that only forty-two (42¢) cents of every dollar spent on asbestos litigation actually go to asbestos victims. The rest of the money is split between plaintiff and defense attorneys fees. Specifically, thirty-one (31¢) cents of every dollar goes to defense costs and twenty-seven (27¢) cents to plaintiff attorneys.[4]

The current asbestos litigation system does not serve the public interest. According to the 2005 RAND Institute Study, asbestos litigation has driven 73 asbestos defendant corporations into bankruptcy between 1982 and 2004.[5] This number is expected to grow exponentially, especially considering the fact that more asbestos litigation pushed more asbestos defendant corporations into bankruptcy between the years of 2000 and 2004 than in all of the 1970s, 1980s, and 1990s.[6] These bankruptcies have had tragic consequences for employees, who have lost their jobs and often their savings, and for the communities that depended on the bankrupt firms. Moreover, this litigation is no longer confined to a few asbestos manufacturers. Asbestos litigation today touches thousands of companies in almost every sector of the American economy.

Our nation's state and federal courts simply cannot adequately manage the problems in the current asbestos litigation system. As the United States Supreme Court stated in *Ortiz* v. *Fibreboard Corporation,* 527 U.S. 815, 821 (1999), "the elephantine mass of asbestos cases * * * defies customary judicial administration and calls for national legislation." The Court has called upon the Congress three times since 1997 to address this issue: in *Amchem Products Inc.,* v. *Windsor,* 521 U.S. 591 (1977), in *Ortiz,* and most recently in *Norfolk & Western Railway. Co.* v. *Ayers,* 123 S. Ct. 1210 (2003). It is time to answer this call.

Today, asbestos is seldom used in comparison to its widespread use in the early 1970s. Nonetheless, the Committee believes that continued asbestos use, however limited it may be, should be banned except in those instances where it presents no reasonable risk to health and it has no reasonably safe substitute, or where it is among others necessary to critical functions.

A. HISTORY OF ASBESTOS LITIGATION

Asbestos is a fibrous mineral used in many products due to its resistance to fire, corrosion, and acid. In the early part of the 20th Century, asbestos was regarded as a miracle fiber because it was versatile enough to weave into textiles, integrate into insulation, line the brakes of automobiles, and construct flame-retardant hulls for naval and merchant ships. Annual asbestos production climaxed approximately thirty (30) years ago, and was incorporated into thousands of products by that time.

This Committee received testimony from a number of witnesses regarding the scope and effects of asbestos exposure.[7] Asbestos is

[4] RAND Institute for Civil Justice, "Asbestos Litigation" May 2005, at 109 (RAND 2005).

[5] Id.

[6] Id. (citing statistics that only one asbestos defendant entered bankruptcy in 1976, twenty in the 1980s, and fifteen in the 1990s—for a total of thirty-six bankruptcies between the years of 1976 and 1999—while thirty-seven were filed between 2000 and 2004).

[7] See, e.g., Hearing on A Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes, Before the Senate Committee on the Judiciary, 109th Congress (April 26, 2005) (prepared testimony of the Honorable Judge Edward Becker and prepared statement of Dr. Francine Rabinovitz); Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act

ubiquitous in the environment. Although practically all Americans are exposed to asbestos to some degree, such everyday exposures do not usually result in health problems. However, substantial occupational exposure to asbestos can lead to a variety of medical conditions. The diseases caused by asbestos can have long latency periods, sometimes up to thirty (30) or forty (40) years.

The first wave of lawsuits began in the late 1960s, when victims brought actions against asbestos manufacturers and suppliers. These lawsuits increased significantly in 1973 when the 5th Circuit Court of Appeals decided the Borel case, which applied strict liability in asbestos lawsuits. *Borel* v. *Fibreboard Paper Prods. Corp.,* 493 F.2d 1076 (5th Cir. 1973). By the early 1980s, the principal asbestos defendant, Johns-Manville filed for chapter 11 bankruptcy in 1982. Six years later, the Manville bankruptcy resulted in the formation of a trust to pay asbestos claims, but after a rush of claims on the trust in 1988–89, the trust was forced to reorganize and reduce benefits to claimants to ten (10¢) cents on the dollar in 1995 and then was forced to reduce the amount again in 2001 to five (5¢) cents on the dollar.[8] Today, the Manville Trust has had to pay claims on a sliding scale—with payments to less seriously injured claimants reduced more than payments to more seriously injured claimants.[9]

Experts estimate that over seventy (70) more companies have followed Manville into bankruptcy in the last twenty (20) years—with more than a third of them filing in the last three years alone.[10] Some of these bankruptcies have resulted in trusts for the payment of victims, and some have not. None of the existing trusts pay claims at their full value. By now, practically all of the former asbestos industry is bankrupt. As a result, asbestos litigation today affects companies that never made asbestos.

The heaviest asbestos exposures occurred decades ago. After the federal government began regulating the use of asbestos in the early 1970s, and with the sharp decline in asbestos use towards the end of that decade, occupational exposure to asbestos has been drastically reduced in recent years. This has greatly reduced the incidence of significant non-malignant disease, especially asbestosis. A leading pathologist of asbestos diseases stated that the "progressive lowering of standards for permitted occupational exposure to asbestos has markedly decreased the incidence and severity of asbestosis."[11] Although serious asbestosis cases, which still occurred in the early 1990s, have now become exceedingly rare, because of the long latency period, there will be significant numbers of mesothelioma and lung cancer claims for many years to come.

Asbestos claims steadily increased during the 1990s, and then exploded during the end of the decade. The vast majority of those claims, however, were filed by people who claimed non-malignant

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of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Dr. James D. Crapo and prepared testimony of Dr. John E. Parker).

[8] http://www.mantrust.org/history.htm.

[9] RAND 2005 at 114.

[10] RAND 2005 at 109 (citing statistics that seventy-three defendant corporations have declared bankruptcy since 1976).

[11] Neoplastic Asbestos-Induced Disease, in Pathology of Occupational Lung Disease (Churg & Green, ed., 2nd 1998) at 339, cited in "Babcock & Wilcox Company Report to the Court Regarding Asbestos Developments Generally and The Proofs of Claims Filed Here," In re: The Babcock & Wilcox Company, et al., Civil Action No. 00–0558, 2000 U.S. Dist. Lexis 5626, Eastern Dist. Louisiana, decided April 17, 2000.

diseases such as asbestosis—the very diseases that had become less and less common during the 1990s. Many of these non-cancer claims were brought by people with no impairment. Such a trend threatens to deplete the amount of funds available to compensate future, legitimately impaired asbestos victims. This is exacerbated by the fact that parties involved and the courts have yet to reach a comprehensive agreement regarding the settlement and treatment of asbestos claims. Rather, "litigation has not only persisted over a long period of time but also continually reshaped itself, in the process presenting new challenges to parties and courts." [12]

B. COURTS UNABLE TO HANDLE VOLUME OF ASBESTOS LITIGATION

The tens of thousands of asbestos claims filed every year have overwhelmed the ability of the courts to provide fair, individualized justice in a timely manner. The result has been disastrous for deserving claimants and defendants alike. For claimants, the flood of cases has meant delay, inequitable compensation, and increasing uncertainty that the defendants responsible for their injury will remain solvent and able to compensate their claims. For defendants, the overwhelmed tort system has caused companies who never manufactured asbestos to face the possibility of devastating liabilities against which they have little practical defense. Asbestos litigation has touched almost every sector of American industry, and no company can be sure it is not at risk.

Defendants' rights are further compromised when courts lack the resources to monitor the medical evidence submitted by plaintiffs. A study by neutral academics showed that forty-one (41%) percent of audited claims of alleged asbestosis or pleural disease were found by trust physicians to have either no disease or a less severe disease than alleged by the plaintiffs' experts (for example, pleural disease rather than asbestosis).[13]

The current asbestos litigation system is failing all of the parties involved. It is slow, expensive, and inequitable for both plaintiffs and defendants alike. The courts have used a variety of judicial management techniques to cope with the influx of asbestos cases and none have succeeded. Furthermore, all of the attempts to solve the problem within the present tort system have been rejected by the Supreme Court. In one case, the Supreme Court rejected a class action settlement that was agreed to by the parties that would have provided an alternative dispute resolution mechanism for asbestos claims against all defendants. *Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591 (1997). The Supreme Court also rejected a class action settlement that would have required all claimants against the defendant company to seek compensation from a fund established by the defendant's insurer. *Ortiz* v. *Fibreboard,* 527 U.S. 815 (1999). And in 2003, the Supreme Court rejected an attempt to limit damages in asbestos cases under Federal law. *Norfolk & Western Railway Co.* v. *Ayers,* 123 S. Ct. 1210 (2003). The Supreme Court held that a defendant that played only a small part in the victim's total exposure could be held liable for the entire damage where the firms primarily responsible were bankrupt or otherwise unreachable, and that a person with only mild impair-

[12] RAND 2005 at Summary xx.
[13] Bell, at 18.

ment due to asbestosis could receive a very large award based only on fear of developing cancer at some future date. Id.

The Supreme Court has continually recognized that the asbestos problem "defies customary judicial administration and calls for national legislation." *Norfolk & Western,* 123 S. Ct. at 1228, quoting *Ortiz,* 527 U.S. at 821. As far back as 1997, Justice Ruth Bader Ginsburg wrote for the Court that "[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure." Amchem, 521 U.S. at 628. Specifically, the Court has endorsed the Judicial Conference's recommendation that "[r]eal reform * * * require[s] federal legislation creating a national asbestos dispute-resolution scheme." Id. at 598. The FAIR Act is the "real reform" called for by the Supreme Court.

C. VICTIMS FACE LONG DELAYS, UNCERTAIN OUTCOMES

On April 26, 2005, a representative of the AFL–CIO testified 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."[14] A flood of asbestos cases is overwhelming the courts, causing delays for victims. An estimated 300,000 cases are currently pending.[15] More than 600,000 individuals have brought claims. Some experts estimate that as many as 2.7 million additional claims will be filed by people who were exposed to asbestos.[16]

Some fatally ill victims die before their claims are resolved. As discussed above, one worker whose claim against Avondale shipyard in a consolidated case involving more than 1,000 plaintiffs, died of mesothelioma before the Louisiana trial involving his claim even got underway.[17] While some courts give priority to plaintiffs with mesothelioma, elsewhere plaintiffs with mesothelioma may die before they get to trial.[18] Senator Kohl noted at our September 25, 2002, hearing that, "[s]imply put, some of the most seriously injured are just not getting their day in court quickly enough."

The flood of asbestos litigation has resulted in seventy-three (73) bankruptcies, which further diminish the prospect that truly ill victims will be timely and adequately compensated. The average amount of time between filing a bankruptcy petition and approval of a reorganization plan is about six years, during which time victims are not paid.[19]

Too many seriously ill victims do not fare so well, and many find that the defendants have filed for bankruptcy and will only pay pennies on the dollar, if anything. Senator DeWine noted at our September 25, 2002 hearing that "[t]he status quo is just not fair.

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[14] Hearing on A Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Cause by Asbestos Exposure, and for Other Purposes, Before the Senate Comm. on the Judiciary, 109th Cong. (April 26, 2005) (prepared statement of Peg Seminario, AFL–CIO) (Seminario April 26, 2005).

[15] Hearing on Solving the Asbestos Litigation Crisis: S. 852, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Comm. on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Jennifer Biggs, at 5) (Biggs June 4, 2003).

[16] Austern Sept. 25, 2002, at 4.

[17] 16–7 Mealey's Litig. Rep. Asb. 2 (May 4, 2001) at 1.

[18] RAND 2002, at 35.

[19] Austern March 5, 2003, at 2.

It is grossly unfair to the victims. What you find is an inconsistency in how victims are treated—a horrible inconsistency that I don't think you'll find anyplace else in our country or our judicial system."

Asbestos-related bankruptcies severely diminish the prospects that sick victims will be adequately compensated. Overwhelmed by the enormous number of claims by the unimpaired in recent years, the Johns-Manville bankruptcy trust now pays claims on a sliding scale—with less severely injured claimants having their payments reduced more than claimants with severe injuries.[20] Moreover, sixty-three (63%) percent of the funds paid out by the Manville trust have gone toward claims by those with non-malignant conditions.[21] The General Counsel of the Manville Personal Injury Trust, David Austern, testified before this Committee that none of the existing asbestos trusts, nor any of the 20 trusts pending in bankruptcy court, will pay any more than a fraction of the value of claims submitted to them.[22]

According to New York Senior District Judge Jack B. Weinstein, the flood of new claims, the reduction in amounts paid pro rata by the Johns-Manville bankruptcy trust on claims, and the increasing number of bankruptcy filings "suggests that there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos-related injuries."[23]

Even for those sick victims who are able to recover monies, those awards are diminished by high transaction costs. As stated before, awards can be broken down in the following manner—amounts are the number of cents per dollar: forty-two (42¢) cents to victims, thirty-one (31¢) in defense costs and twenty-seven (27¢) in plaintiff costs. Today's system is very costly. An alternative system would provide victims with a more efficient means of compensation. The current tort system will only provide victims with $61 billion in compensation. Taking these numbers into account, it is apparent that S. 852 is the far superior option.

D. ECONOMY, JOBS SUFFER UNDER CURRENT SYSTEM

The growth in litigation against this expanding list of defendants threatens jobs, workers' 401(k) and retirement accounts, and the American economy. As Senator Leahy noted at the Committee's April 26, 2005, hearing, "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."[24]

Given that seventy-three (73) defendant corporations have filed for bankruptcy related to asbestos litigation, and as many as 2.7

[20] RAND 2005 at 114.

[21] Claims Resolution Management Corporation, Hearing Exhibit No. 8 at 5, In re: Asbestos Litigation, (E.D.N.Y., Hearing on Dec. 13, 2001) (Nos. CV–91–875, CV–90–3973).

[22] RAND 2005 at 114.

[23] Order of Judge Jack B. Weinstein, Senior District Judge, E.D.N.Y., In re: Johns-Manville Corporation et al., Nov. 7, 2001, Brooklyn, New York.

[24] Hearing on A Bill to Create a Fair and Efficient System to resolve Claims of Victims for Bodily Injury Cause by Asbestos Exposure, and for Other Purposes, Before the Senate Comm. on the Judiciary, 109th Cong. (April 26, 2005) (prepared statement of Senator Patrick Leahy (D–VT)) (Leahy April 26, 2005).

million asbestos claims still may be filed, bankruptcies are likely to continue. More than thirty-seven (37) of the seventy-three bankruptcies have been filed since 2000; as many asbestos-related bankruptcies have been declared in the last two years as in either of the past two decades.[25] Bankruptcies occurring within the last five years include Armstrong World Industries, Owens Corning, Pittsburgh Corning, G–I Holdings Inc. (the successor to GAF Corp.), W.R. Grace & Co., U.S. Gypsum Co., Federal Mogul, Babcock & Wilcox, and Kaiser Aluminum.[26] Asbestos liabilities accounted for eighty-four (84%) percent of total contingent liabilities for Owens Corning, sixty-seven (67%) percent for W.R. Grace, and ninety-three (93%) percent for USG.[27]

As the first wave of asbestos defendants filed for bankruptcy and their resources dried up, the number of companies named as defendants in asbestos suits began to rise. Increasingly, companies with a limited link to asbestos liability are being targeted. Senator Hatch noted at the Committee's September 25, 2002, hearing that "[b]ecause of this surge in litigation, companies—many of whom never manufactured asbestos nor marketed it—are going bankrupt paying people who are not sick and may never be sick, and who, therefore, may not need immediate compensation." Approximately 8,400 firms have been named defendants in asbestos suits,[28] up from the 300 listed in 1983.[29]

The negative impact of asbestos liability is so serious that the mere specter of it has the effect of chilling or even halting transactions. Goldman Sachs Managing Director Scott Kapnick testified before the Committee that "the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole."[30] The asbestos problem also has serious consequences for insurers, who now pay about fifty-seven (57%) percent of the cost of asbestos liability.

A national economic research specialist testified before this Committee on the economic effects caused by asbestos litigation: "Asbestos-related bankruptcies and the associated layoffs will have ripple effects that harm many groups beyond company stockholders. Workers will suffer in many ways, including temporary or long-term unemployment, lower long-term earnings, and inadequate and/or more expensive interim health coverage."[31]

Asbestos-related bankruptcies have a devastating impact on workers' jobs and their economic security. Companies that have declared bankruptcy related to asbestos litigation employed more than 200,000 workers before their bankruptcies. Asbestos-related

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[25] RAND 2005 at 109.

[26] Keith M. Buckley, Asbestos: Impact on the U.S. Insurance Industry, Fitch Ratings, July 25, 2002, at 13.

[27] Joseph E. Stiglitz, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, Sebago Associates, Dec. 2002, at 10 (Stiglitz).

[28] Hearing on Solving the Asbestos Litigation Crises: S.852, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Robert P. Hartwig, Insurance Information Institute, at 2).

[29] RAND 2002, at 49.

[30] Hearing on Solving the Asbestos Litigation Crises; S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Scott Kapnick, at 2).

[31] Hearing on Solving the Asbestos Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee On the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Frederick C. Dunbar, of the National Economic Research Associates, at 1).

bankruptcies led to the direct loss of as many as 60,000 jobs. Each displaced worker will lose an average of $25,000 to $50,000 in wages over his or her career.[32] The need for congressional intervention is clear, testified former U.S. Solicitor General Walter Dellinger: "We need to stop the hemorrhaging of hundreds of millions of dollars going to those who are not sick, to protect American jobs, pensions and shareholders."[33]

When asbestos defendant Federal-Mogul declared bankruptcy in 2001, employees reportedly lost more than $800 million in their 401(k)s.[34] For example, one 82-year-old Federal-Mogul employee saw his $1 million retirement nest egg shrivel to $20,000.[35] Bankrupt Owens Corning saw its shares lose ninety-seven (97%) percent of their value in the two years before its filing. Approximately fourteen (14%) of those shares were held by employees.[36]

The AFL–CIO has told Congress that "[u]ncertainty for workers and their families is growing as they lose health insurance and see their companies file for bankruptcy protection."[37] Many companies had high unionization rates when they filed for bankruptcy: Johns-Manville, 42%; Eagle-Picher, 33%; Federal-Mogul, 33%; Armstrong, 57%; and Todd Shipyards, 75%.[38]

There is no question that the escalating numbers of claims and costs is a threat to workers' jobs and retirement savings.

Six years ago, the Supreme Court endorsed a "national dispute resolution scheme" to remedy this crisis, and the FAIR Act is the vehicle to implement this mechanism.

E. ASBESTOS BAN AND NATURALLY OCCURRING ASBESTOS

Dangers associated with exposure to asbestos fibers are well known, and have prompted efforts to reduce and in some cases ban asbestos use. EPA and OSHA have severely restricted the use of asbestos since 1986. In 1989, EPA attempted to finalize a ban on asbestos use in the United States; however, that ban was subsequently overturned on non-substantive grounds, by the United States Court of Appeals for the Fifth Circuit in 1991. A number of products and processes still use asbestos. Today, asbestos may be present in such products as brake pads and linings, roofing materials, ceiling tiles, garden materials containing vermiculite, and cement products. According to the United States Geologic Survey, approximately 13,000 to 15,000 metric tons of asbestos are consumed in the United States every year. Numerous countries have banned, or are working to ban, the manufacture and importation of asbestos. Despite its continued (albeit limited) use in the United States, some types of asbestos remain a dangerous substance. Therefore, a ban on the import and manufacture of harmful forms of asbestos and asbestos containing products is needed to prevent the well

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[32] Stiglitz, at 3.

[33] Dellinger Sept. 25, 2002.

[34] Hearing on Asbestos Litigation, Before the Senate Committee on the Judiciary, 107th Cong. (Sept. 25, 2002) (FNS Unofficial Transcript of oral testimony of The Honorable Senator Benjamin Nelson, United States Senator, Nebraska) (Nelson Testimony).

[35] Mark Truby, Asbestos Ruined Federal-Mogul, The Detroit News, Mar. 31, 2002.

[36] Hearing on Asbestos Litigation, Before the Senate Committee on the Judiciary, 107th Congress, September 25, 2002. The Honorable Benjamin Nelson, United States Senator, Nebraska.

[37] Hearing on Asbestos Litigation Crisis: S. 852, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, September 25, 2002, Jonathan Hiatt at 2.

[38] Stiglitz, at 22.

known risks associated with these products, and to reduce the number of future victims of asbestos-related diseases. The only exceptions are for uses that present no unreasonable risks to health (e.g., diaphragms in chlorine solvent) and for national security (e.g., use in missile liners).

Exposure to naturally occurring asbestos can occur when asbestos contained in rock or soil is released into the air by human activities, such as construction, or by normal erosion. The risks associated with exposure to naturally occurring asbestos have not been quantified.

The potential for exposure to naturally occurring asbestos is a result of the rapid development and growth in areas where veins of asbestos exist in the natural rock. In the case of California, it is present in the ultramafic and serpentine rock found in many of the Sierra foothill counties. Naturally occurring asbestos has been reported at over 780 sites, including in 44 of California's 58 counties, in parts of Oregon, Washington, Montana, Wyoming, Arizona and along the Appalachian Mountain range in the eastern United States.

Left undisturbed, naturally occurring asbestos is believed to pose little threat to human health. The reality of growing development in areas where asbestos is present in the rock and soil, however, warrants the development of precautionary measures to limit the potential for asbestos exposure and to protect public health. This section provides that where naturally occurring asbestos has been detected at levels of potential concern in schools and public areas, the affected communities should receive financial assistance in the form of Federal matching grants, in order to remediate the asbestos contamination.

In certain circumstances, environmental exposure to naturally occurring asbestos may pose health risks. This section focuses on efforts to assess the risks of exposure to naturally occurring asbestos; to standardize methods of sampling and measuring naturally occurring asbestos; to develop dust management guidelines for new construction in areas containing naturally occurring asbestos in order to minimize asbestos exposure; to understand where asbestos is naturally occurring; and to provide funds to communities for asbestos cleanup and for the development, implementation, and enforcement of State and local dust management regulations that States and localities may choose to adopt.

F. CONCLUSION

It is evident that the current system is fundamentally flawed. Victims and defendants alike face inequity and uncertainty, which will only get worse. The Supreme Court has concluded that only federal legislation can create a fair and efficient asbestos resolution system. The FAIR Act offers just such a resolution.

V. How S. 852 Works

S. 852 takes asbestos claims out of the existing system and processes them through a federally administered trust fund that compensates current and future asbestos claimants on a no-fault basis according to standardized medical criteria and corresponding claims awards. Reduced to its essence, and as discussed further

below, the trust fund operates on two fronts: (i) through the collection and management of contributions received from defendant and insurer participants and existing asbestos compensation trusts; and (ii) through the payment of such funds to compensate claimants who can show eligibility based on standardized medical criteria.

The Committee believes that a national trust fund is the best answer to the current asbestos litigation crisis. By funneling existing asbestos tort claims into an administrative funding system, claimants should see quicker compensation while defendants and insurers benefit from increased economic certainty and stability—an outcome that the current tort system is ill-suited to provide.

Claimants would benefit because the FAIR Act eliminates expensive and time consuming litigation. A claimant can recover from the trust fund if that person can meet the Act's standardized medical criteria, which is categorized in various funding levels based on the severity of the asbestos-related disease. Unlike the current tort system, claimants would not be required to prove causation with respect to a pool of defendants or show that their claim was somehow not caused by their own negligence.

Defendants and insurers would also benefit from a trust fund because their future asbestos liabilities become more predictable. The trust fund will be financed through a structured payment scheme involving defendants and insurers with asbestos liabilities.

A. THE FAIR ACT'S FUNDING MECHANISMS

1. Mandatory payments from defendants and insurers

The Fund will be financed through allocated mandatory and guaranteed contributions of $90 billion from defendant participants and $46 billion from insurer participants that have been exposed to asbestos claims in the tort system. Although insurers and defendants have specific aggregate sums earmarked towards the Fund, the mechanics of how these amounts will be assessed towards each contributing group differ.

For defendants

With respect to the defendants, the Administrator, after receiving company specific data as required by the Act, must first designate companies into tiers that are defined by prior company expenditures incurred defending asbestos claims in the tort system. These expenditures include defense, indemnity, judgment and settlement costs. In addition, the FAIR Act establishes separate tiers for debtor companies currently in bankruptcy and companies subject to claims under the Federal Employer's Liability Act.

Once companies have been designated to tiers, the Administrator's next step is to designate companies into subtiers based on revenue levels—amounts calculated by each company's reported earnings for the most recent fiscal year ending before December 31, 2002. After a company is assigned to a subtier, the Administrator can then identify a corresponding annual contribution amount that the assigned company is obligated to pay into the Fund. In other words, each subtier identifies the annual contribution amount into the Fund.

In the event a tiering assignment unduly burdens a contributing company, the FAIR Act gives the Administrator the authority to

adjust a defendant participant's payment based on financial hardship or exceptional cases of demonstrated inequity. These adjustments in the aggregate can be made up to $300 million annually through a Guaranteed Payment Account, which the defendant participants guarantee in addition to the $3 billion mandatory annual funding figure. The Administrator is authorized to exceed the $300 million cap on hardship and inequity adjustments (and assuming that this cap is exhausted) in the event a defendant participant is faced with insolvency as a result of their payment obligations to the Fund.

For insurers

Unlike the assessment formula for defendants, the FAIR Act takes a different approach with respect to the asbestos insurers. Rather than establish an allocation formula, the FAIR Act creates a separate Asbestos Insurers Commission, which holds responsibility to determine the amount that each insurer is obligated to pay into the Fund. The Committee believes that delegating such a task to a separately commissioned entity makes sense given the necessary technical expertise that is required in developing a fair and appropriate allocation formula. The FAIR Act requires the Commission to determine contributions based on several factors, including premiums from asbestos policies, losses paid, reserve levels, and future liability. However, if the insurers agree on a fair division of contributions among themselves, such an agreement may be used to determine the insurer allocation. This agreement is subject to approval by the Commission after a finding that the agreed upon allocation formula meets all of the requirements of the Act.

2. The $4 billion contribution from existing bankruptcy trusts

In addition to the aggregate $136 billion collected from defendant and insurer participants, the Administrator is authorized to collect roughly $4 billion from existing asbestos compensation trusts that have been established to compensate asbestos claims, including but not limited to those established under section 524(g) of the Bankruptcy Code. The Committee understands that the total amount of all existing bankruptcy and other asbestos compensation trusts is valued to be at least $4 billion. Because the FAIR Act requires that all trust assets be transferred to the Fund within months of the date of enactment pursuant to the provisions of the Act, these trusts represent an immediate source of funding for the Administrator to begin processing claims.

In the unlikely event that the transfer of these trust fund amounts are held up through litigation or otherwise, the bill obligates defendant and insurer participants to guarantee an additional payment to the Fund equivalent to the amount of the declared assets of any non-paying bankruptcy trust.

3. The administrator's borrowing authority

The FAIR Act gives the Administrator the authority to borrow from commercial lending sources and the Federal Financing Bank. The Committee deems such authority necessary especially during the start-up of the Fund. S. 852 also expressly obligates defendant and insurer participants to repay any amounts borrowed by the Administrator.

B. FAIR ACT CLAIMS PROCESS

S. 852 creates a no-fault system to compensate those who meet sound, fair and balanced eligibility criteria to establish the existence of a legitimate asbestos-related disease. The eligibility criteria include diagnostic, latency, medical and exposure requirements. Flexibility is built into the system, providing for exceptional claims and special cases. The FAIR Act then provides fair and equitable claim values to eligible claimants. To ensure the integrity of the system, however, auditing procedures and independent reviews by objective, experienced physicians are also provided.

S. 852's nationalized, streamlined claims processing system provides compensation to eligible claimants promptly without creating a new or large bureaucracy. It works as follows:

1. Office of asbestos disease resolution

Victims of asbestos exposure with pending cases in the tort system that are preempted by the FAIR Act and those with new claims arising after enactment will file their claims with the Office of Asbestos Disease Compensation ("the Office").

The Department of Labor was selected to house the Office because of its institutional experience with administering compensation programs and for its ability to utilize its existing technology, claims templates, and infrastructure to effectuate a quick start up period. The Department currently administers programs that involve the supervision of outside contractors who process claims for compensation. The Department has experience in establishing administrative appeals procedures and auditing programs for these compensation programs. It is the Committee's belief that such experience will greatly assist the Department in quickly resolving asbestos claims in the early months after enactment.

The Committee designed the administrative claims procedure in S. 852 to ensure a truly "no-fault", non-adversarial system with minimized transaction costs. The Office will assist claimants to receive the compensation to which they are entitled regardless of whether the claimant has outside representation. The Office should produce and post on-line "user-friendly" claims forms and filing guidelines to assist in prompt compensation for asbestos victims.

Deadline to file claims with the Office—Victims of asbestos exposure with new asbestos claims have five (5) years from the date of a medical diagnosis and medical test results sufficient to satisfy the relevant criteria to file an asbestos claim with the Office. Victims with pending court claims that are preempted by this Act have five (5) years from the date of enactment to file an asbestos claim with the Office.

Claims Processing—The Administrator shall promulgate regulations to establish the contents of claims filed with the Office. The intent of the Committee is that the claims process be streamlined and efficient. The enumerated information in the FAIR Act is sufficient to establish qualification under the medical criteria and exposure criteria. It was not the intent of the Committee to require claimants to bear the same evidentiary burdens they currently have in the tort system when seeking recovery within the Fund.

If a claim filed with the Office is found to be incomplete, the Administrator will explain to the claimant the additional information

necessary to complete the claim and will see that the claimant receives help completing the claim so it can be processed.

The Administrator may request the submission of medical evidence in addition to the minimum requirements of the medical criteria if necessary or appropriate. This discretion should not be exercised to intentionally delay or to place unreasonable burdens on claimants. Audits of claims submitted by victims and claims processing conducted by outside contractors and other quality control measures should be conducted by the Administrator by reviewing a statistically significant sampling of claims submitted and claims determinations.

Once a claim is completed, a claims processor will review the claim to determine if it satisfies the medical criteria and other requirements for eligibility for an award and, if so, the value of the award. Within ninety (90) days of the filing of a complete claim, the Administrator or the Administrator's designee will issue a proposed decision accepting or rejecting the claim in whole or in part and specifying the amount of the proposed award. This written decision will contain findings of fact and conclusions of law. It will also explain to the claimant how to appeal the decision. If the claimant waives appeal or 90 days passes and no appeal is filed, it will become the final decision and the claimant will be eligible to receive the relevant award.

If the Administrator fails to issue a proposed decision within one hundred and eighty (180) days of a claimant's filing with the Office, that claim shall be deemed to be accepted for the award level requested. Claimant will then be entitled to payment in accordance with the payment installments contained in the FAIR Act. This provision is incorporated as a safeguard so that claims do not languish for years without any processing or determination of eligibility.

Administrative Review Process—If a claimant is not satisfied with the proposed decision, there are two possible avenues for administrative appeal. Both must be requested in writing within ninety (90) days of the proposed decision. The claimant may request a hearing or a review of the written record before a representative of the Administrator. The Committee envisions this representative to play the role of an administrative law judge and therefore the representative will be someone different than the person who initially reviewed the claim and issued the proposed decision.

If a hearing is requested, the representative will receive the claimant's oral evidence and written testimony to ascertain the claimant's right to receive an award from the Fund and issue a final decision on the record as a whole within one hundred and eighty (180) days from the date of the hearing request. Alternatively, if a review of the written record is requested, the representative will receive any additional evidence or arguments that the claimant chooses to submit and issue a final decision on the record as a whole within ninety (90) days from the date of the request for review on the record. All final decisions by representatives will be in writing and will contain findings of fact and conclusions of law.

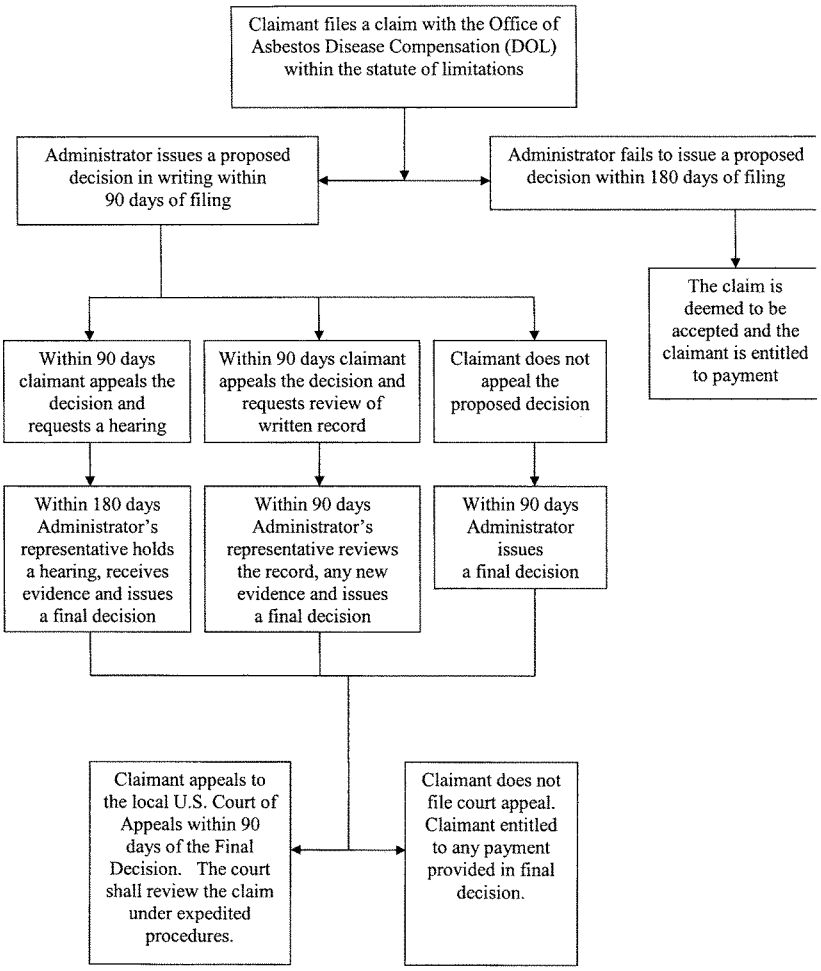
Judicial Review of Final Decisions—Claimants may appeal final decisions of the Administrator with the U.S. Court of Appeals lo-

cated in the state where they currently reside. Appeals must be filed within ninety (90) days of the issuance of a final decision. The Court shall review the administrative record as a whole and determine whether the final decision is not supported by substantial evidence, is contrary to law, or is not in accordance with procedures required by law.

2. Prompt payment of claims

Unlike the current system, in which results can be inequitable and unpredictable, S. 852 ensures rapid, fair, and predictable payments, while still maintaining the stability of the Fund. Once a final decision is rendered, payments are to be made by the Fund over a period of 3 years but in no case longer than 4 years. If no proposed decision is issued within 180 days of submitting a completed claim, that claim is deemed accepted and claimants are also entitled to begin receiving payments.

An expedited payment schedule is available for exigent health claims. Living mesothelioma claimants are entitled to begin receiving accelerated payments within thirty (30) days, and other exigent claimants are entitled to receive their full recovery in less than a year. In addition, during Fund start-up there are special procedures in place to ensure that if the Fund or claims facility is unable to pay in these specified time periods the terminal individual may return to court. This is outlined in greater detail below.


Claimant files a claim with the Office of Asbestos Disease Compensation (DOL) within the statute of limitations
Administrator issues a proposed decision in writing within 90 days of filing
Administrator fails to issue a proposed decision within 180 days of filing
The claim is deemed to be accepted and the claimant is entitled to payment
Within 90 days claimant appeals the decision and requests a hearing
Within 90 days claimant appeals the decision and requests review of written record
Claimant does not appeal the proposed decision
Within 180 days Administrator's representative holds a hearing, receives evidence and issues a final decision
Within 90 days Administrator's representative reviews the record, any new evidence and issues a final decision
Within 90 days Administrator issues a final decision
Claimant appeals to the local U.S. Court of Appeals within 90 days of the Final Decision. The court shall review the claim under expedited procedures.
Claimant does not file court appeal. Claimant entitled to any payment provided in final decision.

3. Disease levels

A claimant filing with the Fund must satisfy the eligibility requirements for one of the following nine (9) disease levels:

Level I (Asbestosis/Pleural Disease A)—These individuals clearly have asbestos-related pleural disease or asbestosis, but their pulmonary function tests are within the normal range. Asbestos-related pleural conditions include discrete plaques on the pleura (the lining of the chest wall) or pleural thickening. Asbestosis involves scarring of the interstitial tissue within the lungs.

Level II (Mixed Disease With Impairment)—Individuals in this group have significant respiratory impairment, as defined by the American Medical Association. They are impaired due to a combination of asbestosis and other causes, typically chronic obstructive pulmonary disease. The requirement for a 1/1 ILO reading on a chest x-ray helps ensure that asbestos exposure is a substantial contributing factor to the lung diseases and impairment.

Level III (Asbestosis/Pleural Disease B)—These individuals have impairment that is primarily due to asbestosis. They develop asbestos-related respiratory disease with increasing losses of pulmonary function, with lung function decreasing to as low as 60 percent of predicted average.

Level IV (Severe Asbestosis)—These individuals have impairment that is primarily due to asbestosis. They experience significant loss of pulmonary function, with lung function between 50 percent and 60 percent of predicted average. Victims with this level of impairment are often disabled and cannot perform some activities of daily living.

Level V (Disabling Asbestosis)—These individuals have impairment that is primarily due to asbestosis. They experience severe loss of pulmonary function, experiencing loss of more than 50 percent of predicted average lung capacity. Victims with this level of impairment will not be able to perform most activities of daily living. Impairment at this level can be fatal.

Level VI (Other Cancers)—Individuals in this group have cancers of the colon, larynx, pharynx, or stomach, the risk of which may be increased by asbestos exposure. The bill commissions the Institute of Medicine to conduct a study on whether these cancers are caused by exposure to asbestos.

Level VII (Lung Cancer With Pleural Disease)—Individuals in this category suffer from lung cancer. Asbestos-relatedness is demonstrated by substantial exposure requirements and the existence of asbestos-related pleural disease.

Level VIII (Lung Cancer With Asbestosis)—These individuals suffer from lung cancer with asbestosis. Asbestos-relatedness is shown by the existence of substantial exposure and asbestosis (scarring within the lung).

Level IX (Mesothelioma)—These individuals suffer from a rare and fatal cancer of the chest lining (the pleura) and abdomen lining. This cancer is usually fatal within 18 months of diagnosis although some victims can survive for years. Mesothelioma is a particularly debilitating disease whose victims typically endure great suffering.

4. Diagnostic and latency criteria

Asbestos claimants must meet diagnostic and latency criteria to be compensated by the Fund. The diagnostic criteria should reflect the typical components of a true medical diagnosis by a claimant's doctor, including an in-person physical examination (or pathology in the case where the injured person is deceased) and a review of the claimant's medical, smoking and exposure history by the doctor diagnosing an asbestos-related disease. These requirements ensure that the claimant will be given a meaningful diagnosis related to the claimant's condition. The diagnosis must also include consideration of other more likely causes of the condition to ensure that asbestos exposure was the cause of any claimed nonmalignant disease (as opposed to other industrial dust exposure) or a substantial contributing factor in causing a malignant disease.

Because asbestos-related diseases have a long latency period before symptoms begin to manifest, S. 852 requires that the claimant demonstrate that his or her first exposure to asbestos occurred at least ten years prior to the diagnosis.

5. Medical criteria

Claimants must meet medical criteria to ensure that resources are protected for those who are currently suffering from asbestos-related disease. The medical criteria establishes requirements for 9 disease levels, 5 of which relate to nonmalignant asbestos-related diseases, such as asbestosis, and 4 of which relate to malignant diseases, such as lung cancer and mesothelioma. The medical criteria for three of the nonmalignant categories are based on increasing severity of the claimant's impairment. Because these impairments may have other causes, such as other airborne contaminants including cotton dust, medical evidence is required to establish that asbestos exposure is the cause of the claimant's impairment. The medical criteria for the malignant categories similarly reflect the need to have medical evidence to support a finding that the claimant's exposure to asbestos is a substantial contributing factor in causing the claimant's asbestos-related disease.

6. Exposure criteria

Claimants must meet exposure criteria to be compensated. Because the risk of developing an asbestos-related disease increases with the amount and intensity of exposure to asbestos, the Committee has set exposure requirements for each disease level to ensure that S. 852 compensates only asbestos-related diseases. The number of years of occupational exposure is weighted based on industry and occupations and by the dates of exposure, so as to serve as a proxy for approximating the dose of exposure associated with various types of occupational exposures typically associated with asbestos-related diseases. The intensity and regularity of asbestos exposures associated with certain industries and occupations were significantly greater prior to the 1970's, at which time federal regulations limiting its use and for the protection of workers were first implemented. Such exposures often occurred in the manufacture of asbestos. The criteria were drafted to ensure that only diseases caused by asbestos exposures are compensated by the Fund.

7. Exceptional cases

S. 852 provides exceptions to the above standards for compensation. Exceptional cases where the medical criteria under the Act cannot be met but the claimant has comparable and reliable medical evidence are eligible for review by a Physicians Panel, made up of objective, experienced physicians, to determine whether the claimant is eligible.

Special provisions are established for review by a Physicians Panel in other unique circumstances, including those related to "take home" exposures where asbestos was brought into the home by an occupationally exposed person, exposures due to naturally-occurring asbestos, and those related to the high levels of environmental exposures of residents and workers in Libby, Montana.

8. Claim values

S. 852 provides for carefully constructed, rational, and fair claims values. Many of the illnesses that are compensated under the Act could be caused or contributed to by factors other than asbestos exposure, such as smoking and other airborne contaminants. Therefore, claims values have been carefully constructed to provide increased compensation in those cases where there is greater confidence that the asbestos exposure was the cause of the claimant's injury. To those ends, mesothelioma and lung cancer claims where the claimant has been diagnosed with underlying asbestosis and is a nonsmoker have been given the highest values. Claims values for claimants with severe asbestosis and other lung cancer claims where the causal connection between the asbestos exposure and the injury is more substantiated similarly reflect the purpose of the Act to direct monies to the most serious injuries caused by exposure to asbestos.

The FAIR Act recognizes that claimants with significant occupational exposure to asbestos may be at risk of developing a serious asbestos-related illness. As such, claimants meeting the minimum exposure criteria will be reimbursed reasonable costs for medical monitoring. In the event these claimants develop into a compensable illness, they may then seek compensation from the Fund.

C. THE FUND START-UP AND PAYMENT OF EXIGENT CLAIMS

S. 852 creates a streamlined process to ensure that exigent health claims are resolved and paid upon enactment of the Act. The Committee strongly believes that individuals with mesothelioma or a diagnosis of less than 1 year to live should have their claims addressed as quickly as possible. Therefore provisions were put in place so that exigent health claims can immediately be filed after enactment with the Fund or the claims facility and then be paid in a timely manner.

S. 852 allows exigent health claims that arise before or after the date of enactment to be resolved through the following process:

1. File

Each exigent individual will file a claim or a notice of intent to seek a settlement with the Administrator (or claims facility). Notice shall be provided to all named or potential defendants.

2. Submit information

Once the notice of intent has been submitted, each exigent individual has 60 days to provide all necessary information to support her claim, including who the relevant possible defendants would be if the claim arose after enactment. If the individual fails to provide all the information required, she will have 30 days to perfect her claim.

3. Certification of claim

Upon receiving all of the required information, the Administrator has 60 days to certify the claim—to certify the Administrator must evaluate if claim is exigent, and what disease level they qualify for. Upon certification, the Administrator must immediately notify defendants of approval of claim

4. Payment

Mesothelioma victims receive 50 percent of their award in 30 days, and 50 percent in 6 months. Other terminal victims receive 50 percent of their award in 6 months, and 50 percent in 11 months. The Administrator has discretion to extend payment if time schedule would severely harm the solvency of the Fund. Once a claim has been paid in full the claimant shall release any outstanding asbestos claims.

5. Failure to certify

If Administrator fails to act on the claim for any reason, the Administrator must notify the claimant and the defendants within 10 days. If the Administrator fails to make such notification the claimant may notify the defendants. Defendants then have 30 days to make a settlement offer for 100 percent of what the claimant would receive under the fund.

6. Failure to pay

If the Administrator certifies the claim, but fails to make the full payment within the payment schedule defendants have 30 days to make a settlement offer for 100 percent of what the claimant would receive under the fund.

7. Appeal

The claimant may appeal any decision of the Administrator in accordance with the appeals procedures provided for in the Act.

8. Acceptance or rejection

The claimant must accept a settlement offer if it equals 100 percent of what they are entitled to under the fund. If it is not, they may reject it. This decision must be made in 20 days in writing.

9. Opportunity to cure

If the claim was not certified by the Administrator or the defendant settlement offer was rejected; defendants have 10 business days to amend the offer. If it is still is not accepted, the individual would be entitled to a settlement of 150 percent of what they would receive under the fund.

10. Failure to make offer

If the defendants fail to make a settlement offer then the individual is entitled to a settlement of 150 percent of what they would receive under the Fund.

11. Failure to pay

If the defendants or Administrator fails to make the payments within the required payment schedule then the individual is entitled to a settlement of 150 percent of what they would receive under the Fund.

12. Return to court

If 9 months after the claim is filed, the Administrator has not certified or paid the claim, or if the defendants have not paid the claim, and the Fund has not been certified as operational then the individual may pursue their claim in court where the case was pending or in the appropriate state or federal court if the claim arose after enactment.

13. Recovery of costs

Defendants, who pay the claim either through the settlement procedure or in a court action, would receive a credit with the fund up to 100 percent of what the fund would have paid the claimant, unless the Administrator finds that the defendant's settlement offer was not in good faith.

This streamlined process is fair to both victims and defendants. It ensures that claims for terminal individuals are handled in an expedited manner, and it provides businesses with the opportunity to resolve claims that the Administrator or claims facility cannot.

VI. Section-by-Section Analysis and Discussion

Sec. 1. Short title; table of contents.

Sec. 2. Findings and purpose.

Sec. 3. Definitions.

TITLE I.—ASBESTOS CLAIMS RESOLUTION

Subtitle A.—Office of Asbestos Disease Compensation

Sec. 101. Establishment of Office of Asbestos Disease Compensation

The FAIR Act establishes the Office of Asbestos Disease Compensation (the Office) within the Department of Labor for the purpose of providing timely and fair compensation to individuals with asbestos-related injuries in a no-fault, non-adversarial manner. If the Office does not sunset early (see sunset provisions in Title IV), then it shall terminate automatically no later than twelve (12) months after the Administrator certifies that the Asbestos Injury Claims Resolution Fund (the Fund) has not paid out claims in twelve (12) months and does not have any debt obligations to pay.

An Administrator, appointed by the President with the advice and consent of the Senate, will head the Office for a term of five (5) years and report directly to the Assistant Secretary of Labor for the Employment Standards Administration. The Administrator is

charged with the following responsibilities: (1) paying all administrative expenses out of the Fund; (2) promulgating rules, regulations, and procedures necessary to implement the Act, including rules expediting the consideration and payment of claims for exigent claims as soon as possible after date of enactment; (3) contracting and appointing of services and personnel; (4) selecting Deputy Administrators, one to handle the claims administration and resolution process and one to handle the fiscal management of the Fund; and (5) managing the assets to ensure the financial integrity of the Fund.

The Freedom of Information Act (FOIA) shall apply to the Office and Asbestos Insurers Commission. The Act provides a process by which a participant or claimant may seek an exemption from disclosing their confidential records under FOIA. The Act charges the Administrator and Chairman of the Asbestos Insurers Commission with establishing: (1) procedures for handling the commercial and financial records of participants marked confidential; (2) a pre-submission process determine the confidential nature of information pertaining to insurer reserves and asbestos-related liabilities of participants; and (3) procedures for determining the confidential nature of personnel and medical files of claimants.

Sec. 102. Advisory Committee on Asbestos Disease Compensation

The Administrator shall establish an Advisory Committee on Asbestos Disease Compensation (the Advisory Committee) no later than one hundred twenty (120) days after the date of enactment to advise the Administrator on all matters related to the functioning, maintenance, and administration of the Fund. The Advisory Committee shall be composed of twenty (20) members appointed for three (3) year terms, except that of the first members appointed, an equal number shall be appointed for one (1), two (2), and three (3) year terms. Of the members appointed, the Administrator shall designate a Chairperson and a Vice Chairperson.

The Majority and Minority Leaders of the Senate, the Speaker of the House, and Minority Leader of the House shall each appoint four (4) members. Of the four, two (2) shall represent the interests of the claimants, at least one of whom having been recommended by national labor federations. The other two (2) shall represent the interests of the participants, one of whom shall represent the interests of the insurer participants and the other the interests of the defendant participants. The Administrator shall appoint four (4) members with qualifications and expertise in fields relevant to the administration of the Fund. None of the members may have earned more than fifteen (15 percent) of their income by serving in matters related to asbestos litigation as consultants or expert witnesses for each of the five (5) years before their appointments.

The Advisory Committee shall meet at the call of the Chairperson, or the majority of its members, at least four (4) times per year during the first five (5) years of the asbestos compensation program and at least two (2) times per year thereafter. The Administrator shall provide such information and administrative support to the Advisory Committee as reasonably necessary to enable it to carry out its responsibilities.

Sec. 103. Medical Advisory Committee

The Administrator shall establish a Medical Advisory Committee to provide expert advice regarding medical issues. None of the members may have earned more than fifteen (15 percent) of their income by serving in matters related to asbestos litigation as consultants or expert witnesses for each of the five (5) years before their appointments.

Sec. 104. Claimant Assistance

The Administrator shall establish a comprehensive claimant assistance program no later than one hundred eighty (180) days after the date of enactment to aid claimants in the claims process. The program shall provide for the establishment of resource centers. To the extent possible, the program shall locate the centers in areas within the Department of Labor, or other Federal agencies, in areas with large concentrations of potential claimants. The Administrator may enter into contracts with outside organizations that do not have a financial interest in the outcome of claims for the purpose of providing services to potential claimants.

Legal Assistance: The Administrator shall establish a legal assistance program to aid claimants in legal representation issues. As part of the program, the Administrator will maintain a list of attorneys who are willing to provide their services on a pro bono basis. The Administrator shall provide claimants notice of and information relating to available pro bono legal services and any limitations on attorneys fees. Further, an attorney shall provide an individual notice of pro bono services for legal services available before the individual becomes a client with regard to an asbestos claim.

An attorney may not receive in attorney's fee awards any more than five (5 percent) of a final award made under the Fund. If a representative violates these provisions, that attorney will be fined the greater of five thousand ($5000.00) dollars or twice the amount received by the representative for services rendered in connection with the violation.

Sec. 105. Physicians Panels

The Administrator shall establish Physicians Panels for the purpose of making medical determinations and performing other such functions that are necessary to carry out the Act. The Administrator shall establish enough Panels to ensure the efficient conduct of the medical review and exceptional medical claims process. The Administrator may periodically adjust the number of Physicians Panels on the basis of a mandatory periodic review.

To serve on a Physicians Panel, a person shall be a licensed physician in any State, board-certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology, and has earned no more than fifteen (15 percent) of their income as an employee of a participating defendant or insurer or law firm representing any party in asbestos litigation or as a consultant or expert witness for each of the five (5) years before appointment. Each panel shall be composed of three (3) physicians. The Administrator shall designate two (2) of the physicians on each panel to participate in each claim submitted to the Panel. The third physician shall only participate in the event of a disagreement.

Sec. 106. Program Startup

Interim Regulations: The Administrator shall promulgate interim regulations and procedures for the processing of claims and the operation of the Fund no later than ninety (90) days after the date of enactment.

Interim Personnel: This subsection grants the Secretary of Labor, the Assistant Secretary of Labor for the Employment Standards Administration, and the Administrator permissive authority to engage in certain activities that will ensure the swift start up of the Act. Specifically, the Secretary of Labor and the Assistant Secretary of Labor for the Employment Standards Administration may make such personnel and resources available to the Administrator. Further, the Administrator is authorized to contract with individuals and entities with experience handling financial matters and reviewing workers' compensation, occupational disease, or similar claims.

Exigent Health Claims: The Administrator shall develop procedures for the expedited categorization, review, and payment of exigent health claims. To qualify for treatment as an exigent health claim: (1) a claimant must provide a diagnosis of mesothelioma meeting the requirements of the Act[39] or documentation of diagnosis in the form of a declaration or affidavit by an examining physician of a terminal asbestos-related disease with the life expectancy of less than one year[40]; or (2) if the spouse or child of a exigent claimant who was living when the claim was filed (or who was living on the date of enactment if the claim is filed before the implementation of interim regulations) but has since died of an asbestos-related disease, the spouse or child must provide information establishing that the claimant was eligible to receive compensation and has not already received compensation from the Fund. The Administrator may designate additional categories of claims that qualify as exigent health claims in final regulations.

The Act authorizes the Administrator to contract with a claims facility to enter into settlements with claimants. The processing and payment of such claims shall be subject to the rules and regulations enacted under the Act.

Extreme Financial Hardship Claims: The Act grants the Administrator permissive authority to give expedited treatment to additional categories of claim on the basis of extreme financial hardship.

Interim Administrator: The Assistant Secretary of Labor for the Employment Standards Administration shall serve as the Interim Administrator until the Administrator is appointed and confirmed. The Interim Administrator shall perform the responsibilities and have the authority conferred on the Administrator by the Act. Prior to the promulgation of final regulations relating to claims processing, the Interim Administrator shall issue interim regulations and may prioritize claims processing based on the severity of ill-

[39] Pursuant to 121(d)(9), the claimant must submit a diagnosis of mesothelioma completed by a board certified pathologist and evidence that the claimant was exposed to asbestos while working, brought home by an individual exposed to asbestos at work, living in the vicinity of a operation that regularly released asbestos fibers in the air, or in some other manner.

[40] The physician must have examined the claimant within one hundred twenty (120) days of the date of completing the diagnosing document.

ness and likelihood that exposure to asbestos was a substantial contributing factor to causing the illness.

Stay of Claims; Return to the Tort System: As of the date of enactment, any asbestos claim pending in State or Federal court shall be subject to a stay unless: (1) the presentation of evidence has begun before an impaneled jury or judge, as trier of fact, or (2) a verdict, final order, or final judgment has been entered by a trial court.[41]

Exigent Health Claims.—This section provides for the settling of exigent health claims filed before and after the date of enactment.

Procedures for Settlement of Exigent Health Claims.—A claimant with an exigent health claim wishing to settle the claim may file a claim or a notice of intent to seek a settlement with the Administrator at any time prior to certification of an operational Fund or claims facility. If the individual files a notice of intent, the claimant then has sixty (60) days to provide the Administrator with the information necessary to file a claim. Filing a claim shall require submission of the following information: (1) the amount received or entitled to be received as a result of collateral source settlements and copies of all such settlements; (2) any information that the claimant would be required to submit in support of a claim against the Fund; (3) certification by the claimant that the information provided is true and complete; and (4) for exigent claims arising after the date of enactment, a good faith identification of every defendant that the claimant could have appropriately brought an action against in a civil action for the asbestos injury.

If the claimant submits all of the required information on time, the Administrator then has sixty (60) days to determine whether the claim is an approved exigent claim. If so, then the Administrator shall issue a certification to all parties that the claim is an approved exigent health claim valued at a set amount (based on the award value under the Act subtracted by the amount of collateral source compensation) and pay the claimant in that amount.

If the claimant fails to submit all of the required information on time or there is a deficiency in the application, then the claimant shall have thirty (30) days to perfect the claim.

If the claimant fails to perfect the claim or is determined not to be eligible as an exigent health claim, then the claimant will not be allowed to proceed.

The Administrator or claims facility must provide notice to the claimant within ten (10) days of failure to act if unable to process and certify the claim and must immediately refer the claim to affected defendants. If the Administrator or claims facility fails to provide such notice, then the claimant may provide notice to defendants to prompt a settlement.

Within thirty (30) days of receiving such a notice from the plaintiff of failure to process or from the Administrator of failure to process or to pay, the defendant may serve a good faith offer. This amount—or the aggregate, if multiple offers are made—may not exceed the amount that the claimant would be entitled to under the Fund.

The claimant must accept or reject the offer within twenty (20) days of receiving an offer. If the claimant accepts the offer, the set-

[41] See Section 403(d)(2).

tlement is subject to court approval, which must be given within twenty (20) days of the acceptance. The court may only reject an offer upon a finding of bad faith or fraud.

