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The Fairness in Asbestos Injury Resolution Act of 2005: A Look Into the Latest Attempt To Rein In the Asbestos Litigation Beast

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Introduction

On September 10, 1973, the United States Court of Appeals for the 5th Circuit, in *Borel v. Fibreboard*,¹ established the manufacturer's duty to warn consumers of asbestos dangers. *Borel* provided the basis for future development in asbestos litigation, extending the doctrine of strict product liability to disease caused by the use of asbestos-containing materials. As a result, a wave of personal injury litigation flooded the American court system. Within 10 years of the *Borel* decision, over 16,000 asbestos-related personal injury cases had been filed in the United States, making asbestos the largest area of product liability litigation. Today, over 730,000 claims have been filed, and as many as 75,000 new cases are filed each year.² The influx of asbestos-related claims being filed—mostly by nonimpaired individuals, as has been found of late—is overcrowding our courts and depleting the resources available for legitimate asbestos claimants.

With no end in sight, Congress has broached the topic of asbestos litigation reform on several occasions. This paper examines the most recent piece of legislation before Congress—The Fairness in Asbestos Injury Resolution (FAIR) Act of 2005, S. 852—and discusses the difficult obstacles it faces in the months to come.

Background

What Is Asbestos?

Asbestos is a naturally occurring fibrous mineral popular in manufacturing and industry due to its strength, flexibility, and chemical and thermal stability. Asbestos was widely used in a variety of building materials and building components during the 20th Century. The widest use of asbestos occurred prior to the 1970s and then dropped dramatically over the following three decades.

¹ 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

² Stephen J. Carroll, *et al.*, *Asbestos Litigation*, RAND Institute for Civil Justice, 2005.

Throughout this time span, millions of American workers were exposed to asbestos. Some of these workers were exposed for long periods of time and/or at high levels of exposure. Today, asbestos use is technically legal in the United States; however, it has been mostly phased out through federal regulations.³

Asbestos fibers are known to be hazardous when inhaled. When airborne, they can become lodged and remain in the lungs, and potentially cause conditions such as mesothelioma, asbestosis, lung cancer, or pleural plaques. Most individuals who develop these conditions, however, usually have had substantial exposure to asbestos over a sustained period of time and experience a latency period of about 10 years to 40 years before the development of a disease.

Mesothelioma is the most serious of these diseases, with no known cause other than asbestos exposure. It is a rare and fatal form of cancer of the lining of the lungs and chest. Death usually occurs about 18 months after manifestation of the disease. Asbestosis, another disease attributed to asbestos exposure, is the fibrous scarring of the lungs from inhalation of asbestos fibers. In some instances, it can lead to breathing problems and heart failure. While asbestos exposure is not the sole cause of lung cancer, it can increase the chances of its development. Pleural plaques are a form of localized thickening or calcification on the outer layer of the chest wall. They indicate asbestos exposure; however, they usually do not cause any symptoms or impairments.

The Evolution of Asbestos Litigation

Asbestos litigation, unlike any other tort action, has been able to transform itself throughout the past 40 years by overcoming both procedural and substantive legal hurdles. For instance, in the early years of its existence, asbestos claimants were faced with the difficulty of dealing with statute of

³ 29 C.F.R. 1910.1001; 29 C.F.R. 1915.1001; 29 C.F.R. 1926.1101; 40 C.F.R. 61 Subpart M, 61.140-61.157; and 40 C.F.R. 763 Subpart E.

limitations laws, which generally require injury victims to file legal claims within a year or two after an injury is sustained. This short time period would require claimants in asbestos cases to file suit when they were initially exposed to the asbestos. This prohibited many would-be plaintiffs from filing claims because of the long latency period associated with asbestos, and therefore, an uncertainty as to whether a disease would ever develop.

Many jurisdictions responded by changing their statute of limitations laws so as to require that latent-injury victims, such as those exposed to asbestos, file suit within one or two years of when they know or should have known that they were injured, rather than when first being exposed. California's statutory period does not begin to run until an individual's ability to work at his or her ordinary occupation is impaired.⁴ Other jurisdictions have adopted the view that asymptomatic pleural thickening is not a compensable injury; therefore, the statute of limitations would not begin to run at discovery of such a finding, but rather when such an injury does develop.⁵ Other states have adopted a "two-disease" rule that allows asbestos plaintiffs who have filed claims for non-malignant diseases to bring a second lawsuit if and when a malignancy is diagnosed.⁶ Essentially, procedural changes such as these have increased an individual's ability to file suit based on asbestos exposure and have contributed to the gross magnitude of asbestos cases seen in our courts.

Typical claimants in asbestos suits worked many years earlier at multiple job sites where asbestos exposure may have occurred, making it difficult for claimants to establish causation on the part of a particular employer. This substantive legal standard of proximate cause has been loosened, however, in cases involving asbestos exposure. Lester Brickman, a Professor of Law at Benjamin N. Cardozo School of Law of Yeshiva University and a critic of the current stature of asbestos litigation, asserts that courts and legislatures have created "special asbestos law" to defeat problems of proof and, in particular, the proximate cause obstacle.⁷

⁴ Ca. Civ. Proc. §340.2.

⁵ *Simmons v. Pacor, Inc.*, 679 A. 2d 232, 237 (Pa. 1996).

⁶ *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (1985); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495 (1985); *Marinari v. Asbestos Corp.*, 612 A.2d 1021 (1992); and *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212 (1999).

⁷ Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, Pepp. L. Rev., Vol. 31, No. 33, 2004.

For instance, some courts no longer require plaintiffs to prove that the defendant's products actually caused the asbestos-related injury. Rather, to prevail at trial, plaintiffs merely have to prove exposure to the products or, in some cases, that the products were "used at a job site simultaneous [to his or her employment at the site]."⁸ This change has enabled many unimpaired claimants—people with little or no current functional impairment, but who have been exposed to asbestos in some way or form—not only to file suit, but also to be successful.

The Status Quo⁹

America's civil justice system has failed to adequately handle the number of asbestos claims flooding its courts and to provide proper recourse for those victims of asbestos exposure it is intended to protect. The hundreds of thousands of claims that have been filed cost over \$70 billion through 2002, according to a RAND report. While this would seem to be an impressive payout amount, only about \$30 billion—or 42 percent—of that was actually in the form of compensation to claimants.¹⁰ NERA Economic Consulting¹¹ prepared a report for the National Association of Manufacturers Asbestos Alliance that estimated that the total cost of asbestos litigation to the U.S. economy has been \$343 billion. NERA's estimate is more inclusive than RAND's, including administrative, legal, and bankruptcy costs, as well as losses in productivity. Under their analysis, claimants have received \$39 billion in compensation. This means that the costs of asbestos litigation outweigh compensation to