If the offer is rejected, then the defendant has ten (10) days to amend the offer. If the offer is the same of the amount that the claimant would receive under the Fund, then the claimant must accept the offer. If the claimant rejects the offer again (for example, because the offer was less than what the claimant is entitled to receive under the fund) or the defendant fails to amend the offer, then the amount the claimant is entitled to receive through the settlement is increased to one hundred fifty (150 percent) percent of the Fund award. If the claimant fails to make an offer at all, then the amount the claimant is entitled to receive through the settlement is increased to one hundred fifty (150 percent) percent of the Fund award.

Payment Schedule.—The Administrator has the discretion to extend these time periods if paying out the claims on the protracted time table would severely harm the solvency of the Fund. The amount the claimant is entitled to receive through the settlement is increased to one hundred fifty (150 percent) percent of the Fund award if there is a failure to pay according to this section.

Mesothelioma Claimants.—Initial payment of fifty (50 percent) percent of the award in thirty (30) days of acceptance and payment of the remaining fifty (50 percent) percent in six (6) months of acceptance. Administrator's discretion allows for payments to be extended to 50 percent in six (6) months and 50 percent eleven (11) months after acceptance;

Other Terminal Claims.—Initial payment of fifty (50 percent) percent of the award in six (6) months of acceptance and payment of the remaining fifty (50 percent) percent in eleven (11) months of acceptance. Administrator's discretion allows for payments to be extended to 50 percent in first year and 50 percent second year after acceptance;

Recovery of Costs.—A defendant who pays out a claim in accordance with this section may recover the cost of settling by deducting it from future payments to the Fund.

Continuation of Health Claims.—After 9 months an exigent claimant may pursue their claim in the court where the case was stayed or in the appropriate state or federal court for claims arising post enactment so long as the Fund is not operational, and if the claim has not been settled or if the claim has not been paid in full.

The continuation of an exigent claim in the tort system shall not be subject to capped damages or attorney's fees caps, and shall not be cut off by a certification that the fund has become operational.

Asbestos Claims.—Pursual of Asbestos Claims in Federal or State Court—If the Administrator cannot certify to Congress that the Fund is fully operational and handling all asbestos claims within twenty-four (24) months of the date of enactment, then persons with asbestos claims, except for those with Level I claims, may pursue their claims in the State or Federal court located within the State where the claimant resides or where the asbestos exposure arose. If the defendant cannot be found in one of these forums, then the claimant may pursue the claim in the Federal or State court in the State where the defendant may be found. If the plaintiff alleges that asbestos exposure occurred in more than one coun-

ty or Federal district, the trial court will determine the most appropriate forum for the claim. If the court determines that another forum is most appropriate, then the court shall dismiss the claim. Any relevant statute of limitations shall be tolled during this time.

This section does not preempt or supersede State venue requirements that are more restrictive.

Credit of Claim and Effect of Operational or NonOperational Fund.—If the claimant receives any compensation as a result of pursuing a claim in the court system, then such recovery shall count as collateral source compensation for purposes of handling the claim under the Fund. Any participant who pays a claimant through a court proceeding may recover the cost of the payment by deducting an amount from subsequent payments into the Fund up to the amount that the claimant would have received from the Fund.

Operational Preconditions and Certification.—The Administrator may not certify that the Fund is operational and paying out claims at a reasonable rate until sixty (60) days after the Administrator has published in the Federal Register information pertaining to the funding allocation of defendant participants and the funding methodology of insurer participants (to be done within thirty (30) days of the date of enactment). Upon certification, the Administrator shall publish a notice in the Federal Register that the Fund is operational and paying out claims at a reasonable rate.

Effect of Certification on Claims.—Any non-exigent claim in Federal or State court that has not begun the presentation of evidence before a judge or impaneled jury or is the subject of a verdict, final order, or final judgment by a trial court shall be null and void and reinstated as a claim against the Fund upon the Administrator's certification that the Fund is operational. Claimants may pursue all asbestos-related claims in court upon the Administrator's certification that the Fund cannot become operational.

Non-Operational Certification.—Claimants may pursue all asbestos-related claims in court upon the Administrator's certification that the Fund cannot become operational.

Sec. 107. Authority of the administrator

This section grants the Administrator the authority to issue subpoenas for and compel the attendance of witnesses within a 200 mile radius, administer oaths, examine witnesses, require the production of books, papers, documents and other evidence, and request the assistance from other Federal agencies with the performance of the duties of the Administrator.

SUBTITLE B.—ASBESTOS DISEASE COMPENSATION PROCEDURES

Sec. 111. Essential elements of eligible claim

Claimants must timely file a claim with the Fund and prove by a preponderance of the evidence that they have an eligible disease or condition as demonstrated by evidence that meets the requirements established in the claims procedures.

Sec. 112. General rule concerning no-fault compensation

It is the intent of the FAIR Act to provide a process to compensate victims in a faster and more certain manner than provided

by the current system. The FAIR Act, therefore, removes the burden that a claimant would ordinarily bear to establish that the injury was the fault of a particular party. Further, under the FAIR Act, claimants do not have to prove that an injury resulted from the negligence or other fault of any other person.

Sec. 113. Filing of claims

A claimant, or the personal representative of a deceased or incompetent claimant, must file claims with the Office within five (5) years from the time the claimant received a medical diagnosis and medical test results sufficient to satisfy the criteria for the disease level for which the claimant is seeking compensation. If the Act preempts a timely filed pending asbestos claim, then the asbestos claimant has five (5) years from the date of enactment to file with the Fund. Failure to file with the Office within the prescribed time period has the effect of extinguishing the claim and prohibiting recovery. This section specifically provides that the Act shall not treat a claim against a bankruptcy trust that has received initial payments and due to receive future payment from such a trust as a pending claim for purposes of filing against the Fund.

The Act does not bar a claimant who receives an award for an eligible disease level from receiving additional awards for higher disease levels. Further, the Act does not impose a statute of limitations on the claimant for filing claims for additional awards relating to the progression of a non-malignant disease. However, any malignant disease level claim must be filed with the Fund within five (5) years of receiving a medical diagnosis and medical test results sufficient to satisfy the disease level.

The Act contains provisions addressing the effect of multiple injuries for Libby, Montana claimants. Pursuant to this section, if the nonmalignant condition of a Libby, Montana claimant progresses and can prove that the condition has progressed by providing pulmonary function tests, the claimant will qualify for an additional award from the Fund. The Administrator shall offset any previous awards from the Fund against an award granted to a Libby, Montana claimant for the progression of a nonmalignant claim. A Libby, Montana claimant shall qualify for treatment as a Level IV claim if the claimant: (1) provides a diagnosis of a bilateral asbestos-related disease; (2) evidence of TLC or FVC less than eighty (80%) percent; and (3) medical documentation establishing exposure to asbestos as a substantial contributing factor to causing the condition in question to the exclusion of other more likely causes. A Libby, Montana claimant shall qualify for treatment as a Level V claim if the claimant: (1) provides a diagnosis of a bilateral asbestos-related disease; (2) evidence of TLC or FVC less than sixty (60%) percent; and (3) medical documentation establishing exposure to asbestos as a substantial contributing factor to causing the condition in question to the exclusion of other more likely causes. The provisions outlined above regarding the effect of multiple injuries on asbestos claims shall apply if a Libby, Montana claimant develops a malignant level disease.

A claimant must include at a minimum the following information with the claim: (1) name and information pertaining to the identity of the claimant; (2) information pertaining to the identity of any dependants and beneficiaries; (3) relevant employment history, (4)

the asbestos exposure of the claimant, (5) the tobacco use of the claimant; (6) medical records identifying the asbestos-related disease; (7) any prior asbestos-related claims, including information pertaining to any collateral sources of compensation, and (8) evidence of non-smoker or ex-smoker status if the claimant asserts such status and seeks compensation under a malignant level.

If the claimant files an incomplete claim, the Administrator shall notify the claimant that the incomplete status of the claim and shall indicate information missing from the claim. Further, the Administrator shall also notify the claimant of assistance services available through the Claimant Assistance Program. The claimant then has a year to supply the missing information. However, failure to provide the information within this timeline will result in the dismissal of the claim.

Sec. 114. Eligibility determinations and claim awards

This section lays out the time period for considering and paying a claim.

When evaluating and determining the eligibility of a claim against the Fund, the Administrator shall consider: (1) the factual and medical evidence presented by the claimant; (2) the medical determinations of the Physicians Panel; and (3) the results of any investigation conducted determining whether the claim satisfies the eligibility criteria.

The Administrator has ninety (90) days after the filing of the claim to provide the claimant with a proposed decision on the claim. If the Administrator fails to provide the claimant with a proposed decision within one hundred eighty (180) days after filing the claim, then the claim shall be deemed accepted and the claimant entitled to payment. However, if the Administrator subsequently rejects the claim in whole, then the claimant shall receive no further payments. Alternatively, if the Administrator subsequently rejects the claim in part, then future payments shall be adjusted accordingly.

A claimant has ninety (90) days from the date of issuance of a proposed decision: (1) to submit a written request for a hearing on the decision; or (2) to make a written request for a review of the written record. A representative of the Administrator shall conduct the hearing in a manner as to best ascertain the rights of the claimant. It is within the discretion of the Administrator's representative to grant a subpoena requested by the claimant. The Administrator shall issue a final decision no later than: (1) one hundred eighty (180) days after receiving the request for a hearing on the decision; or (2) ninety (90) days after receiving the request for review on the written record. If the claimant does not make a request for obtaining a review either on the written record or in a hearing, then the Administrator shall issue a final decision. If the final decision materially differs from the proposed decision, then the claimant is entitled to review of the final decision.

A claimant may authorize an attorney or other individual to represent the claimant in any proceeding under this Act.

Sec. 115. Medical evidence and auditing procedures

This section authorizes the Administrator to establish procedures to ensure that accuracy of medical evidence submitted in support of a claim against the Fund.

The Administrator will establish procedures: (1) to audit medical evidence submitted as part of claims ensuring the accuracy of x-ray readings and pulmonary function tests; (2) to consider the appeal by a provider of a finding of non-compliance with medical standards; (3) to evaluate x-rays submitted in support of a claim; (4) to maintain a list of at least fifty (50) certified B readers that may participate in independent reviews of x-rays; and (5) to audit pulmonary function test results submitted as part of claim. The Office shall pay for the cost of all additional evaluations and tests required under this section.

The Administrator has the authority to find the x-ray readings of certain providers inadmissible if the Administrator determines that the provider fails to comply with prevailing medical practices. A non-compliant provider may appeal the Administrator's determination pursuant to procedures established by the Administrator.

Pursuant to procedures established by the Administrator, independent certified B readers shall evaluate x-rays submitted in support of a claim on a random basis. If the independent B reader disagrees with the grading of the submitted x-ray, then a second independent certified B reader shall review the x-ray. The Administrator shall take into account the findings of the two independent B readers when considering the submitted claim.

When assessing the smoking status of Malignant Level VI–IX claimants, the Administrator shall have the authority to obtain records of past medical treatment and evaluation, affidavits of appropriate individuals, applications for insurance and supporting materials, and employer records of medical examinations. Further, the Administrator may require the performance of blood tests—including the performance of a required serum cotinine screening—or other appropriate medical tests on Malignant Level VI–VIII claimants who assert that they are non-smokers or ex-smokers.

Any false information submitted under this section shall be subject to criminal or civil penalties.

SUBTITLE C.—MEDICAL CRITERIA

Sec. 121. Medical criteria requirements

This section establishes the latency, diagnostic, exposure and medical criteria required of an asbestos claim for each of the nine (9) disease levels. Levels I through V include nonmalignant asbestos-related disease or conditions and levels VI through IX include malignant diseases.

Latency: Claimants must provide a statement from a doctor or a history of exposure stating that at least ten (10) years elapsed from the date of the initial exposure to the date of the initial diagnosis of any asbestos-related injury.

Diagnostic Criteria: This section sets forth diagnostic criteria that track the typical elements of a medical diagnosis, such as an in-person physical examination by the claimant's doctor, a thorough review of the claimant's medical, smoking and exposure his-

tory by the claimant's doctor, and a review of other potential causes of the claimant's illness.

For levels I through V, the claimant must provide a diagnosis based on an in-person physical examination by the claimant's doctor providing the diagnosis, an evaluation of smoking history and exposure history before making a diagnosis, an x-ray reading by a certified B-reader. Level III through V claims must also include a pulmonary function test. For deceased Level I through V claimants, the claim must include a physician's report based on pathological evidence or an x-ray reading by a certified B-reader. For levels VI through IX, the claimant must provide a diagnosis based on a physical examination or on findings by a board-certified pathologist. For deceased Level VI through IX claimants, the claim must include a diagnosis of the disease by a board-certified pathologist and a physician's report based upon a review of the claimant's medical records.

Exposure Criteria: A claimant must demonstrate meaningful and credible evidence of exposure to asbestos in the United States, its territories or possessions, or while a United States citizen, while an employee of an entity organized under any Federal or State law regardless of location, or while a United States citizen while serving on any United States flagged or owned ship, provided the exposure results from such employment or service.

Proof of Exposure—The claimant may demonstrate exposure to asbestos by affidavit of the claimant (or, if deceased, a co-worker or family member of the claimant) or by alternative documentation, such as invoices, construction or similar records, or other reliable evidence.

"Take-Home" Exposure—Alternatively, the claimant may satisfy the exposure criteria by demonstrating that the claimant was exposed to asbestos brought home by an occupationally exposed person. A claimant establishing "take home" exposure must demonstrate that: (1) the claimant lived and used the residence of an occupationally exposed person during the required exposure time; and (2) the occupationally exposed person can satisfy the exposure requirements for the level claimed. It is understood that household members may travel to a certain extent for work or vacation and still be considered as "living with" another member of the household. Except for Level IX claims, a Physicians Panel will review all "take home" exposure claims determine whether the causal relationship between the take home exposure to asbestos is comparable to the occupationally exposed person.

Libby, Montana—The Administrator shall waive the occupational exposure requirements for workers in the mining and milling operations in Libby, Montana, and persons who lived or worked within a 20-mile radius of Libby, Montana for at least 12 consecutive months prior to December 31, 2004.

Exposure Presumptions—The Administrator shall set exposure presumptions prescribing time periods in which workers employed in specific industries or occupations were substantially exposed to asbestos. A claimant must demonstrate that the claimant worked in the industry for the relevant time period to be entitled to the presumption. However, these presumptions are not conclusive of substantial exposure to asbestos and may be rebutted by information to the contrary. Further, even if the claimant can demonstrate

entitlement to a presumption of exposure, the claimant must still satisfy the exposure and medical criteria requirements.

For the first five (5) years of the operational Fund, the presumptions will at a minimum include those identified in the 2002 Trust Distribution Process of the Manville Personal Injury Settlement Trust as of January 1, 2005. Thereafter, the Administrator may modify the presumptions on the basis of supporting evidence. These presumptions are not conclusive of substantial exposure to asbestos.

Asbestos disease levels

Non-malignant Conditions—For non-malignant conditions (Levels I to V), the medical criteria generally require a diagnosis of bilateral pleural plaques or thickening, bilateral pleural calcification, diffuse pleural thickening, bilateral pleural disease of grade B2, or asbestosis based on x-ray readings or pathology. Level II includes claimants with mixed obstructive and restrictive disease based on pulmonary function testing and supporting medical documentation, such as a written opinion by the examining or diagnosing physician according to diagnostic guidelines establishing that asbestos exposure was a contributing factor to the disease. Mild, moderate and severe impairment is required for Levels III, IV, and V, respectively, based on pulmonary function test results and supporting medical documentation, such as a written opinion by the examining or diagnosing physician according to diagnostic guidelines establishing that the claimant's asbestos exposure is a substantial contributing factor in causing the pulmonary condition in question. Level I requires five (5) years cumulative occupational exposure, while levels II through V require five (5) years substantial occupational exposure weighted based on time and industry ("weighted years").

Malignant Conditions—For malignant conditions (Levels VI to IX), the medical criteria require a diagnosis of mesothelioma, primary lung cancer, or other cancer.

Level VI (other cancers) claims include (i) a diagnosis of primary colorectal, laryngeal, esophageal, pharyngeal, or stomach cancer; (ii) evidence of a bilateral asbestos-related nonmalignant disease; (iii) fifteen (15) weighted years of exposure to asbestos; and (iv) supporting medical documentation , such as a written opinion by the examining or diagnosing physician according to diagnostic guidelines establishing that the claimant's exposure to asbestos was a substantial contributing factor in causing the claimant's other cancer. Level VII claims must include: (i) a diagnosis of primary lung cancer; (ii) evidence of bilateral pleural plaques, thickening, or calcification as established by chest x-ray or any such diagnostic methodology supported by the findings of the Institute of Medicine; (iii) evidence of twelve (12) or more weighted years of substantial occupational exposure; and (iv) medical documentation, such as a written opinion by the examining or diagnosing physician according to diagnostic guidelines, establishing asbestos exposure as a substantial contributing factor in causing the cancer. Level VIII claims must include: (i) a diagnosis of a primary lung cancer disease; (ii) evidence of asbestosis based on a chest x-ray showing irregular opacities and the relevant weighted years of exposure; and (iii) supporting medical documentation, such as a written opin-

ion by the examining or diagnosing physician according to diagnostic guidelines establishing that the claimants exposure to asbestos for ten (10) or more weighted years was a substantial contributing factor in causing the claimant's cancer. Level IX claims shall include: (i) a diagnosis of malignant mesothelioma; and (ii) credible evidence resulting from occupational, take home, or other identifiable exposure to asbestos. Diagnosis of all of the malignant disease levels must be made by a board certified pathologist.

Study of "other cancers" and causation: This subsection calls for the Institute of Medicine (IOM) to complete a study no later than April 1, 2006 of causal link between asbestos exposure and the other cancers: colorectal, laryngeal, esophageal, pharyngeal and stomach cancers. Congress, the Administrator, the Advisory Committee on Asbestos Disease Compensation or the Medical Advisory Committee, and the Physicians Panels shall receive a copy of the study. The findings of the study shall have a binding effect on the Administrator and the Physicians Panels when determining whether asbestos exposure is a substantial contributing factor to causing Level VI cancers. If the study finds that asbestos is not a substantial contributing factor to causing any one of the Level VI cancers, then claims may not be filed or compensated for the relevant Level VI diseases.

Study of CT Scans: This subsection calls for the IOM in conjunction with the National Institutes of Health (NIH) to complete a study no later than April 1, 2006 of using CT scans as a diagnostic tool of asbestos indicators. Specifically, the study will determine whether the medical profession accepts the use of CT scans as a tool to detect asbestos indicators and whether professional standards of practice exist for the Administrator to rely on CT scan evidence. Congress, the Administrator, the Advisory Committee or Medical Advisory Committee, and the Physicians Panels shall receive a copy of the study. The findings of this report shall have a binding effect on the Administrator and Physicians Panels in determining what constitutes reliable and acceptable evidence for Level VII claims.

Exceptional Medical Claims: This provision allows a claimant to have a claim designated an exceptional medical claim if the claim does not meet the medical criteria requirements of the bill or has been found ineligible for compensation based on the failure to meet the medical criteria only. The claimant must provide a report from a physician meeting the requirements of this section which includes (i) a complete review of the claimant's medical history and current condition, (ii) additional material as required by the Administrator, and (iii) a detailed explanation as to why the claim meets the standard for designating exceptional medical claims.

A Physicians Panel shall review all applications for designation as an exceptional medical claim. For the claim to receive treatment as an exceptional medical claim, a Physicians Panel must find that the claimant cannot meet the requirements for reasons beyond the individual's control, but can through comparably reliable evidence establish a condition similar to one that would satisfy the requirements. In reaching its determination, a Physicians Panel may request additional reasonable testing. Further, the claimant may submit CT scans in addition to an x-ray.

If a Physicians Panel certifies a claim as an exceptional medical claim, it must designate the disease category for which the claimant may seek compensation and refer the claim to the Administrator for a determination on eligibility on the remaining diagnostic, latency and exposure requirements. In making this determination, the Administrator shall give due consideration to the recommendation of the Physicians Panel. If a Physicians Panel denies claimant's application for designation as an exceptional medical claim, then the claimant may resubmit application based on new evidence, specifying the new evidence that serves as the basis of the resubmission.

Libby, Montana—Due to ongoing studies regarding the medical conditions of the residents of Libby, Montana, such claimants have the option to have their claims designated as exceptional medical claims. A Physicians Panel shall review all such applications made by Libby, Montana claimants.

Nonmalignant Levels II–IV Libby, Montana claimants that receive a certificate of medical eligibility from the Administrator or a Physicians Panel shall receive an award no less than the amount awarded to Level IV asbestosis claimants ($400,000). Malignant level Libby, Montana claimants shall receive an award corresponding to the malignant disease category designated by the Administrator or Physicians Panel. To qualify for Level IV compensation, a Libby, Montana claimant must provide a diagnosis and evidence of an asbestos-related disease as well as supporting medical documentation establishing that asbestos exposure as a substantial contributing factor to causing the condition to the exclusion of other causes.

Study of Vermiculite Processing Facilities—This subsection calls for the Agency for Toxic Substances and Disease Registry (ATSDR) to conduct a study in conjunction with the ongoing National Asbestos Exposure Review (NAER) of all Phase 1 sites that: (1) received vermiculite ore from Libby, Montana; (2) the Environmental Protection Agency (EPA) has mandated further action on the basis of contamination; and (3) was an exfoliation facility that processed at least one hundred thousand (100,000) tons of vermiculite from the Libby, Montana mine. The study shall determine whether the overall nature of these sites is substantially equivalent to that of Libby, Montana. The findings of this study shall have a binding effect on the Administrator in determining whether the claims of residents at these sites deserve the same rights as Libby, Montana claimants.

Naturally Occurring Asbestos—Claimants exposed to naturally occurring asbestos may file and seek designation as an exceptional medical claim.

Guidelines for CT Scans: This subsection calls for the American College of Radiology to develop guidelines and methodology for the use of CT scans as a diagnostic tool. The American College of Radiology shall develop these guidelines after consulting with the American Thoracic Society, American College of Chest Physicians, and IOM.

SUBTITLE D.—AWARDS

Sec. 131. Amount

Eligible claims will be paid as follows:

	Disease/condition	Amount of award †
Level I	Asbestosis/Pleural Disease A	Medical Monitoring
Level II	''Mixed'' Disease	$25,000
Level III	Asbestosis/Pleural Disease B	100,000
Level IV	Severe Asbestosis	400,000
Level V	Disabling Asbestosis	850,000
Level VI	Other Cancers	200,000
Level VII	Lung Cancer with Pleural Disease	
	Smokers	300,000
	Ex-Smokers	725,000
	Nonsmokers	800,000
Level VIII	Lung Cancer with Asbestosis	
	Smokers	600,000
	Former Smokers	975,000
	Nonsmokers	1,100,000
Level IX	Mesothelioma	1,100,000

† Scheduled awards will be indexed for future inflation based on a cost of living adjustment.

Level IX Adjustments: This subsection grants the Administrator discretionary authority to adjust Level IX awards. The Administrator may adjust Level IX awards upon a determination that such an adjustment would have a neutral effect on the revenue. Specifically, the Administrator may choose to increase the awards for Level IX claimants under 51 and decrease the awards of Level IX claimants who are 65 or older. However, before making such adjustments, the Administrator must publish notice of and plan for such adjustments in the Federal Register.

FELA Adjustments: This subsection provides for the development of special FELA adjustments. Representatives of railroad management and labor have forty-five (45) days after the date of enactment to submit to the Administrator a joint proposal on the eligibility requirements for special FELA adjustments, which the Administrator shall promulgate into regulations no later than ninety (90) days after the date of enactment.

If railroad management and labor are unable to agree on a joint proposal, then the Administrator shall appoint an arbitrator acceptable to both railroad management and labor to determine the benefits available under the special adjustment. After meeting with the representatives of management and labor, the arbitrator shall submit the benefits levels to the Administrator no later than thirty (30) days after appointment, which the Administrator will then promulgate into regulations. The parties to the arbitration may file with the U.S. District Court for the District of Columbia to review the Administrator's order. The court may affirm, set aside (in whole or in part), or remand the order of the Administrator for further action.

To qualify for a special FELA adjustment, a claimant filing an asbestos-related FELA claim, or otherwise eligible to bring such a claim, must demonstrate: (i) employment in the railroad industry; (ii) exposure to asbestos as part of employment; (iii) the nature and severity of the asbestos-related injury; and (iv) evidence establishing eligibility for a disease level of Level II or greater. The amount of the special adjustment shall reflect the type and severity

of the disease and shall be one hundred and ten (110%) percent of the average amount a person with the disease would have received in the five (5) year period prior to enactment.

Sec. 132. Medical monitoring

This section provides that Level I claimants will receive reimbursements for all reasonable costs (not covered by insurance) for x-rays, physical examinations, and pulmonary function tests every three years, which will provide the claimant with information as to whether he or she has a compensable illness. Although the claimant may choose which physician conducts such tests, the Administrator will provide eligible claimants with a list of providers in the claimant's area that can provide such services. Filing a claim for reimbursement of medical monitoring costs does not start the clock on the five (5) year statute of limitations for filing a claim for compensation for an eligible condition or disease.

Sec. 133. Payment

This section provides for the payment of asbestos awards. A claimant shall receive payment of their award over a period of three (3) years and in no event more than four (4) years, if necessary to ensure the overall solvency of the Fund, from the date of final adjudication of the claim. The Act establishes a presumption that the claimant shall receive forty (40%) percent of the payment in year 1, thirty (30%) percent in year 2, and thirty (30%) percent of the total amount in year 3. However, the claimant shall in no event receive less than fifty (50%) percent of the award in the first 2 years of the payment period. Claimants may also elect to receive their benefits in the form of an annuity. All benefits are non-taxable and not deemed to be a Medicare benefit. Payment of the asbestos claim shall have the effect of completely satisfying the claim. As such, any claimant receiving payment of an award under the Fund may not later pursue a claim for the same injury in the tort system.

Lump Sum Payments—If a mesothelioma claimant is alive on the date that the Administrator receives notice of eligibility, then the claimant shall receive the full payment of the award in the form of one lump sum no later than thirty (30) days from the date the Administrator approves the claim. If this shortened timeline would threaten the timeline of the Fund, then the Administrator may adjust the time period for paying the claim. However, the Administrator shall ensure that the claimant receives payment no later than the shorter of: (1) six (6) months from the date that the Administrator approves the claim; or (2) eleven (11) months from the date the claimant filed the claim.

Expedited Payments—Exigent health claimants with a terminal diagnosis of less than a year and the spouses or children of exigent health claimants who were living when the claim was filed with the Fund and has since died from an asbestos-related disease shall receive full payment of their claims no later than the shorter of: (1) six (6) months from the date the Administrator approves the claim; or, (2) one (1) year from the date that claimant filed the claim. If this shortened timeline would severely harm the solvency of the Fund, then the Administrator may adjust the time period for paying the claim. However, the Administrator shall ensure that the

claimant receives payment no later than the shorter of: (1) one (1) year from the date Administrator approves the claim; or (2) two (2) years from the date the claimant filed the claim.

Sec. 134. Setoffs for collateral source compensation and prior awards

This section provides for the reduction of claimant awards by an amount equal to any collateral source or prior award that the claimant has received or may receive. This includes any amounts that the claimant has received as a result of judgment or settlement for an asbestos related injury serving as the basis for the underlying claim from a defendant, its insurer, or compensation trust.

Collateral sources do not include worker's compensation and veteran's benefits. Further, prior awards from the Fund for non-malignant disease shall not set off subsequent awards for malignant diseases unless the claimant received a diagnosis of the malignant disease before receiving compensation for the non-malignant disease.

Sec. 135. Certain claims not affected by payment of awards

This section provides that payment of an award shall not affect a claimant's claim against a party relating to insurance payments or workers' compensation. As such, the payment of an award shall not be considered a form of compensation or reimbursement for a loss for the purpose of imposing liability on any such party. The section is intended to preserve asbestos claimants' ability to obtain payments such as life or health insurance or workers compensation for asbestos-related injuries and to make clear that claimants will not be required to provide reimbursement of such payments if they receive an award under the Fund. The section is not intended to permit asbestos claimants to pursue direct actions or other litigation in the tort system against insurance companies, based on insurance provided to defendants that is preempted under the Act. No subrogation is allowed as a result of a claimant receiving an award from the Fund.

TITLE II.—ASBESTOS INJURY CLAIMS RESOLUTION FUND

SUBTITLE A.—ASBESTOS DEFENDANTS FUNDING ALLOCATION

Sec. 201. Definitions

Sec. 202. Authority and tiers

The Act required defendant participants, in accordance with their assigned tiers and subtiers, to pay over the life of the Fund no more than $90 billion, less any bankruptcy trust credits. Defendant participants will generally be placed in tiers based on historical expenditures on asbestos claims, including costs related to defense and indemnity, and further subdivided based on revenues.[42] The Administrator shall assign each defendant to a tier and determine the amount that each defendant participant shall be

[42] It is the intent of the Committee that the amounts contributed by defendants and insurers be tax deductible and that claim awards and the growth of the Asbestos Claims Resolution Fund be tax-free, consistent with the good public policy. The Judiciary Committee and Finance Committee will work together to insert the appropriate language for Senate floor consideration of this bill.

required to pay into the Fund according to the guidelines below. Any appeal of the Administrator's determination shall receive an expedited review.

Bankruptcies Not Caused by Asbestos Liability: This section allows a company to proceed with its bankruptcy if it was not caused by asbestos liabilities. Specifically, the debtor company is permitted to proceed with the filing and approval of the bankruptcy reorganization plan. And any asbestos compensation trust established pursuant to such plan, will be pursuant to other provisions in this Act, be incorporated in the Asbestos Injury Claims Resolution Fund. Therefore, any company that filed for chapter 11 protection prior to January 1, 2003 and has not substantially consummated a plan of reorganization as of the date of enactment of this Act, may petition to proceed with its bankruptcy filing if asbestos liability was not the sole or precipitating cause of its bankruptcy. The presiding bankruptcy court shall make this determination after notice and a hearing upon motion filed by the entity within 30 days of the date of enactment of this Act, which motion shall be supported by an affidavit or declaration of the Chief Executive Officer, Chief Financial Officer, or Chief Legal Officer of that company, and copies of the entity's public statements and filing for chapter 11 protection that asbestos liability was not the sole or precipitating cause of the entity's chapter 11 filing. The bankruptcy court shall hold a hearing and make its determination within 60 days of when the motion is filed. Any judicial review of this determination must be an expedited appeal and limited to whether the decision was against the weight of the evidence presented.

If the bankruptcy court's determination is in favor of the company's motion, that company may proceed with the filing, solicitation, confirmation, and consummation of a plan of reorganization, including a trust and channeling injunction pursuant to section 524(g) of the bankruptcy code, notwithstanding any other provisions of this Act, provided that: (1) the bankruptcy court determines that such confirmation is required to avoid the liquidation or the need for further financial reorganization of that company; (2) an order confirming the plan of reorganization is entered by the bankruptcy court within nine months after the date of enactment of the Act, or such longer period approved by the bankruptcy court for good cause shown. To the extent such company or a debtor successfully confirms a plan of reorganization including a 524(g) trust and channeling injunction that involves payments by insurers who are otherwise subject to this Act, such insurers shall obtain a corresponding reduction in the amount otherwise payable by that insurer under this Act.

Tier I: Includes all debtors that, together with all of their direct or indirect majority-owned subsidiaries, have prior asbestos expenditures greater than $1 million. The definition of "debtor" in Sec. 201 includes persons that have a case pending under a chapter of title 11 of the United States Code on the date of enactment of the FAIR Act or at any time during the 1-year period immediately preceding that date, irrespective of whether the debtor's case under that title has been dismissed. Any appeal of determination shall receive an expedited review in the U.S. Circuit Court of Appeals for the circuit in which the bankruptcy is filed.

Other Tiers: Except as otherwise provided, persons or affiliated groups are included in Tier II, III, IV, V, VI or VII according to their prior asbestos expenditures as follows:

Tier II: $75 million or greater.

Tier III: $50 million or greater, but less than $75 million.

Tier IV: $10 million or greater, but less than $50 million.

Tier V: $5 million or greater, but less than $10 million.

Tier VI: $1 million or greater, but less than $5 million.

Tier VII: $5 million or more in FELA liability. (Note: Tier VII is discussed in Sec. 203.)

A defendant participant shall remain in the tier and the subtier that they are assigned to for the life of the Fund, regardless of subsequent events, unless the Administrator finds sufficient evidence to conclude that inclusion within a tier was inaccurate.

Superseding Provisions: The FAIR Act shall supersede all of the following: (i) The treatment of any asbestos claim in a plan of reorganization with respect to a debtor included in Tier I; (ii) any asbestos claim against a debtor in Tier I; and (iii) any agreement, understanding, or undertaking by a debtor or third party with respect to the treatment of any asbestos claim filed in a debtor's bankruptcy case. Further, any plan of reorganization, agreement, understanding, or undertaking by any debtor (including any pre-petition agreement, understanding, or undertaking that requires future performance) or any third party relating to an asbestos claim shall be of no force or effect and no person shall have any right or claim with respect to such agreements.

Specifically, Section 202(f)(2) provides that agreements by debtors relating to asbestos claims are of no force and effect under this Act, regardless of whether such agreements were entered into prepetition or as part of the reorganization process. Section 202(f)(2) also expressly provides that Section 403(c)(3), which preserves preenactment settlement agreements that meet certain criteria, does *not* apply to agreements relating to the asbestos claims of debtors, even if such agreements were entered into prior to the bankruptcy filing. The differential treatment of settlement agreements entered into by solvent entities and debtors is both logical and entirely consistent with the current expectations of parties to those agreements under existing law. Asbestos claimants who have fulfilled all of the conditions to payment under settlement agreements with solvent entities have a defined right to payment on certain terms; if the Act were to abrogate such agreements, it would be effecting a substantial change in the parties' rights and expectations. By contrast, asbestos claimants with claims against debtors under pre-petition settlement agreements have *no* such settled expectations. By operation of the Bankruptcy Code, the rights and obligations of the parties to such agreements were subject to substantial modification once the debtor filed for bankruptcy, and claimants were faced with uncertainty as to how much and when, if at all, they would be paid under any Plan of Reorganization and/or Trust Distribution Plan. One of the benefits of the Act is that it resolves that uncertainty by providing such claimants, if they meet medical and eligibility criteria, with a certain and timely remedy that is not dependent on the complex byways of the bankruptcy process.

Sec. 203. Subtiers

Defendant participants in Tiers II through VI shall be assigned a subtier on the basis of their revenues. Except as otherwise provided, persons or affiliated groups included within Tiers I through VII shall pay the following amounts to the Fund:

Tier I: Tier I debtors shall pay the following amounts according to subtier assignment:

Subtier 1—Operational companies—In general, 1.67024 percent of the debtor's 2002 revenues. However, a debtor otherwise in Subtier 1 shall annually pay $500,000 if it falls within a limited engineering and construction exception. The Administrator may allow a Subtier 1 debtor to meet its payment obligation with other assets if the Administrator determines that an all cash payment would render the debtor's reorganization infeasible. If a debtor with a case pending under chapter of title 11, United States Code, fails to pay its payment obligation on time, the Administrator may seek payment of all or any portion of the amount due from any direct or indirect majority-owned subsidiaries.

Right of Contribution—The liquidation, cancellation, or termination of a debtor participant's interest in a direct or indirect majority-owned foreign subsidiary resulting from foreign liquidation proceedings shall not affect a participant's obligation to the Fund. However, the debtor participant shall have a claim against the foreign subsidiary, as determined by a court of competent jurisdiction, in an amount greater of: (i) the estimated amount of the subsidiary's asbestos liabilities; or (ii) the subsidiary's allocable share of the participant's obligations to the Fund.

Maximum Annual Payment Obligation—Subject to the assessment provisions of the Act and the contributions of debtors in Tier I, Subtiers 2, 3 and the Class Action Trusts, the annual payment obligation of a Tier I, Subtier 1 debtor shall not exceed $80,000,000.

Subtier 2—Non-operational company debtors other than class action trusts must assign all of the unencumbered assets earmarked for the settlement of asbestos claims to the Fund no later than ninety (90) days after the date of enactment.

Subtier 3—Non-operational companies with no assets earmarked for the settlement of asbestos claims shall contribute fifty (50%) percent of all unencumbered assets to the Fund no later than ninety (90) days after the date of enactment.

Calculation of Unencumbered Assets—Unencumbered assets shall be calculated as the total assets, excluding insurance related assets, jointly held, in trust or otherwise, with a defendant participant less all allowable administrative expenses, allowable priority claims under section 507 of title 11, United States Code, and allowable secured claims.

Class Action Trust—The assets of any class action trust established by a court before the date of enactment for the settlement of asbestos claims of any Tier I debtor shall be transferred to the Fund no later than sixty (60) days after that date of enactment.

Tier II: A person or affiliated group in Tier II shall pay the following amounts into the Fund on an annual basis:

Subtier 1—$27.5 million (highest revenues).

Subtier 2—$24.75 million (next highest revenues).

Subtier 3—$22 million (remaining).

Subtier 4—$19.25 million (next to the lowest revenues).
Subtier 5—$16.5 million (lowest revenues).

Each subtier shall contain as close to an equal number of the total defendant participants as possible.

Tier III: A person or affiliated group in Tier III shall pay the following amounts into the Fund on an annual basis:

Subtier 1—$16.5 million (highest revenues).
Subtier 2—$13.75 million (next highest revenues).
Subtier 3—$11 million (remaining).
Subtier 4—$8.25 million (next to the lowest revenues).
Subtier 5—$5.5 million (lowest revenues).

Each subtier shall contain as close to an equal number of the total defendant participants as possible.

Tier IV: A person or affiliated group in Tier IV shall pay the following amounts into the Fund on an annual basis:

Subtier 1—$3.85 million (highest revenues).
Subtier 2—$2.475 million (next highest revenues).
Subtier 3—$1.65 million (remaining).
Subtier 4—$550,000 (lowest revenues).

Each subtier shall contain as close to an equal number of the total defendant participants as possible.

Tier V: A person or affiliated group in Tier V shall pay the following amounts into the Fund on an annual basis:

Subtier 1—$1 million (highest revenues).
Subtier 2—$500,000 (remaining).
Subtier 3—$200,000 (lowest revenues).

Each subtier shall contain as close to an equal number of the total defendant participants as possible.

Tier VI: A person or affiliated group in Tier VI shall pay the following amounts into the Fund on an annual basis:

Subtier 1—$500,000 (highest revenues).
Subtier 2—$250,000 (remaining).
Subtier 3—$100,000 (lowest revenues).

Each subtier shall contain as close to an equal number of the total defendant participants as possible.

If a participant's required subtier payment under Tier VI would exceed the amount the participant paid in asbestos expenditures during the eight (8) years prior to the enactment of the Act for settlements and judgments, then the participant shall make the payment of the immediately lower subtier. Alternatively, if the participant paid less than $100,000 in annual asbestos expenditures for the eight (8) years prior to the enactment of the Act for settlements and judgments, then the participant shall not have to make payments into the Fund.

If a participant receives an adjustment under this subsection, then the participant may not also receive a hardship and inequity adjustment.

Tier VII—In addition to an assignment in Tiers II through VI, a person or affiliated group shall also be included in Tier VII if it is, or has at any time been subject to, asbestos claims under FELA and has paid not less than $5 million in costs relating to such claims. Such persons or affiliated groups shall pay, in addition to their other tiered payment obligations and on an annual basis:

Subtier 1: $11 million (Railroad or common carriers with revenues of $6 billion or more).

Subtier 2: $5.5 million (Railroad or common carriers with revenues of less than $6 billion, but more than $4 billion).

Subtier 3: $550,000 (Railroad or common carriers with revenues of less than $4 billion, but more than $500 million).

Revenues: Revenues shall be determined by reported earnings for the year ending December 31, 2002, or if applicable, the earlier fiscal year that ends during 2002. Any portion of revenues of a defendant participant derived from insurance premiums shall not be used to calculate the payment obligation.

Sec. 204. Assessment administration

This section requires each defendant participant to pay the amount required of its tier, subtier assignment on an annual basis until the defendant participant has either satisfied its obligations during the 30 annual payment cycles of the Fund or the Fund receives $90 billion from the defendant participants, excluding any amount rebated.

Small Business Exception: This subsection exempts from payment requirements and subtier allocations all persons or affiliated groups meeting the definition of "small business" as defined by the Small Business Administration pursuant to the Small Business Act, 15 U.S.C. § 632, on December 31, 2002.

Adjustments: Under expedited procedures established by the Administrator, a defendant participant may seek an adjustment of the amount of its payment obligations, either in the form of forgiveness of a portion of the payment or a rebate, based on severe financial hardship or demonstrated inequity. The decision of the Administrator whether to grant the adjustment and the size of such an adjustment is subject to judicial review pursuant to section 303.

The Administrator shall appoint a Financial Hardship Adjustment Panel and an Inequity Adjustment Panel to advise the Administrator in granting adjustments.

Hardship Adjustments—A defendant participant may apply for such an adjustment during any period in which a payment obligation to the Fund remains outstanding. To qualify for the adjustment, the defendant participant must demonstrate that the amount of the payment obligation would constitute a severe financial hardship.

Inequity Adjustments—To qualify for an inequity adjustment, a defendant participant must demonstrate that the amount of its payment obligation is exceptionally inequitable: (1) when measured against the amount of the likely cost of its future liability in the tort system in the absence of the Fund, (2) when compared to the payment rate for all defendant participant in the same tier, or (3) when measured against the percentage of prior asbestos expenditures that were incurred with respect to claims that neither resulted in an adverse judgment nor the subject of a settlement that required a payment to a plaintiff. Additionally, a defendant participant shall qualify for a two-tier main tier and a two-tier sub-tier adjustment reducing the payment obligation by demonstrating that not less than ninety-five (95%) percent of such person's prior asbestos expenditures arose from claims related to the manufacture and sale of railroad related products, so long as the sale of such prod-

ucts is temporally and casually remote. The phrase 'shall qualify for' in Sec. 204(d)(3)(A)(ii) shall have the same meaning as 'shall be granted' in the following paragraph.

Term and Renewal—Hardship and inequity adjustments granted shall have a term of three (3) years. A defendant participant may seek renewal of the adjustment by demonstrating continued qualification.

Reinstatement Authority—Following the expiration of the hardship or inequity adjustment period granted under this section, the Administrator shall annually determine whether there has been a material change in the financial condition of the defendant participant such that the Administrator may reinstate part or all of the defendant participant's payment obligation that was not paid during the adjustment term.

Limitation of Adjustments—The aggregate total of financial hardship and inequity adjustments in any given year shall not exceed $300 million, except to the extent (1) additional monies are available for adjustments as a result of carryover of prior years' funds or made available under the Defendant Guaranteed Payment Account; or (2) the Administrator determines that additional adjustments are needed in excess of the cap to address situations that would otherwise render defendant participants insolvent by its payment obligations.

Bankruptcy Relief—This subsection provides a special adjustment for defendant participants that would be rendered insolvent upon paying the amount due to the Fund. A defendant participant may apply for this adjustment at any time during which such a payment is due to the Fund. To qualify for such an adjustment the defendant participant must provide the Administrator with information sufficient to establish that the payment would render the defendant participant insolvent as required by the Bankruptcy Code.

The Administrator may grant a defendant participant an adjustment of its payment into the Fund sufficient to prevent the defendant participant from becoming insolvent and unable to pay its debts. The defendant participant shall have the adjustment for a term of a year but may seek renewal of the adjustment on an annual basis by demonstrating that the adjustment or modification of its payment remains justified. The Administrator shall review such adjustments on an annual basis for a material changes in the condition of a defendant participant warranting the reinstatement of a defendant participant's payment obligation.

Several Liability: Each defendant participant's payment obligation to the Fund is several. There is no joint liability and the future solvency of any defendant participant shall not affect the assessment assigned to any other defendant participant.

Consolidation of Payments: This subsection provides for the consolidated reporting of defendant participants and such affiliated groups as elect to report in such a manner for the purpose of determining payment obligations to the Fund. If such groups choose to report on a consolidated basis, then the Administrator shall treat the group as a single defendant participant. In such a case, sole liability for annual payments to the Fund shall rest with the ultimate parent of the group. However, notwithstanding the subsection immediately preceding this section, members of the group may pur-

sue actions against affiliated members for joint payment into the Fund.

Determination of Prior Asbestos Expenditures: Payments by indemnitors prior to December 31, 2002, shall count as part of the indemnitor's prior asbestos expenditures. However, prior asbestos expenditures shall not be for the account of either the indemnitor or indemnitee if the indemnitor entered into a stock purchase agreements in 1988 that involved the sale of stock of businesses that produced friction and other products where the agreement provided that the indemnitor indemnify the indemnitee and affiliates for losses arising from matters, including asbestos claims, asserted before the date of the agreement and filed after the date of the agreement and prior to the ten (10) year anniversary of the sale.

Minimum Annual Payments: As an aggregate, defendant participants shall pay at least $3 billion annually into the Fund for thirty (30) years. To the extent such annual payments fail to meet this minimum after taking into account hardship and inequity adjustments for defendant participants and applicable adjustments for distributors, then monies from the defendant guaranteed payment account shall pay the balance. To the extent that there are insufficient monies in the guaranteed payment account to meet the minimum net, the Administrator shall assess a guaranteed payment surcharge to pay the balance of the minimum requirement unless the Administrator has implemented a funding holiday.

Procedures for Making Payments: This section outlines the materials defendant participants must submit to the Administrator for the purpose of determining the amount that such defendant participant must pay into the Fund.

Initial Year: Tier I—Each debtor shall file with the Administrator no later than ninety (90) days after the date of enactment: (1) a statement identifying the bankruptcy cases associated with the debtor, a statement of whether its prior asbestos expenditures exceed $1 million; and (2) a statement of whether the debtor is operational and holds any assets. Additionally, debtors falling within the subtiers shall file as follows: (1) those within subtier 1 shall file with their payment, a statement of the 2002 revenues or a statement of prior asbestos expenditures and the nature of business operations if the defendant participant qualifies for the payment exception, (2) those within subtier 2 shall assign its assets to the Fund, (3) those within subtier 3 shall include with their payment a statement of how such a payment was calculated, and a signature page personally verifying the truth of the statements and estimates as required by section 404 of the Sarbanes-Oxley Act.

Initial Year: Tiers II–VI—Each participant included within Tiers II through VI shall file with the Administrator no later than one hundred eighty (180) days after the date of enactment: (1) a statement of whether it elects to report on a consolidated basis; (2) a good faith estimate of prior asbestos expenditures; (3) a statement of 2002 revenues; (4) payment in the amount specified for the lowest subtier of the tier within which the defendant participant falls; and (5) a signature page personally verifying the truth of the statements and estimates as required by section 404 of the Sarbanes-Oxley Act.

Relief—The Administrator shall establish procedures to grant defendant participants relief from its initial payment obligation

where the participant shows that it is likely to qualify for a financial hardship adjustment and failure to provide relief would cause severe irrevocable harm.

Initial Year: Tier VII—Each defendant participant shall file with the Administrator no later than ninety (90) days after the date of enactment: (1) a good faith estimate of all asbestos-related FELA payments; (2) a statement of revenues; and (3) payment in the amount specified by the subtier.

Notice: The Administrator shall directly notify all reasonably identifiable defendant participants no later than two hundred and forty (240) days after the date of enactment that the defendant participant must submit certain information necessary to calculate the amount that the participant must pay into the Fund. Further, the Administrator must publish a notice in the Federal Register that any possible defendant participant must submit such information necessary to calculate the amount that such a participant would be required to pay into the Fund. Such a notice shall include a list of all defendant participants that the Administrator has directly notified of this requirement. Upon receiving notice of this requirement, the defendant participant has thirty (30) days to submit such information to the Administrator.

Initial Determination—Once the Administrator has received this information from the defendant participant, the Administrator has sixty (60) days to send such a participant a notice of initial determination identifying the tier and subtier into which the participant falls and the annual payment obligation. The Administrator then has seven (7) days to publish a notice in the Federal Register listing all of the defendant participants that the Administrator has sent such an initial determination.

Payments—The defendant participant must then pay the Administrator the amount required under this initial determination no later than thirty (30) days after receiving the initial determination.

Rehearing—A defendant participant seeking a rehearing of the Administrator's inclusion of the participant within a given tier and/or subtier must file such a request within thirty (30) days of receipt of notice of the Administrator's determination. The Administrator shall publish a notice of any change of a defendant participant's tier or subtier assignment or payment obligation in the Federal Register.

New Information: The Administrator shall adopt procedures for requiring the payment of additional amounts, or refunding amounts already paid, based on new information received. Additionally, if the Administrator receives information that an additional person may qualify as a defendant participant, the Administrator shall require such person to submit information necessary to determine whether the person is required to make payments.

Defendant Hardship and Inequity Adjustment Account: This subsection provides for the creation of a defendant hardship and inequity account. The Administrator shall deposit any excess monies (not to exceed $300 million) received in a given year that exceed the minimum aggregate payment of $3 billion.

Use of Funds—The money in this account may only be used to balance any hardship and inequity adjustments, distributor tier adjustments, or to reimburse defendant participants granted relief after payment.

Carryover of Unused Funds—Any unused funds in a given year in the account shall be carried over for adjustments in subsequent years.

Defendant Guaranteed Payment Account: The Administrator shall place any monies paid in excess of the minimum annual amount of $3 billion into a defendant guaranteed payment account. The Administrator may then use this money to grant additional adjustments, not to exceed $50 million in any given year.

Guaranteed Payment Surcharge: Unless the Administrator grants a funding holiday, if there are insufficient funds in the defendant guaranteed payment account to meet the minimum aggregate payment into the fund of $3 billion, then the Administrator shall impose a guaranteed payment surcharge on defendant participants sufficient to attain the minimum aggregate annual payment.

Limitation—The Administrator shall not impose a surcharge on defendant participants in Tier V, Subtier 3 or Tier VI, Subtier 3. This amount shall be reallocated on defendant participants.

The Administrator shall impose any such a surcharge on a pro rata basis against a defendant participant's relative liability, taking into account any adjustments granted by the Administrator. Further, the subsection requires the Administrator to certify that all reasonable efforts have been extended to collect the minimum annual payment of $3 billion from the defendant participants before imposing such a surcharge. The Administrator shall not issue a final certification until after publishing a proposed certification in the Federal Register and providing for a public comment and notice period.

Adjustments for Distributors: This section provides a definition of "distributor" and procedures for distributor tier reassignments. Specifically, after a final determination by the Administrator of tier assignment, a distributor may submit an application, prepared in accordance to promulgated rules, for a tier adjustment. A distributor submitting an application for tier adjustment shall pay amounts into the Fund according to its assignment until the Administrator makes a final decision on the adjustment application. The Administrator's decision and designation on the application shall be final. However, if the defendant participant has a right to a rehearing of the Administrator's decision pursuant to the procedures in the Act. If the Administrator's adjustment decision results in a lower payment obligation, then the Administrator shall grant a refund or credit of excess payments.

But that for this provision of the bill, a distributor that: (1) would be assigned to Tier IV, shall be assigned to Tier V; (2) would be assigned to Tier V, shall be assigned to Tier VI; and (3) would be assigned to Tier VI, shall be assigned to no tier at all and shall have no payment obligation to the Fund. However, a distributor shall not be eligible for an inequity adjustment.

The total number of adjustments available under this provision shall not exceed $50 million. If the total number of adjustments will exceed this limit, then each distributor's adjustment shall be reduced pro rata until the aggregate does not exceed $50 million.

Sec. 205. Stepdowns and funding holidays

Stepdowns: The Administrator will reduce the minimum aggregate funding obligations of the defendant participants by ten (10%)

percent of the initial minimum aggregate at the end of the tenth, fifteenth, twentieth, and twenty-fifth years of the life of the Fund. The Administrator will apply these reductions on a pro rata basis to all of the defendant participants, except with regard to tier 1, sub-tiers 2–3 defendant participants and class action trusts. However, the Administrator may suspend, cancel, reduce, or delay any reductions if he/she finds that such is necessary to ensure that sufficient assets in the Fund are present to pay future obligations.

Funding Holidays: This section grants the Administrator the authority to reduce or waive all or part of the payment obligations. However, such a funding holiday may not be granted in the first ten (10) years of the life of the Fund. Further, such a funding holiday may only be granted after the tenth year of the Fund if there are sufficient assets in the Fund to fulfill its obligations.

Each year after the tenth year of the Fund, the Administrator shall conduct an annual review of the Fund to determine whether the Fund contains sufficient assets to satisfy all of its payment obligations and grant a funding holiday. Upon such a finding, the Administrator shall award a funding holiday on a pro rata basis on the relative payment obligations the defendant participants, except with regard to the tier 1, sub-tiers 2–3 participants and class action trusts. However, should the Administrator receive new information that leads him/her to believe that the funding holiday will cause the Fund to be depleted to the point that there will not be sufficient assets to satisfy future obligations, then the Administrator may revoke all or part of the funding holiday on a pro rata basis.

Certification: The Administrator must certify through a written notice in the Federal Register, including a thirty (30) day comment period, that any stepdown or funding holiday satisfies the requirements of the section. After consideration of the submitted public comments, the Administrator must make a final certification of the stepdown or funding holiday and notify each defendant participant of such within thirty (30) days of the final certification.

Sec. 206. Accounting treatment

Payment obligations shall be subject to accounting discounting for each defendant participant. However, this discounting shall not reduce the amount of monetary payments to the Fund.

SUBTITLE B.—ASBESTOS INSURERS COMMISSION

Sec. 210. Definition

Sec. 211. Establishment of Asbestos Insurers Commission

The President, with the advice and consent of the Senate, shall appoint 5 members to serve on the Asbestos Insurers Commission (the Commission) and shall select a Chairman from among its members. No member may be an employee, immediate family member of an employee, or shareholder of an insurer participant and may not be an officer of the Federal Government, except by reason of membership on the Commission. Further, a former officer, director, employee, or shareholder of an insurer participant within the two years prior to appointment may not sit on the Commission unless such information is fully disclosed. Any vacancy shall be filled by Presidential appointment.

Not later than 30 days after the date on which all members of the Commission have been appointed, the Commission shall hold its first meeting and shall thereafter meet at the call of the Chairman as necessary. No business may be conducted without a majority of the member participating.

Sec. 212. Duties of Asbestos Insurers Commission

Determination of Insurer Payment Obligations: Insurer participants shall be responsible for a total aggregate contribution of $46.025 billion, less any bankruptcy trust credits. The Commission shall determine the amount required of each insurer to pay into the Fund. The Commission's first rulemaking shall promulgate the methodology for allocating payments among the participants. This rule shall also include a methodology for adjusting payments by insurer participants to make up in the first five (5) years, and any other years as provided for, any failure to meet the minimum aggregate annual payment to the fund resulting from: (1) financial hardship and inequity reductions; (2) the failure or refusal of an insurer participant to make the required payment; or (3) any other reason causing the payments to fall below the required amounts. Within the time constraints of this provision, the Commission shall conduct a thorough study to determine the reserve allocation of each insurer participant, including requesting information from the Securities and Exchange Commission (SEC) if necessary.

Not later than one hundred twenty (120) days after the initial meeting, the Commission shall commence a rulemaking procedure to propose and adopt a rule providing for the allocation of contributions among the insurers. The Commission may provide for one or more allocation formulas to be applied to all insurer participants or groups of similarly situated participants. After adopting such a rule, the Commission shall then apply that formula to determine the amount that each insurer participant shall be required to pay into the Fund.

This section also grants the Commission and Administrator authority over every insurer, reinsurer and run-off entity to enforce the provisions of the Act and ensure the payment of such an insurer participant's full contribution obligation without regard to whether it is licensed in the United States. Insurer participants are severally liable for payments to the Fund, unless otherwise provided. There is no joint liability and the future insolvency of any insurer participant shall not affect the assessment assigned to any other insurer participant.

Reinsurers who issued retrospective policies to an insurer participant after 1990 that provides for a risk or loss transfer to insure for asbestos and other losses shall make payments into the Fund on behalf of the insurer participant. The insurer participant holding the policy shall direct the reinsurer to pay all or a portion of the payment directly into the Fund within ninety (90) days after the scheduled date to make an annual payment into the Fund, subject to the enforcement procedures of the Fund.

Payment Criteria—Insurers that have paid or assessed at least $1 million in defense or indemnity costs by a legal judgment or settlement for asbestos-related personal injury claims shall be considered insurer participants only. It is not the intent of the Act to submit insurer participants to double liability and so no insurer partic-

ipant shall be liable for payment obligations as defendant participants as well.

The Commission shall consider and weigh the following when establishing the allocation formula: (1) historic premium for lines of insurance associated with asbestos exposure; (2) recent loss experience for asbestos liability: (3) reserves for asbestos liability; (4) the likely cost of future liabilities; and (5) any other relevant factors. The Commission may establish procedures and standards for determination of asbestos reserves of insurer participants.

Payment Schedule—The aggregate annual amounts shall be as follows:

Years 1 and 2: $2.7 billion
Years 3 through 5: $5.075 billion
Years 6 through 27: $1.147 billion
Year 28: $166 million

Certain Runoff Entities—A runoff entity shall include any direct insurer or reinsurer whose asbestos liability reserves have been transferred, directly or indirectly, to the runoff entity and on whose behalf the run off entity handles, adjusts, and/or pays asbestos claims.

Financial Hardship and Exceptional Circumstances Adjustments—Insurer participants may seek adjustments by demonstrating that the set contribution poses an exceptional circumstance or severe financial hardship to the insurer participant. The Commission may determine whether to grant and the size of any such adjustment. However, such adjustments shall not affect the aggregate payment obligations of insurer participants, except as provided in the allocation methodology rule by the Commission, shortfall assessment credits, or the shortfall analysis.

Funding Holidays—At any time after the first ten (10) years of the Fund, the Administrator shall reduce or waive part or all of the payments required by the insurer participants if the Administrator determines that the assets of the Fund at that point in time and expected future payments satisfy the anticipated obligations of the Fund. However, such a funding holiday shall only be made: (1) to the extent that the Administrator determines that the Fund will be able to satisfy the Fund's obligations; and (2) will be applied on an equal pro rata basis to the insurer participants. The Administrator shall conduct an annual review to determine whether to reduce or waive insurer participant payments. If the Administrator receives information at any time that indicates that the reduction or waiver may cause the assets of the Fund and the expected future payments to decrease, then the Administrator shall revoke all or part of the reductions or waivers on a pro rata basis to ensure the Fund's obligations.

Procedure for Notifying Insurer Participants of Individual Contribution Obligations: This section provides the timeline and process for determining the amount that each insurer participant is obligated to pay into the Fund.

Within thirty (30) days after its initial meeting, the Commission must directly notify all reasonably identifiable insurer participants of the requirement to submit information necessary to calculate the amount of any required contribution to the Fund. The Commission shall also publish a notice in the Federal Register requiring any person who may be an Insurer Participant to submit such informa-

tion along with a list of all notified insurer participants. Upon publication of this notice, there will be thirty (30) days public comment period regarding the completeness and accuracy of the list of identified insurer participants. Insurers meeting the criteria of insurer participants shall respond to such notice. The response shall be signed by a responsible corporate officer, general partner, proprietor, or individual of similar authority, who shall certify under penalty of law the completeness and accuracy of the information submitted.

Not later than one hundred and twenty (120) days after the initial meeting of the Commission, the Commission shall send each participant a notice of the initial determination assessing a contribution to the Fund. The Commission then has seven (7) days to publish a notice of initial listing of insurer participants, along with their initial determination. If no response is received from the participant, or if the response is incomplete, the initial determination assessing a contribution from the participant shall be based on the best information available to the Commission. Not later than thirty (30) days after receiving notice of the initial determination from the Commission, an insurer participant may provide the Commission with additional information to support limited adjustments to the assessment received to reflect exceptional circumstances.

The Commission has the authority to conduct examinations of the books and records of insurer participants to determine the completeness and accuracy of the information submitted for the purpose of determining required contributions. The Commission may request the Attorney General to subpoena persons to compel relevant information. Additionally, any escrow account established in connection with an asbestos trust fund that has not been judicially confirmed by the date of enactment shall be the property of and returned to the insurer participant.

Not later than sixty (60) days after the notice of initial determination is first sent out, the Commission shall send a notice of final determination.

Insurer Participants Voluntary Allocation Agreement: Direct insurers and reinsurers have thirty (30) days from the day of the Commissions proposed rulemaking on the allocation formula to submit their own allocation agreement, approved by all the participants in the applicable group, to the Commission. Upon receipt of this agreement, the Commission must determine whether the allocation agreement meets the requirements of the Act and certify the agreement. Once the Commission certifies the agreement, the Commission no longer has authority over insurer participant. At this point, the Administrator shall assume the responsibility of calculating individual contribution obligations.

Commission Report: Until the Commission is terminated, though, the Commission shall submit an annual report stating the amount that each insurer participant is required to contribute to the Fund, including the payment schedule, to the Administrator and the Committees on the Judiciary of the Senate and the House of Representatives.

Interim Payments: Insurer participants must submit a certified statement to the Administrator of its net reserves for asbestos liabilities within thirty (30) days of the date of enactment. The Administrator must allocate this interim payment—which must be

made within ninety (90) days of the date of enactment and in an amount not to exceed fifty (50%) percent of the insurer participants' first year payment obligation—according to the amount that the participants hold in reserves. The Administrator must publish this allocation in the Federal Register within sixty (60) days of enactment. The Administrator's final allocation is appealable under Section 303. Insurer participants must then make a payment into the Fund within the first ninety (90) days of the date of enactment of an amount not to exceed fifty (50%) percent of the first year's total payment obligation.

Transfer of Authority from the Commission to the Administrator: Upon termination of the Commission, the Administrator shall assume the responsibilities and authority of the Commission, except that the Administrator shall not have the power to modify the established allocation formula.

Financial Hardship and Exceptional Circumstances Adjustments—The Administrator shall have the authority to make adjustments for financial hardships and exceptional circumstances as provided for in the Act for a term not to exceed three (3) years. Upon the grant of any adjustment, the Administrator shall increase the payments of all other insurer participants in accordance with the allocation methodology established by the Commission.

Credits for Shortfall Assessments—The Administrator shall grant any insurer participant required to make up for a shortfall pursuant to the allocation methodology within the first five (5) years of the Fund a credit against its annual payments in year 6 and thereafter. The credit will equal amount in the amount the insurer participant made in shortfall assessments and granted on a pro rated bases over the same number of years that the participant paid such assessments. However, the Administrator shall not grant a credit for short fall assessments imposed by the Administrator as a result of the shortfall analysis.

Accounting Treatment: Insurer participant payment obligations to the Fund shall be subject to discounting under applicable accounting guidelines but shall in no way reduce the required payments into the Fund.

Judicial Review: The Commission's established allocation formula, its final determinations of contribution obligations and other final actions shall be judicially reviewable.

Sec. 213. Powers of the Asbestos Insurers Commission

This section authorizes the Commission to conduct rulemakings for the purpose of implementing its authority under the Act. The Commission may hold hearings, sit and act at such times, take testimony and receive evidence as it considers advisable. The Commission may secure directly from any Federal or State department or agency such information as the Commission considers necessary to carry out this act, and may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal government. The Commission may not accept, use, or dispose of gifts or donations of services or property. The Commission may also enter into contracts as it deems necessary to obtain expert advice and analysis.

Sec. 214. Personnel matters

This section provides for certain personnel matters relating to the performance of the duties of the Commission, such as: (1) the pay of members of the Commission; (2) the appointment of additional personnel necessary to perform its duties; (3) the compensation rate for such additional staff; and (4) the detailing of individuals serving in other branches of the Federal government.

Sec. 215. Termination of Asbestos Insurers Commission

The Commission shall terminate sixty (60) days after the date on which the Commission submits its report.

Sec. 216. Expenses and costs of commission

All expenses and costs of the Commission shall be paid by the Asbestos Injury Claims Resolution Fund.

SUBTITLE C.—OFFICE OF ASBESTOS INJURY CLAIMS RESOLUTION

Sec. 221. Establishment of the office of asbestos injury claims resolution

This section provides for the establishment of the Office of Asbestos Disease Compensation within the Asbestos Injury Claims Resolution Fund.

Borrowing Authority: This subsection gives the Administrator borrowing authority. However, in any calendar year, the Administrator may not borrow an amount in excess of all amounts expected to be paid by participants during the subsequent ten (10) years, taking into account previous payment obligations of the Fund for amounts already borrowed and other payment obligations of the Fund. The purpose of this provision is to ensure that the Fund does not sunset early as a result of unforeseen circumstances, such as an unexpected surge in claims filed in a single year. This subsection also gives the Administrator the authority in the first five (5) years of the Fund to borrow amounts necessary for the performance of the Administrator's duties from the Federal Financing Bank in accordance with section 6 of the Federal Financing Bank Act of 1973. Again, the purpose of this provision is to ensure that the Fund does not sunset in the early years that it becomes operational and assist in the smooth start up of the Fund.

Repayment of monies borrowed by the Administrator shall be made in full by Fund contributors to the extent there is either current or prospective amounts available in the Fund.

Lockbox for Severe Asbestos-Related Injury Claimants: This section authorizes the Administrator to establish four separate lockbox accounts to protect the funds needed to compensate the victims with the most severe asbestos-related injuries: mesothelioma (Level IX), lung cancer (Level VIII), severe asbestosis (Level V), and moderate asbestosis (Level IV). The Administrator shall allocate to each of these accounts a portion of payments to the Fund to compensate anticipated claimants for each account. Funds will be allocated to these accounts based on the best epidemiological and statistical studies. Within sixty (60) days after the date of enactment and periodically during the life of the Fund, the Administrator shall determine an appropriate amount to allocate to each account.

Audit Authority: This section grants the Administrator audit authority to examine data, summon persons and materials, and take testimony for the purpose of ascertaining the veracity of information provided, determining outstanding liabilities, or inquiring into any offense connected with the administration or enforcement of payment obligations.

False, Fraudulent, or Fictitious Statements or Practices: If the Administrator determines that materially false, fraudulent, or fictitious statements or practices have been submitted or engaged in by persons submitting information to the Administrator or Commission, then the Administrator may impose a civil penalty not to exceed $10,000.

Identity of Certain Defendant Participants; Transparency: A person, as defined by the Act, having knowledge that either they are an affiliated group has prior asbestos expenditures of $1 million dollars or more shall submit to the Administrator within sixty (60) days of the date of enactment the name, or ultimate parent, of the person with such liability and the likely tier to which the group may be assigned. The Administrator, or Interim Administrator, shall publish in the Federal Register no later than twenty (20) days after this sixty (60) day period a list of submissions received. After this list is published, a person may submit information to the Administrator relating to the identity of others with prior asbestos liability of $1 million dollars or more.

No Private Right of Action: There shall be no private right of action under any State or Federal law against any participant based on a claim of compliance or noncompliance with the FAIR Act or the involvement of any participant in the enactment of the FAIR Act.

Sec. 222. Management of the Fund

The Administrator shall hold monies in the Fund for the exclusive purpose of providing benefits to asbestos claimants and their beneficiaries and to otherwise defray the reasonable expenses of administering the Fund. The Administrator shall invest amounts in the Fund in a manner that enables the Fund to make current and future distributions to or for the benefit of asbestos claimants, taking into account the nature of the Fund and relevant outside factors.

Bankruptcy Trust Guarantee: To ensure the liquidity of the Fund, the Administrator shall have the authority to impose a pro rata surcharge on all participants if the assets of a bankruptcy trust established before July 31, 2004, are not available to be transferred because a non-appealable final judgment has enjoined the transfer of funds from the trust or the borrowing authority is insufficient because it would likely increase the possibility that the Fund will sunset on the basis of reasonable claims projections. Such a surcharge may not exceed the total aggregate amount of the enjoined assets of the relevant bankruptcy trusts of four ($4,000,000,000) billion dollars. Any surcharge shall be applied over a period of five (5) years on a pro rata basis on the relative aggregate funding obligations of all participants, taking into account any hardship, inequity, or exceptional circumstances adjustments granted by the Administrator. Before the Administrator may apply such a surcharge, he/she must publish notice in the Federal Register that in-

cludes information relating to the reasons why a surcharge is necessary, the amount of the assets enjoined from a bankruptcy trust, the total aggregate amount of the surcharge, and the amount of the surcharge for each tier and subtier of participant. After the thirty (30) day comment period, the Administrator shall publish a final certification in the Federal Register.

Bankruptcy Trust Credits: If the Fund receives assets from a bankruptcy trust established after July 31, 2004, then the Administrator shall credit the aggregate payment obligations of all participants. The Administrator shall allocate the credits in amongst the defendant and insurer participants.

Sec. 223. Enforcement of payment obligations

If any participant fails to meet its payment obligations to the Fund, then the Administrator must make a demand of payment and provide the participant with thirty (30) days to cure the default. If the participant fails to cure the default, then the United States shall have a lien for an amount equal to the participant's payment obligation. In the case of a bankruptcy or insolvency proceeding, the lien shall be treated in the same manner as a lien for taxes due and owing to the United States.

In any case where there has been a refusal or neglect to pay an assessment, the Administrator may bring a civil action in any appropriate United States District Court, or other appropriate lawsuit or proceeding outside of the United States. In any action involving a willful refusal to pay, the Administrator may seek punitive damages, including costs and attorneys fees, and may collect a fine equal to the total amount of the liability not collected.

Enforcement Authority as to Insurer Participants: In addition to other enforcement provisions, the Administrator may seek to recover amounts in satisfaction of a contribution not timely paid by an insurer in the following manners:

Subrogation—The Administrator shall be subrogated to the contractual rights of participants to recover payment obligations from non-paying foreign insurer payments. The Administrator may then bring an action or arbitration against the nonpaying participant pursuant to those rights.

Recoverability of Contribution—In any action brought under this section, the nonpaying insurer participant shall not be entitled to a credit or offset for amounts collectable from any participant or a right to collect any sums payable from a participant.

Intervention/Cooperation—An insured party of a nonpaying insurance party shall cooperate with the Administrator in enforcement proceedings against the nonpaying participant. The Administrator shall have the power to settle or compromise any claims against an insurer participant.

Bar on U.S. Business—Unless the participant complies, if any insurance participant refuses to pay a contribution obligation, then in addition to other penalties, the Administrator shall issue an order barring such entity and its affiliates from conducting business within the United States. Further, if any insurer participant does not supply requested information, then the Administrator shall bar the participant from doing business in the United States or from obtaining a license from any State to write insurance until payment of all contributions.

Credit for Reinsurance—If a reinsurer insurer participant defaults on its payment obligation to the Fund or otherwise fails to comply with the Act, then the Administrator may issue an order barring any direct insurer participant from receiving credit for reinsurance purchased from the defaulting reinsurer after the date of the Administrator's determination of default.

Defense Limitations: A participant must raise any challenges available to the participant regarding the constitutionality of the FAIR Act or determinations of payment obligations made by the Administrator or Commission during administrative or judicial review proceedings provided under the Act. If the participant fails to raise these challenges at that point, then the Act bars the participant from later raising such a challenge during enforcement proceedings.

Deposit of Funds: The Administrator shall deposit in the Fund any monies collected as a fine equal to the total amount of the participant liability.

Proposed Transactions: The FAIR Act incorporates language from an amendment by Senator Leahy last Congress designed to ensure future accountability of corporate participants in the Fund that are sold, or otherwise change hands. The Leahy amendment defined participants in the trust fund to include so-called "successors in interest" based on the "substantial continuity test" to determine whether it is fair and appropriate to require a company to take on the obligations of its predecessor. This amendment adopts the precedent of number courts that have generally looked to a number of factors in determining "substantial continuity": whether the new company retains the same assets and facilities, the same employees and supervisors, the same jobs and working conditions, the same products and services, and the same customers and investors.[43]

The FAIR Act includes a comprehensive and specific provision designed precisely to ensure that successors-in-interest to the participants in the Fund are held just as responsible as the participants were, so that the Fund will not suffer any financial harm as the result of merger-and-acquisition activity. This provision of the FAIR Act also requires reporting on all such activity to the Administrator, and just as importantly creates the opportunity for the Administrator—or another interested party—to bring a lawsuit to force compliance with the successor-in-interest provision and the obligations of such successors.

Notice and Contents of Notice—A participant must provide the Administrator notice of a proposed transaction(s) that would result in the transfer of a significant portion of the participant's assets. The Administrator shall protect information contained in the notice as confidential commercial information if: (1) the participant requests such treatment; (2) the participant does not publicly disclose the transaction(s); and (3) the Administrator does not believe that the true nature of the transaction merits action against the participant.

The Administrator shall prescribe by rulemaking the information necessary for the participant to include such notice. The Adminis-

[43] This "substantial continuity" rule has been routinely applied in cases involving tort plaintiffs and the beneficiaries of federal statutes, such as the NLRA (labor relations), the Family Leave Medical Act (FMLA), CERCLA (environmental crimes), Title VII (EEOC) and the Veterans' Readjustment Assistance Act.

trator will use this information to determine whether: (1) the party acquiring the assets of the participants should be considered a successor in interest of the participant; or (2) the transfer would allow a trustee in Chapter 11 proceedings to avoid the payment obligations of the participant to the Fund.

The participant must also include a statement in the notice regarding whether a person has or will become a successor in interest to the participant and whether that person has acknowledged such.

Timing—

Notice of Transaction—The participant must give the Administrator notice of such a transaction no later than thirty (30) days before the consummation of the proposed transaction. If the process involves a series of transactions, then the participant must give the Administrator notice of the series of transaction no later than thirty (30) days before the consummation of the first transaction in the series. As such, any proposed transaction may not be consummated until at least thirty (30) days after the Administrator receives such notice, unless otherwise provided by the Administrator.

Certification Statements—The participant shall submit a certification of notice compliance to the Administrator by the date of the participant's payment obligation.

Right of Action—This subsection provides for the right of action against a participant engaging in such a transaction or any party to the transaction on the grounds that: (1) the participant and person has not stated or acknowledged that the person has or will become a successor in interest as a result of the transaction; or (2) the transfer would allow a trustee in Chapter 11 proceedings to avoid the payment obligations of the participant into the Fund. The Administrator or other participant may bring such an action in the appropriate United States district court or, otherwise, any forum appropriate outside of the United States.

Relief—In such an action, the Administrator or participant may seek: (1) declaratory judgment of whether a person is a successor in interest of the participant; or (2) a preliminary restraining order or any other appropriate relief as determined by the court against the transaction if the transaction would allow a Chapter 11 trustee to avoid the payment obligations of the participant into the Fund.

Sec. 224. Interest on underpayment of nonpayment

If a participant fails to meet its payment obligation on or before the last date prescribed for payment, the liable party shall pay interest on that amount at the Federal short-term rate determined under section 6621(b) of the Internal Revenue Code of 1986, plus 5 percentage points until the date paid.

Sec. 225. Education, consultation, screening, and monitoring

The Administrator shall establish a program for the education, consultation, medical screening, and monitoring of persons exposed to asbestos out of the assets of the Fund.

Outreach and Education: No later than one year after the date of enactment, the Administrator shall establish an outreach and education program to provide information about asbestos-related conditions to members of the population who are at-risk of exposure.

Medical Screening Program: The Administrator shall establish a medical screening program for individuals who are at high risk of incurring an asbestos-related disability between the eighteenth and twenty-fourth months that the Fund is fully operational. The Administrator shall adopt regulations establishing: (1) criteria for participation in the screening program; (2) protocols conducting the medical screening process of participants; and (3) the frequency that participants may receive medical screening services.

The program shall receive annually at least $20,000,000 and no more than $30,000,000 for the first five (5) years of the program. However, the Administrator may suspend funding of the program if continued funding would cause the Fund to sunset. After the program is fully implemented, the Administrator may reduce the annual amount the program receives to less than $20,000,000. At the conclusion of the fourth year, the Administrator shall conduct a review of the program to recommend the amount to be allocated to the program for an additional five (5) years, not to exceed six hundred $600,000,000 million dollars. All contracts with medical screening providers shall provide for the reimbursement of those services and the termination of such contracts if the Administrator determines that the provider does not meet the provider qualifications.

Medical Monitoring Program: The Administrator shall establish a medical monitoring program for persons exposed to asbestos and approved for level I compensation. Procedures for the administration of the program shall include: medical tests, such as the distribution of a health evaluation and work history questionnaire, physical examinations, chest x-rays, and spirometry; qualifications of medical providers who are to provide the tests; and administrative provisions for the reimbursement from the Fund for costs of monitoring.

Sec. 226. National mesothelioma research and treatment program

This section requires the Administrator of the Fund and the Director of the National Institutes of Health (NIH) to allot respectively $1.5 million from the Fund and $1 million from funds available to the Director annually for the years 2006–2015 to establish ten (10) mesothelioma disease research and treatment centers. The Director of the NIH shall, in consultation with the Medical Advisory Committee, select sites for the centers that are, amongst other requirements: (1) distributed in areas of high concentration of mesothelioma cases; and (2) closely associated with the Department of Veterans Affairs medical centers. The Administrator of the Fund and the Director of the NIH shall allot respectively $1 million from the Fund and $1 million from amounts available to the Director for the years 2006–2015 to establish a National Mesothelioma Registry. No less than $500,000 of these amounts shall be allocated for the collection and maintenance of tissue specimens. Each of the ten (10) mesothelioma centers shall participate in the registry. The Administrator of the Fund and the Director of the NIH shall allot respectively $1 million from the Fund and $1 million from funds available to the Director for the years 2006–2015 to establish a Center for Mesothelioma Education, with the advice and consent of the Medical Advisory Committee. The Director of the NIH shall publish and provide Congress a report and recommendations on the

results gained through the Program no later than September 30, 2015, which shall contain such information as the Act requires.

TITLE III.—JUDICIAL REVIEW

Sec. 301. Judicial review of rules and regulations

The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any action to review rules or regulations promulgated by the Administrator. A petition for review shall be filed not later than sixty (60) days after the date notice of such promulgation appears in the Federal Register. The United States Court of Appeals for the District of Columbia shall provide procedures for expedited review.

Sec. 302. Judicial review of award decisions

Any claimant adversely affected or aggrieved by a final decision of the Administrator regarding compensation may petition for judicial review of the decision by filing a petition of review in the United States Court of Appeals for the circuit in which the claimant resides within ninety (90) days of the issuance of a final decision of the Administrator. The court shall uphold the decision of the Administrator unless the court determines, upon review of the record as a whole, that the decision is not supported by substantial evidence, contrary to law, or is not in accordance with procedure required by law. This review will be subject to expedited procedures.

Sec. 303. Judicial review of participants' assessments

The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any action to review a final determination regarding the liability of any person to make a payment to the Fund, including a notice of applicable subtier assignment, notice of insurer participant obligation, a notice of financial hardship or inequity determination, and notice of a distributors tier adjustment. A petition for review shall be filed not later than sixty (60) days after a final determination giving rise to the action and will be subject to an expedited review. Any defendant participant who receive notices of its applicable subtier assignment and any insurer participant who receives notice of a payment obligation must commence any action within thirty (30) days of receiving such notice.

Sec. 304. Other judicial challenges

The United States District Court for the District of Columbia shall have exclusive jurisdiction over any action for declaratory or injunctive relief challenging any provision of the FAIR Act. Such action shall be filed not later than sixty (60) days after the date of enactment or sixty (60) days after the final action by the Administrator giving rise to the action, whichever is later.

A final decision in the action shall be reviewable on appeal directly to the Supreme Court of the United States and shall be taken by filing a notice of appeal within thirty (30) days, and the filing of a jurisdictional statement within sixty (60) days, of the entry of a final decision.

Such actions shall be advanced on the dockets and subject to an expedited review process.

Sec. 305. Stays, exclusivity, and constitutional review

The courts may not issue a stay of a payment obligation pending its final judgment. Further, the courts may not issue a stay or injunction on the basis of a challenge to the whole or any portion of the FAIR Act until the all judicial avenues have been exhausted. An action for which review is otherwise provided for by the FAIR Act shall not be subject to judicial review in any other proceeding.

Constitutional Review: The original action shall be filed in the United States District Court for the District of Columbia and shall be heard by a three (3) judge court. A final decision on the action shall be reviewable only by an appeal directly to the Supreme Court of the United States, which shall be taken by filing a notice of appeal within ten (10) days and a jurisdictional statement within thirty (30) days after entry of the final decision. The United States District Court for the District of Columbia and the Supreme Court of the United States to expedite the disposition of such an action.

If the transfer of any asbestos trust of a debtor or class action trust, or the Act as a whole, is held to be unconstitutional, then the Fund shall transfer the remaining balance of such assets back to the appropriate trust within ninety (90) days after the final decision is ordered.

TITLE IV.—MISCELLANEOUS PROVISIONS

Sec. 401. False information

This section amends Title 18, Chapter 63 of the U.S. Code by adding a new section 1348 to impose criminal penalties for fraud against the Office of Asbestos Compensation, and false statements made against the Asbestos Injury Claims Resolution Fund by any party.

Sec. 402. Effect on bankruptcy laws

Contribution obligations are not dischargeable and may not be stayed when a participant files for bankruptcy. Claims by the Administrator against a participant are allowed even in bankruptcy. Participants' payment pending bankruptcy or in bankruptcy are not avoidable as preferences or executory contract.

Transfer of Existing Asbestos Trusts: Existing asbestos trusts, including 524(g) trusts, will be incorporated into the Asbestos Injury Resolution Fund. The assets of such trusts shall be transferred to the Fund no later than six (6) months after the date of enactment. The Administrator shall have discretion when transferring assets of these trusts and may refuse to accept any asset that may create liability for the Fund in excess of the value of the asset. For trusts with beneficiaries that are not asbestos claims, the assets transferred to the Fund shall not include assets allocable to non-asbestos-related beneficiaries. Incorporation of trust assets is estimated to provide an additional $4–6 billion in contributions to the fund.

Effect on Insurance Receivership Proceedings: In any insurance receivership proceeding involving an insurer participant, there shall be a lien in favor of the Fund for the amount of any assessment and any such lien shall be given priority over all other claims

against the participant in receivership, except for the expenses of the receivership. Payment of any assessment shall not be subject to any stay in any insurance receivership proceeding.

Standing in Bankruptcy Proceedings: The Administrator shall have standing in any bankruptcy involving a debtor participant. Further, no bankruptcy court may require the return of property seized by the Administrator to satisfy participant obligations to the Fund.

Sec. 403. Effect on other laws and existing claims

This section provides that there will be no other forum for recovery of an asbestos injury claim other than under the Act and addresses the effect that the Act has on particular areas of the law as it relates to the asbestos problem.

Effect on silica claims

In General—An individual seeking to recover on the basis of suffering a silica-related injury must plead with particularity and establish by a preponderance of the evidence that: (i) the individual has not asserted or filed a claim for an asbestos-related injury and that the individual is not eligible for a monetary award under the Fund; (ii) the injury was caused by exposure to silica; and (iii) asbestos was not a significant contributing factor. To establish that the individual is suffering a "functional impairment" due to silica and not because of exposure to asbestos, the plaintiff must establish that they would not meet the exposure requirements set in Section 121 of this Act. If an individual is not able to meet these requirements, then the claim is preempted by the Act.

Required Evidence—The initial pleading must be accompanied by: (1) admissible evidence relating to an individual's condition and exposure to asbestos; (2) notice of a previous lawsuit or claim asserting an asbestos-related injury; and (3) copies of all medical and lab reports pertaining to the individual's exposure to asbestos.

Statute of Limitations—State law shall apply regarding the statute of limitations for filing a silica claim. However, the clock will begin to run on the statute of limitations for any claim filed under this subsection when the plaintiff becomes impaired.

Superseding Provisions: Except as provided below and in provisions relating to the settlement of claims during the start up of the Fund, the Act shall supersede obligations imposed by any agreement, understanding, or undertaking relating to an asbestos claim that requires future performance. Such "future performance" is not intended to include obligations to defend, indemnify or hold harmless parties making payments under insurance coverage settlement agreements, or to maintain the confidentiality of such agreements, where the other financial terms and conditions have been satisfied.

Exception—This Act shall not abrogate a binding and legally enforceable written settlement between a participant and a named plaintiff if before the date of enactment the settlement was executed directly by: (1) the settling defendant or insurer and the specific individual plaintiff, the immediate relatives of the plaintiff, or an authorized legal representative on behalf of the plaintiff if the plaintiff is incapacitated; (2) the settlement contains an express obligation by the participant to make future definite payments; and (3) all of the conditions to payment have been fulfilled, including

court approval, within thirty (30) days of the date of enactment. However, if a settlement agreement is prepared in anticipation of this Act, then the exception of this provision shall not apply.

The exception shall not apply to bankruptcy-related agreements.

Any settlement payment under this provision shall be considered a collateral source. This subsection shall not abrogate a settlement agreement reached in anticipation of the Act and anticipates the effects of the Act. Further, this subsection shall not abrogate an otherwise enforceable settlement agreement executed before the date of enactment between a settling defendant or insurer and a named plaintiff for the payment or the health care insurance or expenses of the plaintiff.

Exclusive Remedy: The remedies provided under the Act shall be the exclusive remedy for an asbestos claim. However, the Act shall not apply to any individual civil action in State or Federal court that on the date of enactment: (i) has commenced the presentation of evidence to an impaneled jury or a judge, sitting as a trier of fact; or (ii) a verdict, final order, or final judgment has been entered by a trial court. This exception to the preemption provisions of the Act is intended to permit the completion of civil trials involving plaintiffs in which the presentation of evidence has already begun on the date of enactment, as well as to preserve jury verdicts or judgments on all issues following the completion of such a trial. The exception is not intended to apply to mass trials such as class actions, consolidations, or other trials involving multiple plaintiffs not related by marriage or other family relationship, or to proceedings related to a bankruptcy.

Bar on Asbestos Claims: As of the date of enactment, no new or pending claims may be pursued in State or Federal court, except those that meeting a limited exception preserving certain insurance claims or those filed during the start up to the Fund before it is fully operational. An exception to the preservation of insurance claims under Section 403(e)(2) concerns insurance coverage obligations relating to claims that are preempted, barred, or superseded by Section 403. Insurance coverage obligations relating to such claims are commuted under the Act so that insurers are permitted to take down reserves relating to these claims in order to be able to make their contributions to the Fund.

The only judgment that a trial court may enter for a pending claim after the date of enactment is that of a judgment of dismissal. If a State court does not dismiss a claim, it may be removed to Federal court, which will determine whether removal was proper and whether the claim presented is a pending asbestos claim as defined by the Act.

Notwithstanding the express preemption of pending cases, if a court determines that an asbestos claim for which there has been no order or judgment duly entered before the date of enactment is not subject to the preemption provisions and requires a participant to satisfy a judgment with respect to the claim, then the participant will receive a credit against any assessment owed to the Fund equal to the amount of the payment made with respect to the judgment. The Administrator shall require participants seeking credit to demonstrate that the participant pursued timely remedies, including dismissal of the claim. The participant must have also notified the Administrator of the denial of a motion to dismiss within

twenty (20) days of the expiration of the period to seek appeal. The Administrator may require as much further information as is necessary and appropriate to establish eligibility for and the amount of such a credit.

Sec. 404. Effect on insurance and reinsurance contracts

Because most insurance policies cover multiple liabilities, it was necessary to account for "erosion" of a policy that covers not only asbestos liabilities, but potentially other liabilities such as property or other environmental liabilities when assessing contribution obligations to the Fund in order to avoid depriving an insured of coverage for other non-asbestos related claims. This section establishes how contributions to the Fund by insurers and reinsurers reduce the limits of existing insurance policies held by the defendant participants. The quantum of erosion is based on the collective payment obligations to the Fund by the insurer and reinsurer participants. The payment obligations are deemed as of the date of enactment to erode remaining aggregate product limits available to a defendant participant in an amount of 38.1% of each defendant participant's scheduled assessment amount. The erosion principles apply to the mandatory payment obligations to the Fund. However, any contingent payment required by the Administrator of any defendant participant shall not be deemed to erode remaining aggregate product limits.

Restoration of Aggregate Product Limits Upon Early Sunset: In the event of an early sunset of the Fund, any unearned erosion amount will be deemed restored as aggregate product limits available to the defendant participant as of the date of enactment. Such amounts will be deemed restored to each policy in such a manner that the last limits deemed eroded at enactment of the Act are to be the first limits restored at the early sunset. The applicable statute of limitations and contractual provisions for filing claims under any insurance policy with restored aggregate product limits shall be deemed tolled from the date of enactment through six (6) months after the date of the early sunset.

Finite Risk Policies Not Affected: Notwithstanding any other provision of this Act, except subject to Sec. 212(a)(1)(D), the Act shall not affect or impair any rights or obligations of any party to an insurance contract that expressly provides coverage for governmental assessments imposed to replace insurance or reinsurance liabilities in effect on the date of enactment.

Notwithstanding any other provision of this Act, except subject to Sec. 212(a)(1)(D) and Sec. 404(d)(2), the Act shall not affect or impair any rights or obligations of any person with respect to any insurance purchased by a participant after December 31, 1990 that expressly provides coverage for asbestos liabilities, including finite risk policies. Subject to Sec. 212(a)(1)(D), which governs the obligations of certain reinsurers to their reinsureds under reinsurance policies commonly referred to as finite risk policies, aggregate stop loss, aggregate excess of loss, or loss portfolio transfer policies, Sec. 404(d)(1)(B) addresses the insurance obligations under so-called "finite risk" insurance contracts purchased by a participant after 1990 and that expressly provide coverage for asbestos liabilities. These two sections have distinct purposes.

Effect on Certain Insurance and Reinsurance Claims: Subject to Section 212(a)(1)(D), a participant may not pursue an insurance or reinsurance claim against another participant for payments to the Fund. However, Section 404(e) provides a limited exception to this bar. A participant may pursue a claim against an insurer or reinsurer on the basis of a written agreement specifically providing insurance, reinsurance or other reimbursement for required payments to (i) a Federal trust fund established by Federal statute to resolve asbestos injury claims or (ii) where applicable under 404(d).

Any assignment of any rights to coverage for asbestos claims to any person who has asserted an asbestos claim prior to the effective date, or to any trust, person, or entity established to pay asbestos claims, shall be null and void.

The Act does not affect or impair any rights or obligations of any person for amount that is obligated to pay with respect to asbestos or other claims except as otherwise provided by the FAIR Act.

Sec. 405. Annual report of the administrator and sunset of the act

This section requires the Administrator to submit an annual report to the Senate Committee on the Judiciary and House Committee on the Judiciary concerning the operation of the Asbestos Injury Claims Resolution Fund. The section specifies the contents of the report which includes summaries, estimates, recommendations, and an analysis of the financial condition of the fund, including the ability of the Fund to pay claims for the subsequent five (5) years in full and as required.

Contents of Report: The annual report shall include an analysis of the claims experience of the Fund during the fiscal year, including among other factors a statement of the percentage of asbestos claimants who filed, determined to be eligible, and received compensation to which they were eligible. The report shall also include a statement as to the administrative performance, financial condition, and financial prospects of the Fund.

Claims Analysis and Verification of Unanticipated Claims: On the basis of the annual report, the Administrator will conduct a review based on the best available medical evidence: (1) of qualifying claims under a disease level to determine whether all or a significant number of qualified claimants under the class level suffer from an asbestos exposure related disease if the number of qualifying claims under a disease level exceeds the Congressional Budget Office (CBO) projected claims by one hundred twenty-five (125%) percent, or; (2) of ineligible claims under a disease level to determine if a significant number of claimants that were denied compensation but should have qualified on the basis of an asbestos exposure related disease if the number of qualifying claims under a disease level falls below the CBO projected claims by seventy-five (75%) percent.

Determination—The Administrator shall examine the best available medical evidence and any recommendation made by the Advisory Committee and Medical Advisory Committee regarding the improvement of diagnostic, exposure, and medical criteria to determine the nature of the claims submitted and awarded compensation under a disease level. Specifically, the Administrator shall determine whether claimants suffering from injuries that were not substantially contributed to exposure to asbestos received com-

pensation under a claim level or whether claimants suffering from injuries that were substantially contributed to exposure to asbestos were denied compensation under a claim level. Further, the Administrator shall determine the accuracy of CBO projections of the number of expected claimants.

Recommendations Concerning Claims Criteria—On the basis of these findings, the Administrator shall issue a recommendation to Congress of changes to compensation criteria to ensure that the Fund compensates the claims of claimants suffering from injuries that are substantially contributed to exposure to asbestos.

Recommendations of Administrator and Advisory Committee: Any recommendations of the Administrator to Congress shall be referred to the Advisory Committee, which shall hold expedited public hearings on such recommendations and any alternatives to come to its own recommendations to be submitted to the Senate and House Committees on the Judiciary no later than ninety (90) days after receiving the Administrator's recommendations.

Shortfall Analysis: If the Administrator concludes after conducting the annual report that the Fund may not be unable to pay claims at any time within the next five (5) years, then the Administrator shall include an analysis explaining why and when the Fund will no longer be able to pay out claims. The Administrator must also include recommendations as to alternatives for responding to the situation and a statement as to which of the alternatives he/she believes would be the best.

Beginning in year 6 of the life of the Fund, if the Administrator determines that a shortfall in payments by insurer participants would cause the termination of the Fund, then the Administrator may impose shortfall assessments on insurer participants in addition to the amounts required under the allocation methodology. However, the Administrator shall not impose shortfall assessments if they would be insufficient to avoid a recommendation of termination of the Fund. These shortfall assessments may not exceed the amount necessary to account for any shortfall in meeting the required aggregate amount to be paid into the Fund by insurer participants.

In formulating recommendations, the Administrator shall consider the reasons for the short fall, including: (1) financial factors such as the returns on investments, borrowing capacity, interest rates, and ability to collect contributions; (2) the operation of the Fund, such as the administration of claims process, collection of obligations, programs, and potential areas of fraud; (3) the appropriateness of the diagnostic exposure and medical criteria; the actual incidence of asbestos-related injuries based on data; and (4) the compensation of injuries with alternative causes. If the Administrator recommends the termination of the Fund, such a recommendation must be accompanied by a plan for winding up the Fund.

Sunset of Act: The Fund shall terminate after the Administrator has: (i) begun processing claims; and (ii) conducted an operational review of the Fund in preparation for the annual report and found that there are insufficient monies in the Fund to consider additional claims and still satisfy all of the Fund's outstanding obligations, such as satisfying resolved claims and paying incurred debt.

The Fund shall terminate one hundred eighty (180) days after the Administrator's determination of termination.

Extinguished Claims—A claim that is extinguished for failure to file with the Fund within the prescribed statute of limitations or otherwise preempted shall not be revived after the sunset of the Act.

Continued Funding—The Act requires participants to continue making payments to the Fund. However, if the full payment obligation of the participants is not required to pay off the obligations of the Fund, then the Administrator may reduce the payment levels. Any such reduction shall be allocated among the participants in the same manner as required by the Act above.

Sunset Claims—This provision relates to remaining unsatisfied claims upon termination of the Fund and persons asserting those claims. Upon determination of termination of the Fund, the applicable statute of limitations shall be tolled for the filing of sunset claims. For those who chose to pursue their claims in court, the relevant statute of limitations shall continue to run, except those who filed a claim with the Fund before termination of the Fund shall have two (2) years after the date of termination to file a claim in court.

Asbestos Trusts and Class Action Trusts—After termination, the trust distribution program of an asbestos trust and class action trust will be replaced by the medical criteria requirements of Section 121.

Payment to Asbestos Trusts and Class Action Trusts—The amounts determined to be paid to asbestos trusts and class action trusts must be transferred to the respective trusts of the debtor within ninety (90) days.

Nature of Claim After Sunset: After termination of the Fund, any individual, who has not had an asbestos-related claim satisfied by the Fund, may bring a claim in Federal district court, State court in where the claimant resides, or any State court where the asbestos exposure occurred. If a defendant cannot be found in the State where the plaintiff resides or where the asbestos exposure occurred, then the claim may only be brought in the Federal or State court where the defendant may be found. In suits where asbestos exposure occurred in more than one county or Federal district, the trial court will determine the most appropriate forum for the claim. If the court determines that another forum is most appropriate, then the court shall dismiss the claim. Any relevant statute of limitations shall be tolled during this time.

An individual whose claim was resolved by the Fund may not bring a claim after the sunset of a Fund. However, if the individual recovered for a non-malignant asbestos-related disease from the Fund that has progressed, then the individual may bring a claim for the subsequent progressive disease unless the claimant knew or should have known about the disease at the time of filing with the Fund. Further, an individual, who recovered for a non-malignant or malignant asbestos-related disease from the Fund that has progressed to mesothelioma, may bring a suit on the basis of his/her mesothelioma unless the individual knew or should have known of the disease when he/she filed with the Fund.

Exclusive Remedy—After the Fund sunsets, a suit brought in this manner shall be the exclusive remedy for any asbestos claim, re-

gardless of whether the claim arose before or after the date of enactment or termination of the Act.

Class Action Trusts—An asbestos-related claim may not be maintained against an established asbestos liability class action trust after the assets of the class action trust have been transferred into the Fund. If the Act sunsets, then the only remedy for claims against that class action trust will be to bring a claim against the class action trust established by the Administrator for the purpose of paying asbestos claims.

Expert Witnesses—This provision allows for the introduction of qualified expert testimony meeting certain requirements if the testimony will assist the trier of fact in reaching a determination on a claim.

Sec. 406. Rules of construction relating to liability of the United States government

Except as otherwise specifically provided in this Act, nothing in this Act may be construed as creating a cause of action against the United States government, any entity established under this Act, or any officer or employee of the United States government or such entity. In addition it should not be construed in any way to create an obligation of funding from the United States government, including any authorized borrowing.

Sec. 407. Rules of construction

Nothing in this Act shall preclude the formation of a fund for the payment of eligible medical expenses related to treating asbestos-related disease for current and former residents of Libby, Montana. Any such payment shall not be considered a collateral source.

Nothing in this Act shall be construed to preclude any eligible claimant from receiving health care from the provider of their choice.

Sec. 408. Violations of environmental and occupational health and safety requirements

This section requires the Administrator to refer any information relating to violation of the Toxic Substances Control Act, the Clean Air Act, or the Occupational Safety and Health Act to the Secretary of Labor, to the Administrator of the EPA or the United States Attorney for possible civil or criminal prosecution and penalties. The Act also amends the Occupational Safety and Health Act of 1970 to provide enhanced criminal penalties for willful violations of occupational standards for asbestos.

This section also directs the United States Sentencing Commission to review and amend, as appropriate, the United States Sentencing Guidelines regarding environmental crimes relating to asbestos to ensure that the penalties are sufficient to deter and punish future activity and for other reasons.

Sec. 409. Nondiscrimination of health insurance

A health insurer may not deny, terminate, or alter the terms of coverage of the health plan of a claimant or beneficiary of a claimant because of participation in a medical monitoring program or as a result of information discovered as a result of medical monitoring. This section amends Section 702(a)(1) of the Employee Re-

tirement Income Security Act of 1974, Section 2702(a)(1) of the Public Health Service Act, and Section 9802(a)(1) of the Internal Revenue Code of 1986 to conform with this provision.

TITLE V.—ASBESTOS BAN

Sec. 501. Prohibition on asbestos containing products

This section amends chapter 39 of Title 18 to prohibit the manufacture, distribution and importation of consumer products to which harmful asbestos is deliberately or knowingly added. This section provides a specific exception for the manufacture, processing, or distribution of asbestos-containing products by or for the Department of Defense if the Secretary of Defense certifies and provides a copy of the certification to Congress that: (1) the use of the product is necessary to the critical functions of government (as defined); (2) there are no other reasonably available and equivalent alternatives to the product; and (3) the use of the product will not result in a known unreasonable risk to health or the environment. Further, the provision provides an exemption without a review or limit on duration for any asbestos containing product requested by the Administration of the National Aeronautics and Space Administration if the Administrator certifies and provides a copy of the certification to Congress of the necessity of the product.

The provision also contains specific exemptions and authorizes the Administrator to hear and grant exemptions on a case by case basis. The Committee found precedence and structured this section in large part on an asbestos ban implemented by the Environmental Protection Agency in 1989. Although this regulatory ban was invalidated by the Fifth Circuit on mainly procedural grounds, this section implements it legislatively and it is the Committee's intent that the Administrator use the 1989 Environmental Protection Agency regulations as a guide towards implementing the ban and relevant exceptions under this section. The Committee recommends that the EPA consider, consistent with its prior regulations, among other issues: 1) whether to create a two-stage ban with a manufacturing ban first and a distribution in commerce ban phased in after a proper time delay; 2) whether to provide a labeling mechanism to identify an asbestos containing product as soon as practicable after date of enactment; and 3) whether to provide an enforcement standard that requires a violation under the ban to be knowing and willful.

Sec. 502. Naturally occurring asbestos

This section calls for the Administrator of the Environmental Protection Agency (EPA) to conduct a study and submit a report within twelve (12) months of the date of enactment to assess the risks of exposure to naturally occurring. Given the uncertainties concerning naturally occurring asbestos, including the potential multiple sources of asbestos in communities and the uncertainties associated with the durations of activity-based exposure, the EPA shall evaluate the appropriateness of the existing risk assessment values for asbestos and methods of assessing exposure.

Within eighteen (18) months of the date of enactment, the Administrator of the EPA shall establish dust management guidelines, and model regulations that States or localities can choose to

adopt, after consulting with appropriate Federal and State agencies and other interested parties after appropriate notice. These guidelines and model regulations shall include site management practices to minimize the disturbance of naturally occurring asbestos, air and soil monitoring programs to assess exposure levels as development sites, and appropriate disposal options. Further, not later than eighteen months after the date of enactment, the Administrator of the EPA shall establish comprehensive protocols for testing the presence of naturally occurring asbestos after consulting with appropriate State agencies. For existing buildings and areas, the Administrator of the EPA shall issue public education materials, recommended best management practices and recommended remedial measures for areas containing naturally occurring asbestos no later than one (1) year after the date of enactment.

This section also calls for the following:

(1) the Secretary of the Interior to collaborate with the California Geological Survey and any other appropriate State agencies to produce final, publicly available maps of asbestos zones, prioritizing relevant portions of California counties with significant amounts of naturally occurring asbestos that are experiencing rapid population growth, and also identifying and mapping other areas of significant concern in other States;

(2) the Director of the National Institutes of Health to administer one or more research grants to qualified entities for studies that focus on better understanding the health risks of exposure to naturally occurring asbestos, where grants are awarded through a competitive peer-reviewed, merit-based process;

(3) the participation of representatives of the EPA and Health and Human Services in any task force convened by the State of California to evaluate policies and adopt guidelines for the mitigation of risks associated with naturally occurring asbestos;

(4) the Administrator of the EPA to award fifty (50%) percent Federal matching grants for the remediation of naturally occurring asbestos in schools, parks, other public areas, and public or private serpentine roads that generate significant public exposure to naturally occurring asbestos; and to establish criteria to award such grants within four (4) months of the date of enactment; and

(5) an allotment of $40 million from the Fund for the purpose of carrying out the requirements of the section.

VII. Critics' Contentions and Rebuttals

Critics' Contention No. 1: Critics contend that the funding provided for in S. 852 is inadequate to pay all asbestos victims.

Response: S. 852 as amended obligates defendant and insurer participants to contribute an aggregate of $136 billion to the Asbestos Injury Claims Resolution Fund (hereinafter "Fund"). In addition, at least another $4 billion would be contributed to the Fund from confirmed bankruptcy and other asbestos compensation trusts, bringing the total level of mandatory contributions to the Fund to at least $140 billion. The size of the Fund is based on sound statistical data and economic models, and is more than adequate to compensate all victims of asbestos-related disease. Indeed, a leading actuary with Tillinghast-Towers Perrin, testified convinc-

ingly before the Committee on June 4, 2003 that "$108 billion appears to be more than adequate * * *"[44]

The total estimated cost of ultimate asbestos loss and expense, which includes both past payments and projected future payments, is $200 billion.[45] The RAND Institute for Civil Justice estimated that $70 billion has already been paid through year-end 2002.[46] By reducing the total estimated cost of asbestos-related loss and expense by the $70 billion already paid out through 2002, the remaining future cost of asbestos-related loss and expense is an estimated $130 billion.

One of the most beneficial features of the FAIR Act is that it will significantly reduce the substantial transaction costs of the current tort system—amounts which most experts agree currently consume more than half of the total costs.[47] By substituting the tort system for an administrative no-fault system for compensation, the FAIR Act will wring out these transaction costs and further reduce the future projected costs. Of the $130 billion of asbestos-related spending remaining outstanding, Tillinghast-Towers Perrin estimates that approximately $28 billion (or 21.5%) is attributable to defense costs. Of the remaining $102 billion, Tillinghast estimates that approximately $41 billion (or 40%) will go to plaintiffs' attorneys. In the current system, as a result of these transaction costs, only $61 billion of the $130 billion estimate of future asbestos-related loss and expense, or less than half, is expected to be paid to asbestos victims.[48] Moreover, the FAIR Act will correct the current misallocation of payments being made to unimpaired claimants who are flooding the court system today. Therefore, the $140 billion to be contributed to the Fund by defendant and insurer participants will be more than double the $61 billion, thus giving victims the certainty that they will receive compensation under the new system.

Finally, as an added protection against the unlikely risk of insufficient funding, the FAIR Act gives the Administrator authority to borrow from commercial and government lending institutions amounts to offset short term losses.

Critics' Contention No. 2: Critics contend that given the significant amount of time that will be involved in establishing the Fund and getting it funded and fully operational, asbestos victims may have to wait years before they receive any compensation.

Response: Currently, when cases enter the tort system many individuals are forced to wait significant periods of time before their case is brought before a judge or jury. Some states, however, have enacted expedited procedures to address cases of terminal individuals in an expedited timeframe. In these states, cases are filed and either settled or heard within 6 months. In addition, these cases are often paid within 30 days to 6 months.

Given the expedited processes available in many states, provisions were added during Committee consideration of the FAIR Act

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[44] Statement of Jennifer L. Biggs, FCAS, MAAA, Tillinghast-Towers Perrin, Hearing Before the Senate Committee on the Judiciary, "Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003," 108th Cong., June 4, 2003, at 7.

[45] Id. at 1.

[46] Steve Caroll, RAND Institute for Civil Justice, "The Dimensions of Asbestos Litigation" presentation at the Spring Meeting of the Casualty Actuarial Society, May 19, 2003.

[47] See id; see also Biggs, supra Note 1 at 2–3.

[48] See Biggs, supra Note 1 at 2.

to establish several safeguards to ensure that terminal individuals have their claims paid as quickly as or quicker than the current system.

A process was created whereby exigent claimants, individuals who have mesothelioma or have been diagnosed with less than one year to live, may have their claims resolved in as little as sixty (60) days and receive their first payment in thirty (30) days.

The process created under the bill allows exigent claimants to immediately file their claim with the Fund or with the claims facility, or they may file a notice of intent to seek a settlement. In either case the exigent claimant must provide the necessary information to the Administrator. The Administrator then has up to sixty (60) days to make a determination if the claim qualifies for payment. Upon approval the Administrator must pay the claim on an expedited basis.

In addition, there are several additional provisions to ensure exigent claimants are paid quickly. If for whatever reason the Administrator or claims facility is unable to process or pay the claim, the defendants and the claimant must be notified within ten (10) days. Upon notification, the defendants may make a settlement offer. If the offer is rejected defendants have twenty (20) days to perfect the offer. If the offer is again rejected, or if no offer is made, the claimant's settlement must then be bumped up to 150% of the award value under the trust. If after nine (9) months the exigent claimant has not had their claim processed or fully paid, then they may return to court where their case was originally filed, or if their claim arose after enactment they may file their case in the appropriate state or federal court.

This process ensures that terminal individuals receive fair and timely payment as quickly as possible, and in many cases in a timelier manner than if they proceeded in the courts.

Critics' Contention No. 3: Critics contend that if the Fund runs out of money, asbestos victims will have no place to turn for compensation.

Response: As explained in detail in response to Critics' Contention No. 1, based on all reasonable estimates, the Fund will not run out of funds or be unable to meet all of its obligations to all claimants. But in the event the FAIR Act does not ultimately provide adequate funding to compensate all asbestos victims deemed entitled to compensation, S. 852 provides victims the right to pursue their claims in the tort system.

Critics' Contention No. 4: Critics contend that victims will be paid less under the FAIR Act than they could get in the tort system.

Response: The Committee has approved S. 852 in recognition that the tort system is broken and the status quo cannot be sustained for either victims or defendants. Under the bill, claimants will receive fair, consistent and equitable compensation without the delays inherent in litigation. Moreover, most appropriately, those that are most seriously ill and whose diseases have the most direct causal link to asbestos will receive the most compensation under the legislation, including up to $1.1 million for Level IX, Mesothelioma. Those individuals who have been exposed to asbestos but are not impaired will be eligible for medical monitoring, and their claims will be preserved should they later develop impairment.

In sharp contrast to the bill, the current tort system is unfair to asbestos victims and plagued with uncertainty. Whether asbestos victims receive compensation at all, and, if so, how much they might receive, depends on where and when they file claims, who the defendants happen to be, whether those defendants are solvent, and the leverage and skill of their trial lawyers. The amount of compensation victims receive diverges widely, with some victims receiving very large amounts, and others receiving little or nothing. And sadly, some victims die before their cases can be heard in court. These distortions in the current tort system are further exacerbated by jurisdictional idiosyncrasies. Only five states had two-thirds of all asbestos case filings between 1998 and 2000. The concentration of an overwhelming number of filings in a small number of jurisdictions only increases the delays and inequities inherent in the current system.

While the tort system bestows large awards for some victims, it all too often leaves the unfortunate without fair compensation, and the system is only getting worse with time. In order for victims to be compensated, they need to be able to look to solvent companies for resources. However, to date, at least 73 companies have declared bankruptcy because of asbestos claims. While bankruptcy trust funds can be an efficient way of compensating victims, a study of a number of major asbestos defendant bankruptcies showed that the average time from petition to confirmation of a reorganization plan was six years. During these proceedings, claimants are not paid. Even worse, after a company declares bankruptcy, it has very limited resources with which to compensate victims. The Manville Trust, for example, can only pay victims 5 percent of the value of their claims. Moreover, not one single existing asbestos trust or any of the 20 or more trusts currently pending in bankruptcy court can or will be able to pay any more than a fraction of the value of the claims that will be presented.[49]

As noted in the response to Critic's Contention No. 1, by reducing the substantial transaction costs of the current system and directing resources to those who are injured from asbestos related diseases, S. 852 will deliver more compensation to victims in a timely and certain manner.

The scheduled values of S. 852 are some of the highest of any federal or state compensation program in existence. The values compare very favorably to the statutory, maximum disability and death benefits of all other federal compensation programs and are higher than the benefits offered under state workers' compensation programs. In January of 2002, of the 23 states reporting a calculated, maximum death benefit, the lowest reported amount was $46,900 in Maryland; the highest reported amount was $390,000 in Minnesota. By contrast, under the bill, the benefit for Level IX, Mesothelioma, is $1.1 million.

The values in S. 852 also compare favorably to the other bankruptcy trusts. By example, the Manville Trust provides for a scheduled value of $350,000 for mesothelioma claimants, and is only able to pay 5 cents on the dollar on all claims. A mesothelioma claimant would, therefore, only receive a payment of $17,500 from the Man-

[49] See Statement of David Austern, General Counsel for the Manville Personal Inquiry Settlement, Trust, Hearing before the Senate Committee on the Judiciary, The Asbestos Litigation Crisis Continues—It is Time for Congress to Act, 108th Cong., March 5, 2003.

ville Trust, but under S. 852 would receive $1.1 million. While claimants typically sue a number of trusts, the results are likely to be similar.

Finally, the S. 852 prohibits the subrogation of a claim as a result of a claimant receiving an award from the Fund.

Critics' Contention No. 5: Critics contend that S. 852 is supposed to embody a "no fault" system, but the medical criteria are overly stringent.

Response: S. 852 establishes a non-adversarial, no-fault system in which claimants, in sharp contrast to the tort system, will not have to prove fault on the part of defendants or have to provide specific product identification in order to receive compensation. In addition, those individuals that have been exposed to asbestos but are not ill will be eligible for medical monitoring and will remain eligible to receive compensation at a later time should they become ill in the future.

The bill's medical criteria are fair and reasonable and appropriately designed to provide certainty to claimants. Indeed, the starting point for the medical criteria provided for under S. 852 were those from the Manville Trust, which were adopted with the overwhelming support of the claimants and their counsel and which have been substantially followed by other bankruptcy trusts because of their credibility.

In exchange for establishing a no-fault, non-adversarial system, however, the criteria in the Act require a medical diagnosis by the claimant's doctor and sufficient evidence to establish that the claimed illness is asbestos related. Such criteria are also necessary to keep the problems associated with mass screenings and the current abuses found in the tort system from being transferred to the Fund. To ensure the integrity of the Fund and to promote the purpose of the bill to direct funds to those claimants who are truly ill from their exposure to asbestos, therefore, the criteria in the bill reflects compromises, yet is based on sound, diagnostic, medical, latency and exposure criteria.

Critics' Contention No. 6: Critics contend that small businesses that rely on their insurance will be harmed under S. 852 because they will be forced to contribute to the Fund and will not be able to use their insurance in order to do so.

Response: Under the FAIR Act, small businesses, as defined under Section 3 of the Small Business Act, are *explicitly exempt* from having to contribute to the Fund, but will receive the very protections provided to all of the other defendant participants under the legislation. Also, small companies that have not incurred asbestos liability-related payments of $1 million or more before December 31, 2002 are exempt from having to contribute to the Fund. For those companies that are not exempt from having to contribute to the Fund, S. 852 tiers companies by size and liability, such that no company would have to contribute to the Fund an amount out of line with their resources. In stark contrast, the current tort system provides no protections for small businesses and allows any company of any size, no matter how small, to be sued into bankruptcy. Furthermore, the bill authorizes the Administrator to adjust defendant participants' contributions based on severe financial hardship and demonstrated inequity, further protecting the interests of all businesses of all sizes.

Critics' Contention No. 7: Critics contend that S. 852 will primarily benefit businesses and insurance companies.

Response: This contention is unwarranted. The bill benefits victims who have been inadequately served by the current tort system while providing economic stability to businesses that have been overwhelmed by abusive litigation in the current tort system, driving many into bankruptcy and impacting the jobs and pensions of their employees.

S. 852 will benefit victims significantly because they will receive fair, certain and equitable compensation without the delays and uncertainties inherent in the current tort system. Moreover, claimants will not have to worry whether their defendant is or will become bankrupt, and they will not bear the burden to prove liability, causation or to establish product identification as in litigation.

Further, under the funding provisions in S. 852, more resources will be available to compensate victims than under the current system. As estimated by leading actuaries, because of the substantial transaction costs of the current tort system, only a total of about $61 billion will go to asbestos victims in the future, while an estimated $69 billion will go to plaintiff and defense lawyers.[50] In contrast, under S. 852, $140 billion will go directly to compensate victims.

Victims will be much better protected once S. 852 is enacted because the current awards some receive from the tort system are not sustainable into the future. To date, over seventy (70) companies have gone into bankruptcy as a result of asbestos liability, and without reform, more companies will be at risk in the future. The Committee's hearing record is replete with the devastating impact the current asbestos crisis is having on businesses, workers, retirees, shareholders and the U.S. economy. S. 852 will ensure that asbestos victims no longer face the risk that their only recourse will be trusts created out of bankruptcies paying pennies on the dollar.

In short, S. 852 provides fair compensation to those who are injured by asbestos exposure and ensures that scarce resources will not be spent on the unimpaired at the expense of those with asbestos-related injuries now and into the future. Too often those most deserving do not get their fair share out of the current system. Victims will benefit substantially from the new system. S. 852 is fair and balanced and will produce substantial benefits for victims, workers, retirees, shareholders and the U.S. economy.

Critics' Contention No. 8: Critics contend that S. 852 is unconstitutional and will lead to years of litigation over its constitutionality.

Response: S. 852 has been very carefully written to avoid running afoul of the U.S. Constitution. Indeed, it is important to note that more than a decade ago a committee of the United States Judicial Conference, appointed by the Chief Justice of the U.S. Supreme Court, studied the special features of asbestos litigation and concluded that the "ultimate solution should be [federal] legislation recognizing the national proportions of the problem and creating a national asbestos dispute resolution scheme * * *."[51] Since that

[50] See Jennifer L. Biggs, supra at 2.

[51] Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (March 1991); see also id. at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the

time, the U.S. Supreme Court has called repeatedly for an administrative solution as provided for in S. 852.

In 1997, in *Amchen Prods., Inc.* v. *Windsor,* 521 U.S. 628–629 (1997), Justice Ginsburg wrote: "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."[52] In March 2003, in writing for the Court in *Norfolk & Western Ry.* v. *Ayers,* 123 S.Ct. 1210, 1228 (2003), Justice Ginsburg again stated: "The 'elephantine mass of asbestos cases' lodged in the state and federal courts, we again recognize, 'defies customary judicial administration and calls for national legislation.'" The Committee has heeded the explicit call of both the U.S. Judicial Conference and the U.S. Supreme Court in establishing the no-fault, publicly-administered, privately-funded administrative claims process provided for in S. 852.

In reviewing the constitutionality of S. 852, at the specific request of the Committee, preeminent Harvard constitutional law scholar Professor Laurence H. Tribe, testifying before the Committee on June 4, 2003, confirmed the constitutionality of the legislation:

> My conclusion, in brief, is that the FAIR Act is well within Congress' authority to enact and does not offend the constitutional guarantees of due process, equal protection, or right to jury trial. Nor does it represent an uncompensated taking of private property, an unconstitutional impairment of contracts, or a violation of the separation of powers.[53]

With regard to the concerns of some that the preemption of common law tort claims may violate due process or create a claim under the Takings Clause of the Constitution, Professor Tribe testified further on the ability of Congress to preempt common law tort claims:

> The legislative precedents illustrate the breath of Congress' power to adjust, restrict, or even abolish common-law and statutory causes of action. Thus, Congress has ample authority to rationalize asbestos claims, by creating an Article I procedure in the asbestos court for the orderly payment of such claims and thereby avoiding a race-to-the-bottom situation in which relatively unimpaired plaintiffs are overpaid, transaction costs are high, and grievously injured plaintiffs risk getting little or no compensation at all * * *. It has long been settled, ever since the states began adopting workers' compensation statutes, that a legislature is free to modify or abolish common-law causes of action without violating due process or creating a claim for compensation under the Takings Clause.[54]

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only answer" and suggesting "passage by Congress of an administrative claims procedure * * *")

[52] See also *Ortiz* v. *Fibreboard Corp.,* 527 U.S. 815, 821 (1999).

[53] See Statement of Lawrence H. Tribe, Hearing Before the Senate Committee on the Judiciary, Solving the Asbestos Litigation Crisis: S. 1125 The Fairness in Asbestos Injury Resolution Act of 2003, 108th Cong., June 4, 2003, at 2.

[54] Tribe testimony at 6.

In written testimony submitted to the Committee by former Solicitor General Seth Waxman supports this analysis, he explains that "[t]here is further no doubt that in pursuing proper national goals, Congress may, to the extent it deems necessary or desirable, preempt and supersede the operation of state law." [55]

Nevertheless, should the constitutionality of S. 852 be challenged, the legislation explicitly provides for an expedited appeal directly to the Supreme Court as a matter of right within thirty days of any decision of a federal court finding any part of S. 852 to be unconstitutional. This ensures that any such litigation will be resolved quickly.

Critics' Contention No. 9: Critics contend that the FAIR Act will become another black lung fund with the government having to put money into the Fund to compensate victims.

Response: The FAIR Act establishes a trust fund for the compensation of asbestos claims that is privately funded. (Section 221(a)). Although the program is housed in the Department of Labor, the Act ensures that all administrative expenses, as well as claims, are paid by the Fund. (Section 101(a)(3)). The FAIR Act expressly provides that nothing in the Act shall be construed to create any obligation of funding from the United States or to require the United States to satisfy any claims if the amounts in the Fund are inadequate. (Section 406(b)). As such, industry, not the U.S. Treasury, will be paying the bills.

In response to an inquiry from Senator Nickles on S. 1125, as reported out of the Senate Judiciary Committee in 2003, the GAO recognized that S. 1125 explicitly provides that any borrowing by the Fund would not be supported by the U.S. Government. The GAO noted, however, that "[t]o ensure that the government incurs no liability for repayment of borrowing under the act, Congress may wish to explicitly state that repayment of borrowing is limited solely to amounts available in the Fund." The GAO's recommendation has now been incorporated into the FAIR Act. Under the Specter draft, any borrowing is limited to monies expected to be paid into the Fund, and section 221(b)(4) of the FAIR Act expressly provides that "[r]epayment of monies borrowed by the Administrator under this subsection is limited solely to amounts available in the [Fund]." (Section 221(b)).

In addition, the problems of the Black Lung Disability Trust Fund being chronically under-funded have been considered, and FAIR Act has been carefully crafted so as not suffer from the same problems as the Black Lung program. Many of the companies obliged to pay for workers' illnesses under the black lung fund were, soon after the enactment of the legislation creating the fund, acquired by other corporate interests. The legislation had not contemplated this scenario, and the successors-in-interest were not obligated to continue the payments that the original companies had made. The FAIR Act, by contrast, includes a comprehensive and specific provision designed precisely to ensure that successors-in-interest to the participants in the Fund are held just as responsible as the participants were, so that the Fund will not suffer any finial harm as the result of merger-and-acquisition activity. This provi-

[55] Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Comm. on the Judiciary, 108th Cong. 4 (2003) (testimony submitted for the record by Seth P. Waxman, Wilmer, Cutler & Pickering).

sion of the FAIR Act also requires reporting on all such activity to the Administrator, and just as importantly creates the opportunity for the Administrator—or another interested party—to bring a lawsuit to force compliance with the successor-in-interest provision and the obligations of such successors.

Further, unlike the Black Lung program, which is financed by a tax imposed solely on coal mining companies, the asbestos compensation fund has a much broader funding base because asbestos litigation has affected virtually every sector of industry. Moreover, the funding obligations are not dependent on a fixed tax on a few companies, but are instead guaranteed collectively by all of the defendants and insurers. In addition, unlike the Black Lung program the total amount of funding is based on a long history of claims filing with bankruptcy trusts, which is the best available data upon which to estimate funding obligations, and the most reliable claims projections by experts in the field.

The Black Lung program also has been criticized as being based on overly broad, ill-considered presumptions, creating what has been characterized as a runaway program. The medical criteria in the FAIR Act are based on detailed medical standards and require credible and reliable medical evidence to be filed with all claims. The Act also provides for Physicians Panels to review claims that have a more tenuous relationship to asbestos exposure. There are also independent reviews of certain claims and audit provisions to address any potential fraud and abuse. These safeguards were made to ensure that the FAIR Act does not establish a runaway program, while still providing compensation to the true victims of asbestos exposure. Finally, the FAIR Act also now excludes claims previously called Level VII claims, the so-called exposure-only lung cancers.

Also unlike the Black Lung program, the FAIR Act provides the Administrator with greater flexibility to address short-term funding problems without incurring undue debt, and, as previously noted, any debt incurred must be based on expected monies to be paid by defendants and insurers. If the guaranteed funds are not sufficient to pay all of the Fund's obligations, including administrative expenses and debt repayments, when due, the Fund will sunset and asbestos victims will be able to pursue their claims in court. (Section 405(f)). The funding requirements are to continue even after sunset if necessary to pay off any debt. (Section 405(f)(5)). The taxpayers will not be left holding the bill.

The Black Lung Benefits Act only required that a program be created for coal miners with pneumoconiosis, and the statute merely outlined presumptions of those who should be eligible and delegated authority to determine eligibility requirements to the Department of Labor. See, e.g., 30 U.S.C. § 921. Section 121 of the FAIR Act, on the other hand, prescribes detailed medical, diagnostic, latency, and exposure requirements to determine eligibility for compensation of asbestos claims. Consequently, Congress itself in the FAIR Act prescribes the criteria for eligibility for compensation, and these criteria are designed to compensate only those truly ill from asbestos exposure and not other causes. Unlike the Black Lung Benefits Act, the FAIR Act does not authorize the Department of Labor to promulgate new eligibility criteria or to change the criteria reflected in the statute. Indeed, as part of the annual

report to Congress required by the FAIR Act, the Administrator must review claims filings and eligibility determinations to ensure the purposes of the Act are met and that the Fund is compensating true victims of asbestos exposure and not compensating claims for injuries that are not caused by asbestos. (Section 405(c)). Based on experience gained in implementing the program, the Administrator can recommend changes to the eligibility criteria, but any such recommended changes must first go through a special commission and then be approved by Congress. (Section 405(e)). The Administrator is not authorized to change the eligibility criteria through regulations.

Moreover, the bill expressly mandates Department of Labor the authority to contract out with a claims handling facility to help alleviate the initial influx of claims. (Section 106(c)(4)). Currently, there are a number of private sector claims handling facilities in existence with experience managing asbestos claims. For example, the Claims Resolution Management Corporation ("CRMC") handles the claims processing for the Manville Trust and three other bankruptcy trusts. CRMC reportedly has been able to handle over 150,000 asbestos claims annually from law firms filing with the Manville Trust. In addition to CRMC, there are a number of claims management facilities that handle a multitude of cases every year on behalf of insurance companies and defendants. Existing claims handling facilities are very efficient. For example, in 2002, CRMC adopted a sophisticated electronic claims submission system. These entities (or new entities drawing upon the expertise of these entities) would be available to handle claims on behalf of the Department of Labor and/or to assist in training of claims handling personnel. The costs of retaining such entities would be borne entirely by the Fund.

Critics' Contention No. 10: Critics contend that legislation that imposes a set of medical criteria in the tort system would be preferable to the trust fund created in S. 852.

Response: The Committee received significant testimony establishing that the current system for compensating asbestos victims is broken. Victims are dying while they wait for their day in court. When they finally receive their day in court, victims often receive only a small percentage of the costs involved in our tort system, or if the defendant has been forced to file for bankruptcy, then victims receive little or no compensation. This dire situation cries out for a solution outside of the court system that streamlines the claims process for victims; ensures that they receive timely and fair compensation relative to the severity of their injuries; and protects compensation they receive from subrogation by insurance companies.

According to the most recent RAND study, asbestos victims receive an average of only 42 cents for every dollar spent on asbestos litigation. Thirty-one cents of every dollar have gone to defense costs, and 27 cents have gone to plaintiffs' attorneys and other related costs. Enactment of a medical criteria bill for asbestos would fail to reduce the high transaction costs of the asbestos tort system.

Medical criteria bills do nothing to protect businesses from going bankrupt or victims who were injured by bankrupt companies from receiving fair compensation. Many asbestos manufacturers are in bankruptcy proceedings and therefore are immune from suit. Vic-

tims like our nation's veterans are unable to recover for asbestos exposure they received while serving the country in the current tort system. The Judiciary Committee recently received the following testimony from Hershel W. Gober, National Legislative Director, Military Order of the Purple Heart:

> 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.

Criteria bills would do nothing to compensate victims like our nation's veterans who were injured by bankrupt companies during their service to our country.

Legislation imposing medical criteria in the tort system is inherently unfair to victims. Such measures do not alleviate the delays victims face when confronted with overwhelmed court dockets. Criteria bills will impose new hurdles for plaintiffs and continue to require the identification and proof of the manufacturer or entity responsible for exposing them to asbestos decades ago. In contrast, the FAIR Act Fund will not require victims to identify and prove the manufacturer or entity that exposed them to asbestos. Under the FAIR Act Fund, victims will not have to hope that the entity responsible for their exposure is financially solvent. They will recover compensation under the Fund in proportion to their impairment or disease.

The current system for compensating victims of asbestos exposure is inefficient and inequitable. A medical criteria bill is not a solution because it operates within the same tort system. A true alternative will avoid the problems with the current asbestos tort system and bankruptcy compensation process. The Fund created by S. 852 will provide fair and timely compensation to all victims impaired by asbestos exposure and would bring financial certainty to defendant companies and insurers. Medical criteria proposals that would operate within the existing tort system simply would not.

VIII. Cost Estimate

Due to time constraints, the Congressional Budget Office estimate was not included in the report. When received by the Committee, it will appear in the Congressional Record at a later time.

Language for filing Congressional Budget Office estimate in the Record:

CBO ESTIMATE ON S. 852

Mr. SPECTER: Mr. President, on June 30, 2005, I filed a committee report to accompany S. 852, a bill to provide for education and training, and for other purposes. At the time the report was filed, the estimates by the Congressional Budget Office were not available. I ask that a complete copy of the CBO estimate be printed in the Record.

IX. REGULATORY IMPACT STATEMENT

Pursuant to Rule XXVI, of the Standing Rules of the Senate, the Committee, after due consideration anticipates that S. 852 will have the following regulatory impact:

A. (i) *Businesses regulated*—Under S. 852 companies and insurers with asbestos liability will be required to submit necessary financial documentation to the Asbestos Injury Claims Resolution Fund and the Insurers Commission respectively for proper assessment of contributions. With respect to the ban on certain asbestos containing products in S. 852, it is anticipated the regulatory burden will be minimal especially in light of regulation promulgated in the late 1970's and early 1980's that limited occupational exposure to asbestos.

(ii) *Individuals regulated*—Individuals seeking compensation from the Asbestos Injury Claims Resolution Fund will be required to submit necessary documentation to support their claim.

B. *Economic Impact*—S. 852 will have a positive economic impact on businesses by providing greater certainty with regard to asbestos liability exposure, which in turn will enable businesses to preserve jobs and pension for employees.

C. *Personal Privacy Impact*—Claimants must provide written consent for claims examiners to obtain information necessary to evaluate their claim, including their medical and smoking history in order for a determination of eligibility. It is anticipated that the impact will be comparable to requirements under the current tort system.

X. ADDITIONAL VIEWS

ADDITIONAL VIEWS OF SENATORS SESSIONS, CORNYN, GRASSLEY, KYL, GRAHAM, BROWNBACK, AND COBURN

The asbestos litigation explosion of recent years has caused untold harm to asbestos victims, has cost billions of dollars and has bankrupted over 70 businesses. The RAND Institute notes that asbestos litigation is "the longest-running mass tort litigation in the United States."[1] Today, it continues to deny many victims timely compensation, serves as a significant drain on the national economy, and hinders America's competitiveness on the global stage. This albatross should not be allowed to continue.

S. 852 represents a step forward in our efforts to craft legislation that would offer a national solution to this problem. The bill includes a number of important improvements over the legislation we considered in the 108th Congress, S. 1125 and S. 2290. These improvements combined with the considerable efforts of the Chairman to advance the bill compelled us to vote it out of Committee.

However, we continue to hold serious reservations about a number of important aspects of the current legislation. These concerns generally can be summarized as follows: (1) the medical criteria as written do not ensure that the trust fund will pay only the claims of individuals who are truly sick from asbestos exposure; (2) the trust fund does not create a complete and permanent alternative to litigation, particularly in that it allows a large number of claims to remain in or return to the courts; (3) the trust fund is not adequately protected from much of the abuses and fraud that has contributed a great deal to the existing situation; (4) it is neither clear that the cost of the trust fund can be sustained nor that the allocations formula is structured fairly; (5) the level of available information for our study and analysis is not sufficient to conduct adequate due diligence; and (6) the trust fund does not enjoy the level of broad support from the victims and the parties who are contributing to it that we would prefer.

1. The medical criteria are not sufficient

Because claimants may suffer from diseases that may or may not have been caused by asbestos exposure, and because asbestos exposure may leave markers without impairment or illness, it is essential that this Fund contains medical criteria and exposure requirements that distinguish claimants, based on medical and scientific standards, who have disease caused by asbestos exposure from those who do not. Unfortunately, S. 852, as written, will result in

[1] Stephen J. Carroll, Asbestos Litigation, Rand Inst. for Justice, xvii (2005).

many individuals receiving compensation who are not, in fact, sick from asbestos exposure.

For example, Level VI provides compensation for claimants suffering from "other cancers", including colorectal, laryngeal, esophageal, pharyngeal and stomach cancer. These cancers commonly affect the general public, and according to the overwhelming weight of the medical evidence, are not caused by exposure to asbestos.[2] In addition, the use of CT Scans for diagnoses is fraught with potential abuse and problems. These and other problems could bankrupt the fund, leaving inadequate funds to compensate those victims who are truly sick from asbestos exposure.

In order to ensure that true victims of asbestos exposure are compensated fairly, we believe that the medical criteria should be improved. Doing so would greatly increase the chances of the trust fund's success and help bring resolution to thousands of asbestos victims.

2. S. 852 does not provide a complete alternative to litigation

One of the key benefits of a trust fund should be exiting the current broken asbestos litigation system—one where attorneys' fees and other administrative costs are consuming approximately 58% of all asbestos-related litigation costs.[3] Unfortunately, the current version of the trust fund in S. 852 leaves potentially thousands of claims outside of the trust fund and undermines the ability of the fund to operate properly.

At virtually every turn throughout the life of the fund, the possibility of a claim remaining in the tort system is an option. At start-up, claimants may choose to stay in court if the trust fund is not certified as operational by the Administrator within a certain time frame. Similarly, rather than putting all claims pending at the time of enactment that do not have a final judgment or verdict into the trust fund, S. 852 leaves many current claims in court. Finally, and potentially most troubling, the current legislation would allow a complete reversion to the tort system in the event the Administrator finds the trust fund is insolvent. Below, we discuss the likelihood, or at least potential, that the fund's viability may be in question, but the prospect of spending billions of dollars to create a federal trust fund only to return to the current, albeit slightly modified, court system is troubling.

Virtually everyone agrees that the current system is badly broken. Accordingly, we would prefer that S. 852, or any trust fund legislation, place as many claimants as possible into the newly created fund in order to prevent their continuation in the current fraudulent, broken asbestos litigation system.

One of the advantages of a no-fault compensation system, such as the asbestos trust fund, is the ease with which claims may be filed. Instead of forcing claimants or their attorneys to fully litigate their claim against the defendant companies, the current trust fund only requires them to submit the requisite paperwork and documentation to the Administrator. While S. 852 limits attorney's fees to 5% of the award paid to the claimant, we believe that an

[2] See Generally, Goodman, M., Cancer in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis, Cancer Causes and Control, 10: 453–65 (1999).

[3] Carroll, *supra* note 1, at 105.

attorney, representing a mesothelioma victim who recovers $1.1 million from the trust fund, should not be entitled to $55,000 in attorney's fees for simply filing paperwork with the Administrator.

3. The trust fund does not sufficiently avoid current fraudulent practices

The level of fraud underlying the current asbestos litigation crisis is well documented and troubling.[4] One of the primary benefits of a trust fund should be eliminating these fraudulent practices from continuing. S. 852 goes a long way toward eliminating those abuses but does not go far enough.

Specifically, we are very concerned about the potential abuses with regard to silica litigation and the on-going Multi-District Litigation (MDL) in Corpus Christi, Texas. What has transpired there is more than alarming. The details of the fraud and corruption are covered in the additional views offered by Senators Kyl, Cornyn and Coburn within this document. However, it can be summarized by Judge Janice Jack, who is presiding over this litigation, when she referred to "great red flags of fraud" with respect to numerous doctors signing off on claimants' medical records as consistent with diseases related to silica exposure without performing appropriate analysis.[5]

The trust fund currently takes some steps to address this specific concern—requiring plaintiffs to demonstrate by a preponderance of the evidence that, in short, they are not trying to "double-dip" and obtain a trust fund award while also pursuing a silica claim through the court system. Our concern is that the current language in the bill is not sufficient. It allows a claimant to show that he would only receive Level One medical monitoring and, thus, not a monetary award, and then be eligible to pursue a silica claim in court. This provision opens the door to extension of the existing fraudulent system.

Finally, we remain concerned that one of the key avenues for abuses, the "medical screening" programs, remains a part of S. 852. While improved in many respects—that is, limiting compensation to Medicare rates, requiring screeners to be approved and to not have excessively profited from screening historically—the mere existence of the medical screening program is troubling. At a lifetime cost of $600 million, this program calls into question the soundness of the trust fund and continues a practice that caused much of the problems we are attempting to solve in the first place.

4. The financial structure of the trust fund still causes us concern

The trust fund depends on a comprehensive understanding of the cash inflows and cash outflows. Unfortunately, while we await the analysis of the CBO, at the present we are satisfied neither that the allocations formula (inflows) is fair and adequate nor that the cost of the trust fund (outflows) will be sustainable.

The allocations to be assessed upon the insurance companies have been left to an insurance commission. While this remains dis-

[4] Senate Comm. on the Judiciary, 180th Cong., The Fairness in Asbestos Injury Resolution Act of 2003, (Comm. Report 2003) (additional views of Sen. Kyl).

[5] Jonathan D. Glater, *Civil Suits Over Silica in Texas Become a Criminal Matter in New York*, N.Y. TIMES (May 18, 2005).

concerting to us and many insurance companies, the allocations against defendant companies under the trust fund is particularly troubling. We should never be so careless as to place what amounts to a substantial tax burden on companies without knowing whether this burden is fair and whether it accurately reflects the amount the company would owe under the tort system.

The bill's current funding allocations have the potential to create substantial hardship for companies that have adequately insured themselves against asbestos litigation exposure. Since the fund will strip companies of their insurance coverage and it uses past asbestos expenditures, including those covered by insurance, to determine tier placement, certain companies who have paid no out-of-pocket expenses due to adequate insurance coverage stand to pay substantial sums. For example, the fund's allocations formula will require one company, which has $110 million in total past asbestos expenditures but no out-of-pocket expenses and, it believes, adequate insurance to cover all projected future expenses, to pay $16.5 million per year into the fund equaling $495 million over the life of the fund. Many companies predict that this inequity in funding allocations will drive them into bankruptcy. One of the goals of this legislation is to prevent more companies from going into bankruptcy. In addition, if companies cannot pay their required allocation under the fund, the ultimate viability of the fund may be questionable.

However, our concerns with the outflows or cost of the trust fund center more directly on the effect of medical criteria and the likely number of claimants. As previously discussed, failure to further improve the medical criteria will lead to an increased number of payouts to claimants who are not truly sick from asbestos exposure and, potentially, to the eventual bankruptcy of the fund. In addition, we are concerned that the data we were given regarding claims predictions may be insufficient and outdated. At the present, we are relying solely on one person's projections, those of Dr. Fran Rabinowitz, and the analysis of one company, Goldman Sachs, to determine the total cost of the Trust Fund. Should the claims predictions data, upon which the entire fund is based, prove incorrect; the overall viability of the fund will be jeopardized. Finally, the provisions providing Level IV compensation to residents of Libby, Montana without requiring proof of occupational exposure are problematic and call into question the possibility that other sites throughout the country where significant quantities of asbestos have been mined or processed will qualify, or ask to qualify, for the same benefits. The proposition of this alone could add significant stress to the Trust Fund and potentially lead to its insolvency.

We are also concerned that potential problems created by locating the asbestos trust fund within the Department of Labor will place additional and unnecessary financial strain on the trust fund. As the Department of Labor's experience with the Black Lung Trust Fund shows, housing the asbestos trust fund within the Department of Labor will lead to the inefficient processing of claims and will create an expectation that the federal government guaran-

tees the solvency of the fund.[6] Instead, we believe that a private, non-profit corporation would alleviate these concerns by processing claims quickly and efficiently and by preventing the expectation of a taxpayer bailout should the fund become insolvent.

5. Available information has been insufficient to perform adequate due diligence

One particularly concerning problem has been the lack of information that is available to the Committee with regard to the underlying financial analysis of the trust fund. We have repeatedly requested more information on the financial analysis upon which this trust fund is based. The proponents of the trust fund have provided us with only cursory data. We have inadequate information regarding the identity of the companies required to pay into the fund and their allocations; the past asbestos expenditures of those companies; and whether these companies have received notification of their impending liability. We, as a Congress, should take great care not to enact legislation of this magnitude without performing due diligence adequate enough to ensure that it is based on sound financial analysis.

6. Trust fund support should be stronger among victims and contributing companies

While the potential overall economic benefit to ending the current abusive litigation environment is readily apparent and while the goal to streamline and improve compensation for victims is laudable, support for the fund remains tepid. In fact, for all its potential benefits, the fund has met resistance from both victims and business groups.

Determining the level of support for the trust fund is a difficult task. Among victims' groups, support for the trust fund varies. Some groups are supportive to be sure, but we have received many letters of concern as well. Some victims do not believe it is fair to cap their potential damages—a common complaint for a no-fault system. Still, others recognize that a no-fault system will increase the likelihood they will receive compensation quickly and efficiently.

Among those paying for the fund, again, opinions are mixed. The fund imposes a significant assessment (only semantically different from a tax) upon American businesses to pay for it. Yet, many companies are so desperate for reform that they would support virtually any reform we might enact. Conversely, numerous companies are either opposed or, at best, neutral to our consideration of S. 852. Among the most important concerns are the start-up of the fund and the associated "leakage" from the fund; concerns about the fairness of the allocations formula; concerns about the medical criteria and how the costs associated with that criteria will impact the viability of the trust fund; and concerns about the lack of subrogation.

[6] The history of the Department of Labor's Black Lung Trust Fund demonstrates that the risk of a federal government bail-out is very real. The fund, which had access to financing from the Treasury to cover early claims, owed $2.8 billion to the Treasury by the end of 1985. What is worse, any default by the fund in ultimately repaying its debt—which now exceeds $8 billion—will represent an additional charge to taxpayers.

For a trust fund of this magnitude, we would prefer to see a much broader spectrum of support among victims and those contributing to the Fund. After all, while these groups often have competing interests, they are the intended beneficiaries of the legislation and we would hope that we could engender as much support as possible from them.

In summary, our support for this legislation out of Committee should not be viewed as an indication of its readiness for final passage. Instead, it represents a commitment to continue working to improve it. There are two indispensable characteristics to enacting any type of asbestos litigation reform: predictability and finality. The reform must provide predictability for victims of asbestos-related injuries as well as for the insurers and defendant companies paying for it. In addition, it must provide finality to those paying for it by ensuring that they will not be forced to pay under dual tracks or into the trust fund only to revert back to the same broken tort system. Unfortunately, at this time, this bill provides neither predictability nor finality to the extent needed to ensure the viability of the fund.

While we support the admirable goal behind this legislation—enhancing benefits to victims who are truly sick from asbestos exposure by compensating them generously, quickly and efficiently and by limiting administrative costs and attorney's fees while providing finality for American businesses—we believe that a significant number of important issues must be addressed for it to be successful.

JEFF SESSIONS.
JOHN CORNYN.
CHARLES E. GRASSLEY.
JON KYL.
LINDSEY O. GRAHAM.
SAM BROWNBACK.
TOM COBURN.

ADDITIONAL VIEWS OF SENATORS COBURN, GRASSLEY, KYL, AND CORNYN

The Committee states that the purpose of the Asbestos Injury Claims Resolution Fund ("Fund") is to "address the current asbestos crisis, which has diverted resources from the truly sick, clogged our federal and state courts, bankrupted companies, and endangered the jobs and pensions of employees." Our goal is to compensate those individuals who are truly sick from diseases caused by asbestos exposure, while also establishing a solution to the litigation crisis created by asbestos injury claims. Many businesses have gone bankrupt or have otherwise suffered great financial difficulties, not just because many sick people have sought compensation for their injuries, but because smart trial lawyers have learned to game the system and file phony claims. It is time for that to end.

However, we must be certain that the solution we reach is the right one. We must create a process that provides finality to this crisis. First, we must ensure that we have a Fund that will get on its feet as quickly as possible. Next, we must be certain that the Fund is compensating the correct people. This will require good medical criteria and exposure requirements so that only those claimants who are sick from asbestos exposure are compensated. We also need to know who is paying into the Fund and how their participation is going to affect their viability. We also must ensure that quality assurance is built into the system to prevent it from being gamed—such as limits on attorneys' fees and the fees that doctors receive for screenings, and good auditing procedures of the claims. Finally, the Fund should not sunset before the intended end of its life. Claimants should not return to the broken tort system. Finally, under no circumstances should there be a dual-track system where claims are being paid by the Fund at the same time that litigation is proceeding.

There is no reason why this Fund should become insolvent. Asbestos use has declined dramatically in the last few decades, and is currently heavily regulated. Therefore, very few individuals are presently exposed to asbestos that could cause illness. In fact, Dr. James D. Crapo stated that "[m]ost pulmonologists rarely or never see a case of new asbestosis today."[1] Dr. Crapo estimates that the

[1] Responses to Questions of Dr. James D. Crapo, Professor of Medicine, National Jewish Medical and Research Center, Submitted to the Senate Committee on the Judiciary, May 25, 2005, at 4 (Attachment A). Dr. Crapo is certified in Internal Medicine and Pulmonary Diseases. He is currently Professor of Medicine of 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. Dr. Crapo is also a Professor of medicine at the University of Colorado Health Sciences Center. He is a Past President of the American Thoracic Society. He is currently the President of the Fleischner Society, a leading international society of selected specialists in radiology and pulmonary medicine. He has more than 25 years of experience with asbestos-related issues, including medical research and clinical treatment of patients suffering from asbestos-related diseases. He has served as expert witness on behalf of defendants involved in

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decline of asbestosis began in the mid 1980s, following the implementation of stricter guidelines for occupational asbestos exposure.[2]

Improvements were made to S. 852 in Committee to ensure that all of these requirements are met. However, more changes to the bill must be made. Otherwise, we will see the end of this Fund in as early as 2 to 3 years, leaving a tremendous amount of debt in its wake. CBO noted in October 2003 that "[t]he revenue stream that would be generated by this legislation is highly uncertain."[3] Today, we still do not know everyone who will pay into the $140 Billion Fund.

One of the greatest threats facing this Fund is insolvency. Insolvency is most likely to result from the Medical Criteria in S. 852. In April 2004, CBO had a sunny forecast for last year's bill. CBO made optimistic assumptions that fewer than one in four claimants would qualify for payment under the medical criteria.[4] However, David Austern, the Manville Trust's General Counsel noted in a letter to the Senate Judiciary Committee that under a previous version of this bill "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 * * * 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."[5] Additionally, Dr. Crapo has stated repeatedly that thousands of claimants will qualify inappropriately for payment under two of the malignant claims levels, Level VI and VII.

These forecasts are deeply troubling. If we do not make some significant changes to the Medical Criteria in S. 852, this Fund will go under in 2–3 years, leaving a larger mess than exists now.

Changes needed to the disease levels

Substantial occupational exposure to significant levels of inhaled asbestos may cause a number of diseases. These diseases include Mesothelioma, Lung Cancer, and the nonmalignant lung conditions Asbestosis and Pleural Reactions. However, "[i]ndividuals may develop similar diseases but without contributory causation from asbestos exposure."[6] Also, individuals who are exposed to asbestos may develop pleural reactions that are asymptomatic, such as a pleural plaque which "can be characterized as a callus on the chest wall" but "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.'"[7]

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asbestos litigation, and he has testified before the United States Senate Judiciary Committee twice.

[2] *Id.*

[3] Congressional Budget Office Cost Estimate, 2. 1125, Fairness in Asbestos Injury Resolution Act of 2003, 16 (2003).

[4] Letter from Congressional Budget Office to Senator Don Nickles of April 20, 2004, at 6.

[5] Letter from David Austern to Senate Committee on the Judiciary.

[6] Testimony of Dr. James D. Crapo, Professor of Medicine, National Jewish Medical and Research Center, before the Senate Committee on the Judiciary, April 26, 2005, at 1 (Attachment B).

[7] *Id.* at 2.

Because claimants may suffer from diseases that may or may not have been caused by asbestos exposure, and because asbestos exposure may leave markers without impairment or illness, it is essential that this Fund contains medical criteria and exposure requirements that distinguish claimants, based on medical and scientific standards, who have disease caused by asbestos exposure from those who do not. Unfortunately, S. 852, as written, will result in many individuals receiving compensation who are not, in fact, sick from asbestos exposure. Many changes need to be made to the medical criteria to ensure that the Fund remains viable, so that those individuals who are truly sick from asbestos exposure receive compensation.

THE NONMALIGNANT LEVELS

As mentioned above, the presence of benign pleural plaques in a claimant's chest, while indicating asbestos exposure, does not necessarily indicate asbestos-related illness. As Dr. Crapo explained before the Senate Judiciary Committee:

> 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.[8]

Because the presence of pleural plaques or pleural thickening does not indicate that someone is impaired or likely to become impaired, "bilateral pleural disease" should be deleted as a qualification for compensation in Levels II, III, IV, and V.[9] Additional changes are needed to these levels to ensure that they compensate the appropriate claimants.

Nonmalignant level II (mixed disease with impairment)

In the Committee Report, the stated purpose of Nonmalignant Level II is to compensate individuals who are "impaired due to a combination of asbestosis and other causes, typically chronic obstructive pulmonary disease." However, the Fund would allow individuals who have obstructive pulmonary disease to receive compensation by the Fund even when they do not have asbestosis, which is a restrictive pulmonary disease. Section 121(d)(2)(B) allows someone to receive compensation under Level II who has "evidence of TLC less than 80 percent or FVC less than the lower lim-

[8] *Id.*

[9] Fairness in Asbestos Injury Resolution Act of 2005, S. 852 109th Cong. §§ 121(d)(2)(A), 121(d)(3)(A). 121(d)(4)(A), 121(d)(5)(A) (2005).

its of normal, and FEV1/FVC ratio less than 65 percent."[10] However all cases of mild obstruction, including those commonly found in smokers, show an FVC less than the lower limit of normal and an FEV1/FVC ratio less than 65%. As drafted, non-malignant II does not compensate individuals with mixed restrictive and obstructive disease, as intended. Instead, it compensates smokers who also have pleural plaques (but not asbestosis or any impairment related to airway restriction). Consequently, the Fund allows a smoker with airway obstruction to receive Level II compensation.[11]

Level II should therefore be stricken from the Fund, or in the alternative, the "or" in Section 121(d)(2)(B) should be changed to "and." This will ensure that a claimant under Level II truly has mixed disease—both restrictive and obstructive pulmonary disease.

Non-malignant levels III (Asbestosis/Pleural Disease B), IV (Severe Asbestosis) and V (Disabling Asbestosis)

As discussed above, for non-malignant levels III, IV, and V, "[t]he presence of pleural disease should not be allowed to substitute for a radiographic diagnosis of asbestosis * * * Pleural plaques do not cause a severe restrictive lung disease. There are no studies or publications that would support this concept."[12] Nonetheless, this Fund would allow compensation under levels III, IV, and V with "diffuse pleural thickening, or bilateral pleural disease of B2 or greater" without a radiographic diagnosis of asbestosis.[13] This quoted language should be stricken so that only those individuals who truly have asbestosis are compensated under Levels III, IV, and V of the Fund.

Additionally, Level V of the Fund allows the use of the single-breath diffusing capacity of the lung (carbon monoxide) technique (DLCO). Instead, the Fund should rely on decreases in TLC and in FVC, which is the "gold standard," to determine disabling asbestosis.[14] In contrast, "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."[15]

Notably, claims against the Manville trust decreased from 101,000 in 2003 to 14,500 in 2004 due to reforms done by the trust.[16] One of the reforms was to remove the DLCO as a payment criterion. The DLCO was removed because it was one of the tests easily abused. S. 852 should not allow this abuse to begin, by striking the use of DLCO from the Fund.

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[10] S. 852 § 121(d)(2)(B).

[11] See Email from Dr. James D. Crapo to Senator Tom Coburn (Attachment C); Crapo, James D., *supra* note 1, at 2.

[12] Email from Dr. James D. Crapo to Senator Tom Coburn.

[13] S. 852 §§ 121(d)(3)(A), 121(d)(4)(A), 121(d)(5)(A).

[14] Crapo, James D., *supra* note 6 at 5.

[15] *Id.* Dr. Crapo also notes that "DLCO is most commonly influenced by smoking." Email from Dr. James D. Crapo.

[16] Roger Parloff, Diagnosing for Dollars, Fortune Magazine, June 13, 2005, at 102.

THE MALIGNANT LEVELS

Malignant level VI (other cancer)

Dr. Crapo succinctly stated in his written testimony to the Judiciary Committee that Level VI "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."[17] While some have argued that there are studies to support the claim that asbestos exposure may be linked to other cancers, such as cancer of the gastrointestinal tract, larynx, kidney, liver, pancreas, ovary, and hematopoietic systems, Dr. Crapo explained the problems with the studies that these individuals cite:

> 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.[18]

According to a meta-analysis of appropriately conducted studies, "there is either no evidence of a significant association with asbestos exposure or no dose-response effect * * * Besides lung cancer and mesothelioma the only cancer for which a possible association with asbestos exists is laryngeal cancer[,] * * * 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," without the elimination of the confounding variables of alcohol and tobacco use.[19]

Other physicians agree. Dr. J. Bernard L. Gee stated for the record in 2003, with regard to cancer of the larynx and pharynx: "The confounding factors previously mentioned, namely smoking and alcohol, remain major often-unadjusted factors in these diseases * * * We reviewed 24 prospective and 17 retrospective studies out of which only three or four showed any excess risk. We concluded that asbestos exposure does not cause these cancers, as did Liddell reporting for the U.K. health authorities."[20] Regarding esophageal cancer, he stated that "there is no evidence relating them to asbestos." For kidney cancer, he stated that "analysis

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[17] Crapo, James D., *supra* note 6 at 5.

[18] *Id.* at 4.

[19] *Id.*.

[20] S. Rep. No. 108–239, at 98–103 (3003). To supplement his additional views in the Committee Report for S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Senator Jon Kyl posed three questions to four experts, Dr. James D. Crapo (Professor of Medicine of the National Jewish Medical and Research Center), Dr. William Weiss (Emeritus Professor of Medicine, Drexel University), Dr. Michael Goodman (Senior Managing Scientist, Exponent Health Group), and Dr. J. Bernard L. Gee (Emeritus Professor of Medicine Yale University School of Medicine). The questions were: (1) Do pleural plaques or pleural thickening constitute an injury or impairment? Are they a useful predictor of future injury? (2) If an asbestos exposure was not significant enough to cause clinically significant asbestosis, could it nevertheless have cause lung cancer? (3) Can asbestos exposure cause colorectal cancer,or cancer of the larynx, pharynx, esophagus, or stomach?

pointed toward a lack of an association between asbestos exposure and renal cancer." Dr. William Weiss stated that "[f]or colorectal cancer the evidence indicates no causality between asbestos and colorectal cancer." Dr. Michael Goodman stated that "[d]ata for urinary cancers (bladder, kidney, prostate), gastrointestinal cancers (esophagus, stomach, colon, rectum) and lymphohematopoietic cancers (lymphoma, myeloma, leukemia) failed to demonstrate a consistent statistically significant increase in risk. Analysis for laryngeal cancer was suggestive of a causal association, but not as conclusive as the analysis for lung cancer." However, Dr. Gee made the following comment on Dr. Goodman's study:

> [The study] noted an overall excess laryngeal cancer risk rate that was about 1.6 but there was no dose response, no correlation with increasing mesothelioma rates and importantly, no adjustment in the original cohort data for the confounding effects of smoking, alcohol or their combination. Thus, this value of 1.6 is suspect and the absence of a dose response with asbestos exposure suggests alternative factors cause these cancers. Other data show a correlation between lung and laryngeal cancer rates that is most likely due to a common smoking origin.[21]

Because there is truly no reliable science that links asbestos exposure to forms of cancer besides Lung Cancer and Mesothelioma, these cancers should not be compensated in the Fund.[22] S. 852 provides for a study by the Institute of Medicine to determine whether there is a causal link between asbestos exposure and other cancers. If the study determines that there is not a link, then no claimants should be compensated under Level VI. However, keeping Level VI in the Fund without knowing if there is a causal link is the same as putting the cart before the horse. Level VI should be removed from S. 852 unless and until the Institute of Medicine's study is completed and shows a causal link.

Additionally, specific criteria should be included in S. 852 to guide IOM in their study. The Institute of Medicine evaluation should be based only on one of three criteria: (1) multicentered, double-masked, placebo-controlled, randomized clinical trials with explicit data safety and monitoring boards incorporated into the

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[21] *Id.* See also, S. Rep. No. 108–239, at 144–183 (2003) (Letters submitted to the Committee Report at the Request of Senator Jon Kyl).

[22] See also, John F. Gamble, Asbestos and Colon Cancer: A weight-of-the-Evidence Review, Environ Health Perspect. 1994 Dec; 102(12):1038–50, 1038 ("Population-based case-control studies of colon cancer do not show any consistent risk associated with asbestos exposure. Long-term ingestion studies show no evidence of an increased incidence of colon cancer in animals by this route of exposure and do not provide biological plausibility for a causal association between asbestos exposure and colon cancer."); David H. Garabrant, Ruth K Peters, & David M. Homa, Asbestos and Colon Cancer: Lack of Association in a Large Case-Control Study, Am J Epidemiol 1992; 135:843–53, 843 ("Previous studies linking exposure to asbestos with human colon cancer have used mortality rather than incidence as their endpoint and have neither assessed nor controlled for confounding by diet, genetic factors, or other risk factors for colon cancer * * * This study suggests not only that occupational exposure to asbestos is not a risk factor for colon cancer in the general population of Los Angeles, but also that observed associations between asbestos and colon cancer should not be interpreted as causal unless confounding by nonoccupational factors has been evaluated and controlled."); Joshua E. Muscat & Ernst L. Wynder, Tobacco, Alcohol, Asbestos, and Occupational Risk Factors for Laryngeal Cancer, May 1, 1992, Vol. 69, No 9 2244–2251, 2249 ("With regard to asbestos exposure, our study adds evidence to the body of literature that does not show a significant relationship with laryngeal cancer."); Robert W. Morgan, Donna E. Foliart & Otto Wong, Asbestos and Gastrointestinal Cancer, West J. Med 1985 Jul; 143:60–65, 60 ("We conclude that more studies are required before stomach and colorectal cancers are documented as asbestos-related diseases.").

data acquisition process, or; (2) on a single-centered, masked, non-randomized clinical trials, or; (3) by using meta-analysis of all available studies. The Institute of Medicine should not consider any studies that did not take out the confounding variables.

Malignant level VII (lung cancer with pleural disease)

Level VII is another compensation level that will lead to thousands of inappropriate claims and will lead to the insolvency of this Fund. Malignant Level VII allows for compensation for lung cancer when there has been exposure to asbestos and pleural plaques are present on the lungs. However, Dr. Crapo stated that pleural plaques "do not predict enhanced risk of lung cancer."[23] Rather, "[t]he enhanced lung cancer risk is with very high level of asbestos exposures that cause asbestosis. This will be compensated in Level 8."[24]

Dr. William Weiss agrees. He stated in an article that adequately designed studies in the literature support the hypothesis that "excess lung cancer risk in worker cohorts exposed to asbestos occurs only among those with asbestosis."[25] His review concluded that:

> Only a few cohort studies have addressed directly the issue of asbestosis as a marker for increased risk of lung cancer among workers exposed to asbestos. What evidence exists supports the hypothesis that asbestosis is such a marker as reviewed in the first section above. Additional circumstantial evidence has been described in subsequent sections: (1) there is no excess risk of lung cancer in cohorts with no deaths from asbestosis; (2) workers with pleural plaques but no asbestosis have no increased risk of lung cancer in well-designed studies; and (3) the association between asbestosis and excess lung cancer rates in much stronger than the association between cumulative asbestos exposure and the relative risk of cancer.[26]

Therefore, Level VII should be eliminated.[27]

Malignant level VIII (lung cancer with asbestosis)

There is an increased risk of lung cancer in individuals who have asbestosis. Therefore, it is appropriate for Level VIII to compensate individuals suffering from lung cancer and asbestosis, who meet the appropriate exposure requirement. However, the CT scan should not be used for diagnostic purposes in Malignant Level VIII, because its use will lead to the inappropriate compensation of many claimants. "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." Dr. Crapo elaborated that "[v]irtually all heavy smokers who are those for greatest risk for lung cancer would have CT changes

[23] Crapo, James D., *supra* note 12.
[24] *Id.*
[25] William Weiss, Asbestosis: A Marker for the Increased Risk of Lung Cancer Among Workers Exposed to Asbestosis. Chest 115:536–549, 1999.
[26] *Id.* at 546.
[27] See also, S. Rep. No. 108–239, at 98–103 (2003).

showing small markings in the lower lung fields and can qualify under the criteria of the bill if CT were included. In the absence of standards for interpretation of CT for the diagnosis of early asbestosis, this test should be eliminated from the Trust."[28] If the use of the CT scan is not eliminated, its use "will bankrupt the trust rapidly."[29]

In the alternative, guidelines should be developed for the use of the CT Scan for the detection of early asbestosis. However, until these guidelines are completed, CT Scans should not be used for diagnostic purposes under the Fund. Presently, S. 852 provides for an Institute of Medicine Study on the use of CT Scans "as a diagnostic tool for bilateral pleural plaques, bilateral pleural thickening, or bilateral pleural calcification."[30] S. 852 also provides that the Administrator "shall commission the American College of Radiology to develop, in consultation with the American Thoracic Society, American College of Chest Physicians, and Institute of Medicine, guidelines and a methodology for the use of CT scans as a diagnostic tool for bilateral pleural plaques, bilateral pleural thickenings, or bilateral pleural calcification under the Fund. After development, such guidelines and methodology shall be used for diagnostic purposes under the Fund."[31] While the inclusion of these provisions is commendable, CT scans should not be used until the American College of Radiology's guidelines are completed.

EXCEPTIONAL CLAIMS

This Fund provides for exceptions to the medical and exposure requirements. These "exceptional cases" exist where "[a] claimant who does not meet the medical criteria requirements" may seek compensation by providing comparable medical evidence.[32] In order to determine if these claimants are eligible for exceptional claims, they must be reviewed by a Physicians Panel made up of "physicians with experience and competency in diagnosing asbestos-related diseases."[33] However, there is no point having medical criteria if claimants are able to seek compensation under the Fund without meeting that criteria. Every person who does not qualify for the medical criteria will have nothing to lose by trying to qualify for an exceptional medical claim. While Physicians Panels will examine these claims, physicians are patient advocates. They will always err on the side of supporting their patient's claim for compensation. Furthermore, the Fund is not set up as an adversarial body. The Administrator will largely be forced to rely on the recommendations of the Physicians panels.

As long as medical criteria are part of this bill, they should be followed. The exceptional claims provision should be stricken from the Fund.

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[28] Crapo, James D., *supra* note 1.
[29] Crapo, James D., *supra* note 1, at 5.
[30] S. 852, § 121(f).
[31] S. 852, § 121(h).
[32] S. 852, § 121(g).
[33] S. 852, § 105.

Take-home exposure

S. 852 provides an alternative to satisfying the medical criteria requirements for those individuals who suffer from "take-home exposure." These individuals must "allege their exposure to asbestos was the result of living with a person who, if the claim had been filed by that person, would have met the exposure criteria for the given disease level, and the claimant lived with such person for the time period necessary to satisfy the exposure requirement, for the claimed disease level."[34] These claims are submitted as exceptional medical claims and are reviewed by a Physicians Panel.

This provision provides a huge problem for the Fund. Take-home exposure criteria greatly expand the number of claimants who will meet the criteria for standard and heavy asbestos exposure. Any individual born prior to 1971, whose mother or father was a worker or a bystander in workplace that used virtually any type of asbestos-containing product would have met most of the exposure criteria in the Trust by the time they were five years old. Further, the group of individuals who were born in the three decades between 1941 and 1971 are now the principal group developing lung cancer. The majority of these people were raised in families where one or more parents worked in an environment that would qualify, under the trust, as either standard or heavy exposure. If a physician diagnoses these individuals with lung cancer, and finds small changes in the lung parenchyma on a chest CT scan, they will qualify for payment under the Trust.[35]

The provision allowing compensation for take-home exposure should be stricken from the Fund.

EXPOSURE CRITERIA, THE ASBESTOS BAN, AND NATURALLY OCCURRING ASBESTOS

As the Committee Report states, the Fund includes exposure criteria for each disease level. A claimant must meet the appropriate exposure criteria to qualify for a certain disease level. The Committee is correct in stating that such criteria are necessary because someone is more likely to develop asbestos-related disease if they have had long- term and intense exposure to asbestos. However, there are two large problems with the exposure criteria as they are written.

First, the Fund creates a presumption that individuals who worked for certain industries had sufficient exposure to receive compensation under the Fund, based on the Manville Personal Injury Settlement Trust.[36] While this presumption is mitigated by part (C) of the provision, which states that "nothing in subparagraphs (A) or (B) shall negate the exposure or medical criteria requirements in section 121, for the purpose of receiving compensation from the fund," the presumption present in the Fund may still effectively undermine the exposure requirements in the bill. The Fund does not set up an adversarial system. The burden should not be on the Fund to rebut the presumption that each claimant who worked for a certain industry in a certain job received substantial

[34] S. 852, § 121(c)(3).
[35] See Crapo, James D., *supra* note 1, at 5.
[36] S. 852, § 12(c)(5).

occupational exposure. Furthermore, the Manville Trust is a bad example to follow. The Manville Trust included broad categories defining who qualified for compensation, but gave out smaller payments. The Manville Trust's exposure criteria will break this Trust.

Second, an individual who worked with asbestos containing products where the fibers are encapsulated should not qualify for substantial occupational exposure.[37] Instead, the definition of "substantial occupational exposure" should "include a requirement that the regular exposure to asbestos fibers must also be to a substantial concentration of airborne fibers."[38] As Dr. Crapo explained in his testimony, someone who uses a product with a fiber release under work conditions that are "equivalent to or even an order of magnitude less than the current OSHA PEL" should not be able to receive compensation.[39] Dr. Crapo recommends 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."[40] Dr. Crapo's recommendation should be incorporated into the exposure requirements.

In what is a closely associated issue, the ban on asbestos is unnecessary because not all use of asbestos is hazardous.[41] Furthermore, it might be shortsighted to completely ban a product that might be needed in the future. Finally, this ban is outside of the Judiciary Committee's jurisdiction. Any changes to OSHA regulations of asbestos, much less an outright ban, should be decided by the Committee on Environment and Public Works ("EPW"). Chairman James M. Inhofe and Ranking Minority Member James M. Jeffords requested that Title V, Section 501 of S. 852 be removed or sequentially referred to their Committee.[42]

Finally, the EPW also objects to the Judiciary Committee's jurisdiction over Title V, Section 502 of S. 852. This provision requires the U.S. Environmental Protection Agency (EPA) to conduct a study to determine the feasibility of establishing national ambient air quality standards (NAAQS) for naturally occurring asbestos and implement interim standards while the study is being completed, as well as create guidelines, testing protocols, best management practices, remedial measures, and a grant program. The EPW objects because authorization and direction of EPA activities and resources is within the purview of the EPW. Again, Senators Inhofe and Jeffords request that this provision be removed or sequentially referred to their Committee.[43]

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[37] See email from Dr. James D. Crapo.
[38] Crapo, James D., *supra* note 6, at 5.
[39] *Id.*
[40] *Id.*
[41] S. 852, Title V.
[42] Letter from James M. Inhofe and James M. Jeffords to Chairman Arlen Specter and Ranking Minority Member Patrick Leahy, April 27, 2005.
[43] *Id.*

WHAT ALL OF THIS MEANS TO THE VIABILITY OF THE FUND

Without the changes recommended above, "the trust fund could go bankrupt in three to five years."[44] Dr. Crapo explains the largest problems best:

> Under Level V compensation for disabling asbestos ($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.[45]

This analysis leads to the question—what does this mean for the fund? The attached table (Attachment D) provides the number of new cases per year of lung cancer and each of the cancers compensated under Level VI of the Fund. These numbers are then multiplied by 10% (of cases per year), 5% (of cases per year), and 1% (of cases per year). The resulting numbers are multiplied by how much recovery is available under the Fund. The results are staggering. If 10% of new lung cancer patients claim the lowest level of compensation available to lung cancer patients, $300,000, that will cost the fund $5,213,100,000.00 per year. Over the course

[44] Crapo, James D., *supra* Note 1, at 2.
[45] *Id.* at 2–3.

of 30 years, it will cost the fund $156,393,000,000.00. In other words, lung cancer compensation alone will swallow the 140 billion dollar trust fund. Even a more moderate approach is devastating. If only 1% of Patients with Lung, colorectal, stomach, Esophageal, Laryngeal, and Pharyngeal cancers claim the lowest level of compensation available under the Fund, that will cost the fund $891,010,000.00 per year. Over the course of 30 years, that amount adds up to $26,730,300,000.00, or nearly 20% of the Fund. This is not even counting payments to Mesothelioma and nonmalignant claimants, or administrative costs. If 10% of these patients seek compensation, that will equal $267,303,000,000.00 over the course of 30 years, $107,303,000,000 more than is planned for the Fund.

This bleak outlook for the solvency of the Fund demonstrates why improvements to the medical criteria are desperately needed.

CONCLUSION

There is no question that many individuals have lost their lives or are presently suffering because of occupational exposure to asbestos. There is also no question that asbestos-related litigation—much of it legitimate, but much of it frivolous—has led to bankruptcy for many companies in the United States. The system needs to change. Stronger medical criteria are essential to our goal of compensating those ill from asbestos exposure and providing finality for companies.

TOM COBURN.
JOHN CORNYN.
JON KYL.
CHARLES GRASSLEY.

NATIONAL JEWISH MEDICAL AND RESEARCH CENTER,
Denver, Colorado, May 25, 2005.

Senator ARLEN SPECTER,
Chairman, U.S. Senate Committee on the Judiciary,
Washington, DC.

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.

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 a bystander to the above worker to also qualify as a "moderate 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 abestosis 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, the 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 exposure that occurred as a result of federal regulations in 1970s and 1980s 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 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 but would qualify under the liberal exposure criteria of the Trust.

Question 8: I understand [that] Mr. Irving Selikoff, in his 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 sign 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 VII 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.

WRITTEN STATEMENT OF DR. JAMES D. CRAPO

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	3.70

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	RR
69 Cohorts	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, nonspecific 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.

DEAR SENATOR COBURN: I appreciate the opportunity to meet with you and your staff yesterday and am in strong support of your position to improve the medical criteria in S. 852. The following are my thoughts about important changes that should be made in the medical criteria. Please feel free to use these concepts as you deem appropriate.

PLEURAL DISEASE

—The only meaningful difference between Levels 1 and 2 is the requirement in Level 2 or "evidence of TLC less than 80% or FEC less than the lower limits of normal with an FEV1/FVC ratio less than 65%. This is billed as indicating mixed lung disease but, in fact, only identifies obstructive lung disease. All cases of mild obstruction show an FVC less than the lower limit of normal and an FEV1/FVC ratio less than 65%. This occurs commonly in smokers. Non-malignant 2, as written, does not compensate individuals with mixed restrictive and obstructive disease. It compensates smokers who also have pleural plaques. You should either argue for elimination of this level or in this phrase above change the word "or" to "and". If you require a low TLC and evidence of obstruction, then there is evidence of mixed disease. One does not have mixed disease by only requiring one or the other—that would then point to the common element of simple obstructive disease.

—For non-malignant levels 4 and 5, these are defined as severe asbestosis and disabling asbestosis under the awards schedule. The presence of pleural disease should not be allowed to substitute for a radiographic diagnosis of asbestosis in these two levels. Pleural plaques do not cause a severe restrictive lung disease. There are no studies or publications that would support this concept.

—Under Level 5, the use of DLCO as an alternative criterion for meeting pulmonary function requirements should be deleted. DLCO is highly variable between laboratories. It is very sensitive and goes down markedly early in lung diseases of all types. It has no reproducible correlation with functional disability. It cannot be used to establish disabling asbestosis. DLCO is most commonly influenced by smoking and its use in this trust would allow large numbers of inappropriate claims under Level 5.

—Level 6—Other Cancers. This level should be deleted for all the reasons that we have previously discussed and that you know.

—Malignant Level 7—Lung Cancer. Association with bilateral pleural plaques. This entire level should be deleted for the same reason that the old Level 7 was deleted. Plaques are a marker of exposure. They do not predict enhanced risk of lung cancer. The enhanced lung cancer risk is with very high level of asbestos exposures that cause asbestosis. This will be compensated in Level 8. The analysis of the literature showing that asbestosis is required for enhanced risk of lung cancer is somewhat complex and best laid out in a recent article by Dr. Weiss. A copy of that article is at-

tached as a PDF. The data summarized by Dr. Weiss clearly show that there is not a credible scientific basis for compensation of lung cancer in individuals with pleural plaques but no evidence of asbestosis.

—Malignant Level 8. The use of CT scans in this level should be deleted. CT scanning is highly sensitive but not specific in terms of etiology for small changes in the lung parenchyma. Virtually all heavy smokers who are those for greatest risk for lung cancer would have CT changes showing small markings in the lower lung fields and can qualify under the criteria of this bill if CT were included. In the absence of standards for interpretation of CT for the diagnosis of early asbestosis, this test should be eliminated from the Trust.

OTHER SIGNIFICANT ISSUES

On page 5 of my report, I delineated two additional issues that should be addressed in modifying the Trust.

1. Require quality assurance to be more rigorous and, in particular, require that there be quality assurance for the pulmonary function tests. The vast majority of PFTs used in litigation today would fail to meet ATS standards, yet these criteria are essential elements of the classification for payment under the Trust.

2. Change the concept of substantial occupational exposure to include not only duration but intensity of dose. Work with asbestos containing products where the fibers are encapsulated should not qualify an individual for a substantial occupational exposure.

Please give me a call if I can provide further assistance.

JAMES D. CRAPO, M.D.

Cancer	No. of new cases per year	Payment per claimant	10% of cases per year multiplied by payment/claimant	5% of cases per year multiplied by payment/claimant	1% of cases per year multiplied by payment/claimant
1 Year:					
Lung	173,770	$300,000.00	$5,213,100,000	$2,606,550,000	$521,310,000
Colorectal	130,000	200,000.00	2,600,000,000	1,300,000,000	260,000,000
Stomach	21,860	200,000.00	437,200,000	218,600,000	43,720,000
Esophageal	14,520	200,000.00	290,400,000	145,200,000	29,040,000
Laryngeal	9,880	200,000.00	1,976,000,000	98,800,000	19,760,000
Pharyngeal	8,590	200,000.00	171,800,000	85,900,000	17,180,000
Total			$10,688,500,000	$4,455,050,000	$891,010,000

Note.—The payment per claimant for Lung Cancer is for Level VII smokers—the lowest payment available for lung cancer.

Cancer	No. of new cases per year	Payment per claimant	10% of cases per year multiplied by payment/claimant multiplied by 30	5% of cases per year multiplied by payment/claimant multiplied by 30	1% of cases per year multiplied by payment/claimant multiplied by 30
Cancer:					
Lung	173,770	$300,000.00	$156,393,000,000	$78,196,500,000	$15,639,300,000
Colorectal	130,000	200,000.00	78,000,000,000	39,000,000,000	7,800,000,000
Stomach	21,860	200,000.00	13,116,000,000	6,558,000,000	1,311,600,000
Esophageal	14,520	200,000.00	8,712,000,000	4,356,000,000	871,200,000
Laryngeal	9,880	200,000.00	5,928,000,000	2,964,000,000	592,800,000
Pharyngeal	8,590	200,000.00	5,154,000,000	2,577,000,000	515,400,000
Total			$267,303,000,000	$133,651,500,000	$26,730,300,000.00

*New Case statistics provided by the American Cancer Society (2005), and National Cancer Institute (2004).

ADDITIONAL VIEWS OF SENATORS KYL, CORNYN, AND COBURN

In July 2003, a statement of additional views to the report for a previous version of this bill "survey[ed] the publicly available evidence that fraud is the predominant feature of asbestos litigation as it is conducted today." The additional concluded that "[t]his evidence indicates that the large asbestos-litigation plaintiffs firms routinely coach their clients to lie under oath about their exposure to asbestos products; that these law firms routinely rely on fraudulent readings of chest x-rays and pulmonary-function tests, in order to manufacture false evidence of asbestos injury; and that invalid medical testimony routinely is employed in litigation to support the existence of asbestos injuries that do not or could not exist."[1]

In December 2003, Professor Lester Brickman of Cardozo School of Law published a law-review article on asbestos lawsuits that began by noting that "the weight of the evidence * * * indicates that much asbestos litigation today involves the production and use of specious evidence including PFT [Pulmonary Function Test] printouts, other medical evidence produced by a small number of B-readers and doctors hired for their propensity to find high rates of asbestosis, and testimony of claimants according to prepared scripts."[2] Professor Brickman concluded that "for the most part, asbestos litigation consists of a massive client recruitment effort which relies on the creation and use of specious evidence in a process which has corrupted the civil justice system."[3]

On January 7 of this year, the President of the United States participated in a public dialogue about asbestos litigation with Professor Brickman. The President noted that in U.S. asbestos litigation, "those with no major medical impairment now make up the vast majority of claims." He then asked Professor Brickman to "tell us what the problem is." This is what Professor Brickman told the President:

> "[L]awyers have taken [the asbestos-exposure medical] tragedy and turned it into an enormous moneymaking machine, in which, as you say, baseless claims predominate.
>
> In the year 2003, 105,000 new claimants came into the asbestos litigation system. * * * [M]ore than 90,000 of these claimants have no illness related to asbestos exposure, as recognized by medical science. These are truly meritless claims. Nonetheless, they're supported by medical testimony from a handful of medical experts routinely selected by plaintiff lawyers who are not acting in good faith, in terms of supplying diagnosis, but are, in fact, re-

[1] Senate Report No. 108–118, p. 82 (Additional Views of Senator Kyl).
[2] Lester Brickman, On the Theory Class's Theories of Asbestos Litigation, 31 Pepperdine L. Rev. 33 (2004) (hereinafter "Theories of Asbestos Litigation").
[3] *Id.*

> sponding to enormous financial incentives, which is to say, millions of dollars in fees that they generate for reading the X rays in the right way.
>
> These meritless claims are also supported by the activities of screening companies hired by the plaintiff lawyers, who administer pulmonary function tests, which fail to adhere to medical standards, and produce false evidence of lung impairment. And finally, these meritless claims are supported by false witness testimony. Witnesses in asbestos litigation, including claimants, are prepared to testify by their lawyers. It's a remarkable fact that every time a company goes bankrupt, the witness testimony about what their exposure was, what products they were exposed to, immediately shifts to inculpate new defendants, new deep pockets.
>
> I have written about this extensively, and I've called it subornation of perjury. * * * The consequence is that we've had, out of approximately 850,000 claimants since asbestos litigation began, perhaps 600,000 of these are largely baseless claims. Nonetheless, they have generated tens of billions of dollars in payments, and billions of dollars in fee income for lawyers, which is why they're brought.[4]

On April 6 of this year, Thomas Donohue, the President of the U.S. Chamber of Commerce, sent a letter to United States Attorney General Alberto Gonzales in which he noted that "over the last several years, considerable evidence has emerged indicating the existence of substantial and systematic fraud in asbestos litigation." The letter continued:

> A handful of asbestos plaintiffs' lawyers have hired a small number of doctors with an extraordinary propensity to diagnose asbestosis. The specious evidence for which the doctors are responsible, coupled with medical testimony supporting the existence of asbestos injuries that do not or could not exist, has led to enormous settlements and judgments.

Mr. Donohue's letter then cited the following evidence of widespread fraud in asbestos litigation:

> (1) the recent Gitlin study, which examined x-rays submitted by plaintiffs lawyers in support of asbestosis claims and discovered, in Mr. Donohue's words, "a gaping disconnect between asbestos claims and actual asbestos illness."
>
> In [the Gitlin] study of 492 chest x-rays obtained by plaintiffs' lawyers and entered as evidence in lawsuits against former employers, the original x-ray readers claimed to find evidence of possible asbestos-related lung damage in 96 percent of cases. In contrast, when the same x-rays were re-read by six unbiased physicians, unaware of the original findings or that the x-rays were part of court

[4] A transcript of this conversation is available on the White House internet website, in the news releases section, at *http://www.whitehouse.gov/news/releases/2005/01/20050107-8.html.*

> cases, the doctors found only 4.5 percent showed signs of asbestos injury.

The Gitlin study concludes by noting that "[t]here is no support in the world literature on x-ray studies of workers exposed to asbestos and other mineral dusts for the high levels of positive findings recorded by the initial readers in this report."

> (2) the recent silica MDL in the Southern District of Texas, in which plaintiffs' doctors disavowed their own diagnoses when deposed, leading the district judge to note the presence of "great red flags of fraud." Mr. Donohue noted that:
>
> [t]he stunning revelations in the silica MDL directly bear on the asbestos litigation because many of the doctors who have repudiated their own silica findings also have diagnosed thousands of patients with an asbestos related disease, often using essentially the same techniques that are used to diagnose asbestosis. In fact, it appears that virtually 60% of the [tens of thousands of] plaintiffs in the silica MDL had made prior asbestos claims, many times diagnosed by the same physicians with asbestosis and silicosis. These asbestos related diagnoses are particularly troubling because experts agree that there is only a small likelihood that an individual could have both asbestos-related and silica-related disease;

and

> (3) "evidence of asbestos plaintiffs' lawyers coaching their clients to lie" about their exposure to asbestos products.

Mr. Donohue's letter to Attorney General Gonzales concludes as follows:

> Based on the evidence outlined in these materials, I request that the Justice Department immediately open a formal investigation into the conduct of lawyers, doctors and others who are responsible for the explosion of meritless and abusive asbestos claims across the country in recent years.
>
> * * * The longer the government waits to act, the greater the harm. I strongly encourage the Department of Justice to take immediate action to investigate the compelling evidence of fraud underpinning the ongoing asbestos litigation across the country.

Mr. Donohue's letter also notes why it is necessary for the Justice Department to investigate this matter—*i.e.*, why the remedies available to private parties in litigation are inadequate:

> Unlike private law firms, the U.S. Department of Justice is immune to the threats and tactics that have been employed by the asbestos plaintiffs' bar to squelch efforts to challenge the practices that are outlined in this memorandum. In addition, the Department's subpoena power is a critical tool in assembling the evidence that will connect the dots and expose the systemic problems with asbestos

> litigation. Accordingly, a formal government investigation is critical to exposing and bringing an end to the extensive pattern of highly questionable behavior that continues to occur in asbestos litigation.

Today, we add our voice to this request. We join the U.S. Chamber of Commerce in its call for a federal investigation into the practices of the large asbestos plaintiffs' law firms and their retained physicians and screening companies. Evidence of routine fraud in the creation of asbestos legal claims is now overwhelming. Further, these practices may violate federal criminal statutes. This matter demands further inquiry. When this nation's leading academic expert on asbestos litigation publicly confronts the President of the United States with allegations that an enormous economic fraud is being perpetrated against the American people, and when the premier trade association for American business formally requests a federal investigation into the same activities, it is appropriate for the Attorney General to act.

There is little to add here to the publicly available record of evidence of the need for an investigation into asbestos fraud. In particular, Professor Brickman's law-review article Theories of Asbestos Litigation, described by others as "prodigiously researched,"[5] provides a useful compendium of the most recent evidence of widespread asbestos fraud, as well as a guide to possible avenues of investigation.

This statement of views elaborates on only the following additional points: first, there is a complete disconnect between the number of asbestos injury legal claims filed in recent years and the actual amount of asbestos injury in the U.S. population. This gap recently has grown so massive that litigation fraud is the only possible explanation for its existence. Second, this statement briefly describes the enormous costs imposed on the U.S. economy by asbestos litigation fraud: tens of billions of dollars stolen, tens of thousands of manufacturing jobs destroyed, and pension plans devastated. Third, the statement describes some of the revelations from the recent hearings in the silica MDL in Texas. These hearings suggest that silica litigation has the potential to become an ugly offshoot of asbestos litigation. And finally, the statement briefly discusses why a federal investigation is the appropriate means of addressing this crisis.

THE MISSING ASBESTOSIS EPIDEMIC

At the time that the 2003 Additional Views were published, it was noted that:

> Asbestos-injury legal claims * * * have "prov[en] impervious to the predictions of medical science." "Contrary to expectations, the numbers of claims filed increased rapidly during the 1990s." Only "[a]pproximately 20,000 claims were filed annually against major asbestos defendants in the early 1990s." But in 2001, at least 90,000 new asbestos

[5] Roger Parloff, Diagnosing for Dollars, Fortune Magazine, June 13, 2005, at 98.

> claims were filed—a three-fold increase over the number filed in 1999.[6]

Since that time, the 2001 record has been broken. "In 2003, more than 110,000 new claimants surfaced—the most ever in a single year."[7]

As described in the 2003 Additional Views, the recent years' surge in asbestos claims is utterly contrary to the expectations of medical science:

> According to Dr. James Crapo, one of the nation's leading specialists in pulmonary medicine, "[d]ue to federal regulation of asbestos that began in the early 1970s, current occupational exposure levels are a tiny fraction of those that existed in the 1940s and 1950s. All of the asbestos-related diseases are considered dose-dependent, and the pre-1973 exposures to asbestos that resulted in severe asbestosis and lung cancer are not present today."
>
> Today, "[i]t has been more than 30 years since the government began imposing strict limits on workplace exposure to asbestos dust," and "[i]t has been 20 to 30 years since most asbestos-containing products were phased out of production completely."
>
> "John Dement, an associate professor for environmental and occupational medicine at Duke University and the former deputy director for lung disease research at the National Institute for Occupational Safety and Health, [has] said there were far fewer cases of serious asbestosis today than 5 to 10 years ago." According to Dr. Dement, "What we're seeing right now is the downswing." Epidemiological data confirm these observations. "[C]ancer deaths in the United States attributable to asbestos exposure are already falling, and are estimated to have peaked in 1992 at 9700 per year." Indeed, almost a decade ago—in 1994—the medical text Occupational Lung Disorders describe[d] asbestosis as a "disappearing disease."[8]

Since the publication of the 2003 Additional Views, additional evidence has emerged that suggests that the 110,000 asbestos injuries purported to have manifested themselves in 2003 are a medical impossibility.

Theories of Asbestos Litigation cites several sources in support of the proposition that "almost no new actual cases of asbestosis have manifested in the past ten years."[9] These sources include a 1994 study of asbestos-exposed workers whose authors, doctors specializing in the field, note that "we have not seen a single case of significant asbestosis with first exposure [to asbestos occurring] during the past 30 years;" a 1988 study that notes that "[a]sbestosis appears to be a disappearing disease;" and an interview with a Harvard Medical School professor indicating that "medical students

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[6] S. Rep. 108–118 at 83–84 (citations omitted).

[7] Statement of Lester Brickman, Subcommittee on Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary, July 21, 2004 (hereinafter Brickman 2004 Testimony).

[8] S. Rep. 108–118 at 82–83 (citation omitted).

[9] Theories of Asbestos Litigation, 62 & n.85 (citations and quotations omitted). *See also id.* at 36 & n.5; Brickman 2004 Testimony at 7, 8.

have recently started questioning their professors as to why asbestosis is even part of the curriculum, since it is virtually never seen in patients outside of mobile x-ray trailers set up by plaintffs' lawyers."

The same medical reality is described by a Mobile, Alabama pulmonologist who has treated shipyard workers for asbestosis. In an interview with the Mobile Register, this doctor also comments on the asbestos-testing companies that are employed by plaintiffs' lawyers:

> Dr. Marc S. Gottlieb, a Mobile pulmonologist, said he and his professional colleagues in the area are well aware of the testing companies and have little regard for their work.
>
> * * * * * * *
>
> Gottlieb frequently sees people who make appointments after receiving letters from screening companies informing them they tested positive. "Unfortunately, the percentage of people who go through these testing mills and test positive is probably real high, like 75 percent," he said.
>
> "If they were going to clinical physicians—somebody who's not trying to make a buck off of it—the percentage of those people who really have it would be on the order of 20 to 25 percent, and people who are really disabled by it, like 5 to 10 percent."
>
> * * * * * * *
>
> Gottlieb, who has practiced medicine in Mobile since 1981, said he saw far more serious cases of asbestosis during his first 10 or 15 years than he does now.
>
> "Thousands and thousands of men who worked in the shipyards in World War II were exposed, and they have no safeguards. There were lots and lots of warships along the Gulf Coast.
>
> "The old-timers would wrap pipe, and the air was all white, and they came out looking like snowmen" from the asbestos, he said.
>
> But these days, when Gottlieb makes a diagnosis of asbestosis, it's usually a mild case with no disability or with disabilities caused by other factors, like heavy smoking, he said.[10]

The same Mobile Register article also provides the following account of recent statements about asbestos litigation made by the American Bar Association:

> [T]he ABA stated that asbestosis claims were substantial in the early 1990s—about 15,000 to 20,000 per year—but "were fairly predictable." The statistics suggested that non-malignant claims might begin trailing off as "the period of most intensive industrial use of asbestos had drifted further into the past."
>
> The ABA continued: "In retrospect, however, it is clear that a countervailing trend was emerging and accelerating

[10] Eddie Curran, "Myster Companies, Massive Payouts," Mobile Register, March 28, 2004.

> in the 1990s: for-profit litigation screenings began systematically generating tens of thousands of non-malignant claims each year by individuals who had some degree of occupational asbestos exposure, but did not have, and probably would never get, an impairing asbestos-related disease." [11]

One month ago, Dr. James Crapo repeated his previously expressed views about the actual incidence of asbestos disease in the United States, in his answers to written questions that Senator Kyl posed to him following this committee's April 26, 2005 hearing regarding the asbestos bill. Dr. Crapo stated:

> 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).[12]

Dr. Crapo and other medical experts' observations are confirmed by an unexpected additional source: former paralegals and attorneys of Baron & Budd, one of the principal plaintiffs' law firms behind the wave of asbestos lawsuits. In interviews with Dallas newspapers, these sources have confirmed that over the course of the 1980s and 1990s, the firm encountered fewer and fewer clients with significant asbestosis. As one former paralegal notes, in the late 1980s, if a potential client only had pleural plaques—benign spots on the lining of the lung that indicate exposure to asbestos but do not constitute a disease or even predict future development of disease—the law firm would not take the case. But in later years, "that's all they had." [13]

Running as it may from the best medical research facilities in the nation to the paralegals of Baron & Budd, the view that incidence of asbestosis has been declining in the United States in recent decades is not unanimously held. One report, recently issued by the Department of Labor and entitled "Work Related Lung Diseases Surveillance Report," purports to show an increase in incidence of asbestosis in the United States over the past ten years.

The Labor Department's findings, if they were correct, would be noteworthy for several reasons. Not only would these findings suggest that the best physicians currently performing research and practicing in the field of pulmonary medicine utterly have failed to detect a revival of asbestosis incidence in the United States; these findings also would suggest that the occupational health regulations that universally were thought to have sharply limited asbestos exposures after 1972 have in fact failed to do so, and that the

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[11] *id.*

[12] Dr. James Crapo, Professor of Medicine, National Jewish Medical and Research Center, Response to Questions on Senate Bill S. 852, May 25, 2005. A copy of Dr. Crapo's answers to written questions is included as an attachment to Senator Coburn's additional views to this report.

[13] S. Rep. 108–118 at 92. For information about pleural plaques, *see id.* at 98–99.

problem of occupational exposure to asbestos actually has grown worse since the time when those regulations were implemented. Either that would have to be the case, or the Labor Department's findings would suggest that everything that modern medicine thought that it knew about asbestosis is in fact wrong—that the disease is not dose-dependent, or is not even caused by exposure to asbestos at all.

Or the Labor Department could be wrong. A persuasive case for the latter interpretation is made by Dr. James Crapo. In a letter response to an inquiry from Senator Kyl, Dr. Crapo notes the following about the Labor Department report:

This report is in conflict with the general experience in pulmonary medicine throughout the United States today, which is that the incidence of patients with clinically significant asbestosis is declining. In the 1980s it was common to see patients with asbestosis and many of these cases were severe or disabling. In my experience and in that of most pulmonologists I know, the incidence of such patients has declined steadily during the 1990s. It is now rare to see severe, disabling asbestosis except as cases that developed much earlier and who are returning for chronic follow-up.

The problem with the NIOSH report is that its data is contaminated by the large-scale screenings done by law firms during the 1990s looking for cases of asbestosis that could enter our legal system. These screenings have been shown to lead to large numbers of inappropriate diagnoses of asbestosis (see Gitlin JN, LL Cook, OW Linton and E Garrett-Mayer. Comparison of "B" readers' interpretations of chest radiographs for asbestos related changes. Acad Radiol 11:843–856, 2004).

In the NIOSH Report, Appendix A, page A–3, it states that their multiple cause of death data came from the National Center for Health Statistics (NCHS): "Each death record includes codes for up to 20 conditions listed on the death certificate including both underlying and contributing causes of death." Appendix B, page B 1, in describing the methods states: "in this report the number of deaths for each occupational respiratory condition is the number of decedents for which the condition was coded as either underlying or contributing cause of death." For this purpose, International Classification of Diseases (ICD) codes were used.

In my judgement, it is likely that mass screenings done by law firms in the 1990s resulted in large numbers of patients being given an incorrect diagnosis of asbestosis and assigned an ICD9 code for this diagnosis. With the enhanced used of computer technology during the 1990s, ICD9 codes were often permanently tracked for each patient and ultimately included in death certificate or hospital discharge information. In the case of asbestosis, this likely indicates only that the individual had participated in a mass screening exercise, not that asbestosis was identified by the treating physician as a significant cause of death.

In my judgement, the actual incidence of clinically significant asbestosis in the United States has been steadily decreasing throughout the 1990s.[14]

[14] A copy of Dr. Crapo's letter to Senator Kyl is attached to this statement. Unfortunately, the Labor Department's data are uncritically reproduced in the most recent RAND Corporation

Continued

Dr. Murray Janower, the past chairman of American College of Radiology Committee on Ethics, reviewed Dr. Crapo's analysis of the Labor Department report and concluded that he "could not agree with Dr. Crapo more." Dr. Janower further states:

> I trained and was on the staff at the Massachusetts General Hospital for the decade of the sixties. Initially we saw a number of cases from the plumbers and pipe fitters at the Boston ship yards, but the cases were only a trickle at the end of the decade. In fact, when I wrote the first (or second) paper on mesothelioma in the American literature in 1970 (AJR:Vol. 108; p 53–59), we only had six cases.
>
> Again, asbestosis is a dying disease. * * * Almost all of the money being paid out [in the litigation system] goes to perfectly well people and the trial lawyers.

Dr. Janower also notes:

> While it has been estimated that about 90% of claimants are walking well, based on my experience, I would say that the number is closer to 95% or higher and that there are very few cases of true disease.
>
> [T]here have been no workers exposed to significant concentrations of asbestos in over thirty years, and most exposure occurred prior to that in shipyards and related industries during the second world war. Most of the war workers have passed away, as expected given their old age. And of course, the cause of death of the dying workers is the usual causes of death, including heart attacks, strokes, accidents, etc.

Dr. Janower concludes:

> If one were to survey the 126 university radiology departments, one would find that the departments probably see less than 6–10 cases per year. Community hospitals only see a case or two per year. I always tell my medical students and residents not to study asbestosis as it is such a rare disease.[15]

The fact that 110,000 asbestos-injury legal claims were filed in 2003—over 90% of which asserted asbestosis and were generated by attorney-sponsored screenings—is itself nearly conclusive evidence of widespread fraud in asbestos litigation. The actual medical experience of asbestos-related injury in the United States simply cannot account for the sharp rise in, and sheer volume of, re-

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report on asbestos litigation. Because the RAND reports routinely are used as a reference source by many commentators on asbestos litigation, it is likely that the Labor Department's dubious data will be repeated again and again. RAND even speculates in its report that the current rise in asbestosis "reflects the delayed effects among workers exposed to asbestos during its peak use" in the United States. It bears mention that virtually everyone agrees that the types of sustained exposures to friable asbestos that cause asbestosis were substantially eliminated in the United States after 1972, and experts generally agree that the latency period for asbestosis is 15 to 30 years. Simple math thus suggests that the last wave of exposures in the late 1960s and early 1970 would have begun to cross the 15- to 30-year latency threshold in the mid-1980s, and that most of the tail of this final large exposed cohort would have crossed that threshold by 2003. Again, assuming that the controls imposed by 1972 did have some effect on exposure, the Labor Department data on which RAND relies make sense only if one is willing to believe that asbestosis is not primarily caused by exposure to asbestos.

[15] Electronic message to Senator Jon Kyl, June 29, 2005 (on file with the Judiciary Committee).

cent asbestos-injury legal claims. Fraud is the only plausible explanation for this phenomenon.

ASBESTOS FRAUD HAS COST THE UNITED STATES TENS OF BILLIONS OF DOLLARS AND TENS OF THOUSANDS OF JOBS

In his testimony last year before the House Commercial and Administrative Law Subcommittee, Professor Brickman gave an overview of the current and projected impact of asbestos litigation on the United States economy:

> In 2003, more than 110,000 new claimants surfaced—the most ever in a single year. Since each claimant files claims against approximately 30–60 different defendants and bankruptcy trusts, this translates into approximately 5,000,000 new claims which will have been generated by just these claimants. While approximately 750,000 claimants have so far filed claims against over 8500 different defendants, it is estimated that 1,600,000 to 2,100,000 new claimants will yet emerge. Moreover, while defendants and their insurers have so far paid out over 70 billion dollars, it is estimated that former asbestos-containing product manufacturers, owners of premises containing asbestos, and their insurers will have to pay out an additional $130–$140 billion before the litigation is concluded.
>
> So far the litigation has accounted for approximately 70 bankruptcies including, in recent years, such companies as Owens Corning, W.R. Grace, Armstrong World Industries, Babcock & Wilcox, Federal Mogul, and Combustion Engineering. I note that negotiations are currently underway in the Senate to remove the litigation from the judicial system and provide an alternative administrative resolution. No end is yet in sight, however, as what has become a weapon of mass business destruction cuts deeper and deeper into the American industrial process and product distribution system. If the litigation continues along its current path, many more bankruptcies will ensue—scores if not hundreds of companies, big and small, will almost certainly succumb as will a number of insurance companies.[16]

Professor Brickman has estimated that "[m]eritless asbestos claiming thus far approaches $28.5 billion."[17] "One researcher has calculated that * * * the [Manville] trust alone may have paid $190 million dollars for inauthentic or inflated claims between 1995 and 2001."[18]

This economic devastation exacts a human toll. According to a RAND Corporation study, "the number of jobs that [asbestos] defendants would have created if they had not had to reduce their capital investments by $33 billion is estimated to be 423,000."[19] Moreover, "[b]ecause of the [asbestos] bankruptcies, an estimated 52,000–60,000 employees of asbestos defendants lost both their jobs

[16] Brickman 2004 Testimony, *supra,* at 3–4.
[17] Brickman, Theories of Asbestos Litigation, at 59 n.66.
[18] *Id.* at 132.
[19] *Id.* at 37 n.10.

and an average of 25% of the value of their 401(k) accounts."[20] For example, "the value of Federal Mogul stock in the accounts of its 22,000 employees declined by more than $70 million."[21]

Real people are being hurt by what is happening with asbestos litigation. Tens of billions of dollars have been stolen, tens of thousands of workers have lost their jobs, and billions of dollars have been confiscated from workers' pension plans. This is a massive scandal.

SILICA FRAUD

Today, no discussion of fraud in asbestos litigation is complete without a discussion of silica. The committee has good reasons to include in the trust-fund bill a provision that seeks to prevent asbestos claimants from also filing silica claims. Again, Professor Brickman provides a useful summary of events—in testimony before this committee earlier this year:

> Only recently has silica litigation exploded. In the first half of 2003 alone, more than 17,000 plaintiffs filed suit. While one company was facing 3,505 claims in 2002, the next year it was facing 22,000 silica claims. Similarly, as of September 2003, one insurer identified 30,000 silica cases brought against its insureds, compared to 2,500 cases it had one year earlier. Illustrating this trend is the Federal Silica MDL 1553 ("MDL") that now involves over 10,000 plaintiffs predominately from cases initially filed in the Mississippi state courts and removed to Federal court.
>
> This rise in silica claims in the last few years seems incompatible with observations in the medical literature. I am not a medical doctor, but a few examples from the medical literature demonstrate the lack of a medical epidemic. From 1950 to 1979, for example, Massachusetts General Hospital reported only 15 cases of silicosis and coal worker's pneumoconiosis. From 1980–1987, the Mayo Clinic found only 10–25 cases of silicosis per year from the approximately 250,000 patients seen annually. Between the two periods of 1969 to 1981 and of 1982 to 2001, the death rate for silicosis had dropped 70%. As one journalist noted, "litigation is rising at the same time deaths from silica are falling * * * ."
>
> Further, prior to 2001, there had never been a year in which more than 1,000 plaintiffs filed suit for silica related injuries. Yet in 2003 alone, 19,389 plaintiffs filed suit—more than in the previous thirty years combined.
>
> * * * * * * *
>
> One obvious question is why has there been such a marked increase in silica claims in the last few years when the medical evidence points to a disappearing disease. The answer is simple. It involves the same reasons that account for the hundreds of thousands of non-malignant asbestos claims which I describe in my Pepperdine article. It

[20] *Id.*
[21] *Id.*

is the application of the entrepreneurial model to silica, beginning with mass screenings sponsored by lawyers who have the economic incentive to convert asbestos claims to silica claims—perhaps motivated by the concern that the asbestos litigation end game has begun. Heath Mason, the co-owner of the mass screening entity N&M, Inc., testified that the reason his company started focusing on silica cases was because of a previous version of the very legislation that is before this Committee:

Q. With respect to testing that's being done by N&M these days, would you say that N&M is doing more silica testing versus asbestosis or what is the breakdown?

* * * * * * *

A. I would say at the particular time that we did those tests we were doing more silica than we were doing asbestos.

Q. And is that true today?

A. As of the last month with the Hatch bill, yes, sir, I would say that it is.

Q. And has the Hatch bill influenced your business?

A. For sure.[22]

Professor Brickman also notes that the silica plaintiffs' attorneys "are following the same practices and procedures that have been used to generate the massive number of non-malignant asbestos tort claims."

One particularly noteworthy aspect of the silica litigation is the large number of silica claimants who also have filed asbestosis claims. "One plaintiffs' law firm admitted that it represents over 3,500 MDL silicosis plaintiffs who had prior asbestosis diagnoses."[23] And just one doctor—Ray Harron—has "diagnosed about 1,500 patients with silicosis after he had earlier found them to be suffering from asbestosis."[24]

These dual diagnoses are noteworthy in light of the fact that several experts have testified before this committee that such overlap is virtually nonexistent in the real world. Dr. Paul Epstein, a pulmonary physician and Clinical Professor of Medicine at the University of Pennsylvania who has wide experience in treating occupation lung disease, noted that "[s]ilicosis has quite a different appearance [from asbestosis] on the chest x-ray."[25] He continued: "When people have both diseases, (that is, both asbestosis and silicosis) the characteristic clinical and x-ray manifestations are each discernible as separate features and the diagnosis of dual disease process can be made with relative ease." Dr. Epstein concluded:

Over the course of the past 30 years I have personally examined approximately 17,000 individuals who have been

[22] Statement of Lester Brickman, U.S. Senate Committee on the Judiciary, February 2, 2005. For an excellent overview of the explosion of fraud in silica litigation, see also Roger Parloff, Diagnosing for Dollars, Fortune Magazine, June 13, 2005, at 98.

[23] Recent Screening Developments: The Silica MDL 1553 Daubert Hearing, Harris Martin Publishing 12, 2005.

[24] Neal Falgoust, Defense Goes After Doctors—Physicians Paid to Read X-Rays, Work Histories, Corpus Cristi Caller-Times, February 17, 2005.

[25] This and the subsequent testimony is from the hearing entitled Asbestos: FELA and Mixed-Dust Issues, U.S. Senate Committee on the Judiciary, February 2, 2005.

> occupationally exposed to asbestos. These workers have held many different jobs, including those of shipyard workers, oil refinery employees, construction workers, steel mill employees, chemical workers, insulators, electricians, painters, and riggers, to name a few. Additionally, I have evaluated many workers who were occupationally exposed primarily to silica, including coal miners, sandblasters, stone-quarry workers, glass makers, and refractory brick manufacturers. A large number of these workers were exposed to both silica and asbestos.
>
> While it is theoretically possible to have combined disease consisting of asbestosis and silicosis, it has been my clinical experience that the overwhelming majority of patients I have seen with asbestos-related diseases have had no evidence of silicosis. In fact, I can recall no more than a dozen or so individuals who have had combined asbestosis and silicosis and these were people who had substantial occupational exposure to silica, often in jobs that were separate from their subsequent jobs that involved exposure to asbestos. For this reason, it is my professional opinion that the dual occurrence of asbestosis and silicosis is a clinical rarity.

Similar testimony was presented to the committee by Dr. Theodore Rodman, a retired professor of medicine at Temple University who has 50 years' experience in medical practice, teaching, and research. Early in his career, Dr. Rodman developed an interest in occupationally related lung diseases—he examined hundreds of such patients, and reviewed the x-rays of thousands. He concluded:

> Of the hundreds whom I examined, I can remember only one or two who gave a clear-cut history of significant occupational exposure to both asbestos and silica—not surprising considering the disparity in occupations in which asbestos and silica exposure commonly occur.
>
> Among the thousands of chest x-rays which I reviewed in asbestos and silica exposed individuals, I cannot remember a single chest x-ray which showed clear-cut findings of both asbestos exposure and silica exposure.
>
> During the decades of the seventies, eighties, and nineties, in connection with the asbestos litigation, I evaluated a large number of litigants.
>
> Not one of them had medical records suggesting a history of significant silica exposure.
>
> I found evidence of asbestos related changes in many.
>
> I found no evidence of silica related changes in any.
>
> I found no evidence in the reports of any physician—whether retained by the plaintiff or the defendants—that concluded that the patient had silica related changes.
>
> On the basis of this personal experience, I have concluded that both asbestos and silica related changes and disease are common but rarely occur in the same patient.
>
> The medical literature and textbooks with which I am familiar are consistent with my conclusion.

Finally, the committee heard testimony from Dr. David Weill, an associate professor in the Division of Pulmonary and Critical Care Medicine at the University of Colorado Health Sciences Center. He stated: "silicosis and asbestosis are different diseases; they are not easily confused in practice; and it is very rare for one person to have both diseases."

Dr. Weill also indicated that "[i]n the Spring of 2004, I had the privilege of serving as a visiting professor at the National Institute of Occupational Medicine and Poison Control in Beijing, China." He noted: "During my time in China I saw hundreds of cases of asbestosis and silicosis, many involving very serious and advance stages of the disease. The Chinese experience is sobering, and far different from what I have seen in the U.S., where genuine cases of these diseases are quite rare." Regarding the dual-disease litigation phenomenon, Dr. Weill commented that:

> Although asbestosis and silicosis are different diseases that look different on x-ray films, it is theoretically possible for one person to have both diseases. A person could be exposed to both silica and asbestos in sufficient quantities to cause either disease, but it would be extremely unusual for one person in a working lifetime to have sufficient exposure to both types of dust to cause both diseases. In my clinical experience in the United States, I have never seen a case like this and colleagues who saw patients in periods where exposure levels were much higher have difficulty recalling an individual worker who had both asbestosis and silicosis. Even in China, where I saw workers with jobs involving high exposure to asbestos and silica (such as sandblasting off asbestos insulation), I did not see anyone or review chest radiographs of anyone who had both silicosis and asbestosis.

Dr. Weill also reviewed 300–400 case files from the Texas silica MDL. He testified with regard to that litigation that:

> From a medical standpoint, it is puzzling to see so many ostensible silicosis cases in such a short period of time. In my clinical practice and those of colleagues in the occupational medicine field, it is unusual to see new silicosis cases, at least in the United States, largely because of the workplace regulations that have been put in place by OSHA. The situation in China, and the rest of the developing world, is very different.
>
> Although statistical evidence is incomplete and imperfect from a methodological point of view, few would question the proposition that industrial dust control mechanisms have made silicosis much less common today than it was a generation ago.
>
> * * * * * * *
>
> Silicosis and, for that matter, all pneumoconioses are dose-dependent, meaning that increased level and total amount of exposure results in increased risk and/or severity of the diseases. Conversely, as workplace exposures have been substantially reduced in the last several dec-

> ades, silica-related health effects have become less prevalent. The declining incidence of silicosis should be associated with fewer and fewer silica lawsuits, but in my experience exactly the opposite is taking place. Silica lawsuits are sharply increasing even though from a medical perspective silicosis is declining.

During a Daubert hearing in the Texas silica MDL, one witness—a former fellow of pulmonary diseases at the National Institute for Occupational Safety and Health—testified that the doctors who had diagnosed the claimants as having silicosis were not "intellectually and scientifically honest." He characterized these diagnoses as "stunning and not scientifically plausible."[26]

Another doctor also described the sheer medical impossibility of the thousands of silicosis cases asserted in the MDL:

> Defense witness Dr. Gary Friedman, a Houston physician who has testified on behalf of silicosis patients in other lawsuits, said he could not offer a plausible explanation for the apparent outbreak of silicosis that had arisen through the litigation.
>
> The worst outbreak of the disease occurred in the 1930s in West Virginia, when hundreds of workers drilling a tunnel died from inhaling the dust. Some documentaries have called it the nation's worst industrial disaster.
>
> Friedman said that disaster pales in comparison to the 10,000 cases of silicosis reported in this set of lawsuits.[27]

Judge Janis Jack, the federal district judge presiding over the MDL, summed up the import of all this evidence: it raises "great red flags of fraud." "This is extremely serious."[28]

THE NEED FOR A FEDERAL INVESTIGATION

Again, as the Chamber of Commerce noted in its letter to the Attorney General, only the Justice Department has the investigative tools that are needed to conduct an unimpeded investigation into fraudulent practices in asbestos litigation. Professor Brickman makes the same point in his 2004 law-review article; he repeatedly notes that only grand-jury subpoenas could uncover various critical evidence about dishonest practices among asbestos plaintiffs' bar.[29] He also suggests that a governmental investigation is the only way to uncover corresponding evidence that likely is in the possession of the asbestos bankruptcy trusts.[30]

What is happening with asbestos litigation is not happening by accident and it is not happening spontaneously. Indeed, there already is substantial evidence that, in addition to the screening companies and physicians involved, the attorneys at the top of the asbestos-litigation pyramid are fully aware that the legal claims that comprise this litigation are being filed on behalf of individuals

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[26] Neal Falgoust, Doctor Decries Testing Process, Corpus Christi Caller-Times, February 19, 2005.

[27] *Id.*

[28] Neal Falgoust, "Red Flags of Fraud" Are Raised, Corpus Christi Caller-Times, February 18, 2005.

[29] See Brickman, Theories of Abestos Litigation, at 76 n. 20, 141 n. 399, 164 n, 503.

[30] See Brickman, 2004 Hearing Testimony, at 55–57, See also S. Rep. 108–118 at 95 (describing difficulties encountered by private investigators collecting evidence of asbestos fraud).

who are not sick and who were not even exposed to the products of the manufacturers who are being sued.[31] If these attorneys are aware of the practices of which their own paralegals suggest that they are aware, these attorneys may be violating federal criminal statutes.

Asbestos litigation has become a cancer on the American economy and a disgrace to the American justice system. As the 2003 claims-filing data and the developments in silica litigation demonstrate, this cancer is not receding—it is spreading. Even if Congress enacts an asbestos trust fund and preempts all future asbestos litigation, the patterns and practices developed in asbestos litigation inevitably will migrate to other toxic-torts litigation—unless the cancer is cured at it source. This is a problem that will not go away on its own. It is a problem that must be addressed.

JON KYL.
JOHN CORNYN.
TOM COBURN.

[31] S. Rep. 108–118 at 85–92.

ADDITIONAL VIEWS OF SENATORS CORNYN, KYL, AND COBURN

One particularly concerning problem has been the lack of information that is available to the committee with regard to the underlying financial analysis of the trust fund. Further, and on a related note, we are concerned that the underlying assumptions regarding those expected to pay into the fund, the amount to be paid into the fund and the total cost of the fund have not been sufficiently explained to us.

While each of us supports the mission and objectives of this legislation, the success of the trust fund requires that the financial analysis be sufficiently thorough and performed by an adequate number of objective parties to give us a high degree of confidence that the trust fund is sustainable. Sustainability of the trust fund is absolutely imperative if we are to treat victims fairly and get them the awards they deserve. Unfortunately, the two primary analyses we have seen to date vary significantly as we await the opinion of the Congressional Budget Office (CBO) with regard to S. 852.

At its core, the trust fund boils down to cash inflows and cash outflows. Inflows, scheduled to be capped at $140 billion over the life of the trust fund, consist of payments by defendant companies, insurers and, possibly, existing asbestos trusts. Outflows consist of all expenses associated with the trust fund, including all victim compensation payments, all administrative expenses and, at least as currently contemplated, all debt and interest expenses.

Our responsibility to perform basic due diligence dictates that we have at our disposal, at a minimum, a comprehensive understanding of the history of asbestos-related payments by defendant and insurance companies expected to pay into the fund, a reasonable idea of the expected defendant and insurance companies that will pay into the trust fund by tier and the amount each will pay, a firm understanding of the expected numbers of victims to be paid by claims level per year, a thorough projection of the costs associated with managing the trust fund at the Department of Labor, a comprehensive projection of potential interest expense and, generally, a comprehensive year-by-year financial analysis that details the expected cash flows for the trust fund.

In virtually all respects, the information available to us is less comprehensive than we would prefer in order to be confident in the viability of the trust fund. In addition, based on what we know, the fairness of the allocations formula is questionable and the likelihood that the trust fund will remain solvent currently is, at best, a guess.

LACK OF AVAILABLE INFORMATION

As of the writing of this committee report, we have been able to analyze only limited information. Senators have made repeated requests to see greater detail but only with limited success. Accordingly, we are left in the uncomfortable position of largely guessing about the impact of any proposals offered to deal with many of the issues we face on this bill.

Perhaps most troubling is our fundamental lack of understanding of those expected to pay into the trust fund and the amounts they are expected to pay. We have seen two separate, but significantly different, presentations of the estimated numbers of companies expected to pay into the trust fund by tier. We know that Tier 1, representing bankrupt companies that have filed for Chapter 11, has approximately 20 companies in it. Beyond that, however, the story is less clear. We have been told that Tier 2 companies number between 30 and 78; Tier 3 between 28 and 80; Tier 4 between 230 and 360; Tier 5 between 150 and "hundreds;" and Tier 6 simply between 400 and "hundreds."[1] Generally, we have heard estimates of total contributing companies from fewer than 1000 to over 1700.[2] While a few companies have volunteered the tier and subtier in which they expect to fall, for the most part we have very little idea about the amount most companies will pay.

Additionally, we have very little information detailing the estimated historic asbestos-related expenses for any companies to give us a reference point from which to compare the effective fairness of the trust fund tier values. Without knowing who will be paying, it is difficult to know what their past expenditures have been. Moreover, even public companies don't always have the most information available, so until companies are required to or volunteer to submit their data in full, we will not have enough information to analyze.

Information with regard to the trust fund outflows also could be more readily available. So far, we have seen only a high-level analysis produced by the investment bank, Goldman Sachs, who was retained by the pro-reform Asbestos Study Group. This analysis, though very helpful for us to understand the theory behind the fund, is not the level of detail we require. At a minimum, we should be able to see year-by-year cash flow summaries with best and worse case scenarios—including the impact of possible interest expense if there is "a run" on the trust fund at any point. Further, while we finally were given the baseline projection on which the entire model appears to be based, we have not seen any of the detailed modeling and analysis built upon those projections.

We are sympathetic that the information is quite difficult to obtain given the complexity of the legislation, the number of parties involved and the amount of information involved. Nevertheless, it would seem that the burden of proof should fall upon those most supportive of the trust fund to show that fund will be adequately funded and that it will be fairly allocated. As United States Sen-

[1] Verbal presentation from the National Association of Manufacturers Asbestos Alliance and the Asbestos Study Group on April 12, 2005.

[2] Congressional Budget Office Estimate, S. 1125—Fairness in Asbestos Injury Resolution Act of 2003, October 2, 2003, at 1.

ators voting on a trust fund of this magnitude, we should have more information than is available to us at this time.

TOTAL COST OF THE FUND

To ensure that those sick from asbestos exposure are treated fairly and effectively, we must ensure that the fund remains viable. As of the time of this report, we have only two analyses on which to base our assessment regarding the fund until the CBO provides its analysis in the coming weeks. We have the model from Goldman Sachs described above which focuses on S. 852 and we have last year's valuation of S. 2290 by the CBO.

According to Goldman Sachs' analysis, we are told that the trust fund will pay out claims of approximately $118 billion.[3] We have only been provided limited detail regarding the assumptions underlying this model, have seen only limited summaries of the model and are not certain if it represents a best-case, expected or worse-case scenario. The other analysis we have is a CBO analysis from April 2004 that indicates the fund would cost approximately $140 billion.[4] Clearly these represent a sizable discrepancy.

To be sure, there have been a number of significant changes in the legislation. But some of these changes subtract costs and some add costs. For example, since S. 2290 last year, we have improved the medical criteria considerably by removing from the trust fund the "Level 7" claims value which would have made payments to individuals without the necessary indicia of illness related to asbestos exposure. In addition, the number of claimants expected to be paid necessarily has changed over time, the claims levels are markedly higher than in S. 2290 and other changes in the medical criteria may actually increase costs significantly. For example, the use of CT Scans may cause a substantially larger group of claimants than we have contemplated previously. Detailed discussion about the issue of medical criteria is contained in separate views in this document.

Making a sound evaluation regarding the overall cost of the trust fund is a difficult task. Indeed, the CBO pointed out a number of these difficulties with regard to S. 2290, at least, in a letter to then Chairman Hatch just last year:

> Any budgetary projection over a 50-year period must be used cautiously, and as we discussed in our analysis of S. 1125, estimates of the long-term costs of asbestos claims likely to be presented to a new federal fund for resolution are highly uncertain. Available data on illnesses caused by asbestos are of limited value. There is no existing compensation system or fund for asbestos victims that is identical to the system that would be established under S. 1125 or S. 2290 in terms of application procedures and requirements, medical criteria for award determination, and the amount of award values. The costs would depend heavily on how the criteria would be interpreted and imple-

[3] Verbal presentation from the National Association of Manufacturers Asbestos Alliance and the Asbestos Study Group on April 12, 2005.

[4] Letter from the Congressional Budget Office to Chairman of the Budget Committee Don Nickles dated April 20, 2004 at 3.

> mented. In addition, the scope of the proposed fund under this legislation would be larger than existing (or previous) private or federal compensation systems. In short, it is difficult to predict how the legislation might operate over 50 years until the administrative structure is established and its operations can be studied.[5]

In truth, the success of the asbestos legislation depends almost entirely on the estimates on which the financial assessments are based. Thus far, we have seen a one page table of what we believe to be the projections on which the Goldman Sachs model is based. We have not seen, however, any detail that would demonstrate whether these projections are reasonable nor how the model then assesses the impact of these projections. In an October 2003 letter to Senator Orrin Hatch regarding S. 1125, CBO noted its concerns about the claims and potential costs, writing that "there is a risk that the actual number of claims could exceed our estimate."[6]

We note that there is a great deal of uncertainty regarding the expected number of claimants that actually would qualify for an award as opposed to receiving medical monitoring. Again, the CBO opined about some of these problems with regard to S. 2290:

> One area in which the potential costs are particularly uncertain is the number of applicants who will present evidence sufficient to obtain a compensation award for nonmalignant injuries. CBO estimates that about 15 percent of individuals with nonmalignant medical conditions due to asbestos exposure would qualify for awards under the medical criteria and administrative procedures specified in the legislation. The remaining 85 percent of such individuals would receive payments from the fund to monitor their future medical condition.
>
> If that projection were too high or too low by only 5 percentage points, the lifetime cost to the Asbestos Fund could change by $10 billion. Small changes in other assumptions including such routine variables as the future inflation rate could also have a significant impact on long-term costs.[7]

Further, we have great concerns about the necessary funding in the early years of the trust fund. As we describe separately, the medical criteria give us great concern that the trust fund cannot sustain the potential cost. The proposed up-front funding of approximately $42 billion over the first 5 years may very well not be enough to cover the cost of the pending claims existing today, notwithstanding the additional claims that no-doubt will enter the fund right away.

We eagerly await the CBO's updated analysis and are hopeful that it can shed greater light on the expected cost of the fund, but regardless of their determination, we stress the many concerns we have regarding the current process for estimating the cost.

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[5] Id. at 6.

[6] Letter from the Congressional Budget Office to Chairman of the Judiciary Committee, Orrin Hatch. October 2003 at.

[7] Letter from the Congressional Budget Office to Chairman of the Budget Committee Don Nickles dated April 20, 2004 at 6.

ALLOCATIONS CONCERNS

The Allocations formula for both defendant companies and insurers remains as much a mystery as the process for determining the total cost of the fund. Insurers, unable to come to any agreement thus far regarding a fair allocation formula, will leave their fate to an insurance commission if they cannot agree. This is not the preferred situation, but even worse, the current allocations scheme in place for defendant companies strikes us as somewhat arbitrary and arguably unfair in at least certain instances.

Determining a fair allocations formula for defendant companies is an extraordinarily complex proposition. The current formula attempts to do that, but many companies have raised significant concerns that they are not being treated fairly. Specifically, the primary concerns seem to be that there are a number of companies that believe they will be forced to pay significantly higher amounts into the fund than they would have paid or expect to pay in the current litigation environment. Further, many companies are well insured and believe themselves to be sufficiently insured against future claims.

No system we can devise will be perfect. However, we make a number of observations:

- A hypothetical company with as much as $1 billion in total previous asbestos-related expenditures would be required to pay no more than $27.5 million per year in future years. A similar size company with as few as $75 million in total previous asbestos-related expenditures would pay the same amount.
- A well insured company that has paid few, if any, claims out of pocket and believes itself to be well insured against any possible future claims could be forced to pay millions of dollars into the federal trust fund.
- At least three companies of which we are aware have spent historically just over $100 million in total previous asbestos-related expenditures, and less than $2 million has come out-of-pocket. Under the trust fund, these companies would be expected to pay, most likely, $16.5 million per year into the trust fund.
- Premises companies, often self-insured, make a case that their asbestos liability is not the same as products defendants. According to information we have seen, many of these companies would be expected to pay into the trust fund as much or more than twice the amount they have been spending historically.

We could offer additional observations, but the point is clear that while certain companies will benefit from the legislation it is probable that some companies will be made worse off by the trust fund, not better. Much is made of the "hardship and inequity" provisions as a way to offset the concerns these business have. No doubt these provisions may provide the needed relief in some, if not all, instances. However, it is of no comfort to the Board of Directors, CEO, shareholders and other stakeholders of a corporation that they "may" get an offset from some future Administrator when they are seeking access to the public markets, loans from banks, ratings

from Standard and Poor's or Moody's, or any other critical business transaction they care to make.

The Coalition for Asbestos Reform is a coalition of businesses opposed to the legislation that includes a number of businesses and we are told it is growing. In a letter to Senator Specter dated April 6, 2005, the coalition reiterated its concerns about the cost burden on small and medium sized businesses, calling it a "manifestly unfair allocation formula," and adding:

> The formula for assigning mandatory payments is almost certain to be the direct cause of a number of bankruptcy filings for otherwise financially sound companies. Each version of the FAIR Act has increased the payment burden on defendant companies, and has based each company's ability to pay on its historic asbestos defense costs. These allocations—across all tiers of the FAIR Act—fail to recognize that many defendant companies have paid only insurance premiums related to asbestos defense, and would be obligated to make payments to the trust fund that far exceed their anticipated liabilities under the current tort system. By shifting the burden of paying for asbestos claims from the companies with the greatest asbestos exposure to a host of other businesses—including many small and medium sized entities—the legislation creates a substantial likelihood that a cascading series of defaults will rapidly lead to the insolvency of the trust fund."[8]

In addition, we are concerned that should the trust fund face insolvency, as we fear may be possible given the limited analysis we have been able to conduct, that many of these businesses would face the difficult task of paying off the debt accumulated by the trust fund at the same time they attempt to deal with additional litigation upon reversion to the court system.

Finally, we note that the current funding formula contemplates a "guarantee surcharge" to ensure that the entire $3 billion annual payment is available. Our primary concern is that if there remain serious issues with the underlying allocations formula, any pro-rata surcharge will simply exacerbate the problem for companies facing an unfair assessment.

We feel that any allocation formula must be structured in such a way as to give companies the actual finality the fund contemplates and that to do so requires as hard and as objective a trigger as is possible. We have offered a number of alternative solutions, but we prefer anything that will cap, for at least smaller companies or companies with smaller historic expenditures, annual assessments at an amount reasonably related to what they would have expected to pay were the trust fund not enacted.

CONSTITUTIONAL CONCERNS

The allocations issue raises at least two notable constitutional questions relating to the taking of existing bankruptcy trust assets and placing them into the national trust; and the abrogation of ex-

[8] Letter from the Coalition for Asbestos Reform to Chairman of the Judiciary Committee, Arlen Specter, April 6, 0025 at 1.

isting insurance contracts. We cannot be certain how these questions would be resolved. Nevertheless, any analysis we conduct about a "worse case scenario" should take into account the possibility that some aspects of the trust fund could be held unconstitutional.

Existing bankruptcy trusts

The first concern deals with the issue of taking existing bankruptcy trusts and placing those funds directly into the national trust fund. The existing trusts, in many cases, are a significant part of the current broken system. Often times, asbestos victims are paid only pennies on the dollar through these trusts. Yet, some of the bankruptcy trustees feel that any forced transition of trust assets to a national trust fund would be a serious constitutional problem. In a letter addressed to Senator John Cornyn from former Solicitor General Ted Olson, he makes the following points:

> 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 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.

He then went on to describe that there would be three main arguments. First, that the FAIR Act violates the Takings Clause of the Fifth Amendment. Second, that 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."

Without considering the merits of the possible litigation, our concern is that there is a very real possibility that the litigation will, in fact, occur and that there is at least the possibility that these existing trust fund assets will not be available for the national trust fund. Without these funds, the liquidity of the trust fund within the earliest years would be seriously jeopardized. We are concerned that this likelihood has not adequately been contemplated in the current funding analysis.

Furthermore, it still is unclear to us the extent of the moneys in question in the existing bankruptcy trust funds. Often times, a value of $4 billion is quoted as the amount in question. However, this amount was the amount in question at the time negotiations were taking place on previous legislation in the 108th Congress. Now, as a result of the Halliburton bankruptcy and other "wrapped up" bankruptcy trusts, there may be as much as $7 to 10 billion in question. Again, we simply seek a full explanation as to the likely impact of these monies becoming unavailable.

Abrogation of insurance contracts

As explained above, we are concerned about the impact this legislation will have on businesses being forced to pay into the fund despite previously having only minimal out-of-pocket expenses as a

result of being well insured (or otherwise). This is not a new concern. Some of us raised these concerns in the Additional Views signed by Senators Grassley, Kyl, Sessions, Craig and Cornyn included in the Committee Report on S. 1125 in the 108th Congress:

> The bill also 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 is critical.[9]

But the issue is heightened further by the possibility of a constitutional challenge. Again, without commenting on the merits of the arguments, we are concerned that a number of companies will challenge the trust fund on the grounds that the legislation "could be declared unconstitutional, as applied to certain defendants, under the Takings and Due Process Clauses of the Fifth Amendment."[10] This is the contention of at least one law professor and constitutional scholar, David Strauss, who has been retained by National Service Industries, Inc. Such a challenge could, as any other possible constitutional challenges, undermine the viability of the trust fund.

We believe that the allocations concerns explained here must be resolved for the trust fund is to be successful. The well being of victims of asbestos exposure depends on the long term viability of the trust fund and the trust fund cannot succeed without a fair allocations formula applied to those paying for the fund. We would like to note that Chairman Specter has been committed throughout the debate over this legislation to working out all serious issues, and that is true regarding this problem as well. We will continue to work to solve these serious problems in hopes that we can end the disastrous effects of the current broken asbestos litigation system.

JOHN CORNYN.
JON KYL.
TOM COBURN.

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[9] Senate Report No. 108–118, 108th Congress, 1st Session 76 (July 30, 2003).

[10] Letter from Professor David Strauss to Chairman of the Judiciary Committee Orrin Hatch, 3/5/2004.

ADDITIONAL VIEWS OF SENATORS CORNYN, KYL, AND COBURN

A significant concern that the Trust Fund fails to address is the issue of 524(g) bankruptcies and a current flaw in the statute that should be resolved. A simple fix is required to fix the unintended result of inequity among creditor classes created by the 524(g) provisions added to the bankruptcy code in 1994. Such a fix simply would add language to that provision which would make clear that a class created by 524(g) is subject to the so-called "cramdown" procedures provided under 11 U.S.C. § 1129(b).

While the Trust Fund ostensibly eliminates the concern going forward with respect to the creation of 524(g) trusts, the problem should not be left unresolved for two reasons. First, it is bad policy to leave such an apparent and troublesome flaw in the code. Second, because the Fund as currently written contemplates a reversion to the tort system, even if the Trust Fund is enacted it will be reasonably possible for the 524(g) provisions to one day again have an effect.

BACKGROUND

At the end of the Chapter 11 process emerges a reorganization plan. The plan outlines the recovery that each class of creditors or stockholders will receive so that the company can emerge as a viable entity. For the plan to be adopted, it must be approved by *each class,* with each class requiring approval by two-thirds of the total amount and more than half of the number, subject to the judge's "cramdown" power described below.[1]

Cramdown is the judge's power to impose a reorganization plan *over the objections* of a class of creditors if the court finds it "fair and equitable."[2] Cramdown thus provides a critical "safety valve" to prevent a creditor or stockholder class from vetoing a plan and holding up the proceedings. Without the cramdown provision, each creditor or stockholder group could hold the process hostage and refuse to allow the bankrupt company to emerge from Chapter 11 until its demands are met. The prospect of cramdown keeps the parties honest, prevents any one class from holding a "veto" and generally encourages consensus.

The 524(g) bankruptcy code changes

The 103rd Congress passed the Bankruptcy Reform Act of 1994, an omnibus law directed at a wide variety of bankruptcy issues. One of those changes was the addition of section 524(g) and (h) to deal with asbestos bankruptcies. These amendments, among other things, create "channeling injunctions," which channel all present

[1] 11 U.S.C. § 1126(c) & (f)
[2] 11 U.S.C. § 1129(b)

and future claims to the bankruptcy trust and discharges the debtor from liability. In addition, for asbestos claimants, Section 524(g) increased the required class approval to 75 percent of asbestos claimants (and requires one person, one vote).[3]

Most troubling, however, lawyers have argued that asbestos claimants created under Section 524(g) are exempt from cramdown. Unfortunately, at least one judge has interpreted it along these lines and it appears that many now are interpreting Section 524(g) as preventing the application of cramdown to any asbestos class.[4] Further, there appears to be no legislative history supporting congressional intent to cause this result, rather it seems to have been either an oversight whereby the drafters of Section 524(g) failed to cross-reference the cramdown section that would make clear the same judicial override should apply or a simple assumption that it would so apply.[5] It seems highly unlikely that Congress would have granted an exemption from such a fundamental tenet of the bankruptcy code without any discussion whatsoever.

Result

Because of the perceived exemption from cramdown, lawyers representing the asbestos classes are able to make significant demands of other classes and hold the process hostage if these demands are not met. Take, for example, the duration of asbestos bankruptcies since passage of 524(g) in 1994 as compared to the average duration of all bankruptcies since that time.

The average length of time it has taken for companies to emerge from bankruptcy reorganization since enactment of 524(g) in 1994 has been slightly less than 15 months.[6] In stark contrast, asbestos related bankruptcies have taken almost 3 times as long, averaging more than 41 months and counting, as most remain pending.[7] Some of the most complex bankruptcies in American history, including Worldcom and Enron, have been initiated and concluded subsequent to the filing of the largest contested asbestos bankruptcies, all of which languish unresolved.

As a result of the asbestos cramdown exclusion, companies in bankruptcy, their commercial creditors and their shareholders possess very little negotiating power. Even financially sound companies with asbestos exposure are detrimentally affected as they encounter difficulties in raising funds due to their unequal bargaining position in the event of a bankruptcy. 524(g) was intended to protect future asbestos claimants while allowing companies to emerge from Chapter 11 bankruptcy as viable entities. Instead, 524(g) has created a stalemate on both these fronts—preventing all parties to a bankruptcy from realizing a positive outcome.

SUMMARY

The Asbestos Trust Fund contemplated under S.852 should include a fix to this seemingly unintended result. To do so would re-

[3] 11 U.S.C. § 524(g)
[4] Report of the National Bankruptcy Commission p. 19.
[5] See Mark D. Brodsky, Fixing the Asbestos Mess: Step One, January 14, 2003 at 4
[6] The 2004 Bankruptcy Year and Almanac, p. 71.
[7] The 2004 Bankruptcy Yearbook and Almanac, p. 195. In addition, this is based on available data and does not include, for example the recent wrap-up of Halliburton and certain other prepackaged asbestos bankruptcies where there were no significant commercial creditors.

store some sanity to the process in the unfortunate, but possible, event of a reversion to court should the Trust Fund become insolvent.

JOHN CORNYN.
JON KYL.
TOM COBURN.

ADDITIONAL VIEWS OF SENATORS KYL AND COBURN

When this committee reported an asbestos-trust fund bill in 2003, some members proposed three criteria for evaluating such a bill: the trust fund must be fair to people with asbestos injuries; its cost must be reasonable; and it must provide a permanent solution to the asbestos-litigation crisis.

We have voted to report this bill out of committee, in no small part out of appreciation for the Chairman's extensive efforts to address our concerns about the bill. We particularly appreciate his assistance in adding to the bill a gatekeeper mechanism for certifying exigent claims seeking an early settlement. Any startup provision that threatens to prematurely return the trust fund to court is bad for victims, bad for participant businesses, and bad for the U.S. government. Once this fund is started, it needs to work—we cannot shift victims back and forth between the tort system and the fund, especially those with malignant conditions who likely do not have long to live.

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

In written questions to Dr. Francine Rabinovitz, who has been retained by trust-fund backers to estimate future claims under the Fund, Senator Kyl asked her about the experience under the asbestos bankruptcy trust funds. Those bankruptcy funds are the closest analog to what we are doing here—no-fault funds that compensate all asbestos claimants that meet particular exposure and medical criteria. Indeed, the criteria for this Fund explicitly are borrowed from the latest version of the Johns Manville bankruptcy fund.

We thank Dr. Rabinovitz for her candor. This is what she had to say:

> To my knowledge, none of the bankruptcy trust created prior to 2002 have been able to pay over the 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 5% of liquidated value. There will be a reevaluation of Manville's ability to pay a higher per-

> centage in the near future by virtue of the impact of its recently imposed more stringent eligibility criteria.

These figures should disturb us all. We are legislating a $140 billion trust—one that *must* work, because the costs of failure would be catastrophic. And yet the model for this Fund is one that has failed *every time that it has been tried.* The miserable performance of the bankruptcy trusts should, at the very least, make us very cautious in proceeding down the same no-fault trust-fund path. While we recognize that this Fund is not exactly like the bankruptcy trusts—that it is designed better in some ways—in other ways the compensation criteria employed by this Fund are worse. And the award values are high enough, with many categories in the hundreds of thousands of dollars, and several approaching or exceeding $1 million, that there inevitably will be intense interest among potential claimants in seeking an award from the Fund.

Another precedent for this Fund that also should give us pause is the Black Lung Fund, which is designed to compensate miners with CWP, a coal-mining-induced lung disease. That Fund is now $8.7 billion in debt. It finally has enough revenue to pay current claimants, but is unable to service its debt—each year's interest is simply added on to the total debt. This is no way to run a trust fund.

It is telling to read the history of this Fund and why it has become so overburdened. The narrative should sound familiar to anyone who has closely followed the proceedings in this committee. A June 12, 2002 report from the Congressional Research Service provides the following account:

> Defining and diagnosing the medical conditions that should qualify one for compensation have been contentious issues throughout the legislative, regulatory, and adjudicative history of the [Black Lung] program. The statutory definition of black lung is less specific than the currently accepted medical criteria for CWP. The law makes a person eligible if one has "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" (30 U.S.C. 902(b)). This clearly includes clinically-defined CWP but it could also include chronic obstructive pulmonary disease (COPD), *e.g.,* bronchitis, emphysema or asthma. While CWP is almost always associated with mine employment, COPD has many other common causes, including smoking. The current Department of Labor regulation (20 C.F.R. 718.201) explicitly allows for COPD to be compensated as black lung, but the Department emphasizes that the burden of persuasion lies with the claimant to show that the disease arose out of his coal mine employment.

In other words, the Black Lung Fund's drafters ignored medical science when setting the Fund's compensation criteria. As is predictable for Congress, criteria were developed in the spirit of political compromise rather than under the guidance of hard science. The results have been unfavorable. The same CRS report goes on to note:

> Virtually all of the expectations for the Black Lung Benefits Act when it was enacted in 1969, *e.g.,* the numbers of claims submitted or approved, were contradicted by subsequent experience. Corrective legislation was adopted in 1972, 1977, and 1981, including the establishment of trust fund financing in 1977, but results have continued to be at variance with expectations. As a consequence, the trust fund has perennially been in a position of growing deficit.
>
> [It was expected when the Black Lung Fund was created that] the number of new cases would rapidly dwindle due to the dust control measures mandated by the mine safety act, and in the interim a federal "Part C" benefit, administered by the Labor Department and funded mostly by the employers of the claimants ("responsible operators"), would serve as a temporary backstop. What happened, though, was that claims were much more numerous than expected, while it proved difficult to find responsible operators, litigate their challenges, and collect from them. Even so, the rate of claim rejections was high enough to produce widespread dissatisfaction and elicit a liberalization of criteria via the 1972 and 1977 amendments.

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

The committee already has repeated the first part of the Black Lung Fund story. Our concern is that as we continue down this path, we risk repeating the rest of the story as well.

But this Fund is different from Black Lung in one key respect: it is much, much more expensive. This Fund has the potential to burn through scores of billions of dollars, rack up $30 billion in debt, and throw us back into the tort system—*all within one decade.* Such a result truly would make the Black Lung fiasco seem insignificant. It would be an utter disaster. We cannot let it happen.

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

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

And just as was the case with Black Lung, despite the asbestos fund's use of criteria that are far more liberal than what can be justified by medical science, we already are hearing arguments that

the Fund should go further, that its compensation criteria should be even more liberal. For example, the medical literature strongly demonstrates that the only marker for asbestos-related lung cancer is clinically significant asbestosis. The cohort studies overwhelmingly show that unless a person has at least some asbestosis, asbestos exposure played no role in his lung cancer. But in this bill, we go further than compensating lung cancer in the presence of asbestosis. We also compensate lung cancer with pleural plaques. Pleural plaques are evidence of asbestos exposure, but are not a valid marker for asbestos-related lung cancer.

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

Several other aspects of this bill also cause us concern:

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

Allocation. This is an emerging problem, the scope of which we are only gradually becoming aware. The bill requires companies to pay into the Fund based on their past "asbestos expenditures"—judgments and settlements and litigation costs—even if those payments in the past were all absorbed by insurance. Companies' insurance will not cover their trust-fund payments; insurers pay into the fund separately. The fact that the bill effectively invalidates these companies' insurance contracts creates colorable takings claims against the Fund. It also creates some serious inequities. Companies which had found their asbestos liabilities to be manageable for many years suddenly will find themselves facing unaffordable Fund assessments. We still lack adequate data about who is actually paying for this Fund. Until such data is available, it is impossible to attempt to reallocate the Fund's burdens in order to assess inequities and other problems.

Start Up. Much progress was made during the last days of mark up toward fixing the Fund's start-up provisions. Nevertheless, the Fund still ultimately allows claims to return to court if there are

delays in start up, with no limits on awards and no offset from future Fund payments for participants. Other, much simpler trust funds, such as that for radiation workers, have taken 18 months to start functioning. We cannot dismiss the possibility that this Fund will require more than 2 years to begin paying all claims. Without an offset and limits, such a start-up reversion would be disastrous for many companies.

Pending Claims. The Fund allows claims that already have advanced to trial to remain in the tort system, with no offset and no limits on damages. Already, some trial lawyers have begun seeking acceleration of their trial dates in order to take advantage of this provision. For the same reasons as apply to the start-up provisions, such continued litigation could be very damaging.

Medical Criteria. Although improved over the 2003 committee bill—especially with regard to the removal of Level VII smokers—the Fund still pays people with very common diseases that were not caused by exposure to asbestos. Credible medical experts have expressed the view to us that these problems will bankrupt the Fund. For example, the continued use of CT scans to diagnose asbestosis in lung-cancer patients could alone devour all of the Fund's revenues. The Fund also still allows payments for colorectal, stomach, and other common cancers with no proven relation to asbestos exposure. These flaws in the bill would be less severe if the Fund contained some self-correction mechanism that allowed tightening the medical criteria in the event of insolvency caused by non-meritorious claims, but the Fund currently contains no such mechanism.

This bill remains a work in progress, and we are committed to addressing its problems as it advances through Congress. The bill is important to many people—to mesothelioma and other asbestos victims seeking compensation that might at least take care of their families, to businesses with only marginal connections to asbestos that nevertheless face bankruptcy through litigation, and to workers and pensioners who see their jobs and retirement accounts destroyed by the litigation juggernaut. This bill is too important for us to let it fail.

JON KYL.
TOM COBURN.

ADDITIONAL VIEWS OF SENATORS BROWNBACK AND TOM COBURN

The Senate Judiciary Committee's passage of a legislative solution to the asbestos litigation crisis long was thought—and for some time, properly so—to be impossible. The Chairman's hard work, willingness to compromise, and ability to accommodate myriad interested parties overcame the substantial odds against progress and enabled Members to report favorably S. 852, the Fairness in Asbestos Injury Resolution Act of 2005, to the Senate floor.

I write separately for two purposes: first, to commend the inclusion in the reported bill of two amendments I offered in Committee; and second, to promote for future consideration one amendment I circulated to my Judiciary Committee colleagues but refrained from formally introducing during the Committee's deliberation on S. 852.

I. IMPROVEMENTS MADE: EXPLANATION OF BROWNBACK AMENDMENTS TO S. 852 WHICH WERE ADOPTED

A. Tier VI contributors

S. 852 appropriately separates contributors to the Asbestos Injury Claims Resolution Fund (hereinafter, "Fund") into different tiers, with assessments to be made on the general principle that contributions should be proportionate to a contributor's asbestos-related liability, as measured by its average annual expenditure on claims of injury from occupational asbestos exposure. While I approve of this principle, I was concerned that the bill as introduced could work an unfairness and/or hardship on Tier VI contributors, whose required contributions in some cases could greatly outstrip the amounts they had spent to fulfill settlements and satisfy judgments of asbestos exposure claims before 2003.[1]

In order to preserve the general principle of proportionality in contributions, I circulated and introduced the following amendment:

> In section 203, page 132, line 13, insert after "following:" the following:
>
> Notwithstanding any other provision of subsection (g), any person or affiliated group within Tier VI whose required subtier payment in any given year would exceed such person's or group's average annual expenditure on settlements and judgments of asbestos disease-related claims over the ten years prior to enactment of this Act

[1] I focused on the period prior to 2003 specifically because in that year, during the 108th Congress, this body began in earnest to search for a comprehensive, permanent legislative solution to the problem of asbestos litigation. See S. 1125, 108th Cong., 1st Sess. (2003). This, of course, has been the path recommended repeatedly by the Supreme Court, most recently in Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003). It seems proper to assume that 2002 was the latest year in which plaintiffs, manufacturers, and insurers faced litigation incentives and made settlement decisions which were relatively unaffected by expectations of Congressional action.

shall make the payment required of the immediately lower subtier or, if the person's or group's average annual such expenditure over the ten years prior to enactment of this Act is less than $100,000, shall not be required to make a payment under this Act.

To ensure that the core of this amendment was included in the bill, I agreed to both a slight modification of the amendment and the inclusion of the modification in the Second Managers' Package of amendments, which ultimately was accepted by voice vote on May 11, 2005. The modified amendment, inserted within section 203(g) of the bill as reported, read as follows:

(3) OTHER PAYMENT FOR CERTAIN PERSONS AND AFFILIATED GROUPS.—

(A) IN GENERAL.—Nothwithstanding any other provision of this subsection, and if an adjustment authorized by this subsection does not impair the overall solvency of the Fund, any person or affiliated group with Tier VI whose required subtier payment in any given year would exceed such person's or group's average annual expenditure on settlements, and judgments of asbestos disease-related claims over the 8 years before the date of enactment of this Act shall make the payment required of the immediately lower subtier or, if the person's or group's average annual expenditures on settlements and judgments over the 8 years before the date of enactment of this Act is less than $100,000, shall not be required to make a payment under this Act.

(B) NO FURTHER ADJUSTMENT.—Any person or affiliated group that receives an adjustment under this paragraph shall not be eligible to receive any further adjustment under section 204(d).

I am pleased that the amendment was adopted as part of the Second Managers' Package. The reported bill now clearly provides that any Tier VI contributor whose subtier contribution exceeds its average annual expenditure on asbestos-related settlements and judgments during the eight-year period preceding enactment is entitled to a one-subtier stepdown (e.g., a Tier VI, subtier 1 contributor would instead make a subtier 2 level contribution). For a Tier VI, subtier 3 contributor whose required contribution ($100,000, per section 203(g)(2)(C)) exceeded its average annual expenditure on asbestos-related settlements and judgments, no contribution would be required, given that this is the lowest subtier within Tier VI.

This amendment provides fairness to small businesses and to other companies that have carefully managed their asbestos liabilities, and I laud its ultimate inclusion in the bill as reported.

B. Post-certification opt-out

The most obvious and fundamental purpose of every asbestos litigation reform bill in recent memory, including this one, is to provide a complete and predictable substitute to the idiosyncratic vagaries of the tort system. Yet S. 852 as introduced contained a major loophole that, if not filled, would have created an

unsustainable dual-track recovery system which would be worse than the status quo.

Specifically, section 106(f)(3)(E)(ii) of S. 852 originally provided that after the Administrator certified to Congress that the Fund was operational and was paying valid asbestos claims at a reasonable rate, claimants who had filed a lawsuit that had not yet proceeded to trial could still choose to stay in the tort system, instead of being required to channel that claim into the Fund (the bill deemed such claims to be "reinstated" against the Fund).

Thus, even after the Fund was up and running, hundreds of thousands of claimants who previously filed complaints in the tort system could have decided to opt out of the Fund altogether. The risk of this result would have been all the greater because plaintiffs' attorneys would have had a strong incentive post-certification to advise their clients against opting into the Fund: attorneys would receive one-third or more of their clients' recovery in litigation, but five percent at most in the Fund (as S. 852 consistently has provided).

To fix this flaw, I circulated an amendment which stated simply as follows: "In section 106(f)(3)(E)(ii), page 45, lines 14–15, strike ', may, at the option of the claimant,' and insert 'shall.'" This provision aimed to prevent the combined chaos of an unpredictable tort system and a leaking Fund by requiring claims to be deemed reinstated against the Fund once the Administrator certified to Congress that the Fund is operational. Under my amendment, claimants would receive prompt and just recovery under the Fund for their injuries, and defendants and insurers would avoid the prospect of paying billions of dollars into both the Fund and the tort system at the same time.

I am pleased that this amendment was included as part of the Second Managers' Package, which was accepted on May 11, 2005. The bill now clearly precludes the post-certification opt-out of the Fund by asbestos claimants whose cases have not reached trial.

II. AN AREA FOR IMPROVEMENT: ADMINISTRATION OF THE FUND BY A PRIVATE, NON-PROFIT CORPORATION

Although I voted for S. 852 on final passage in Committee, I believe the bill could be made better. One particular item on which I recommend future consideration involves private administration of the Fund.

Both as introduced and as reported, S. 852 provides for the administration of the Fund by the Department of Labor. See S. 852, 109th Cong., 1st Sess., at §101(a)(1); Committee Report, supra at 36 ("The FAIR Act establishes the Office of Asbestos Disease Compensation (the Office) within the Department of Labor for the purpose of providing timely and fair compensation to individuals with asbestos-related injuries in a no-fault, non-adversarial manner."). It is my belief that housing the Fund in the Department of Labor would not be the best way to achieve the laudable goals of just compensation for victims, certainty for manufacturers and insurers, and efficiency. Rather, administration of the Fund by a private, non-profit corporation would accomplish each of these goals much more effectively. I circulated an amendment which would have cre-

ated such a non-profit corporation; the text of this amendment is included with these Additional Views as Appendix A.

A. Dangers of public administration

Administration of the Fund by a federal agency could create an expectation that the federal government stands behind the Fund and is committed to ensuring its long-term solvency. That, in turn, would create a serious risk that taxpayers ultimately may have to bear huge unintended costs. Moreover, S. 852 as reported provides that the Fund may borrow directly from the Treasury, creating the danger that any default would come at the taxpayers' expense. See §221(b).[2]

Extended experience with the Black Lung Trust Fund, also administered by the Department of Labor, demonstrates that the risks enumerated above are significant. In 1969, Congress passed the Coal Mine and Safety Health Act,[3] which established a black lung compensation program to be administered by the Secretary of Labor. Separate legislation in 1977 established a trust fund for the payment of black lung disability benefits.[4] That Fund was to be financed by excise taxes levied on coal extracted and sold within the United States. But the Fund also could access financing from the Treasury to cover early claims. Proponents expected that the Fund would repay early advances from the Treasury (with interest) within a few years. But that did not happen. Instead, the Fund owed $2.8 billion to the Treasury by the end of 1985. Congress then instituted a five-year moratorium on interest charges by the Treasury, transferring a significant portion of the ongoing costs of the Fund to U.S. taxpayers by effectively requiring them to subsidize the Fund's financing.[5] And the worst may still be to come: The Fund's debt currently exceeds $8 billion, and should the Fund default in ultimately repaying its debt, the taxpayers will again have to pay the charge. For further information on the problems which have attended the Black Lung program since its inception, see generally CRS Report for Congress, "The Black Lung Benefits Program" (June 12, 2002) (included as Appendix B); *Id.* at CRS–2 ("The program is administered by the Division of Coal Mine Workers' Compensation, which is a component of the Office of Workers' Compensation Programs in the Department of Labor."); id. at CRS–4 ("Virtually all of the expectations for the Black Lung Benefits Act when it was enacted in 1969 * * * were contradicted by subsequent experience. * * * As a consequence, the trust fund has perennially been in a position of growing deficit," which is financed at taxpayer expense.).

B. Advantages of private administration

Private administration of the Fund would yield several advantages. First, a non-profit corporation would process claims more efficiently than a government agency and would speed up the process for delivering justice to victims. A primary reason is that a corpora-

[2] Specifically, the Fund will be able to borrow up to five years' worth of anticipated assessments from the Federal Financing Bank.
[3] Pub. L. 91–173, 83 Stat. 792–798.
[4] Black Lung Benefits Reform Act of 1977, Pub. L. 95–239, 92 Stat. 95.
[5] Consolidated Omnibus Reconciliation Act of 1985, Pub. L. 99–272, §13203(b).

tion could adopt streamlined personnel, management, regulatory, and government contracting processes. For example, the corporation would be able to use time-saving personnel mechanisms from the private sector, such as hiring temporary personnel from employment agencies and hiring personnel who have outstanding qualifications without having to wait until a certain amount of time had passed before the positions could be filled. Because the new corporation would be staffed more quickly than a government agency, it is likely that the corporation would also be able to pay the most meritorious and exigent claims more quickly than a federal government agency could.

Next, the corporate governance of the non-profit would be structured to insulate the start-up process so that those charged with administering the Fund would be focused solely on doing so responsibly. The corporation would be run by a Board of Directors appointed by the President (perhaps cabinet secretaries serving ex officio, as with the Pension Benefit Guaranty Corporation). The day-to-day operations of the corporation would be managed by a Chief Executive Officer appointed and removable by the Board—thus ensuring a high level of accountability and responsiveness. Administering the Fund responsibly, and compensating victims fairly and expeditiously, would be the only priorities of the corporation's directors and officers.

Additionally, a non-profit corporation, much more so than a traditional federal program, could be set up to minimize the potential for changing course mid-stream. Unfortunately, compensation schemes run by the federal government have a history of changing the rules in the middle of the game. Most recently, for example, the energy workers compensation program has expanded substantially in size and scope. In the asbestos context, private stakeholders have signaled their willingness to participate in a trust fund solution precisely because it provides the certainty they need to resume job-creating activities. Private administration would minimize the risk of disrupting contributors' reliance on the Fund's sound operational structure.

Third, a non-profit corporation provides the best hope for ensuring that the Fund will not end up requiring a taxpayer bailout of private defendants and private insurance companies. Legislation can be crafted to impose structural controls and constraints on the corporation to ensure even-handed administration of the Fund and institutional discipline to prevent defaults and shortfalls.

Administering the fund through a non-profit corporation, as my amendment would have provided, would give Congress the flexibility of allowing the corporation to borrow from alternative sources, and would have reduced the likelihood of depending, during any part of the life of the Fund, upon the public fisc.

C. Ample precedents for private administration

Creating a non-profit corporation to serve important governmental objectives would hardly be unprecedented. To the contrary, Congress has routinely created non- profit corporations of various types. Perhaps the most well known is the Corporation for Public Broadcasting. The Public Broadcasting Act of 1967 "authorized to be established a nonprofit corporation * * * which will not be an

agency or establishment of the United States Government."[6] The Corporation was established under the laws of the District of Columbia and operates as a nonprofit, non-political organization. Similarly, Congress established the Legal Services Corporation as a 501(c)(3) "private nonmembership nonprofit corporation,"[7] and created the Neighborhood Reinvestment Corporation, which "shall not be considered a department, agency, or instrumentality of the Federal Government."[8] Non-governmental features of these non-profits include exemptions from the Freedom of Information and Federal Advisory Commission Acts, the ability to sue and be sued, and to invest funds and acquire property. Each congressionally created non- profit has its own unique governance structure, but all perform functions in the public interest. And each non-profit corporation embodies a legislative judgment that Congress's objectives could best be met outside the normal federal bureaucracy.

More recently, in the Sarbanes-Oxley Act of 2002, Congress created the Public Company Accounting Oversight Board ("the Board"), as a private-sector, non-profit corporation that "shall not be an agency or establishment of the United States Government."[9] The Board oversees the auditors of public companies in order to protect the interests of investors and further the public interest in the preparation of informative, fair, and independent audit reports—a decidedly public function. Congress provided that funds to cover the Board's annual budget are to be collected from "issuers" in the form of an "accounting support fee." Once each year, the Board computes the fees based on the Board's budget for that year, as approved by the Securities and Exchange Commission. Using its discretion, the Board allocates fees based on the average monthly U.S. equity market capitalization of publicly traded companies, investment companies and other equity issuers. Thus, like the Asbestos Injury Claims Resolution Corporation my amendment envisioned, the Board plays a substantial role and exercises significant discretion both in the collection of fees and the expenditure of resources.

The record of other congressionally created non-profit corporations confirms that operations would begin quickly. For example, the Pension Benefit Guaranty Corporation, which was established on September 2, 1974,[10] received its first premium from a participating employer less than three weeks later. The Corporation for Public Broadcasting, which was established on November 7, 1967,[11] made its first broadcast just over three months later. And the Tennessee Valley Authority, which was established on May 18, 1933,[12] began work on its first construction project less than five months later. As these examples show, the non-profit corporation's initial steps would be taken almost immediately.

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[6] See 47 U.S.C. § 396.
[7] P.L. 93–355; 42 U.S.C. § 2996.
[8] P.L. 95–557; 42 U.S.C. § 8101.
[9] P.L. 107–204; 15 U.S.C. § 7201.
[10] See 29 U.S.C. § 1302.
[11] See 47 U.S.C. § 396.
[12] See 16 U.S.C. § 831.

D. The constitutional propriety of private administration

Despite the fact that Congress has routinely created various non-profit corporations, some critics might suggest that creating a non-profit to administer the asbestos trust fund might offend the Constitution. That criticism is based on the premise that the non-profit corporation would be "private" for constitutional purposes. As Chairman of the Subcommittee on the Constitution, Civil Rights, and Property Rights, I do not take that criticism lightly. Careful review, however, reveals that the premise upon which it rests is legally flawed.

Under the rule laid down by the Supreme Court in *Lebron* v. *National Railroad Passenger Corp.,* 513 U.S. 374 (1995), a non-profit corporation created to house the asbestos trust fund would be deemed part of the federal government for constitutional purposes. The Court stated in *Lebron* that "where * * * the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government * * *." *Id.* at 400. The creation of a non-profit corporation to administer the asbestos trust fund would satisfy both prongs of the Lebron test. First, there is no dispute that the non-profit corporation would be created by Congress to further specific "governmental objectives." Second, the government would "retain[ ] for itself permanent authority to appoint a majority of the directors" under the proposal, which provides for Presidential appointment of the Board of Directors. For constitutional purposes, then, the non-profit corporation would be deemed a part of the federal government and would stand on the same footing as an office located in a federal agency.

For this reason, objections to the corporation on grounds that it violates the Seventh Amendment and the non-delegation doctrine are misplaced. As to the former, the Seventh Amendment guarantees the right to a jury trial in suits involving common-law claims, but the Seventh Amendment does not apply to claims brought against the government. *See, e.g., Glidden Co.* v. *Zdanok,* 370 U.S. 530, 572 (1962). Where, as here, "the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, * * * the seventh amendment does not require that it must also provide a jury trial." *In re Consolidated U.S. Atmospheric Testing Litigation,* 820 F.2d 982, 992 (9th Cir. 1987) (quoting *Hammond* v. *United States,* 786 F.2d 8, 15 (1st Cir. 1986)). Because any claim against the corporation would be one against the United States for constitutional purposes, the Seventh Amendment does not apply.

As to the latter objection, the non-profit corporation would be deemed part of the federal government for constitutional purposes and therefore would not trigger the heightened scrutiny under the non-delegation doctrine accorded to private entities. Rather, were my amendment adopted, the legislation establishing the corporation would be subject only to the traditionally lenient standard that applies to congressional delegations to the executive branch, which the legislation would satisfy.

In sum, nothing in the Constitution or laws of the United States bars Congress from creating an asbestos trust fund administered

by a non-profit corporation, and good government militates in favor of such administration. It is therefore my hope that this amendment will receive due consideration in future deliberation on S. 852.

SAM BROWNBACK.
TOM COBURN.

APPENDIX A

On page 6, strike lines 19 through 22, and insert the following:

(1) CHIEF EXECUTIVE OFFICER.—The term "Chief Executive Officer" means the Chief Executive Officer for the Asbestos Injury Claims Resolution Corporation appointed under sections 101(b) and 109(b).

On page 15, line 1, strike all through page 16, line 11, and insert the following:

TITLE I—ASBESTOS CLAIMS RESOLUTION

Subtitle A—Asbestos Injury Claims Resolution Corporation

SEC. 101. ESTABLISHMENT OF ASBESTOS INJURY CLAIMS RESOLUTION CORPORATION.

(a) IN GENERAL.—

(1) ESTABLISHMENT.—There is established an Asbestos Injury Claims Resolution Corporation (referred to in this Act as the "Corporation" to undertake a program on compensation for injuries suffered by exposure to asbestos. The Corporation shall undertake the performance of the duties in this Act.

(2) PURPOSE.—The purpose of the Corporation is to provide timely, fair compensation, in the amounts and under the terms specified in this Act, on a no-fault basis and in a non-adversarial manner, to individuals whose health has been adversely affected by exposure to asbestos. Compensation amounts provided by the Corporation shall be subject to the availability of funds in the Asbestos Injury Claims Resolution Fund.

(3) EXPENSES.—There shall be available from the Asbestos Injury Claims Resolution Fund to the Chief Executive Officer sums reasonably necessary for the administrative and legal expenses of the Corporation, not to exceed $100,000,000 for the first 6 years, $50,000,000 for the following 10 years, and $25,000,000 thereafter.

(b) APPOINTMENT OF THE CHIEF EXECUTIVE OFFICER.—

(1) IN GENERAL.—The Chief Executive Officer shall be appointed by the Board of Directors of the Asbestos

Injury Claims Resolution Corporation, to serve for a term of 5 years.

(2) REMOVAL.—The Chief Executive Officer may be removed at any time by the Board of Directors for any reason the Board determines sufficient.

(c) DUTIES OF CHIEF EXECUTIVE OFFICER.—

(1) IN GENERAL.—The Chief Executive Officer shall be responsible for—

On page 18, line 21, strike all through page 19, line 12, and insert the following:

(2) CERTAIN ENFORCEMENTS.—For each infraction relating to paragraph (1)(H), the Chief Executive Officer also refers such matters to the Attorney General who may impose a civil penalty not to exceed $10,000 on any person or entity found to have submitted or engaged in a materially false, fraudulent, or fictitious statement or practice under this Act. The Attorney General shall prescribe appropriate regulations to implement paragraph (1)(H).

(3) SELECTION OF DEPUTY CHIEF EXECUTIVE OFFICERS.—The Chief Executive Officer shall select a Deputy Chief Executive Officer for Claims Administration to carry out the Chief Executive Officer's responsibilities under this title and a Deputy Chief Executive Officer for Fund Management to carry out the Chief Executive Officer's responsibilities under title II of this Act. The Deputy Chief Executive Officers shall report directly to the Chief Executive Officer.

On page 46, strike lines 3 through 14, and insert the following:

SEC. 107. AUTHORITY OF THE CHIEF EXECUTIVE OFFICER.

The Chief Executive Officer on any matter within the jurisdiction of the Chief Executive Officer under this Act may subpoena persons to compel testimony, records, and other information relevant to the responsibilities of the Chief Executive Officer under this section. The subpoena may be enforced in appropriate proceedings in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

SEC. 108. ESTABLISHMENT OF CORPORATION.

(a) FEDERAL CHARTER.—There is established a corporation to be known as the Asbestos Injury Claims Resolution Corporation ("Corporation").

(b) NATURE OF CORPORATION.—The Corporation is a nonprofit corporation and shall have no capital stock. The Corporation is not an agency or establishment of the United States Government.

(c) TERMINATION OF CORPORATION.—The Corporation shall dissolve 40 years after the date of enactment of this

Act, unless dissolved sooner by the Board. All remaining funds held by the Corporation shall be distributed to the defendant participants and insurer participants in proportion to the percentage of assessments paid into the Corporation.

SEC. 109. BOARD OF DIRECTORS; OFFICERS AND EMPLOYEES; CONFLICTS.

(a) BOARD OF DIRECTORS.—There shall be in the Corporation a Board of Directors. The Board shall appoint the Chief Executive Officer and formulate the policies of the Corporation.

(b) APPOINTMENT.—The Corporation shall have a Board of Directors ("Board"), consisting of 7 members. The Board shall be appointed as follows:

(1) DESIGNATED MEMBERS.—The Secretary of the Treasury, the Attorney General, and the Secretary of Labor shall serve as members of the Board.

(2) APPOINTED MEMBERS.—The remaining 4 members of the Board shall be appointed by the President. The members of the Board shall not, by reason of such membership, be deemed to be officers or employees of the United States.

(3) INELIGIBILITY.—None of the Directors shall be individuals who, for each of the 5 years before their appointments, earned more than 15 percent of their income by serving in matters related to asbestos litigation as consultants or expert witnesses.

(c) OPERATION OF THE BOARD.—

(1) CHAIR.—The Board shall be chaired by a member elected by the Board, but the Chairperson may not be a full-time Federal employee.

(2) MEETINGS.—Meetings of the Board may be convened by the Chairperson upon reasonable notice, but the Board shall meet at least once per year.

(3) QUORUM.—A quorum shall consist of all of the Directors or their representatives.

(4) COMPENSATION.—The compensation of each member of the Board shall be paid by the Corporation as current expenses. Each member other than members serving by virtue of their Federal office shall be compensated at the daily equivalent of the highest rate payable under section 5332 of title 1, for each day (including travel time) during which the member is engaged in the actual performance of duties as a member of the Board. Members of the Board shall be reimbursed by the Corporation for actual, reasonable, and necessary expenses (including traveling and subsistence expenses) incurred by them in the performance of the duties vested in the Board by this Act.

(e) OFFICERS AND EMPLOYEES.—

(1) STATUS.—Officers and employees of the Corporation are not employees of the Federal Government as a result of their service with the Corporation.

(2) CHIEF EXECUTIVE OFFICER.—There shall be in the Corporation a Chief Executive Officer who shall be responsible for carrying out the functions of the Corporation as described in section 101(c) and in accordance with policies established by the Board. The Chief Executive Officer shall be appointed by the Board of Directors under section 101(b) and on such additional terms as the Board may determine and may be removed by the Board of Directors in accordance with section 101(b)(2). The Chief Executive Officer shall receive compensation at the rate provided by law for the Vice President of the United States.

(3) APPOINTMENT.—The Chief Executive Officer shall appoint, remove, and fix compensation for all subordinate officers and employees of the Corporation as determined necessary.

(4) COMPENSATION.—No officer or employee of the Corporation, other than the Chief Executive Officer, may be compensated by the Corporation at an annual rate of pay which exceeds the rate of basic pay in effect for level I of the Executive Schedule under section 5312 of title 5, United States Code.

(f) CONFLICTS OF INTEREST.—No part of the Corporation's revenue, income, or property shall inure to the benefit of its directors, officers, and employees, and such revenue, earnings, or other income, or property shall be used for the carrying out of the corporate purposes set forth in this Act. No director, officer, or employee of the corporation shall in any manner directly or indirectly participate in the deliberation upon or the determination of any question affecting his or her personal interests or the interests of any corporation, partnership, or organization in which he or she is directly or indirectly interested.

(g) REGULATIONS.—

(1) AUTHORITY.—The Attorney General, after consultation with the Secretaries of the Treasury and of Labor, shall issue regulations imposing on the Chief Executive Officer, the Deputy Chief Executive Officers, and the Board a fiduciary duty to manage the affairs of the Corporation with prudence in order to provide timely compensation to eligible claimants, giving appropriate priority to those most ill, while also preserving the funds available to the Corporation in order to compensate all eligible claimants.

(2) SUNSET.—Effective 2 years after the enactment of this Act, all authority to issue and revise regulations under this section shall terminate.

(h) PERSONAL LIABILITY.—The Chief Executive Officer, Deputy Chief Executive Officers, and members of the Board shall be exempt from civil liability for any act or omission committed within the scope of their employment with the Corporation, except for acts that constitute gross negligence or intentional wrongdoing.

(i) CORPORATE COMPLIANCE OFFICER.—

(1) IN GENERAL.—The Board of Directors shall establish within the Corporation a Corporate Compliance Office headed by a Chief Compliance Officer selected by the President on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.

(2) INDEPENDENCE.—Neither the Board nor the Chief Executive Officer shall prevent or prohibit the Chief Compliance Officer from initiating, carrying out, or completing any audit or investigation during the course of any audit or investigation.

(3) STAFF.—The Board shall authorize the Chief Compliance Officer to obtain sufficient staff and other resources to carry out the function of the position.

(4) DUTIES.—It shall be the duty and responsibility of the Chief Compliance Officer to—

(A) provide policy direction for, and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the Corporation;

(B) recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by the Corporation for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;

(C) recommend policies for promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by the Corporation, or the identification and prosecution of participants in such fraud or abuse;

(D) keep the Chief Executive Officer, the Board, and Congress fully and currently informed concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by the Corporation; and

(E) recommend corrective action concerning such problems, abuses, and deficiencies, and report on the progress made in implementing such corrective action.

(5) CRIMINAL VIOLATIONS.—In carrying out the duties and responsibilities established under this section, the Chief Compliance Officer shall file a criminal complaint with the Attorney General whenever the Chief Compliance Officer has reasonable grounds to believe there has been a violation of Federal criminal law.

SEC. 110. POWERS; OFFICES; TAX LAWS; AUDIT; ANNUAL REPORT.

(a) POWERS.—In furtherance of the purposes of the Corporation, the Corporation may—

(1) adopt bylaws consistent with law;

(2) adopt, alter, use, and destroy a corporate seal;

(3) sue and be sued, complain and defend, in its corporate name and through its own counsel, in courts of competent jurisdiction;

(4) enter into contracts and modify, or consent to the modification of, any contract or agreement to which the Corporation is a party or in which the Corporation has an interest;

(5) make advance, progress, or other payments;

(6) own and dispose of property;

(7) issue written policies and statements; and

(8) exercise any and all powers established under this Act and such incidental powers as are necessary to carry out its powers, duties, and functions under section 101 and other provisions of this Act.

(b) PRINCIPAL AND BRANCH OFFICES.—The Corporation shall maintain its principal office in the metropolitan Washington, DC, area. The Corporation may establish offices in any place or places in which the Corporation may carry on all or any of its operations and business.

(c) TAX LAWS.—The Corporation, including its franchise and income, shall be exempt from the tax laws and from taxation now or hereafter imposed by the United States, or any territory or possession thereof, or by any State, county, municipality, or local taxing authority.

(d) AUDIT.—The programs, activities, receipts, expenditures, and financial transactions of the Corporation shall be subject to audit by an independent certified public accounting firm under generally accepted accounting principles that would apply to a private not-for-profit corporation. The auditing firm shall have access to such books, accounts, financial records, reports, files, and such other papers, things, or property belonging to or in use by the corporation and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. A report on each such audit shall be made by the auditing firm to the Board of Directors, to the Secretary of the Treasury, and to Congress.

(e) ANNUAL REPORT.—Within 6 months after the close of each fiscal year, the Corporation shall submit to the President and to the Committees on the Judiciary of the Senate and the House of Representatives the report on the activities of the Corporation during the prior fiscal year required under section 405 of this Act.

(f) ANNUAL REPORT CERTIFICATION.—Before submission of the annual report required under section 405 of this Act, the Chief Executive Officer and the Deputy Chief Executive Officers, in regard to their particular areas of responsibility, shall certify that—

(1) the signing officer has reviewed the report;

(2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to

make the statements made, in light of the circumstances under which such statements were made, not misleading;

(3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the Corporation as of, and for, the periods presented in the report;

(4) the signing officers—

(A) are responsible for establishing and maintaining internal controls;

(B) have designed such internal controls to ensure that material information relating to the Corporation is made known to such officers by others within the Corporation, particularly during the period in which the periodic reports are being prepared;

(C) have evaluated the effectiveness of the Corporation's internal controls as of a date within 90 days before the report; and

(D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;

(5) the signing officers have disclosed to the Comptroller General and to the independent auditing firm—

(A) all significant deficiencies in the design or operation of internal controls which could adversely affect the Corporation's ability to record, process, summarize, and report financial data and have identified any material weaknesses in internal controls; and

(B) any fraud, whether or not material, that involves management or other employees who have a significant role in the Corporation's internal controls; and

(6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Make all technical and conforming amendments changing references from the Administrator to the Chief Executive Officer and from the Office of Asbestos Disease Compensation to the Asbestos Injury Claims Resolution Corporation.

Appendix B

Order Code RS21239
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CRS Report for Congress
Received through the CRS Web

The Black Lung Benefits Program

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Summary

The federal black lung program (codified at 30 U.S.C. 901 et seq.) provides medical and income assistance to coal mine workers who suffer disability or death due to pneumoconiosis and related diseases. One of the goals of the program was to make benefits more readily available than they might be under state workers compensation laws. Thus, it uses certain streamlined rules of evidence, but pursuing cases can still be rather involved. A trust fund, supported by a tax on coal, was established to finance the benefits, but the fund has chronically been in deficit. The Treasury Department has proposed a refinancing that would eventually extinguish the accumulated debt. This report will be updated should significant legislative actions occur.

It has long been known that working in coal mines was associated with lung disorders, but official recognition of a specific disease caused by coal-dust – coal workers' pneumoconiosis (CWP), now widely known as black lung – first came in 1942 in the United Kingdom. CWP occurs as dust particles accumulate in the lungs. The "simple" stage entails a reduction in lung function. If it progresses to the "complicated" stage, scarring and degeneration of the lung tissue occurs, physical activity becomes very difficult, and the disease becomes progressive and irreversible.

After the scope of the problem in the United States was highlighted by studies in the 1960s, and after a major mine disaster in Farmington, WV, Congress passed the Federal Coal Mine Health and Safety Act (P.L. 91-173) in 1969. (Together with subsequent amendments, the benefits program is codified in 30 U.S.C. 901 et seq.) In addition to a comprehensive safety enforcement regime, the Act mandated limits on miners' dust exposure and provided income and medical support to those who become disabled by black lung. Dust control has yielded some success in a reduction of new cases, but nearly 5,000 new claims are still being received each year and more than 60,000 primary beneficiaries remain on the rolls.

Benefits

Former miners who suffer total disability or death due to CWP or related diseases are eligible for medical and income benefits. The medical benefit consists of diagnostic testing (available for all claimants) and services needed due to the disease, including drugs, durable medical equipment, home nursing visits and hospitalization. The base rate of the income benefit is equal to three-eighths of the federal salary for an employee in grade GS-2, Step 1, i.e., a base rate of $518 per month in calendar year 2002. The benefit is augmented if the miner (or his survivor) has dependents, up to as much as double the base rate when there are three or more dependents. Black lung benefits are not subject to federal income tax but may be taxed by the states. The benefits may be subject to offsets, depending on when the initial claim was made, against various other income support systems such as workers compensation, disability insurance and Social Security.

The program is administered by the Division of Coal Mine Workers' Compensation, which is a component of the Office of Workers' Compensation Programs in the Department of Labor.[1] Decisions can be appealed to the Office of Administrative Law Judges, then to the independent Benefits Review Board, and finally to the U.S. Courts of Appeal.

Eligibility

Definition of Black Lung

Defining and diagnosing the medical conditions that should qualify one for compensation have been contentious issues throughout the legislative, regulatory and adjudicative history of the program. The statutory definition of black lung is less specific than the currently accepted medical criteria for CWP. The law makes a person eligible if one has "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" (30 U.S.C. 902(b)). This clearly includes clinically-defined CWP but it could also include chronic obstructive pulmonary disease (COPD), e.g., bronchitis, emphysema or asthma. While CWP is almost always associated with mine employment, COPD has many other common causes, including smoking. The current Department of Labor regulation (20 C.F.R. 718.201) explicitly allows for COPD to be compensated as black lung, but the Department emphasizes that the burden of persuasion lies with the claimant to show that the disease arose out of his coal mine employment.

Another point of contention has been the requirement of being *totally disabled due to pneumoconiosis*. The difficulty, again, is that other causes may lead to the disability in question. The current regulation (20 C.F.R. 718.204) requires that, if a miner with black lung also has a disabling impairment unrelated to mine employment, then the black lung must at least be a *substantially contributing cause* of his disability.

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[1] In FY1998 responsibility for managing "Part B" claims (those originating before June 30, 1973) were transferred from the Social Security Administration.

Evidence and Procedure

One of the motivating factors behind the black lung program was to overcome what were perceived as the burdensome evidentiary requirements of state workers compensation laws. In support of this objective, the Act mandated five presumptions to facilitate the consideration of claims, two of which still apply to new claims (generally those filed after 1981). These are: (1) that if a miner suffering from pneumoconiosis was employed for 10 years or more in coal mines, then there is a *rebuttable* presumption that his disease arose out of that employment, and (2) that if a miner suffering from a chronic dust disease of the lung meets certain diagnostic standards by X-rays, biopsy or autopsy, then there is an *irrebuttable* presumption of qualifying total disability. (30 U.S.C. 921(c)) Moreover, the definition of *total disability* is less stringent than in most other laws. A miner is considered totally disabled if black lung prevents him from engaging in his usual mine employment. (30 U.S.C. 902(f)(1))

The criteria in the Act and amendments have been further elaborated by administrative and judicial cases and by regulation. In December 2000, the Department of Labor issued the first comprehensive revision of its regulations for the program since 1983.[2] The standards in regard to "evidentiary development" now provide that:

- The claimant is entitled to a complete pulmonary evaluation performed by a physician of his choice from a list of qualified specialists;
- Both sides (claimant and mine operator) are limited in how much medical evidence they may present: two each of chest x-ray interpretations, pulmonary function tests, blood gas studies and medical reports. Also one of each category of evidence may be submitted by each side in the rebuttal phase;
- The testimony of the miner's treating physician may be given additional weight if he/she is adjudged to have in-depth understanding of the miner's condition;
- In testing pulmonary function, it is mandatory to use the flow-volume loop method (spirometry testing); and
- If a claim is denied, a subsequent claim may be made a year or more later if matters have changed, e.g. the miner's condition has worsened.

It was expected that the changes of 2000 would lead to an increase in the number of successful claims, but it is still too early to quantify any such effect. According to the United Mine Workers, only 7% of claims were being accepted under the previous regulations.

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[2] The regulations were stayed upon a court challenge by the National Mining Association, but the stay was lifted and the regulations upheld in a ruling on August 9, 2001. Billings, Deborah. Court Upholds New Black Lung Rules. *Daily Labor Report*, August 10, 2001. p. A-11,A-12.

Financing and Administration

Evolution of the Program

Virtually all of the expectations for the Black Lung Benefits Act[3] when it was enacted in 1969, e.g., the numbers of claims submitted or approved, were contradicted by subsequent experience. Corrective legislation was adopted in 1972, 1977 and 1981, including the establishment of trust fund financing in 1977, but results have continued to be at variance with expectations. As a consequence, the trust fund has perennially been in a position of growing deficit.

The program initially provided a "Part B" benefit intended to deal with existing (or even deceased) cases caused by prior years of coal dust exposure. Part B was funded by general revenues and administered by the Social Security Administration. It was expected that most states would bring new black lung cases into their workers compensation laws in accord with general standards of the new federal law.[4] The number of new cases would rapidly dwindle due to the dust control measures mandated by the mine safety act, and in the interim a federal "Part C" benefit, administered by the Labor Department and funded mostly by the employers of the claimants ("responsible operators"), would serve as a temporary backstop. What happened, though, was that claims were much more numerous than expected, while it proved difficult to find responsible operators, litigate their challenges, and collect from them. Even so, the rate of claim rejections was high enough to produce widespread dissatisfaction and elicit a liberalization of criteria via the 1972 and 1977 amendments.[5]

In response to these developments, trust fund financing was established in 1977 to reduce reliance on the Treasury and make the mining industry cover the lion's share of costs. This was done by levying a tax on coal production.[6] Interestingly, the program then had in place a financing mechanism which was mirrored a few years later in the much larger environmental program known as Superfund: recovery of costs so far as possible from "responsible parties," backed up by a general levy on the industry. Still, costs continually outpaced revenues.

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[3] Title IV of the Federal Coal Mine Health and Safety Act, P.L. 91-173.

[4] To date, no state has been found to provide "adequate coverage." The most recent formal finding to that effect is in the *Federal Register*, December 20, 2000. p. 80,054.

[5] The 1981 amendment reversed that trend, making claims harder to sustain.

[6] At present, the tax is $1.10 per ton for underground-mined coal, $0.55 for surface-mined (or 4.4% of the sale price if that is less).

Financial Results

As shown in **Table 1**, the population of Part C beneficiaries[7] on the rolls has been declining by about 5% per year over the last decade. The decline has resulted from a combination of declining employment in underground coal mining, better control of dust (hence fewer new cases), and passing away of older beneficiaries. The generational transition is evident in an almost-stable population of widows. As miners have died, women have been transferred from dependent to widow status. But, since peaking in 1993, even the widow beneficiary ranks have been decreasing.

Table 1. Number of Part C Beneficiaries (September 30 of each year)

	Miners	Widows	Dependants and others	Total
2000	24,568	39,053	21,289	84,910
1999	24,838	40,517	23,361	88,716
1998	27,340	41,585	25,563	94,488
1997	29,839	42,468	28,045	100,352
1996	32,452	43,155	30,316	105,923
1995	35,220	43,688	32,861	111,769
1994	37,970	44,073	35,526	117,569
1993	40,866	44,103	38,244	123,213
1992	43,723	43,967	41,071	128,761
1991	46,450	43,831	43,924	134,205
1990	49,306	43,404	47,144	139,854
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avg. annual rate of decline	6.7%	1.1%	7.6%	4.9%

Source: U.S. Department of Labor. Employment Standards Administration.

Table 2 shows the factors leading to a growing indebtedness of the trust fund to the Treasury. Each year the expenses of the Part C program (benefits, administration and interest) have exceeded revenues, with an advance from Treasury making up the difference and accumulating as a debt. Interestingly, though, in almost every year of the

[7] The older, Part B benefits are financed from general revenues rather than the trust fund, and totaled $509 million in FY2000. As of 2000, there were 89,000 Part B beneficiaries, including 12,000 miners and 62,000 widows, more than 80% of whom were over 75 years of age.

last decade, direct costs (benefits and administration) have been less than revenues. If it were not for interest on the accumulated deficit, the trust fund would be self-supporting. In effect, the annual advances from the Treasury are being used to pay back interest to the Treasury, while the debt has been growing as if with compound interest.

Table 2. Growth of Black Lung Trust Fund Debt
($ millions)

Fiscal Year	Debt, 1 October	+ Benefit costs	+ Administrative costs	+ Interest charge	- Revenues	Debt, 30 September
2002	7254	388	55	593	594	7696
2001	6749	393	52	568	536	7254
2000	6259	423	50	541	525	6749
1999	5857	439	51	515	604	6259
1998	5487	459	46	495	645	5857
1997	5112	488	46	471	626	5487
1996	4738	500	47	445	623	5112
1995	4363	526	52	419	620	4738
1994	3949	554	53	388	578	4363
1993	3606	562	56	367	644	3949
1992	3266	575	56	342	635	3606

Source: U.S. Department of Labor, Employment Standards Administration

The Treasury Department has proposed restructuring the trust fund's debt so that it could eventually be extinguished.[8] The plan is to convert the debt into a series of zero-coupon bonds payable from the trust fund to the Treasury. The bonds' implicit interest rates would be lower than the rates on the current debt (because rates generally have fallen in recent years). In order to reimburse the Treasury for receiving less interest than currently scheduled, a one-time appropriation would be made. (It is presumed that the one-time appropriation would not trigger budgetary "pay-go" limitations because it would be only an intragovernmental transfer.) Treasury projects that coal tax revenues at current rates would be adequate to eventually pay off the bonds (if the tax were extended past its currently scheduled expiration of 2014).

[8] Originally proposed in October 2000, the plan was again broached in the budget justification document for the black lung trust fund for FY2003.

ADDITIONAL VIEWS OF SENATOR HERB KOHL

I write separate views on S. 852, the FAIR Act, to highlight certain amendments that passed in Committee and to specify my reasons for supporting this legislation. This version of the FAIR Act represents an improvement over the bill as introduced, and a major improvement over past asbestos bills considered in the 108th Congress.

That said, given the complexity of this issue, no bill will be a panacea. Perfection is not the standard, rather, the proper test is to compare the current tort system with the proposed legislation and then determine which will be better for victims—both now and in the future. That is the bottom line. Despite the bill's shortcomings, I believe that victims will be better served by this trust fund than by the tort system.

We would do well to step back and look at why Congress got involved in this issue in the first place. A significant problem exists for many asbestos victims who simply do not receive proper compensation for their injuries. Let me explain why. Bringing an asbestos lawsuit today is no easy assignment. First, you have to find a company that caused your asbestos exposure and then hope that company has not gone bankrupt. Considering the fact that many exposures took place decades ago and that many of the primary defendants went bankrupt long ago illustrates just how difficult it is to find someone to sue.

Even if the injured person finds someone to sue, many victims find themselves stuck in line—oftentimes behind those who are not yet sick from asbestos—and wait years for their day in court. Even then, if they win a verdict or receive a settlement, receiving that money can be delayed by appeals and further bureaucratic logjams. And finally, after waiting years for compensation, some awards are slapped with subrogation suits that seek to reimburse insurance companies that picked up the tab for medical bills. Quite simply, this system is broken and cannot sustain itself.

A legislative alternative presents a more optimistic picture for victims so long as certain principles are met. First and foremost, we must be convinced that victims will get a better deal in the trust fund than they do now. Second, some of us are concerned that the current bill eliminates compensation for certain lung cancer victims. Finally, we all should be concerned that the money pledged to this trust fund is actually going to be there if and when this bill becomes law.

These primary considerations are highlighted below, including comments on my amendments that have addressed some of these concerns.

No subrogation of awards

There have been several improvements to this bill that favor victims. For example, it is very important that there will be no subrogation of a victim's award received from the trust fund. This means that an award will be a real dollar amount as promised under this legislation and will not be subject to legal hassles to pay back past claims and diminish the amount of money in the pockets of the victims.

Mesothelioma research funding

We must do more for victims than simply writing them a check. We owe current and future victims a significant effort to find a cure and better treatment options for the deadliest asbestos disease, mesothelioma. That is why I worked with Senators Specter and Leahy to include an amendment that will provide $290 million to support efforts to better diagnose, treat, and find a cure for mesothelioma. Specifically, The amendment will provide $29 million a year (funded jointly by the trust fund and the NIH) for ten years for the following: $25 million for ten meso research centers across the country ($2.5 for each center); $2 million for a meso registry and tissue bank which are crucial for research; and $2 million for a meso education center that will better educate meso victims on treatment options and assistance. My amendment has the support of the Mesothelioma Applied Research Foundation (MARF) who we worked closely with in drafting this plan. Quite simply, if we are going to create a $140 billion trust fund to compensate the mass casualties of asbestos exposure, we must also commit resources to find a cure and better treatment options for the deadliest asbestos disease. This will be money very well spent and it also represents some hope for future victims.

Institute of Medicine study regarding CT scans

If we are interested in compensating true victims of asbestos-related disease, then we should allow the best and most modern medicine to make those determinations. It is difficult to accept that some lung cancer victims who were exposed to asbestos will not be eligible for compensation under this legislation. But, we have done the next best thing by adopting my amendment which simply instructs the Institute of Medicine (IOM)—which is part of the nonpartisan National Academies—to find out whether CT scans can be appropriately used to detect scarring of the lung caused by asbestos.

In particular, the IOM would study if CT scans should be used to detect this sort of asbestos-caused lung scarring in lung cancer victims eligible for compensation under the trust fund (the "Level VII" claims). The IOM's determination on this issue will be binding upon the Administrator. And if the Institute makes CT scans available for diagnosing scarring of the lung, we expect that the Institute will create a uniform, reliable and consistent standard for the use of CT scans.

Funding methodology

It is the $140 billion question to ask whether or not the money pledged to the fund is going to be there for victims. It is unsettling

to think of this trust fund never getting off the ground because the money does not come into the fund as envisioned. In an ideal world, I would prefer to delay the start-up of the Fund after enactment and allow pending cases to continue in the tort system until we have the entire list of defendant and insurer contributors and the size of their contributions made public. That said, I have studied this issue extensively and I feel that Chairman Specter and Senator Leahy have made responsible decisions and that the funding methodology is as certain as possible.

The evidence on this point supports the bill. A recent RAND report estimates that there are 8400 companies that have been named as defendants in asbestos litigation—and the RAND report concludes that is a conservative estimate. Combining the large number of contributors with the guarantee that this pool of defendant companies will contribute $3 billion in the aggregate each year for the next thirty years boosts my confidence that the money will be there for the victims. The guarantee is jointly and severally shared by all companies. This ensures to a significant degree the solvency of this fund. In addition, tough enforcement provisions are in place to hold contributors accountable for their obligation to pay into the fund. And, if we are wrong about all of this and the entire system fails, then the victims will be able to return to the tort system. Clearly, given the dire state of the current system, it is in everyone's best interests to see this trust fund work.

To be sure, voting in favor of this trust fund is a calculated risk. And when one considers that we are risking the well-being of thousands of asbestos victims, we had better be very sure that we get this right. I think we do a good job of ensuring that victims will get paid.

Though this bill is complicated, my support rests on very simple and straightforward reasoning. First and foremost, the trust fund will put more money in the pocket of the victim than the current system. The same RAND study cited earlier also found that of all the money spent in the current system—an estimated $70 billion—roughly 42 cents of every dollar winds up in the victim's pocket. The trust will give at least 95 cents of every dollar to the victim, and in *pro bono* cases or those where no lawyer is needed, 100 cents of every dollar. Further, the trust fund will provide certainty that the money will be there, whereas the current system is fraught with uncertainty. Between moving court dates, settlement delays, appeals, attorney fees and the subrogation of court awards, no one with a straight face can tell you how much you will get in the current system and when you will get it.

This legislation and the trust fund it creates is a better approach than the current system for making victims whole in a timely, predictable and reliable fashion. I look forward to continuing to work with Chairman Specter, Ranking Member Leahy, and others to make this bill the best possible product it can be for asbestos victims and to see it passed on the Senate floor.

HERB KOHL.

ADDITIONAL VIEWS OF SENATOR DIANNE FEINSTEIN

I write separate views on S. 852, the FAIR Act, to clarify amendments that I authored and that were adopted in Committee and to highlight the specifics about why I believe these amendments were important to the underlying legislation. The bill that passed out of Committee reflects a substantial improvement over the FAIR Act as introduced and over the bills that were under consideration in the 108th Congress.

Throughout the Committee's consideration of asbestos legislation the record has been filled with examples of why reform is needed. The State and Federal courts face a litigation crisis, businesses and insurers continue to go bankrupt, and too often victims are left without recourse either because of the backlog of cases or the inability to have their awards paid in full. As a result, the sickest victims can often wait years before their claims are resolved and paid.

In California, however, the legal system has served many victims well by ensuring that terminal individuals have their cases heard in a timely manner. The procedures in my state have also led to quick payments and settlements for the most serious claims. However, some states do not employ these same procedures.

During consideration of asbestos legislation, I have been concerned with two major goals: (1) to ensure that the sickest individuals are compensated in a timely and fair manner; and (2) to do all that we can to ensure that the trust fund is successful for all parties and stakeholders. With these goals in mind, I offered several amendments that were adopted.

Transparency amendment

One of the major concerns with the legislation has been regarding whether the amount of money that is expected to be paid will actually materialize. This concern has lead to questions about which companies are paying; how much they are paying; and when the payments will be made.

The Chairman and Ranking Member have made several improvements to the bill to ensure that protections are in place in case the underlying assumptions prove inaccurate or in case the funding formula has flaws or unintended consequences. In addition, they have added numerous "transparency" provisions to ensure there is wide disclosure and ability to correct any inaccurate information that is submitted to the Administrator.

However, there were many Senators, including myself, that expressed concern about passing legislation that relies on private funding without knowing the actual sources of the funding and without having the ability to have public scrutiny before the legislation is passed. While I recognize there were a variety of reasons this information could not be produced, I continued to believe that

there needed to be an additional incentive for the participant companies and insurers to get their contributions into the fund.

Therefore, the language I authored would prevent the Administrator from certifying the Trust as operational until sixty days after publication in the Federal Register of all the required information necessary to determine each company that must pay into the trust and how much they will be required to pay under the bill. My language also made clear that insurers must provide their information to the Administrator within 30 days from enactment and that the insurer information must also be published in the Federal Register with sixty days provided for public scrutiny. Only once both of these preconditions are met, may the Administrator take steps to certify that the fund is operational and paying all valid asbestos claims at a reasonable rate.

Other amendments with a similar goal were offered which would have prohibited the legislation from taking effect until a certain time period after the information was produced. These approaches, however, could slow down the collection of money into the trust and could weaken the ability of the Administrator to get the trust operational as quickly as possible.

My amendment was a compromise that allowed the Administrator and the Department of Labor to move forward with the implementation of the legislation, but prohibited complete operation of the fund until there is full and public disclosure as well as time to review.

Start up amendment

The committee report explains operation of the start up in detail; however, I believe it is important to succinctly summarize the provision and further explain the evolution of the language and the intent behind it.

The language I drafted creates a streamlined process to ensure that exigent health claims are resolved and paid on an expedited basis following enactment of the Act. Exigent health claims are specifically defined to include individuals with mesothelioma or a diagnosis of less than one year to live. To get their claims resolved, an exigent individual would file their claim with the Administrator or claims facility; or they could file a notice of intent to seek a settlement. There are specific requirements regarding what information that is required to file a claim, and the individual is given 60 days to complete their claim application.

The language clarified that the claims facility shall operate as an outside contractor of the Administrator and that the Administrator is ultimately responsible that the processes provided in the legislation is adhered to by the claims facility. Specifically, the language states that the regulations promulgated under the act will apply to the claims facility. This further clarifies that the claims facility is acting as an arm of the Administrator and may not act on its own accord outside of the statutory requirements or the interim regulations issued by the Department of Labor.

Once the exigent claimant provides all the required documentation, the Administrator must determine whether the claimant does have an exigent health claim, and if so, what their payment must be. Upon certification that the claim is exigent, there must be no-

tice to the claimant and the defendants. If, for any reason, the Administrator cannot certify a claim or pay a claim, then the defendants or insurers may pay the terminal individual directly.

If they fail to do so, there is a penalty, and the amount the individual is entitled to receive automatically increases to one-hundred-and-fifty percent of what the individual is entitled to receive under the trust. If the exigent health claim still fails to be paid within the nine month stay, then that individual may return to court without any limitations on their rights or recovery.

In addition, the language specifies that Administrative appeals can be made from a determination made by the claims facility under the same process as is made available when a proposed decision is made by the Administrator. Therefore, if an exigent individual disagrees with any decision made by the claims facility, they may appeal to the Administrator and they maintain the same rights to further judicial review as an individual whose claim is processed by the trust fund.

This process should provide terminal individuals an expedited path to have their claims paid quickly. I felt this was important for a variety of reasons.

Under California's Rules of Civil Procedure, if a doctor certifies that there is "substantial uncertainty" about whether the individual will live for another six months, those cases may be given preferential treatment to be set for trial within 120 days. This provision has ensured that terminal individuals in California have their cases before a court or settled quickly. In addition, it has served to ensure timely payment to terminal individuals as well.

Given that these victims are terminal, I have consistently advocated that their cases be prioritized under the legislation. Congress is taking a step to strip individuals of their fundamental right to a trial, and in doing so, we must take every precaution to ensure that those who are sick and dying from asbestos exposure are compensated in a fair and timely manner, especially individuals who have a short life expectancy.

During the previous Congress, I had originally proposed allowing all claims to proceed in the court system until the trust fund becomes operational. I felt this was important to provide an incentive for businesses and insurers to get their money in quickly and for the trust to do all it can to become operational as quickly as possible. This also ensured that victims would not have their rights abrogated and left without recourse for an extended period of time. My amendment that incorporated this policy was unanimously adopted by the Judiciary Committee.

However, the amendment ultimately met with significant opposition from both the business and insurer communities. There was a real concern about the ability of companies to simultaneously pay into the trust while continuing to face the current caseloads in the courts. In addition, concerns were raised about the potential drain on the trust fund and the subsequent impact on its stability. In an effort to address these issues, I sought to find a compromise that would address cash flow limitations of the companies while at the same time maintaining necessary protections for victims, especially for terminal individuals.

My initial compromise would have provided a ninety-day window to the Administrator to get the trust fund operational. If the Administrator was unable to meet this deadline, then terminal individuals could proceed in court. I provided an extended timeframe to the Administrator for other non-terminal victims. This too met with strong opposition and fundamentally provided an unrealistic amount of time for the new trust to become fully functioning.

After many negotiations and conversations with stakeholders and other members of the Committee, the compromise that is now in the bill was struck. This compromise attempts to balance the legitimate concerns of all sides. Clearly, it is not what any one stakeholder would prefer. Victims and labor organizations continue to strongly advocate that my original proposal should remain intact, and businesses and insurers continue to advocate that victims should never be allowed to proceed in the courts during the start up, or that if they are their rights should be severely restricted. Neither of these extremes are feasible. Instead, a real compromise is the only way to get a bill enacted and to achieve a workable solution.

My amendment combines the changes that were requested by business, insurers, and other Senators to narrow the scope of the start up provisions to limit the risk businesses and insurers must face, while at the same time provide a timely process for terminal victims, a safety valve for all individuals, and a strong incentive for businesses and insurers to cooperate with the Administrator. This was a tough balance to achieve, but the language in the bill does just that.

The biggest change in the start up provisions is to allow a claims facility to pay terminal individuals the amount they would receive under the trust, and to let a successful operation of such claims facility serve as a trigger to stop cases from proceeding in court. This provision should help ensure that claims are processed quickly. It should also serve to limit and alleviate the flood of claims that could overwhelm the fund in the initial years.

In addition, by allowing defendants and insurers the opportunity to pay claims directly, the ability to avoid higher costs and a possible court case is in their hands and under their control. The bill provides that the settlement amount automatically rises to one-hundred-and-fifty percent of the amount required under the trust if the company tries to avoid or delay payment. In addition, the bill provides victims with an opportunity to return to court if the company or insurer still refuses to pay their claim.

If the company or insurer does not settle the claims as directed under the legislation, it is the company and insurer's choice to take that risk and face larger expenses and possibly much larger damages in court. Significantly, if an individual is forced to return to court to receive their payment, they cannot later have their case pulled out of court, nor will there be any limits on their rights to recover or secure representation.

Finally, the expedited payment language serves to ensure that mesothelioma victims and individuals who have been diagnosed with a life expectancy of less than one year receive their awards quickly and not force them to wait years for their payment. One of the principle purposes of doing this legislation and setting up a

trust fund is to provide victims with a system that takes less time, energy and resources and, at the same time, expedites the payments they need and deserve. The start up language should assist in achieving this goal.

Judicial review

Another concern that has consistently been raised is whether the courts will determine that the provisions directing the trust fund to appropriate the monies from the confirmed bankruptcy trusts will be held to be constitutional. Clearly, there are strong held beliefs on both sides and the record contains legal opinions from many scholars.

Regardless of how the courts ultimately decide, one thing is clear—there will be a constitutional challenge. In order to ensure that cases challenging the act do not serve to undermine the efficacy of the legislation there must be specific provisions in place to ensure enough funding is available to cover the costs and claims while a court review is underway. The Chairman and the Ranking Member included various provisions to address this goal, including a "guarantee surcharge." This would raise additional funds to cover the liquidity needs of the trust should the bankruptcy trust monies be held up in court or fail to materialize altogether.

In addition, I was concerned that the bill must contain a strong and efficient judicial review procedure to ensure cases are decided upon as quickly as possible. While language was included in the bill as introduced, the McCain-Feingold campaign finance legislation that was recently enacted into law has had its judicial review provisions tested and proven effective. Therefore, I offered an amendment to modify the bill to provide that any constitutional challenge of the act or its provisions shall be filed in the United States District Court for the District of Columbia and heard by a three-judge court panel.

A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision. Since this is a tested and successful model it should serve to resolve constitutional questions efficiently and effectively.

It is also important to clarify how this provision intersects with the start up provisions. The start up provisions as I drafted should proceed even if a court suspends operation while it determines constitutional questions. This means that the claims facility should continue to make settlements with exigent claimants to the extent permitted by the court, because the timelines for processing exigent claims would remain intact. Therefore, the Administrator must continue to work towards ensuring that the claims facility and the national trust become operational in order to avoid a reversion to the courts. If this administrative process cannot be accomplished because of a court order, businesses and insurers should on their own initiative, continue to make settlement offers to avoid a reversion to the tort system since the timelines for when a claim may return to court cannot be tolled.

Settlements

Contamination of asbestos has occurred for decades, and individuals who were exposed have been getting sick or dying from its use and distribution. Given its significant history, a sizable number of victims have already sought relief investing years of time and resources to having their situations addressed.

While the trust is designed to provide a more efficient and satisfactory solution, there are some claims that should not be preempted and should remain in tact. Where to draw the line on which claims must go to the trust and which may stay out was the subject of much negotiation and many different proposals. Finally, a compromise was reached that in principle would allow enforceable settlements to remain outside the trust.

However, defining this principle proved to be complicated and it involved several additional layers of negotiations. In the bill as introduced, some interpreted the language as wiping out enforceable settlements that were not intended to be eviscerated. For example, I was concerned that the language could be read to eliminate an enforceable settlement between a mesothelioma victim and a defendant company simply because the company had their outside lawyer sign the settlement rather than their CEO. This is a ridiculous outcome and certainly was not the intent of the compromise.

To remedy this, I authored an amendment that would preserve settlements even if they were not signed "directly" by the insurer or the business. My amendment deleted the word "directly" to clarify that the CEO does not need to sign the agreement for it to be valid and remain outside the trust. In addition, the amendment added language to clarify that settlements secured by "immediate family" members would also remain outside the trust even though they too are not signed "directly" by the plaintiff.

Criminal acts

Drafting comprehensive asbestos reform legislation has been a significant undertaking, and even upon enactment it is clear that those who want to maintain the current tort system will continue their attacks. In addition, there are provisions that could raise various constitutional challenges, like the previous bankruptcy trusts discussion. I continue to believe that the Congress should do all it can to ensure the trust fund is successful and protected from legal challenges that are an attempt to induce failure.

This year the Committee received a letter from Professor Erwin Chemerinsky expressing his belief that the provision in the bill that would provide a $400,000 floor to individuals exposed to vermiculite in Libby, Montana would raise an Equal Protection problem.

He stated, "I believe that the courts would invalidate this provision as violating the Fifth Amendment guarantees of equal protection and due process."

Whether the courts eventually agree with his assessment, I was concerned that the legislation be tightened as much as possible to prevent an Equal Protection challenge. Initially, I sought to offer an amendment that would apply the $400,000 floor to any individual whose claim is based on asbestos exposure arising from a

company's actions that have been the subject of a criminal indictment.

However, this proved to be an ineffective solution since the distinguishing characteristics of the exposure in Libby, Montana was not simply limited to the type of vermiculite mined from the W. R. Grace's plant, but also included the uniqueness of the exposure, the proliferation of asbestos fibers, and the direct actions that impacted the community.

Therefore, I worked with the Chairman and the Ranking Member and Senator Baucus to strengthen the language in the bill and to further develop the record establishing the uniqueness of Libby. In the end, as part of a manager's package, new language was included in the bill that further outlined why the Libby-specific provisions should be protected from an equal protection challenge.

Expedited payments amendment

As discussed in the start up section, one of my primary concerns has been to ensure that terminal individuals have their claims resolved and paid quickly. I have consistently stated that if Congress is going to take an action that would eliminate an individual's fundamental right to a trial, we must ensure that individuals are being protected and provided a system that does not further exacerbate the injustices they have already endured.

I was very concerned when I re-read the bill as introduced and realized that the structured payment provisions covered individuals with exigent health claims. This meant that mesothelioma victims and individuals who have been diagnosed as being terminally ill from asbestos-related diseases with a life expectancy of less than one year could have their payments stretched out over three years, and possibly four years.

This was unacceptable. How can we tell an individual who has less than one year to live they are going to have to wait for three years to get their full payment? While the bill language provided the Administrator with flexibility to establish "accelerated payments" for mesothelioma victims and "expedited payments" for exigent cases, there were no time frames to quantify these provisions.

Therefore, my amendment established specific payment time frames. Mesothelioma victims would be paid in one lump sum within 30 days from the time the claim was approved or six months from when the claim was filed, whichever is shorter. Other exigent victims would be paid within six months after the claim was approved, or one year after the claim was filed, whichever is shorter.

In addition, my amendment addressed concerns raised by the business and insurance communities that expedited payments could cause a cash flow problem. To respond, my amendment provided the Administrator with flexibility to extend payments if she determines that solvency of the fund would be severely harmed. If such a determination is made payments may be extended for mesothelioma cases to six months from the date the claim is approved by the Administrator, or eleven months from the date when the claim is filed, which ever is shorter; and for other exigent cases, one year from the date the claim is approved by the Administrator; or two years from the date the claim is filed; which ever is shorter.

Naturally occurring asbestos amendment

As time marches on, unfortunately, new concerns about asbestos exposure have come to light. In my home state of California, and in some other states across the country, communities are discovering veins of naturally occurring asbestos in the ground. These veins are not new; however, the medical risks associated with them remain unquantifiable and raise real concerns.

With the discovery of naturally occurring asbestos in California, I realized that the definition of asbestos contained in the legislation did not include the type of asbestos found in my state. Clearly, the intent of the legislation is to cover all forms of asbestos. Therefore, I authored an amendment that modified the language to include asbestiform amphibole minerals to ensure individuals from my home state who would qualify under the medical criteria are not prohibited from receiving an award simply because of an error in the definition of asbestos.

In addition, there has been much confusion about the section of the bill entitled "exceptional medical claims". The intent of this language is to provide a separate path for those individuals who do not meet the precise medical criteria under the bill, yet do suffer from the specific asbestos-related diseases enumerated and defined in the bill, to have their cases reviewed and evaluated by a medical panel. This process would eliminate the presumptions provided to those who do qualify under the medical criteria, but it would give victims an opportunity to be compensated by the Fund for their asbestos-related conditions.

This exceptional medical claims provision would provide the opportunity for those who are exposed to naturally occurring asbestos that has been released into the air either because of developers or other activities to have their cases considered by the trust. However, there were some who felt the language was not clear. Therefore, I authored an amendment that made this explicit.

Finally, I authored a comprehensive amendment to more thoroughly address the problem of naturally occurring asbestos exposure and potential medical health risks to individuals and communities. My amendment was initially conceived to address the situation in California, however, as I looked into the situation I realized that many states across the country are dealing with this problem.

Some have argued that nothing should be done in this area because there are not clear cases of individuals getting sick or dying from naturally occurring asbestos; this position is shortsighted. Congress has sat by for too long watching the asbestos crisis grow to outrageous proportions. Rather than again sitting back and failing to act unless thousands more become sick from a new asbestos threat, Congress should take proactive steps in evaluating whether there are potential health risks associated with exposure to naturally occurring asbestos.

It is critical that the government evaluate whether there are health risks associated with exposure levels to naturally occurring asbestos in the communities where it exists. Then if there are levels of fibers that create risks, then communities need the appropriate tools to determine whether these risks are present in their neighborhoods and the tools necessary to protect the public from exposure.

In a recent exposure assessment conducted by the Environmental Protection Agency (EPA) in areas of the Sierra foothills in California, asbestos fibers were found in almost all samples collected in an effort to measure personal exposures levels to naturally occurring asbestos during simulated recreational activities. The EPA has acknowledged concern over the measured exposure levels because of the potential for long-term development of asbestos-related diseases and the higher toxicity of amphibole asbestos present in the area.

The citizens of the California Sierra foothill areas are becoming increasingly concerned and have demanded a clarification about potential health risks associated with exposure in their communities. The problem is the current risk assessment models used to evaluate health risks to asbestos are inadequate. They were designed to address the cancer risks associated with low-level occupational exposures over long periods of time and are insufficient to address variable exposures to naturally occurring asbestos or estimate non-cancer risks. Given the lack of sufficient information, study and evaluation are necessary.

My amendment addressed this urgent need by requiring the EPA to evaluate within one year the appropriateness of the existing risk assessment values for naturally occurring asbestos and methods of assessing exposure, and to establish risk assessment models that incorporate the latest knowledge of exposure, toxicity of amphibole asbestos, and understanding of non-cancer risks. I urge EPA to complete this evaluation and establish a revised risk assessment model as quickly as possible.

This amendment also provides the communities with the information, tools, and resources they need to understand how to minimize their exposure to naturally occurring asbestos and address existing contamination in their schools, public buildings and parks, and homes. My amendment also ensures that individuals residing in these areas may participate in the medical screening programs to detect any health risks early and then, hopefully, prevent further damage.

It is often quoted that an ounce of prevention is worth a pound of cure. The time for Congress to move on this issue is long overdue and I believe proactively working to prevent further asbestos-related diseases from debilitating individuals and families is the right place to begin.

DIANNE FEINSTEIN.

XI. MINORITY VIEWS OF SENATORS KENNEDY, BIDEN, FEINGOLD, AND DURBIN

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V. Conclusion

I. INTRODUCTION

We offer these dissenting views on S. 852 because of our strong belief that the bill is seriously flawed. The Asbestos Trust Fund it creates is both unfair and unworkable. It completely excludes large numbers of seriously ill victims who are suffering and, in many

cases, dying from asbestos-induced diseases, providing them with no compensation at all. Nor does the Trust Fund have adequate funding to ensure that all of those asbestos victims who are eligible to receive compensation under the terms of the bill will actually receive what the bill promises them.

We would readily support a properly designed and adequately funded trust fund bill. It would have to fairly compensate all the victims of asbestos-induced diseases in a timely way. Unfortunately, S. 852 is not such a bill. In fact, S. 852 will leave a substantial number of the most seriously ill victims worse off than they are under current law.

The real crisis which confronts us is not an "asbestos litigation crisis;" it is an asbestos-induced *disease* crisis. Asbestos is the most lethal substance ever widely used in the workplace, and it has left an unparalleled legacy of illness and death in its wake. All too often, the tragedy these seriously ill workers and their families are enduring becomes lost in a complex debate about the economic impact of asbestos litigation on defendant corporations. We should not 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, and the cost 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 bill can do is shift those costs from one party to another. Any proposal which would shift more of the financial burden onto the back of these seriously ill workers and their families is unacceptable to us.

It is not enough to say that there are serious inadequacies in the way asbestos cases are adjudicated today. That does not mean that any legislative solution is better than the current system. Our first obligation is to do no harm. We regret to say that, despite the best intentions of its sponsors, this bill will do harm. We are compelled to oppose S. 852 for the following main reasons:

- The Asbestos Trust Fund created by this bill is seriously underfunded. The funding plan in this bill relies on very substantial borrowing in the early years as the only way to pay the hundreds of thousands of initial claims that will flood the system. The result will be huge debt service costs over the life of the Trust that could reduce the $140 billion intended to pay claims by as much as 40 percent or more.[1] The amount remaining would be far too little to pay the claims of all of those who are entitled to compensation under the terms of the bill. The bill does not guarantee that sufficient resources will be available to keep the commitments which this bill makes to eligible victims, and it fails to adequately protect these victims should sufficient funds not be available to compensate them.
- Seriously ill victims are not allowed to continue their cases in court until the Trust Fund is ready to process and pay claims. These victims will be left in a legal limbo, unable to recover either in the courts or from the Trust Fund, while time is running out for them. Tragically, many of these claimants

[1] Testimony of Mark A. Peterson, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005, at 2–3.

will die from mesothelioma or other cancers while they wait for the Trust Fund to become operational and for the expected constitutional challenges to be resolved.[2]

• Tens of thousands of lung cancer victims who have had very substantial asbestos exposure are denied any compensation from the Trust Fund. Under the bill, these victims would lose their right to go to court, but receive nothing from the Trust Fund.

• The bill makes it harder for asbestos victims to recover compensation from the Trust Fund by unfairly raising the standard of proof. Victims should simply have to prove that asbestos exposure was a contributing factor to their disease. That is the standard used in most state courts and workers' compensation proceedings today. This bill requires a much tougher standard.

• Compensation levels for the most severely ill victims of asbestos-induced disease are too low. The amounts were determined more on the basis of what companies are willing to pay than on the basis of what the victims deserve.

• The current bill does not honor all existing court settlement agreements. By voiding these settlements, the bill will force some victims whose claims have been resolved in court to pursue their claims all over again in the Trust Fund. That means they will have to wait years to receive any compensation for their injuries.

• The bill lacks a clear, automatic sunset that allows victims to quickly seek compensation in the courts if the Trust Fund becomes insolvent and unable to pay their claims. The bill the Committee approved in 2003 contained such a provision, but the current version of the bill does not. Under the current bill, workers could end up trapped in the Trust with reduced benefits and long delays before receiving their payments.

• There is no compensation category for victims of asbestos-induced diseases, other than mesothelioma, whose exposure did not occur on the job. Their illnesses were also caused by asbestos, and it is unfair to ignore their plight. Their current right to seek compensation through the courts is being taken away, but they will receive no right to compensation from the Trust Fund in return.

• Residents of other asbestos-contaminated communities are denied the same opportunity to receive compensation from the Trust Fund that the residents of Libby, Montana, have under the bill. These residents of Arizona, California, Illinois, Louisiana, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania, Texas and elsewhere[3] are permitted to file an "exceptional medical claim" seeking compensation only if a study conducted by the Agency for Toxic Substances and Disease Reg-

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[2] As discussed further below, numerous time-consuming legal challenges to the bill are likely. See Letter from Theordore B. Olson to the Honorable John Cornyn, April 18, 2005; and Letter from Robert A. Falise, Chairman and Managing Trustee, Manville Personal Injury Settlement Trust, October 21, 2003. See also, Testimony of Eric D. Green, Professor of Law, Boston University School of Law, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims to Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005, at 7–8.

[3] See *www.EWG.org* for entire list of communities that received 10,000 tons or more of asbestos-containing material from Libby, Montana.

istry finds their community contamination to be "substantially equivalent" to Libby, Montana. Even assuming these sick residents of contaminated communities can overcome all of the bill's hurdles, the amount proposed for the Trust Fund has never been calculated to include these individuals. During Committee discussions, it became clear that they have been excluded from compensation solely because it is "too expensive" to cover them.

- Victims with complex cases will be unable to find a qualified attorney to pursue their claims because the bill imposes an inflexible cap on attorneys' fees that ignores the amount of work that the case would actually require.
- The bill takes away rights from victims of silica disease even though they are not eligible to receive any benefits from the Trust Fund.
- Despite much discussion in Committee regarding the importance of transparency, the bill fails to require full disclosure of the corporations and insurers who will fund the Trust and the amounts each of them will pay before victims lose their right to proceed in court. That information is essential to determine whether the promised $140 billion in funding will actually be provided.
- The financial burden of funding the Trust Fund is not fairly apportioned amongst the affected businesses. Many smaller companies would be required to pay more than they have historically paid in the court system, while some of the largest corporations with the greatest exposure would receive a huge windfall.

These shortcomings cannot be overlooked. They are too fundamental. They will end up hurting the seriously ill victims of asbestos disease who we are trying to help. As evidenced by the aforementioned list of problems with S. 852, the bill focuses too much on providing relief to corporate defendants, and not enough on securing fair compensation for the thousands of victims of asbestos exposure, and their families.

We are perplexed at the Committee's decision to report S. 852 in its current form for Senate consideration. Even the bill's proponents recognize that their proposal is flawed and needs work. We believe that the bill's deficiencies are so significant that it will be impossible to correct them on the Senate floor.

II. BACKGROUND

Hundreds of thousands of men and women, including many patriotic war veterans and defense workers, have died or become severely ill by exposure to asbestos. These deaths and illnesses were entirely preventable. Asbestos manufacturers, distributors and many employers, including the United States government, have known asbestos exposure was deadly since at least the 1930s, but workers were not told of the hazards they faced until it was too late.[4]

Asbestos is the most lethal substance ever widely used in the workplace. Between 1940 and 1980, more than 27.5 million work-

[4] See *http://www.ewg.org/reports/asbestos/documents.*

ers in this country were exposed to asbestos on the job, and nearly 19 million of them had high levels of exposure over long periods of time. That exposure has irrevocably changed many of their lives.

Each year, 10,000 of these victims die from lung cancer and other diseases caused by asbestos.[5] Each year, hundreds of thousands of them suffer from lung conditions which make breathing so difficult that they cannot engage in the routine activities of daily life. Even more have become unemployable due to their medical condition.

Because of the long latency period of these diseases, not only will the damage done by asbestos continue for decades but many of the exposed live in fear of a premature death due to asbestos-induced disease. In addition, many of the spouses and children of these workers, and their neighbors, have now been diagnosed with asbestos-related diseases.[6] The real victims of the asbestos nightmare must be the first and foremost focus of our concern.

Despite the magnitude of the preventable tragedy that has been inflicted on working men and women throughout the United States, the debate in Committee has, in our view, been focused mostly on the harm of asbestos litigation to the economic fate of corporate defendants, some of which knowingly exposed workers to danger. We believe the innocent victims of asbestos exposure deserve as much, if not more, attention. Our position has been that appropriate funding for all the victims of these horrible diseases should be the precondition for creating a trust fund.

III. PROBLEMS WITH THE BILL

S. 852 proposes to replace the current court system with a national Trust Fund that would resolve asbestos civil disputes and compensate those who have been injured by asbestos exposure. Accordingly, it would eliminate the rights of asbestos victims to a jury trial and compel them to seek compensation from the newly created Federal program.

The Trust Fund is to be financed by assessments on corporations and businesses that have had previous asbestos liabilities or have been the subject of asbestos litigation. As it stands, it is unclear who this class of businesses includes. Supporters of the bill claim that it covers as many as 10,000 American businesses, including many small and medium-sized businesses.

The general aim of the Trust Fund is to provide victims fair and timely compensation on a no-fault basis, relieving them of the legal delays and costs associated with the court system, while relieving business firms of greater costs than they would face in the litigation system. The problem with S. 852 is that it fails to meet these goals with respect to victims of asbestos-induced disease, as well as many of the affected business entities. It also likely creates new burdens for Federal taxpayers.

In its current form, S. 852 not only fails to solve the asbestos litigation challenges facing the nation today, but it would exacerbate them for the overwhelming majority of groups that are directly affected by the issue.

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[5] See *http://www.ewg.org/reports/lungcancer/*.
[6] See *http://www.ewg.org/reports/asbestos/facts/fact4.php.*

The bill artificially caps defendant and insurer liability at levels too low to provide full compensation to victims over the expected life of the Trust Fund, while explicitly excluding tens of thousands of cancer victims from receiving compensation in order to protect the financial interests of participating corporations. We believe this is the wrong approach.

We believe that a Trust Fund paying timely, adequate compensation to all victims would be a good idea. But this asbestos bill is not, strictly speaking, a Trust Fund at all. It is not designed to fully fund payments to all beneficiaries.

Congress has never before acted to limit compensation to victims when the court system was compensating them. S. 852 is unique among the compensation programs Congress has considered, in that for many victims its effect would be to eliminate a right to compensation rather than to create one. Past compensation programs have been designed to ensure that victims receive compensation when the courts have failed to provide relief. In the case of asbestos, Congress is stepping in not to protect victims, who some proponents of S. 852 claim receive too much, but to protect hundreds of companies from having to pay the full costs of the health effects they have caused.

The essential components of such a fair Trust Fund would include:

- Adequate funding to fully compensate present and future victims;
- Medical criteria which fairly reflect the asbestos-related diseases currently compensated by the court system;
- Claims values which reasonably reflect the amount of compensation victims would receive in court; and
- A non-adversarial, efficient claims processing system which would speed payment of claims.

We do not believe S. 852 meets this test.

Rather, we believe that S. 852 represents a financial windfall for many asbestos defendants and insurers, while providing too little to victims of asbestos exposure. We believe this Trust Fund will leave many victims worse off than they are today. In many respects, S. 852 represents a retreat from the bill reported by the Committee during the last Congress.

A. Inadequate funding

In our view, ensuring full funding for the best estimate of expected claims is a critical precondition before taking away an individual's right to a jury trial. Past efforts to resolve the asbestos litigation dilemma, both private and public, have foundered over the question of whether there would be enough money to pay benefits to future victims. S. 852 suffers from the same limitation because it fails to include adequate funding to ensure future victims will receive compensation.

The proposed total funding of $140 billion over 30 years, and a proposed $42 billion of up-front funding in the first 5 years, while large sums, are almost certainly going to prove inadequate to ensure fair compensation for asbestos victims over the short and long term. Just based on the hundreds of thousands of claims the program will face right away, the proposed $140 billion is insufficient.

This insufficiency has resulted from the fact that the figure of $140 billion was determined based on what companies were willing to pay, not how much the Trust Fund is likely to require to fairly compensate individuals.

Funding for the Trust should be tailored to increase or decrease as the needs of the Trust Fund demand. In other compensation programs, such as workers' compensation, payors must increase the amount they contribute when more claims than expected are approved. Under the Trust Fund proposed in S. 852, however, victims are faced with the threat that benefits will be reduced or medical criteria changed if funding for the Trust proves inadequate. Throughout Committee consideration of S. 852, many suggestions for improvements to the proposal were rejected, apparently because of the view that there isn't enough money[7]. We do not believe that is an adequate answer. Congress has an obligation to protect the rights of the claimants to fair compensation—especially if the bill is going to take away their right to proceed in court.

As it stands, the bill does not contain sufficient funding to adequately compensate all victims. The bill lacks transparency regarding what the companies will pay, leaving in great doubt whether the proposed funding will ever be raised. Additionally, it imposes higher costs on thousands of medium and small businesses than they face in the present court system. It also involves Federal outlays of tens of billions of dollars, thereby placing taxpayers at risk of having to absorb these costs without repayment because of the strong possibility of the Trust Fund's failure.

When the Committee considered this issue during the last Congress, the Committee- reported bill, S. 1125, included up to $153 billion in funding. However, corporate defendants and insurers objected to paying that much money. Accordingly, following the Committee's action, S. 1125 was rewritten without the benefit of Committee deliberations, and re-introduced directly on the floor of the Senate as S. 2290.

The revised bill, S. 2290, included only $118 billion in funding, even though the Congressional Budget Office (CBO) estimated that its benefits would cost $139 billion,[8] not counting interest payments on any amounts that the Trust Fund would have to borrow, which have been estimated to be $32 billion or more.[9]

CBO's cost estimate and analysis assumed that only 10 to 15 percent of non-malignant claims would qualify for payment.[10] Yet, well-qualified outside experts, such as David Austern of the Manville Trust, and Dr. Mark Peterson formerly with the RAND Corporation, predict that at least 55 percent or as high as 75 percent of claimants will qualify for compensation under the Trust Fund. Importantly, CBO admits its estimate is uncertain, and notes that if the expected claims are underestimated by merely 5 percent, the

[7] See e.g. Oral Statement of Senator Arlen Specter, Senate Committee on the Judiciary, Executive Session, 109th Cong., May 19, 2005, at 48.

[8] See letter from Douglas Holtz-Eakin, Director, Congressional Budget Office, to Senator Don Nickles, April 20, 2004, at 5.

[9] Analysis of Mark Peterson, April 13, 2005, p. 1; see also Statement of Mark A. Peterson Before the Senate Judiciary Committee Hearing of S. 852 "Fairness in Asbestos Injury Resolution Act of 2005," p. 6. April 26, 2005.

[10] See letter from Douglas Holtz-Eakin, Director, Congressional Budget Office, to Senator Don Nickles, April 8, 2005, at 3.

Trust Fund would require an additional $10 billion of funding to operate.[11]

The funding problem is worse under S. 852. This year's bill includes $140 billion as the cap on funding. While this amount was agreed to outside the Committee's jurisdiction in private negotiations between Senators Frist and Daschle at the end of the last Congress, it was part of a negotiated compromise that they undertook for a different bill, with different medical criteria, and different claims values. According to experts, $140 billion bears no relationship to the amount truly needed to fully fund the benefits provided under S. 852.[12] Indeed, the Committee has repeatedly narrowed the benefits provided to victims to try to ensure that the cost of S. 852 never exceeds $140 billion.

We believe this approach is backwards. The Committee should have retained the same set of medical criteria that were unanimously agreed to in a bipartisan manner by this Committee during the last Congress. This year's bill also should have developed reasonable claims values and insisted on the funding necessary to pay those benefits. Even accepting CBO's unrealistic estimate of a 10 to 15 percent approval rate for filing of non-malignant claims, outside experts believe that S. 852 will cost at least $189 billion.[13]

Moreover, estimates of the number of asbestos claims and the amount necessary to pay those claims have proven woefully understated throughout the history of such predictions. Simply put, if corporate defendants and insurers pay no more than $140 billion, the Trust Fund will not be able to pay the promised benefits to present and future victims.[14]

CBO has not yet analyzed S. 852. However, it has already prepared cost estimates of previous similar bills, S. 1125 and S. 2290, which can be helpful in evaluating the solvency of the Trust Fund to be created by S. 852. S. 1125, the version approved by the Committee in the last Congress, would have required a maximum of $153 billion from corporate defendants and insurers to pay into the Trust Fund. That bill provided compensation levels which were significantly lower than those contained in S. 852.

That bill, S. 1125, also allowed pending cases with a value of approximately $5 billion to remain in the court system. However, these pending cases have been brought into the Trust Fund by later versions of the bill, thereby creating an additional demand on the Trust Fund. CBO estimated that the cost of paying all the claims covered by S. 1125 at the claims values set in that bill would be $123 billion.

It is worth noting that even with the exclusion of the $5 billion of pending cases and the relatively low claims values in S. 1125, CBO nevertheless found that the amount of money needed to pay all the claims and to fund other operating expenses during the first 10 years would virtually equal the amount collected from corporate defendants and insurers during that period. If the $5 billion pending cases had not been left outside the Trust Fund, the costs would have exceeded revenues. CBO cautioned:

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[11] See Nickles letter, April 20, 2004, at 5.
[12] See Peterson testimony at 3–5.
[13] See Nickles letter, April 20, 2005, at 5.
[14] See also Peterson testimony at 3–5.

> There is a risk that the actual number of claims received could exceed our estimate. There is also a risk that revenues collected could be less than we estimate. If either event were to occur, the amounts collected could be insufficient to pay all claims.[15]

This simply highlights what we all know—the Trust Fund will suffer from serious financial demands during the first decade of operation and we must ensure that the funds will be sufficient to cover those expenses. Otherwise, we are legislating certain failure.

As indicated above, S. 2290 was introduced by Senator Frist to address various dissatisfactions raised by the corporate defendants and insurers with provisions of S. 1125. That revised bill sharply reduced the amount of money available to pay the claims of asbestos victims to a maximum of $118 billion, which was $35 billion less than the amount approved by the Committee.

At the same time, S. 2290 increased the compensation levels for some of the disease categories. CBO's analysis of S. 2290 determined that the Trust Fund would face claims totaling about $140 billion, far more than the total available funding. As a result, CBO concluded that the Fund would need to borrow substantially in its early years of operation and that ultimately, "the sunset provisions * * * would have to be implemented by the Asbestos Fund's administrator."[16]

The CBO's letter emphasized the uncertainty of projecting Trust Fund finances:

> One area in which the potential costs are particularly uncertain is the number of applicants who will present evidence sufficient to obtain a compensation award for nonmalignant injuries. CBO estimates that about 15% of individuals with nonmalignant medical conditions due to asbestos exposure would qualify for awards under the medical criteria and administrative procedures specified in the bill. The remaining 85% of such individuals would receive payments from the Fund to monitor their future medical condition. If that projection were too high or too low by only 5 percentage points, the lifetime cost to the Asbestos Fund could change by $10 billion.[17]

CBO's estimate of the percentage of nonmalignant claims that would qualify for a monetary award is extremely low compared to the experience of the Manville Trust and other studies. This assumption alone could result in a very substantial underestimation of the actual cost of the Trust Fund's financial liability. The $140 billion estimate of S. 2290's cost may well be too low.

CBO's analysis of S. 2290 raises serious doubt about the solvency of S. 852. Many of the claims values in S. 852 have been raised above the levels set in S. 2290. While S. 852 has eliminated one disease category, the overall cost of payments is likely to be higher than under the earlier bill. Interest costs resulting from large scale borrowing by the Trust Fund are also likely to be higher.

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[15] CBO Cost Estimates for S. 1125, October 2, 2003, at 2.
[16] See Nickles letter, April 20, 2005, at 4.
[17] See Kickles letter, April 20, 2005, at 6.

S. 852 provides a maximum of only $140 billion in contributions from corporate defendants and insurers, which is exactly the amount CBO estimated to be the cost of the less generous compensation provided for by S. 2290. Yet the current bill, S. 852, provides no cushion at all, and no margin for any financial error. As a result, the probability is more than great that the Trust Fund to be created by S. 852 will be seriously underfunded from the beginning and will remain so throughout its operation.

1. Number of future claims remains impossible to ascertain

The only way to ensure an adequate funding level is to base the total amount of the Trust Fund on some rational estimate of current and future claims activity. However, the bill fails to link the proposed funding to any reasonable estimate of claims. Without this information, or some meaningful mechanism to tailor the funding and assessments to the actual number of claimants, there is no assurance that sufficient funding will be available to adequately compensate victims. That means either the Trust Fund is doomed to fail, or claimants will be shortchanged down the line.

In its analysis of S. 1125, CBO raised several red flags concerning the potential claims and liability costs:

- "Estimates of future claims * * * contain a number of potential sources of error in forecasting."
- "Forecasts of asbestos claims * * * have failed to accurately predict the magnitude, scope and evolution of asbestos claims."
- "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."
- "Furthermore, there is uncertainty about how claims would qualify under the criteria of the bill."
- "Various projections of the number of nonmalignant cases and their distributions among the categories specified in the bill vary greatly."

However, neither CBO nor the Asbestos Study Group, the primary proponent of this legislative solution and the likely source of the underlying data that were used in the CBO estimates, has provided evidence of the assumptions they rely upon, that only 15 percent of nonmalignant claims, and fewer than one in four of all claimants would qualify for payment. Instead, past experiences contradict the assumption. Lessons from the Manville Trust, one of the first major asbestos trusts, are revealing. In testifying before the Committee, Manville Trust's general counsel, David Austern warned:

> [T]here 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.[18]

It should be noted that, while the criteria in S. 852 for malignant lung cancer claims has changed from the criteria in S. 1125 and S. 2290, the criteria for non-malignant claims has not been disturbed. Moreover, an insurance study of 225,000 claims filed in the Babcock and Wilcox bankruptcy also contradicts CBO's previous estimates. This study found that 70 percent of nonmalignant claims would qualify for payment under the criteria of S. 852 at Level II or higher.[19]

Additionally, CBO's previous assumptions did not take into account claims that have arisen in 2003 and 2004.[20] CBO assumes that the Trust Fund will receive 300,000 claims arising before 2005, which is the same number of claims that all parties have accepted as pending at the end of 2002 in their analyses made since early 2003. 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 alone has received about 120,000 claims in those two years, including over 6,700 new claims for mesothelioma.[21]

Historically, assumptions regarding future asbestos claims have proven exceedingly inaccurate. For example, during 1986, expert claims forecasters testified in the Manville bankruptcy court that between the late 1980s and 2049, the Manville Trust would receive between 83,000 and 100,000 claims.[22] The Manville Trust began operations in 1988, yet as of today, only 17 years later, the Manville Trust has received over 620,000 claims.

During 2001, the Manville Trust commissioned the fourth future claims forecast it has undertaken during its history. That forecast predicted that by 2049 the Manville Trust would receive between 750,000 and 2.7 million claims, in addition to the nearly 620,000 claims it had already received.

Likewise, S. 852 is predicated on calculations from numbers that are literally impossible to ascertain. The actuarial estimates are educated guesses, at best, and thus now provide broad ranges of potential future claims. Currently the Manville Trust is paying mesothelioma victims only $17,500, instead of the $1,050,000 it predicted at its inception. It is now apparent that the guessing game of 1988 did not work. What, if anything, will prevent the program envisioned in S. 852 from becoming another Manville debacle when the methods used by the actuaries to calculate the Trust Fund has not changed?

The CBO's 2004 letter noted that if the number of non-malignant claims qualifying for payment at Level II or higher exceeds their projections by only five percent, it could increase costs by $10 billion. CBO also stated: "Small changes in other assumptions—in-

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[18] Letter from David Austern, General Counsel to the Manville Trust, to Rebecca Seidel and J. Edward Pagano, Committee on the Judiciary, October 9, 2003, emphasis added.

[19] Charles E. Bates, Ph.D., "Expert Report," Prepared for Babcock & Wilcox Insurers Joint Defense Group, August 18, 2003.

[20] Letter from Douglas Holtz-Eakin, Director, Congressional Budget Office, to Senator Orrin G. Hatch, April 24, 2004, at 1–2.

[21] Peterson testimony at 4.

[22] Letter from Robert A. Falise, Chairman and Managing Trustee, Manville Personal Injury Settlement Trust, October 21, 2003.

cluding such routine variables as the future inflation rate—could also have a significant impact on long-term costs."[23] Unfortunately, future claimants will suffer greatly if the current calculations again prove inaccurate. Since the bill has no provisions to increase the total amount of funding for the Trust Fund, future claimants are likely to face decreased benefits or a bankrupt Trust Fund. Congress should not knowingly enact bill with so many uncertainties.

Finally, we note that asbestos is still not banned in the United States. This means that today, many more thousands of workers and others continue to be exposed to this deadly substance. According to the Occupational Safety and Health Administration, 1.3 million workers are currently being exposed to asbestos. Consequently, there is major uncertainty as to how many victims there will be in the future and whether the Trust Fund will be able to compensate them.

Moreover, the Trust Fund has a proposed life of only 30 years. Thus, it is a cruel reality that people who are being exposed today and in the future will have no source of compensation for asbestos-related injuries they suffer after the Trust Fund's demise in 30 years, or perhaps even sooner.

2. Up-front funding is inadequate

As noted, S. 852 contemplates up-front funding of approximately $42 billion in the first five years. According to the testimony of Dr. Peterson before this Committee,[24] the Trust Fund will face between 15,000 and 19,000 mesothelioma claims at its inception. Based on the proposed awards values in the bill, these claimants alone will be entitled to approximately $20 billion of the up-front funding at inception. Simply put, the monies will not be there. Dr. Peterson also estimates it will take at least two years to establish the bureaucracy required to administer the Trust Fund, and that it will not contain sufficient assets to pay the pending claims until 2011 or 2012 at the earliest.[25]

Dr. Peterson testified that the Trust Fund will have to pay tens of billions of dollars of interest under every set of assumptions.[26] He stated that:

> 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% of the $140 billion that is supposed to be paid asbestos claimants would instead go to service the Trust Fund's enormous indebtedness. For seven of the fifteen simulations, half or more of the $140 billion will be spent on interest.[27]

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[23] Nickles letter, April 20, 2004, at 5.

[24] Dr. Peterson was a founding member of the RAND Corporation's Institute for Civil Justice, has worked for four District and Bankruptcy Courts as an expert, and has served as "Special Advisor to the Courts" for the Manville Trust for over 14 years.

[25] Peterson testimony at 3.

[26] Statement of Mark A. Peterson Before the Senate Judiciary Committee Hearing of S. 852 "Fairness in Asbestos Injury Resolution Act of 2005," p. 6. April 26, 2005. See Table 3.

[27] Statement of Mark A. Peterson Before the Senate Judiciary Committee Hearing of S. 852 "Fairness in Asbestos Injury Resolution Act of 2005," p. 6. April 26, 2005.

Dr. Peterson concluded his testimony by warning that:

> [U]nder 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.[28]

A lack of necessary up-front funding from the corporate defendants and insurers will necessitate massive borrowing by the Trust Fund to pay pending claims. Using CBO's model for up-front funding needs, it appears that interest payments alone could equal $49 billion, which is 35 percent of the total amount of the Trust Fund.[29] Yet, Dr. Peterson testified that $49 billion in interest is a best case scenario. He believes interest payments will certainly exceed $57 billion and could exceed $76 billion, under 15 different models which simulate claims filings under the Trust Fund.[30] The reality is that more money could go to interest payments than to victims. Why would Congress create such a poorly-designed program that is sure to fail?

3. Resulting additions to the budget deficit and taxpayer burden

Notwithstanding any assurances by the bill's sponsors, it seems clear that S. 852 will require major Federal financial assistance. The bill already allows for massive borrowing from the Federal government, including over $40 billion in the early years. Many observers are skeptical that private borrowers will lend this money to the Trust Fund, and expect that Federal Government will become the principal lender to the Trust Fund.

The borrowing allowed by the bill includes generous terms, including allowing repayment to be made decades later. Yet, because of the unstable funding mechanisms in the bill, there is a strong potential that these funds borrowed from the U.S. government or elsewhere will never be repaid. Moreover, given the strong likelihood of the program's failure—which even the bill's supporters acknowledge is a possibility—Federal taxpayers may absorb costs much higher than even the borrowed amounts.

Congress' recent experience with another national compensation fund is an example of what could go wrong. The Black Lung Fund was designed to compensate coal miners with pneumoconiosis on a no-fault basis. Within a few years, however, the Department of Labor was granting awards in only 8 percent of cases while the Social Security Administration paid 70 percent. Despite the large number of denials, $8 billion in claims was paid during the first five years. Yet, prior predictions had pegged the total cost of the

[28] Statement of Mark A. Peterson Before the Senate Judiciary Committee Hearing of S. 852 "Fairness in Asbestos Injury Resolution Act of 2005," p. 6. April 26, 2005.

[29] Peterson testimony at 3.

[30] Peterson testimony at 3.

fund between $1.5 and $3 billion.[31] The real number of claims necessitated a massive government bailout of tens of billions of dollars.

One of the reasons for this massive failure is that the corporate interests who sought the legislative solution relied upon the Federal program to substantially reduce their own costs, not just to settle claims and to seek finality. This is the same scenario we are facing with asbestos corporate defendants and insurers who are advocating for S. 852.

B. Unanimously adopted medical criteria abandoned

In the many years that this Committee has deliberated on creating an asbestos Trust Fund, no single provision received more broad bipartisan support than the medical criteria agreed upon by this Committee in 2003. These criteria were carefully worked out by Senators Hatch and Leahy with the help from expert medical advisors provided by both businesses and labor unions. When presented to the Committee during its consideration of S. 1125, this bipartisan medical criteria amendment was approved unanimously and hailed by all sides as a major constructive step. This bipartisan criteria amendment became the bedrock of the bill, and in all of the legislative proposals put forth since, the criteria remained unchanged, until now. S. 852 for the first time abandons the bipartisan consensus on medical criteria, leaving these lung cancer victims with no remedy.

1. Exclusion of lung cancer victims with substantial asbestos exposure

While S. 852 purports to establish a compensation fund for all victims of asbestos- induced disease, it excludes tens of thousands of lung cancer victims who have had more than fifteen years of substantial occupational exposure to asbestos. These severely ill individuals were included in previous versions of the trust fund bills, S. 1125, and S. 2290, from the last Congress. Under S. 852, they are denied any compensation from the Trust Fund and barred from pursuing their claims in court.

The consensus medical criteria in S. 1125 recognized three categories of lung cancer victims, all of whom would have been eligible for compensation from the Trust Fund:

1. Malignant Level VII—lung cancer victims who had 15 or more weighted years of exposure to asbestos;
2. Malignant Level VIII—lung cancer victims who had 12 or more weighted years of exposure to asbestos and evidence of bilateral pleural plaques, or bilateral pleural thickening or bilateral pleural calcification; and
3. Malignant Level IX—lung cancer victims who had 10 or more weighted years of exposure to asbestos and evidence of asbestosis.

Asbestos exposure is a probable cause of the lung cancers in all three categories. Each category required evidence of a causal link, with more extensive evidence required at higher levels. Those lung

[31] Peter S. Barth, Professor Emeritus, The University of Connecticut, "Commentary on the Creation of a Fund for Victims of Asbestos Caused Diseases", February 15, 2005. Available at www.usaction.org

cancer victims in Malignant Level VII were required to show a greater number of years of weighted exposure to asbestos since they could not show scarring from non- malignant asbestos disease on their lungs. They were also required to go through an individual case review before a panel of physicians to verify that asbestos was a contributing factor to their disease. Those victims qualifying under Level VII would have received a lower level of compensation than those who could demonstrate either pleural thickening or asbestosis. That was a reasonable way to proceed.

Unfortunately, S. 852 rejects the consensus medical criteria and completely eliminates compensation for the lung cancer victims in the original Malignant Level VII. (S. 852 renumbers the original Level VIII as Level VII, and the original Level IX as Level VIII.) It denies these victims all relief despite the fact that they had very extensive occupational exposure to asbestos over a long period of time. They are excluded despite the testimony of two distinguished medical experts—Dr. Laura Welsh and Dr. Philip Landrigan—that prolonged exposure to asbestos can cause lung cancer even if the victim does not also have markers of nonmalignant asbestos disease. In their testimony,[32] they cited numerous medical authorities supporting their position. They even described their experience treating lung cancer victims whose disease was caused by asbestos but who had neither pleural thickening nor asbestosis.

Dr. Landrigan, a nationally recognized expert in this highly specialized field of occupational medicine, testified at the Committee's April 26, 2005 hearing:

> Fibrosis is not on the critical pathway to the development of lung cancer. Or to say that in plain English, a person does not need to have asbestosis, who has been exposed to asbestos, to develop lung cancer. The development of fibrosis is one pathological process; the development 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 am very much concerned by the elimination of what was previously called Category VII, the person who had 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 * * *[33]

At a later point in the hearing, he reemphasized this point:

> In our very large occupational medicine practice at Mount Sinai, we have seen cases * * * of lung cancer in asbestos workers with many years of substantive exposure

[32] Testimony of Dr. Philip J. Landrigan, MD, Professor of Occupational and Environmental Medicine, The Mount Sinai School of Medicine, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fiar and Efficient System to Resolve Claims of Victims for Bodily Injury Caused By Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005; See also Testimony of Dr. Laura Welch, Medical Director, Center to Protect Worker Rights, Before the Senate Committee on the Judiciary, "Asbestos: The Mixed Dust and FELA Issues," 109th Cong. February 2, 2005, at 8.

[33] Landrigan testimony at 117–119.

> 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 * * * It says right in here, a direct quote from page 6 of this article, "Heavy exposure (to asbestos), in the absence of radiological-diagnosed asbestosis, is sufficient to increase the risk of lung cancer," a direct quote.[34]

While there are some doctors who hold a contrary view, we believe that the clear weight of the evidence supports the conclusion that asbestos can be a substantial contributing factor to lung cancer in persons who were exposed to high levels of asbestos over long periods of time, even if they do not also have visible markings from nonmalignant asbestos disease on their lungs. Certainly, all of those lung cancer victims should not be categorically excluded from seeking compensation under the Trust Fund as a matter of law. The Trust Fund should be authorized to consider their claims for relief and provide appropriate compensation, as it was under S. 1125. In a situation where people are undeniably severely ill and undeniably had 15 or more years of weighted exposure to asbestos, it is terribly unjust to legislatively deny them all opportunity for compensation.

One of the arguments we hear most frequently in favor of creating a Trust Fund is that in the current system, too much money goes to people who are not really sick and too little goes to those who are seriously ill. Lung cancer victims who have years of exposure to asbestos are the ones who are seriously ill. They are the ones this bill is supposed to be helping. Yet, they are being completely excluded.

The rationale given by those who oppose inclusion of the Level VII lung cancer victims is that their disease is more likely to have been caused by smoking than by asbestos exposure. This argument does not withstand scrutiny.

First, all Level VII lung cancer victims are removed from eligibility under the Trust Fund, even those who were nonsmokers. Victims with 15 or more weighted years of exposure to asbestos who had never smoked are denied compensation by S. 852. Their ineligibility obviously cannot be justified based on the relationship between asbestos and smoking.

Second, Dr. Landrigan testified that smokers who have substantial exposure to asbestos have 55 times the background risk of developing lung cancer, while smokers who were not exposed to asbestos have 10 times the background risk of developing lung cancer.[35] This relationship is well-established. Similar findings are

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[34] Landrigan testimony at 177.

[35] Statement of Dr. Philip J. Landrigan, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily In-

documented in the Surgeon General's 1986 Report on Cancer in the Workplace, which determined that smokers with asbestos exposure have a 50-fold increased risk of developing lung cancer, while the risk from smoking alone was only ten times.[36] Clearly, the asbestos exposure makes a huge difference.

There is a powerful synergistic effect between asbestos and tobacco in the causation of lung cancer. Both are substantial contributing factors to the disease. We agree that a lung cancer victim with substantial asbestos exposure who smoked should receive less compensation from the Trust Fund than a nonsmoker with lung cancer. That principle appears throughout the bill. But smoking is not a valid reason to exclude the victim from all compensation, when he or she also had substantial asbestos exposure.

Asbestos and tobacco companies are analogous to joint tortfeasors. Each is partly responsible and each should pay a proportionate share of the compensation. The involvement of one tortfeasor does not absolve the other tortfeasor from all responsibility. Without prolonged exposure to asbestos, the smoker would have been far less likely to contract lung cancer.

The real reason for eliminating the Level VII lung cancer victims was not medical science, it was money. Precisely because there are tens of thousands of lung cancer victims in this category, the cost of compensating them is high. The inadequate scope of this bill was dictated by how much money the corporate defendants and insurers were willing to pay. Instead of first determining the cost of fairly compensating all the seriously ill victims of asbestos-induced disease and then setting the size of the Trust Fund at a level that would meet the need, the reverse was done. The $140 billion size of the Trust Fund was negotiated with the business community first, and then the medical criteria were narrowed to fit within the available funding. The result is that many deserving victims—including tens of thousands of lung cancer victims—are denied compensation.

During Committee consideration, Senator Kennedy offered three amendments to address this glaring deficiency in the bill. The first would have restored the eligibility for compensation of lung cancer victims with fifteen or more weighted years of exposure to asbestos.

When that proposal was rejected, Senator Kennedy offered a second amendment that would have provided for a study by the Institute of Medicine "to determine whether there is a causal link between asbestos exposure and lung cancer for individuals who have had substantial exposure to asbestos but have no evidence of bilateral pleural disease or of asbestosis." If the IOM report determined there was substantial scientific evidence demonstrating a causal relationship between asbestos exposure and these lung cancers, the Administrator of the Trust Fund was directed to establish an additional eligible disease category to compensate them.

The Committee also rejected the proposal for an IOM study, vividly illustrating that the reason for excluding the lung cancer vic-

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jury Caused by Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005, at 2.

[36] "The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace," Report of the Surgeon General, U.S. Department of Health and Human Services, at x. (1985)

tims in the original Malignant Level VII from the Trust Fund was not medical but monetary. If the majority of the Committee really wanted the best scientific determination of whether a causal link exists between asbestos exposure and these lung cancers, they certainly would have approved this amendment. The amendment's defeat shows that the prime motivation of the supporters is to keep the cost of claims against the Trust Fund below the arbitrary financial ceiling that had already been negotiated with the corporate defendant and insurers who want this bill.

Senator Kennedy's third amendment would have preserved the right of these lung cancer victims to seek compensation through the judicial system since they were being excluded from the Trust Fund. This, too, was rejected. In essence, these severely ill victims who have had very substantial exposure to asbestos are being told to suffer in a legally imposed silence with no recourse whatsoever.

If S. 852 is not going to provide compensation for these lung cancer victims under the Trust Fund; justice requires, at the very least, that the bill not foreclose their right to seek compensation in the courts. They have that right today, and their cases have real value.

When the victim has had substantial asbestos exposure and was not a smoker, the likelihood that the lung cancer was caused by asbestos is very high. When the victim has had substantial asbestos exposure and also smoked, the likelihood is that both contributed to the lung cancer. The interaction of asbestos exposure and smoking greatly increases the probability of lung cancer beyond the risk posed by either substance individually.

As noted earlier, a smoker who was never exposed to asbestos has 10 times the background risk of developing lung cancer. A smoker who had substantial exposure to asbestos has 55 times the background risk of developing lung cancer.[37] Clearly, asbestos exposure makes a very substantial difference. The two substances are, in essence, joint tortfeasors in causing the disease. Those responsible for the asbestos exposure are partially liable for the lung cancer, and are obligated to compensate the victim accordingly.

S. 852 as written would take away the right of those victims to bring their cases to court, while providing them no right to recover from the Trust Fund. Congress has the right to substitute one remedy for another. But, it does not have the right to arbitrarily foreclose the existing remedy and provide no new remedy in exchange. To do so violates fundamental principles of due process. It is not only morally wrong, it is legally wrong.

If the Trust Fund does not provide a remedy for a certain class of asbestos victims, then it cannot be the exclusive remedy for that category of claim. Victims who are categorically excluded from compensation under the Trust Fund cannot be precluded from seeking compensation in the judicial system. That principle is well established.

Similar issues have arisen in a number of states regarding the scope of their workers' compensation statutes. Two recent state supreme court decisions illustrate this principle. The Oregon Supreme Court addressed this issue in the case of *Smothers* v. *Gresh-*

[37] Landrigan testimony at 2.

am Transfer, Inc., 332 Ore. 83 (2001). The court ruled that a person with work-related injuries that were not compensable under the state's workers' compensation laws had a right to bring a civil action in the courts. Even though the statute provided that the workers compensation system was to be the exclusive remedy for work-related injuries, it could not deprive an injured worker of his remedy in court when it was not providing an alternative remedy for that worker in the administrative system.

The Virginia Supreme Court came to a similar conclusion in *Adams* v. *Alliant Techsystems Inc.,* 261 Va 594 (2001). It held that the Virginia Workers' Compensation Act does not bar a plaintiff from bringing a common-law cause of action against his employer to recover damages for hearing loss resulting from cumulative trauma when such a hearing loss was not a compensable injury or disease under the Act.

The same principle applies here. Lung cancer victims with substantial exposure to asbestos who are categorically ineligible for compensation under the Trust Fund should not be precluded from seeking a remedy in the courts. If these victims can prove a causal link between asbestos exposure and their disease, they should be able to receive compensation through the courts in the future, just as they can today. That is only fair. Due process and fundamental principles of justice require nothing less.

Raising standard to "substantial contributing factor"

A second major change in the consensus medical criteria made by this bill relates to the standard of proof which victims must meet to receive any compensation. Each of the medical criteria has been changed from S. 1125 to require the worker to prove that asbestos was a "substantial contributing factor" to his disease, rather than "a contributing factor." This will raise the bar even higher for injured workers.

It is a significant increase in the burden they must overcome to qualify under the Trust Fund. There is no question that the change was made to make it harder for victims to receive compensation. Rather than having to show that asbestos exposure was "a contributing factor" to their illness, victims will now have to address the relative impact of asbestos and other potential factors. That hurdle will be difficult for many of them.

The original standard requiring that asbestos be "a contributing factor" has a history. It is the proof standard used in most state worker compensation laws involving exposure to toxic substances. "Workers' Compensation Policy Review," a respected journal in this area of law, stated in an article examining statutory compensability standards:

> Under traditional standards, for either an accidental injury or an occupational disease, a workers' compensation claim is compensable if the work contributed to or aggravated a preexisting condition. That is, the general rule has been that the work does not have to be the sole, major, or

> primary cause of a disability in order for the worker to receive workers' compensation benefits.[38]

That is still the majority rule in state workers' compensation laws and it is the standard we should enact for the Trust Fund in S. 852.

Even in litigation, the victim only needs to prove that asbestos was a contributing factor to his disease. In a unanimous decision rendered just last year, the Georgia Supreme Court spoke to exactly this issue. The court considered and rejected the concept of elevating the standard of proof in asbestos litigation from "contributing factor" to "substantial contributing factor." The court stated:

> It would be a departure from (tort law) analysis to add the requirement that the causal connection must be substantial * * * Once the term "substantial factor" is employed in the general negligence law vocabulary, there is the danger that it will be used not only to describe a general approach to the legal cause issue, but will turn into a separate and independent hurdle that the plaintiff will have to overcome in addition to the standard elements of a claim of negligence. So, too, has there been great difficulty and disparity in courts' definition of "substantial factor * * *
>
> Thus, refusing to endorse the additional hurdle that each individual tortfeasor's conduct must constitute a "substantial" contributing factor in the plaintiff's injury in order to be considered a proximate cause thereof will neither subject defendants like John Crane to unjust liability nor open the floodgates of asbestos litigation.[39]

By adding "substantial," the current language in S. 852 goes beyond what would be required to establish proximate cause in a court case. It would create, in the court's words, "a separate and independent hurdle" that victims of asbestos-induced disease would have to overcome. Certainly, it should not be harder for a victim to receive compensation from the Trust Fund in a supposedly no-fault system than it currently is in an adversarial court system. That is exactly what this bill will do—set a more burdensome standard to recover from the Trust Fund than to recover in the courts. That would go against the entire concept of a Trust Fund. It is unfair and unreasonable.

The bill should not be erecting additional barriers to compensation under the Trust Fund. This is supposed to be a no-fault system. It is supposedly minimizing the need for each claimant to have an attorney, making the system non-adversarial. This language change—requiring proof of "substantiality"—will make the process of qualifying for compensation much more complex than it should. It will create serious proof problems in many cases. Many victims will need to obtain legal representation to overcome this additional burden.

The medical criteria in this bill retain the requirement from S. 1125 that there be proof that the asbestos exposure was substantial. Many of the disease categories require a minimum number of

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[38] Sara T. Harmon, "Statutory Compensability Standards." Workers' Compensation Policy Review, 1, 2 (2001): 15–28, at 15.

[39] *John Crane, Inc.* v. *Jones,* 604 SE 2d 822, 825 (2004).

weighted years of exposure before the worker can even apply for compensation. But requiring substantial exposure is not the same as requiring that the exposure be a substantial contributing factor.

Under the terms of the Trust Fund, the Administrator will know the victim is seriously ill, he had substantial exposure to asbestos, and his medical condition is consistent with asbestos- induced disease. That should be sufficient. Creating an additional hurdle for seriously ill workers to jump is inconsistent with the stated goals of the bill.

During Committee consideration, Senator Kennedy offered an amendment to restore the "contributing factor" standard of proof contained in the consensus medical criteria unanimously adopted by the Committee in 2003. Unfortunately, it was defeated. The supporters of this bill seem intent on erecting new and difficult hurdles for injured claimants. That is wrong.

3. Requirement for bilateral impairment not based on science

In another example of how S. 852 is not based on sound medical science but rather on economic expediency, the bill's medical criteria include a requirement of "bilateralism" that makes no sense.

The bill is replete with references to the need for "bilateral" pleural plaques, "bilateral" thickening, "bilateral" calcification, and "both lower lung zones" but nowhere in the bill is there an explanation for why both lungs of a victim need to be affected with asbestos-related injury. Neither can the sponsors of S. 852 explain why such a requirement is in the bill.

On the contrary, medical experts have indicated that there is no medical or scientific basis for requiring both lungs to be impaired before a claimant can qualify under this bill. For example, Dr. Philip Landrigan of the Mount Sinai School of Medicine who testified before the Committee on April 26, 2005, stated:

> 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.[40]

Dr. Landrigan also testified that "requiring that the damage be bilateral, has no basis in biology or medicine."[41] The only possible reason for including this is to make the medical criteria as tough as possible in order to limit the number of claimants who may qualify under the bill.

On numerous occasions throughout the hearing and Committee consideration of the bill, Senator Durbin pointed out this illogical requirement, yet the language of the bill as passed by the Committee still contains this flaw.

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[40] Dr. Philip J. Landrigan, April 26, 2005 testimony before the United States Senate Committee on the Judiciary, pp. 3–4.

[41] Id at p. 4.

4. Other problems

Under the revised medical criteria, asbestos-related cancers of the larynx, esophagus, stomach and colon may also receive no compensation. Each claim for such cancers must be reviewed by a physician's panel which may deny compensation. Based on a future report of the Institute of Medicine, compensation for these cancers may be completely eliminated.

Although the Committee has narrowed the medical criteria to prevent victims from receiving compensation, where the medical criteria are outdated and the scientific consensus of the American Thoracic Society suggests the criteria should be broadened, the Committee refused to do so. Currently, the criteria require 5 years of occupational exposure to qualify for non- malignant compensation. American Thoracic Society's guidelines currently provide that 5 years occupational exposure is not necessary for a diagnosis of non-malignant asbestos disease.[42] In this regard, the medical criteria are too stringent and should be loosened.

Another problem with the medical criteria is that some years of exposure are discounted and count for less than other years of exposure. Workers exposed after 1986 are required, as a practical matter, to have decades of exposure to asbestos before they can qualify for any compensation. For instance, "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 in the bill."[43] Few workers will be able to show such long exposure, and this "discounting" of "weighted years" again seems an effort simply to restrict compensation to individuals, rather than rely on hard science.[44]

C. Requirement of occupational exposure

Initially, S. 852 was crafted to compensate only those individuals who were clearly exposed to asbestos in the workplace. Reluctantly, the spouses and children of these workers, if they could prove a link to occupational exposure, were given some limited rights of recovery under the bill if they become ill. Then, the residents of Libby, Montana, were afforded special provisions under this bill. But, unfortunately, thousands of others who may develop asbestos-related diseases have only been provided a weak study which will determine whether they can recover under S. 852. Again, the financial concerns of the defendants are overriding common sense and fairness.

Why should people who have resided near asbestos processing plants for decades, and who have reported clouds of asbestos dust in their neighborhoods, or the use of donated asbestos- laden products in their yards or schools, be denied any right of recovery under the Trust Fund or through court? We believe that is unjust.

These are individuals who may not have worked at these plants, but who lived near places that received 10,000 tons or more of as-

[42] "Diagnosis and Initial Management of Non-malignant Diseases Related to Asbestos," American Thoracic Society, published in American Journal of Respiratory Critical Care Medicine, Vol. 170, pp. 691–715, 2004.

[43] Landrigan testimony at 3.

[44] Landrigan testimony at 3.

bestos materials from the Libby, Montana, mine over the past few decades. Now, they have been told they will only be able to pursue a claim against this criminally-indicted corporation if future air sampling shows asbestos exposure levels equal to those in Libby, Montana. In other words, Congress is seeking to set up an impossible standard—especially since most of these plants have been closed for a decade or more, and the Libby contamination level is far above the level that can cause asbestos diseases. Some individuals in these communities have already developed asbestos-related diseases without working in these plants, and they are barred by this bill from seeking redress in court.

We believe fairness dictates that the residents of these other communities, which received 10,000 tons or more of asbestos or more of asbestos-containing material from Libby, Montana, should be afforded the same rights as those residing in Libby.

The bill provides no rational basis for making the distinction between the residents of the following communities and residents of Libby: Beltsville, MD; Dallas, TX; Dearborn, MI; Denver, CO; Easthampton, MA; Edgewater, NJ; Ellwood City, PA; Glendale, AZ; Honolulu, HI; Los Angeles, CA; Marysville, OH; Minneapolis, MN; Minot, ND; New Castle, PA; New Orleans, LA; Newark, CA; Omaha, NE; Phoenix, AZ; Portland, OR; Portland, OR; Santa Ana, CA; Spokane, WA; St. Louis, MO; Tampa, FL; Trenton, NJ; Weedsport, NY; West Chicago, IL; Wilder, KY.[45]

D. Fairness among contributors

Limiting funding to $140 billion creates a financial windfall for those corporations most vocally advocating for the Trust Fund. For example, Tier 1 defendants with pending bankruptcies would pay $25.9 billion to asbestos victims if their bankruptcies were completed; yet, under S. 852 they will pay only $5.6 billion. Similarly, a handful of Fortune 500 corporations will save billions under the Trust Fund, while many small businesses and others with limited asbestos liability exposure will pay more than their fair share.[46]

Based on the proposed payment Tiers in the bill, many medium and small businesses already have determined that the bill will impose higher costs on them than what they currently endure in the court system. Many of these businesses had adequately insured themselves against any asbestos liabilities. However, S. 852 will not allow the crediting of such insurance. Consequently, these entities will lose their insurance coverage under the bill without any compensation from the government, and in turn, will have to meet

[45] See Environmental working group, "Asbestos Hot Sports," April 26, 2005, available at *www/ewg.org/issues/asbestos/20050426/hotspots.php.*

[46] As a matter of simple mathematics and the definitions in S. 852, every company in Tiers 3–6 would be required to pay more over the next 30 years (and without the benefit of insurance to cover the claims) than each such company has paid over its entire history in asbestos litigation. Some Tier 3 and Tier 4 companies will pay into the proposed National Fund more than six times their historical expenditures in asbestos litigation, while many Tier 1 and Tier 2 companies who have much greater historical liability for asbestos claims will pay only a fraction of their historical expenditures. See Sections 201–203.

One reason these lower tiers are paying more into the Fund than they (or their insurers on their behalf) have paid historically is because other, mostly larger corporations are paying less. Many of the Tier 2 companies have historic asbestos expenditure in excess of $100 million per year. These companies are reducing their liability from paying out $50–$200 million (or more) per company per year in the court system to no more than $27.5 million per year under the Trust.

the assessments that will be imposed on them to finance the Trust Fund.

The constitutionality of this approach is expected to be a heavily litigated issue that may take years to resolve. Many of these businesses perceive the evisceration of their insurance premiums without due compensation as a Fifth Amendment Property Takings violation, and the new assessments as a tax on their businesses.

In addition, S. 852 lumps asbestos "premises" defendants into the same contribution tiers and subtiers as asbestos "products" defendants. These two groups are treated as if there were no difference between them, even though the level of culpability for a company that manufactured asbestos is clearly higher than for one that, for example, merely had a boiler wrapped in asbestos on its premises.

The Coalition for Asbestos Reform is a broad coalition of businesses and insurers who oppose S. 852. This group, which includes many small and medium businesses, has written to Chairman Specter on several occasions expressing their concerns about the bill. In a letter dated January 3, 2005, the group focused on two key weaknesses of the bill:

> *The Allocation of Payment Obligations on Defendant Participants:* As presently drafted, the Trust funding arrangement would impose payment obligations on our companies that would substantially exceed the asbestos-related costs we reasonably anticipate under the existing tort system, while simultaneously stripping many of us of our insurance coverage. Each of us can demonstrate that we would fare better under the existing tort and judicial system than under the proposed funding mechanism. Indeed, the proposed arrangement would impose inequitably large obligations on companies with limited asbestos-related liabilities. For some smaller companies, such obligations would mean bankruptcy.
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> *The Separation of Companies From Their Insurance Coverage:* The proposed Trust funding arrangement would eliminate many companies' rights to access long-held insurance assets; in some cases such rights would be eliminated even though the companies have insurance sufficient to address their current and projected asbestos liabilities. The abrogation of these insurance contracts for which premiums have been paid—and the transfer of those assets to the Trust—may well represent an unconstitutional taking.[47]

In an April 6, 2005, letter to Chairman Specter, the group reiterated its concerns about the cost burdens on small and medium-sized businesses:

> *Manifestly Unfair Allocation Formula:* The formula for assigning mandatory payments is almost certain to be the direct cause of a number of bankruptcy filings for otherwise financially sound companies. Each version of the

[47] Letter from Coalition for Asbestos Reform to Senator Arlen Specter, January 3, 2005, at 1 (emphasis added).

> FAIR Act has increased the payment burden on defendant companies, and has based each company's ability to pay on its historic asbestos defense costs. These allocations—across all tiers of the FAIR Act—fail to recognize that many defendant companies have paid only insurance premiums related to asbestos defense, and would be obligated to make payments to the Trust Fund that far exceed their anticipated liabilities under the current tort system. By shifting the burden of paying for asbestos claims from the companies with the greatest asbestos exposure to a host of other businesses—including many small and medium sized entities—the bill creates a substantial likelihood that a cascading series of defaults will rapidly lead to the insolvency of the Trust Fund * * *[48]

Moreover, if the Trust Fund does become insolvent as many believe it will,[49] employers will face a return to the court system without the benefit of their insurance coverage. Under the bill, they must continue to make contributions to the Trust Fund for the final twenty-plus years to pay off the bonds. Since the post-sunset court claims will be paid out of pocket, a torrent of bankruptcies will surely follow.

E. A risky startup

The funding shortfall is most acute in the early years of the Trust Fund when the 400,000 to 500,000 pending claims will be immediately transferred to the Trust Fund for payment.[50] Rather than make defendants and insurers actually pay the costs of the Trust Funds' early years, S. 852 relies on borrowing against the Trust Fund's future assets to pay present claims. Interest costs generated by this early borrowing will be huge, representing a significant reduction in the monies available to pay claims.[51] We are skeptical that private borrowers will lend this money to the Trust Fund, and expect the Federal government will become the principal lender to the Trust Fund.

This concern about the Trust Fund's viability during the start up was raised at the Committee's April 26, 2005, hearing by Professor Eric Green of Boston University Law School, who serves as a court-appointed Legal Representative for future asbestos claimants in four asbestos-related bankruptcy proceedings and as a Special Master in several major state and federal court asbestos cases:

> 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 * * * 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 con-

[48] Letter from Coalition for Asbestos Reform to Senator Arlen Specter, April 6, 2005, at 1.
[49] See Peterson testimony at 3, 5.
[50] See Peterson testimony at 3, 5. Note: On October 2, 2003, the Congressional Budget Office estimated there were 300,000 claims pending, without counting claims arising in 2003 and 2004.
[51] See Peterson testimony at 3, 5.

tributions—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 bill. 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.[52]

F. Lack of transparency

S. 852 continues to lack transparency regarding who the participants will be and what they will be required to contribute. While this bill, in some areas, such as the medical criteria and the claims values, is very specific, in other areas, such as funding requirements, it remains frustratingly vague. In fact, the bill does not require a specific determination of the amounts to be paid, by whom, or when, until after the Trust Fund is up and running.

This order of events is clearly backward. As Senators charged with understanding and voting on this bill, we need to know—not just estimate, assume, or guess—that this Trust Fund will have the assets to work before it forcibly removes people from the courts where they currently have the right to seek compensation.

Because asbestos victims will be losing their common law right to a trial by their peers, they at least deserve to know that the Trust Fund will have adequate funds to compensate them. How can we even begin to assure them of this fact if we do not even know how much various companies are really going to pay into the Trust Fund?

When we repeatedly asked for this crucial information, we did not receive it. For this reason, Senator Biden offered an amendment in Committee to require the application of the transparency provisions already in the bill—which determine who is paying how much, and therefore whether there really will be as much money as is currently assumed—before the Trust Fund goes into effect.

The amendment would have ensured that there is a responsible, viable funding plan in place and that the Trust Fund will really work. After all, who would start a $140 billion business without a specific, viable financial plan? Unfortunately, proponents of the bill

[52] Testimony of Eric Green, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005, at 9–10.

refused to acknowledge this weakness in the bill, and defeated the amendment.

The bill would bring within its ambit thousands of small companies that are not even aware they will be expected to pay into the Trust Fund. A number of companies have already announced their plans to sue to prevent any assessments or taking of their property and resources. The challenges by these businesses alone could keep the program mired in litigation for several years.

Unfortunately, the proposed formulas for determining the amounts that defendant corporations and insurance companies will pay provide no guarantee that the payments will produce the proposed $140 billion in overall funding, or the annual contributions of $5 billion. In fact, the payment formulas for insurance companies will not even be determined until after enactment of the bill. Nor are there sufficient enforcement provisions in the Act to ensure the parties contribute their required sums.

G. A sunset in name only

A guiding principle for us in considering asbestos litigation reform bill has always been to make sure that victims are treated as well as possible given the constraints of a Trust Fund system. A second guiding principle has been that, if the Trust Fund fails to operate as promised, the victims' rights should be restored to their status under the common law system; they should exit a failed system no worse off than they entered it.

Supporters of this bill have recited the "need for certainty," that is, the need to know that (1) they will pay a set amount of money into the Trust Fund, and (2) they will not be subject to the vagaries of litigation down the road. We believe that asbestos victims are entitled to the same certainty as corporations and insurers.

It is for this reason that Senator Biden offered an amendment during the Committee's deliberation of S. 1125 in the last Congress to create a sunset of the Trust Fund if it ran out of money. That amendment, which passed the Committee with the largest bipartisan majority of any amendment during that markup session, provided that if the Trust Fund ever failed to pay 95 percent of its claims value, or 95 percent of its claimants, the Trust Fund would sunset and victims would return to the court system from which they had been removed.

S. 852 includes a "sunset" provision, but it is a sunset in name only. Under the new provision, if the Administrator of the Trust Fund thinks that there will be a shortfall of monies in the Trust Fund, he—an individual with a vested interested in maintaining the solvency of Trust Fund—can recommend any number of measures to salvage the Trust Fund. These include lowering the award values or making the medical criteria even more stringent. Under either scenario, victims of asbestos disease would do even worse under the revised Trust Fund than they would under the law as enacted.

During this year's consideration in Committee, Senator Biden offered an amendment to ensure that the Administrator could not save the solvency of the Trust Fund on the backs of the victims. Specifically, the Administrator would have been limited to two options: (1) sunsetting the Trust Fund to permit victims to return to

court; or (2) raising more money from those making contributions to the Trust Fund, so the program could remain operational.

In addition, the Biden amendment would have required not merely a vague analysis of the Trust Fund by the Administrator; it would have required the Administrator to certify his findings, not unlike the requirements of corporate executives under the Sarbanes-Oxley corporate accountability law and similar laws.

Also, while the sunset in the bill would return cases only to federal court, the state court where the exposure occurred, or the state court where the claimant resides—a provision far more restrictive than the current laws allow, Senator Biden's amendment would have permitted a return to the state court where the defendant is headquartered or has its principal place of business, or the state court of any state where the defendant has at least 10 percent of its employees or conducts 10 percent of its sales.

Thus, this year's Biden sunset amendment was a far cry from what this Committee adopted two years ago. It was significantly weaker, a compromise. Yet, it was still defeated.

The key concept adopted by the Committee in the last Congress—that the Trust Fund must terminate and permit victims to return to court if it does not pay substantially all of its claims—has been abandoned. We believe Chairman Specter was correct two years ago, when he spoke forcefully in favor of a mandatory, self-executing sunset:

> We are taking away a right to jury trial, which is very substantial, it is a fundamental right, and I think in the interest of the workers who are injured and not being compensated that it is a tough balancing act * * * But I want to be sure, Mr. Chairman, that if the companies do not put up the money or whatever point the Trust is out of money and there is no more money to be collected by injured people, at least at that stage, they have access to the courts.
>
> Unfortunately, under the current sunset formula, claimants are likely to be stuck in a faltering system while the Administrator seeks to stiffen the medical criteria and/or reduce the compensation for claimants. Since Congress will have to approve these recommendations, we had better be prepared to re-open this debate in the next several years. Maybe then my colleagues will see the wisdom of encouraging increased contributions to the Fund by including a real sunset provision in the Act.[53]

In addition, the chaos that would result if there was, in fact, a sunset and assets had to be redistributed back to the current bankruptcy trusts is not addressed by the bill. Given that these existing trusts would have been completely shutdown (assuming the bill survived constitutional challenge) it would take years to reconstitute them.

As Professor Green testified:

> 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

[53] S. Rep. No. 109–118, at 198 (2003)

> 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 * * *
>
> 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.[54]

H. Inadequate claims values

The principal argument of supporters, that S. 852 represents an improvement over S. 1125, rests on the idea that claims values have been increased and subrogation has been prohibited to preserve the value of awards for the victims. These are certainly positive steps. However, many of the compensation values, especially for the most seriously ill victims, are still too low. The victims in many cases will receive less than they would get in court today, even after attorney's fees are deducted.[55]

Further, new medical treatments for mesothelioma are now being implemented. These treatments are very expensive. As medical costs for mesothelioma victims increase, their awards under the Trust Fund have not risen proportionately. An amendment to provide medical benefits to mesothelioma victims, similar to the medical benefits provided to successful claimants under the Energy Employees Occupational Illness Compensation Program Act ("EEOICPA"), to ensure that treatment expenses would not reduce their awards, was not acted on by the Committee.

Other efforts to allow for extraordinary medical or family expenses to be considered, were also rejected. The only concession has been to authorize the Administrator to consider increasing compensation to younger mesothelioma victims with dependants, but at the expense of older victims. But even this is not guaranteed under S. 852, nor are there additional funds provided for to make such payments.

In addition, the court system currently compensates workers with substantial asbestos exposure and lung cancer regardless of whether the patient also has nonmalignant disease. The Trust

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[54] Statement of Eric Green, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005, at 11–12.

[55] It bears noting, however, that not all values have increased. The consensus value included in draft bill for Category II with $35,000 but was inexplicitly lowered to $25,000 in S. 852. In addition, while the claims value for mesothelioma victims has been increased by a meager $25,000 from S. 2290, in real terms, that is a reduction in value. See *http://www.aier.org/cgi-aier/colcalculator.cgi*. Thus, the lowest and highest categories of claims values have been reduced by S. 852 as compared to earlier versions of this bill, and they are far below what victims would receive in the court system.

Fund will not. Our efforts to reinstate compensation for this group of asbestos victims were rejected in Committee. Since one of the major justifications for asbestos reform is to provide more money to those who are truly sick, we believe there is no justification for denying compensation to victims with lung cancer or other diseases currently being compensated through the courts.

I. Replacing one adversarial process with another

S. 1125 and S. 2290 from the last Congress aimed to streamline the administrative process, in order for victims to recover compensation more easily. Both bills relied on medical presumptions and simplified proof of exposure to facilitate recovery. However, S. 852 reintroduces an adversarial environment by making proof of claims more difficult and by removing some presumptions favoring compensation.

As discussed above, whereas previous bill required victims to prove that asbestos was a "contributing factor" to their disease, under S. 852 victims are now required to prove that asbestos was a "substantial contributing factor" to their disease. In many instances, however, it is not possible to gauge the relative contribution of different environmental factors. This is a much higher burden than victims have to meet in court.

On top of the new and difficult burden, S. 852 requires claimants to, among other things, demonstrate substantial occupational exposure and employment history; catalog all collateral source payments; set forth evidence to support an assertion of non-smoking, and even in the case of exigent claimants, identify each appropriate defendant as if the claim could be heard in court, consistent with Rule 11 standards for attorneys under the Federal Rules of Civil Procedure.

One of the justifications for setting up an administrative system has been to simplify and ease the burden of proof for victims, as a tradeoff for giving up their common law rights. As the administrative burden rises for victims, the tradeoff becomes less fair.

While S. 852 has made the claims process more adversarial and has layered on more review by the Physician's Panel than previous iterations, it has simultaneously made it more difficult for victims to engage professional advocates to plead their case. The bill imposes a severe cap on fees for victims' attorneys, 5 percent of the amount awarded to claimants. This will complicate, if not make it impossible, for many victims to engage quality attorneys to aid them in presenting complex claims both before the Administrator and before the Physician's Panel, and challenging adverse decisions, including low awards or total rejections.

Even United States District Judge Edward Becker—the chief architect of the bill—in his January 11, 2005, testimony before the Judiciary Committee, warned against severe attorneys' fee caps, on the grounds that Congress would hinder the ability of persons to obtain effective legal counsel.[56]

In contrast, the bill contains no caps on the attorneys for the corporate defendants or insurers. Thus, these entities will be free to

[56] Testimony of Judge Edward Becker, Before the Senate Committee on the Judiciary, In the Matter of: Fairness in Asbestos Injury Resolution Act, 109th Cong., January 11, 2004, at 14–15.

challenge any adverse decisions and the constitutionality of the program without such restrictions.

J. Collateral source rule not fair to victims

S. 852 requires any payment made to a claimant from the Trust Fund be reduced by the amount of any "collateral source" compensation the claimant may have received from previous court proceedings or settlements relating to asbestos injuries. It is fair and reasonable to offset the sum that a claimant has actually received from other sources for asbestos injury, in order to avoid a situation of "double dipping" with the Trust Fund. But it is completely unfair to offset from the claimant money that never ended up in the claimant's pocket.

It is a standard practice in litigation for jury awards or settlements to often include costs and expenses in addition to attorney's fees as part of the total amount of money awarded to the plaintiff. However, these extra costs, fees, and expenses are not for the victim but for his legal representatives. If such items are included under the bill's collateral source rule, then it has the effect of reducing the amount of payment provided by the Trust Fund to the victim dollar for dollar for amounts that the victim never received.

During Committee consideration, Senator Durbin offered an amendment that would have corrected this problem by amending the definition of collateral source compensation in the bill to make it clear that the calculation of collateral source offset is based on "net" compensation, not "gross." That way, an asbestos victim who loses his right to a jury trial and is forced into making a claim with the Trust Fund is not penalized further by having additional amounts offset from a claim payment that he never received.

Unfortunately, in another example where the interests of the corporate defendants trumped the interests of asbestos victims, the Committee rejected this amendment. Senator Durbin argued that "if we are going to have a fair set-off, it would be a set-off of the money actually received by the victim * * * as opposed to the gross amount which was subject to attorneys' fees and costs." But Chairman Specter asserted that, "there is really the companion issue of how much the defendants ought to be credited."[57]

K. Unfair treatment of asbestos victims with pending or settled cases

Under S. 852, the victims of asbestos disease are asked to bear the burden of the multi-year delay anticipated before the Trust Fund becomes operational and ready to pay victims. It will take time to promulgate rules and to set up the elaborate bureaucratic structure created by the bill. It will take time to determine which companies are obligated to pay into the Trust Fund and how much each one must contribute. It will take time for the insurance industry to develop a formula apportioning its funding obligation amongst the individual insurers. Finally, it will take a great deal of time to resolve the myriad of legal challenges that will inevitably confront this bill should it be enacted.

[57] Executive Business Meeting, Senate Committee on the Judiciary, May 25, 2005, pp 8–9.

Rather than permitting asbestos claims to continue to be adjudicated in the courts until the Trust Fund is able to process and pay them, the bill imposes an immediate two year stay on nearly all asbestos personal injury cases. According to CBO estimates, at least 60,000 to 80,000 claimants with serious asbestos disease will be subject to this two-year stay.[58] This will create an extreme hardship on many seriously ill victims with cases already pending in the courts. With their health deteriorating and unable to work, medical bills and other expenses are steadily mounting. It is wrong to put them into a two-year legal limbo.

Even the sickest victims—those with less than a year to live—will see their cases halted should S. 852 become law. While the stay imposed on them is for nine months, rather than two years, it can still have a devastating impact.

There is no compelling reason why all asbestos cases should be stayed as soon as the bill passes. The provision is the result of the insistent demands of corporate defendants and insurers who want a two year payment holiday. Yet, S. 1125, the bill approved by the Committee in the last Congress, did not give in to this unreasonable demand by the business community. It recognized the principle that the courts should remain available to asbestos victims until another system of compensation is in place and ready to process claims. It expressly provided that cases in the court system could continue uninterrupted until the Administrator certified that the Trust Fund was operational. That is the right standard, and the Committee was wrong to abandon it in S. 852.

1. Even exigent cases are subject to a stay

Under the bill as drafted, even exigent health claims currently pending in the courts will be automatically stayed for nine months as of the date of enactment. An exigent health claim is one in which the victim has been diagnosed "as being terminally ill from an asbestos-related illness and having a life expectancy of less than one year."

By definition, these cases all involve people who have less than a year to live due to mesothelioma or some other disease caused by asbestos exposure. Their cases would all be stayed for nine months. Nine months is an eternity for someone with less than a year to live.

The stay language is written so broadly that it would stop all forward movement of a case in the court system. A trial about to begin would be halted. An appellate ruling about to be issued would be barred. Even the deposition of a dying witness could not be taken to preserve his testimony. The stay would deprive victims with less than a year to live of their last chance at a day in court. We cannot believe that the authors of this bill intended such a harsh result. At the markup, several members expressed deep concern about this provision.

[58] Statement of Margaret Seminario, Director, Safety and Health Department, American Federation Labor and Congress of Industrial Organizations, Before the Senate Committee on the Judiciary, "Hearing on a Bill to Create a Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes," 109th Cong., April 26, 2005, at 3.

The bill does contain language allowing an "offer of judgment" to be made during the period of the stay in the hope of producing a settlement. However, this provision is unlikely to resolve many cases because it requires the agreement of the defendants. There is little incentive for defendants to agree to a settlement when the case has been stayed. Those who have tried cases know that it is only the imminence of judicial action which produces a settlement in most cases. Delay is the asbestos defendant's best ally; and under this bill, the case is delayed for at least nine months and may never be allowed to resume if the Trust Fund becomes operational. If, however, these exigent cases were not stayed, and judicial proceedings could continue, there would be far more likelihood of cases settling under the offer of judgment process.

We strongly believe that, at a minimum, all exigent cases should be exempted from the automatic stay in the bill. Victims with less than a year to live certainly should be allowed to continue their cases in court uninterrupted until the Trust Fund becomes operational. Their ability to recover compensation in court should not be halted until they are able to receive compensation from the Trust Fund. It is particularly unfair to leave these dying victims in a legal limbo. For them, the old adage is especially true—justice delayed is justice denied.

Under the bill, defendants would receive a credit against what they must contribute to the Trust Fund for whatever payments they make to these dying victims; so they would not be "paying twice," as some have claimed.

Allowing the exigent cases to go forward in the courts without interruption is a matter of simple fairness. Staying the cases of victims who have less than a year to live is bureaucratic insensitivity at its worst. Most of these victims will not live to see the doors of the Trust Fund open. At the markup, an amendment was offered by Senator Kennedy to strike the provision staying exigent cases, but it was defeated.

We should not deprive these dying victims of their last chance—their only chance—to receive some measure of justice before asbestos-induced disease silences them. They should be allowed to receive compensation in their final months to ease their suffering. They should be allowed to die knowing that their families are financially provided for. S. 852 in its current form takes that last chance away from them.

Incidentally, S. 852, as introduced, did not specify whether the benefits of an exigent claimant who pass away while awaiting such benefits under the Trust Fund could be passed on to the surviving widow or children. Senator Durbin offered an amendment, which the Committee adopted unanimously, that would provide such benefits to the surviving family members. Yet even such a non-controversial change to the bill set off an active round of deliberations among the corporate defendants supporting the bill, which forced the Chairman to revisit the issue in two additional sessions of Committee consideration. The language that survived in S. 852 is not as clean as the original Durbin amendment, but it nevertheless addresses the core concerns raised by Senator Durbin, to provide compassionate benefits to the surviving family members of asbestos victims.

2. Impact of multiple stays and venue rules

Other aspects of the treatment of pending cases are also troublesome. If the Trust Fund is not operational after two years, the stay is lifted for all claimants. However, asbestos victims cannot necessarily return to the courts where their cases were pending. New, restrictive venue provisions are put in place by S. 852 which will require some of these seriously ill victims to start their cases from scratch in a new court. This will further postpone, in some cases by years, the day when they finally receive compensation for their injuries.

Finally, even if the stay is lifted and court proceedings resume, the cases will be halted again if and when the Trust Fund finally becomes operational, forcing victims to play an absurd game of "red light-green light" with their right to a day in court. Imagine the frustration of an asbestos victim whose case is stayed on the verge of trial by the enactment of S. 852. For two years, he has nowhere to go for financial relief while his health steadily worsens. After two years, the Trust Fund is still not up and running, so he can finally return to court.

However, because of the new venue rules, he cannot return to the same court that was ready to hold his trial. Instead, he must refile in a new court and begin the litigation process anew. After spending a year pursuing this new court case, it is stayed because the Trust Fund is finally ready to process claims, three years after passage of the bill. Of course, the Trust Fund will be swamped with claims the day its doors open, so that unfortunate victim may wait another year or more before his claim is reached. It is difficult to imagine a more arbitrary and unfair system. Yet, that is the system which S. 852, if enacted, will impose on thousands of seriously ill asbestos victims.

3. Abrogating existing settlements

S. 852 also abrogates many existing asbestos settlement agreements. A number of victims have settled claims with defendants in the court system and are counting on those settlements to pay their medical bills and take care of their families. Although the bill's proponents suggest that final settlements in which the only remaining act is payment will be honored, the proposed language actually excludes many such settlements.

The language in the current bill requires that a written settlement agreement be signed directly by the defendant or the insurer, as well as the individual plaintiff.[59] As permitted by state agency and contract law, most settlements are finalized either orally or by a confirming letter from counsel and require a release that is signed by the plaintiff but not the companies or insurers. This new requirement is likely to delay many pending settlements, thereby adding further to the large number of cases that will have to be adjudicated when the Trust Fund becomes operational.

The bill would also overturn settlement agreements awaiting court approval. In situations where the parties have agreed to a settlement but are awaiting court approval, the settlement will be

[59] The only circumstance in which a representative of the plaintiff is permitted to sign on his or her behalf in where the plaintiff is "incapacitated." See section 403(c)(3)(A)(i)(II)(bb).

voided. The bill also includes a complicated and ambiguous provision that may void settlements entered into by companies that later filed for bankruptcy but that would likely emerge from bankruptcy if the bill passes.

Under S. 852, a victim, having assumed his or her case was settled, will suddenly have to start all over in the new Trust Fund system, without any compensation for the cost and hardship of having his or her settlement superceded by the terms of the Act. Victims who have already settled their cases but have yet to receive payments will be compelled to relinquish the money that defendants have agreed to pay.

Victims have a vested property right in these settlement contracts, and this bill would unconstitutionally deprive them of that property right without due process of law. Many of these cases have been entirely resolved, yet the victims will be forced to surrender the unpaid dollars to the wrongdoers who injured them. We cannot support these policies, which clearly favor the defendants over the injured parties.

The purported purpose of the bill is to quickly and efficiently resolve claims. Instead, the bill will reopen old cases that all parties agreed were fairly and entirely resolved. Many of these people have passed up their day in court to reach a settlement and were counting on receiving those promised dollars quickly. Now that settlement will be taken away as well as their right to a trial.

Processing claims for thousands of victims with settlement agreements will put an enormous burden on the Trust Fund. It is likely to delay compensation for all victims. We believe this is unnecessary and that existing settlements should be honored.

In Committee, Senator Biden attempted to address some of these shortcomings by offering an amendment providing that a settlement agreement or confirmation of settlement would suffice to be considered final if it "was authorized by the settling defendant or the settling insurer, and confirmed by, or with, counsel for the settling defendant or settling insurer."

Moreover, to address the criticism that his amendment would have opened the door to permitting so-called inventory settlement agreements—agreements that settle claims for future, or even hypothetical claimants, in advance—he included a provision in the amendment that would have required that the specific asbestos claim be settled for a specific sum with a specific named plaintiff. It simply aimed to recognize in the bill settlement agreements that are universally recognized in the courts as legitimate and enforceable. The amendment was rejected.

L. Labor department delays in administering the trust fund

Despite repeatedly seeking assurances that the Department of Labor ("DOL") can administer S. 852, we have received no such assurances. There is reason to believe DOL cannot have the Trust Fund up and running as quickly as S. 852 contemplates.

For example, S. 852 calls for regulations governing the Trust Fund to be issued within 90 days, but courts are unlikely to enforce such a deadline, and the bill provides no penalty if the goal is not met. The Office of Management and Budget also has a right to review and revise the regulations under the Executive Order. In past

compensation programs, much simpler to administer than the Asbestos Trust, DOL has taken longer than 90 days to develop implementing regulations.

Disease compensation has consistently proven to be extremely difficult to administer. Other compensation programs adopted by Congress and administered by DOL have each cost more, faced a higher volume of claims, and faced greater claims processing delays than proponents of the program acknowledged during Congressional consideration.

Though supporters of the Black Lung law argued that there would be several thousand claimants in total, in fact, in the first two years of the program, 350,000 claims were submitted.[60] In the case of EEOICPA, approximately 3,000 successful claimants were forecast when the law was advocated in 2000.[61] Yet, by December 31, 2004, over 60,000 claims had been submitted to DOL, almost 13,000 claims had been paid, and many others were in the process of adjudication.[62] Clearly the advocates of these programs greatly underestimated the number of individuals who would file valid claims.

A consequence of this massive underestimating of potential claims was that the forecasted costs by the proponents proved exceedingly low—including the federal government's compensation costs for each program. For example, at the time of enactment, supporters of the Black Lung program estimated the maximum annual costs would be approximately $100 million.[63] Yet, in the first 10 years of the program, the Social Security Administration alone had expended $8 billion.[64] Moreover, a Trust Fund to pay DOL's share has a debt to the U.S. Treasury that currently exceeds $8 billion.[65] Clearly, the actual costs have far exceeded the expected future costs. We believe the same is likely to happen with this proposed Trust Fund.

In addition, the initial underestimation of the actual number of claims contributed greatly to the delays in providing compensation to claimants. Moreover, in some cases, it resulted in payments being received after the applicant had died from the relevant disease. Other delays were the result of more time being needed to develop appropriate regulations, and to evaluate the evidence submitted by claimants or their survivors.

M. Litigation delays

If S. 852 is enacted into law, the program contemplated by this legislation will surely face numerous immediate court challenges from a variety of interested parties, including defendants, insurers and victims' groups. Over 8,500 defendants, insurers, and private trusts are currently involved in the asbestos litigation. Several of these entities, including the Manville Trust, have indicated they

[60] Peter S. Barth, Professor Emeritus, University of Connecticut, February 15, 2005, "Commentary on the Creation of a Fund for Victims of Asbestos Caused Diseases," at 5. Available at *www.usaction.org*.
[61] Barth at 13.
[62] Barth at 11.
[63] Barth at 8–9.
[64] Barth at 9.
[65] Barth at 9.

may challenge the bill as a "taking" of their property without due process of law.

This concern about delay due to protracted legal challenges was discussed at length at the Committee's April 26, 2005, hearing by Professor Green:

> 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?" [66]

The following are among the other expected constitutional challenges to S. 852:

- *Cancellation of Businesses' Insurance Contracts.* In an April 20, 2005 letter to the Committee, Professor David Strauss of the University of Chicago law school contends the taking of a defendant's insurance proceeds, combined with a required contribution to the Trust Fund, could prove to be unconstitutional.[67] The medium and small-sized businesses that would be adversely affected by the bill include entities that have sufficiently insured themselves against future asbestos liabilities. However, S. 852 will not allow the crediting of such insurance. Consequently, these entities will lose their insurance coverage under the bill without any compensation from the government, and in turn, will have to meet the assessments that would be imposed on them to finance the national Trust Fund independently. This is expected to be a heavily litigated issue that may take years to resolve, as many perceive the evisceration of premiums they have paid without due compensation as a Fifth Amendment Property Takings violation, and the additional assessments as a tax.
- *Confiscation of Assets of Settled Trusts.* According to an April 18, 2005, letter from former Solicitor General Ted Olson to Senator Cornyn, the taking of the assets of the bankruptcy Trusts is also unconstitutional. In his letter, Mr. Olson indicated that his firm represents such Trusts and plans to file

[66] Green statement at 6–7.
[67] Letter from Professor Davis Strauss to the Honorable Arlen Specter, April 20, 2005.

suit to protect their assets if the bill continues to allow for the confiscation of those Trusts.[68] The bill's supporters, however, are relying on the $7.4 billion from those Trusts to meet the Trust Fund's initial funding needs. If a court rules for Trusts in this challenge, the Trust Fund will be short $7.4 billion of the $42 to $60 billion required for an effective startup period. On the other hand, if the bankruptcy Trusts' funds are allowed to be transferred to the new Trust Fund, and the funds are paid to claimants, then the U.S. Treasury could be responsible for reimbursing these Bankruptcy Trusts, with interest.

- *Suits by Businesses over the Allocation Formulas.* The Coalition for Asbestos Reform has already advised Congress that its members will challenge the proposed assessments on them as well as the cancellation of their insurance coverage. And it is likely that even some of the companies advocating for the bill will challenge their particular assessments as unfair to them.
- *Legal Challenges by Victims' Groups.* Court challenges are also expected by victims who are not covered by the Trust Fund but who, nevertheless, will have their rights to a jury trial eviscerated. This will surely include some lung cancer victims with substantial asbestos exposure who have been excluded from the Trust Fund and others who have suffered environmental or community-based exposure to asbestos. Individuals residing outside Libby, Montana, but similarly affected by environmental exposure to asbestos, are likely to have strong claims based on the Fourteenth Amendment's Equal Protection clause. And individuals with enforceable settlement agreements may challenge the bill's voicing of those agreements.

S. 852 borrows the procedures for expedited judicial review from the Bipartisan Campaign Reform Act of 2001 (McCain-Feingold). The constitutional challenge under that law took 20 months before the Supreme Court's final resolution. McCain-Feingold's expedited review provision is similar to the provision in the Cable Television Consumer Protection and Competition Act of 1992, amending the Communications Act of 1934. The constitutional challenge to that law took four and a half years to resolve. Clearly, the proposed "expedited review" standard is no guarantee of quick resolution of these likely multiple legal claims against S. 852.

During the course of Committee consideration, a question arose as to what would happen if this bill were enacted and subsequently stayed by a court reviewing its constitutionality. Specifically, is it possible that victims, who will have been pulled out of court by the new law, will then neither be able to sue for damages nor pursue a claim against the Trust Fund for a period of years while the constitutional challenges are pending? The answer to that question is almost certainly yes—in the event of a judicial stay of S. 852, victims will be stuck in litigation "no man's land." That is patently unfair to these seriously ill claimants.

For these reasons, Senator Biden offered an amendment to guarantee that, in the event of a judicial stay of this law, victims would be permitted to continue to pursue their claims in court until the

[68] Letter from Theodore B. Olson to the Honorable John Cornyn, April 18, 2005.

challenge is resolved. That amendment, like so many others that sought to provide some basic fairness for claimants, was defeated.

N. Unfair restrictions placed on victims of silica disease

This bill has provisions that impose arbitrary conditions for the filing of silica claims in court. It seriously restricts the legal rights of individuals who are suffering from diseases caused by exposure to silica dust even though it offers those victims no compensation whatsoever under the Trust Fund. That is not fair.

The rationale is to prevent asbestos claims from being recycled as silica claims. The sponsors fear that lawyers will try to turn asbestos claims into silica claims. These fears are greatly exaggerated. Medical experts from both businesses and labor unions testified before the Committee that disease caused by exposure to silica is easily distinguishable from disease caused by exposure to asbestos. While someone whose lung disease was actually caused by asbestos may file a silica claim, there is very little likelihood of the case succeeding. The real cause of their illness would become apparent as soon as the defendant's doctors reviewed the medical evidence.

While it is reasonable to establish a procedure to identify prior asbestos claims brought by persons filing silica lawsuits, the current provision goes too far. There are serious problems with the way the bill currently handles this issue. It severely limits the rights of some people who are suffering with real silica disease, preventing them from going to court and obtaining the compensation they deserve.

One major problem is that the bill creates an entirely new medical criterion for filing a silica claim. It requires that someone who has both silica disease and asbestos disease must have functional impairment from their silica disease before they can go to court. This bill is not supposed to be a medical criteria bill for diseases in the court system. But that is what this does to silica cases. It dramatically raises the evidentiary bar that a victim of silica disease must clear in order to recover in court. Such a provision has no place in an Asbestos Trust Fund bill.

O. Special interest provisions and changes during markup

S. 852 contains several provisions that appear vague and ambiguous, yet probably will tremendously benefit certain "stakeholders." These special interest provisions include financial exemptions for foreign and off-shore insurers, a significant offset credit for certain insurers, exemption for the largest companies from having to disclose prior asbestos expense history, exemption for a certain transaction involving the sale of friction products, and perhaps others we have yet to identify.

Because these provisions are drafted in generic language, it is difficult to determine which corporate defendants and insurers would benefit financially or be harmed in comparison to other similarly situated entities.

In addition, during the Committee consideration of S. 852, there were a myriad of major provisions added in a series of hastily drafted managers' amendments, and substantial substantive changes made to the bill that have not received careful examina-

tion. We hope the full Senate pays particular attention to these provisions, should the bill move forward.

IV. WINNERS AND LOSERS

S. 852 will provide a huge financial windfall to a few large corporations that have substantial asbestos liabilities and those that failed to adequately insure for their liabilities. These include the companies that are largely responsible for the asbestos health and litigation problem that the country faces today.

Included among these entities is the W.R. Grace Company, which is now under a federal criminal indictment for its asbestos actions. S. 852, if enacted, will relieve the costs and liabilities of these firms in two ways: (1) by significantly reducing the amount of compensation asbestos victims receive—in many instances the proposed compensation will not even equal cancer victims' medical and economic losses; and (2) by imposing greater costs on many small and medium-sized businesses, and American taxpayers, than they would be responsible for under the present system.

The groups that will be most adversely impacted by the bill include:

- Millions of victims of these horrible diseases caused by asbestos, including deadly lung cancers such as mesothelioma, who will be under-compensated by the Trust Fund;
- Thousands of lung cancer victims and community exposure victims who will have no means of recovery once this bill is enacted;
- Thousands of small and medium-sized businesses, including many that are unaware that they will be compelled to finance the program out of their own pockets and without any acceptance of liability insurance coverage or credit; and
- American taxpayers, who also will likely be compelled to subsidize the program at a cost of tens of billions of dollars.

V. CONCLUSION

For the reasons stated above, we believe that this bill is not the proper solution to the asbestos health and litigation problem. In its present form, the bill would be unfair to victims, small and medium-sized businesses and taxpayers. The advantages of the bill would flow to the corporations that have been most responsible for causing the problem that we face today. Congress should not be supporting such a one-sided bill.

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RUSSELL D. FEINGOLD.
RICHARD J. DURBIN.

XII. Changes in Existing Law

The Committee has determined that it is necessary, in order to expedite the business of the Senate, to dispense with the requirements of rule XXVI, paragraph 12, of the Standing Rules of the Senate, with regard to this legislation.

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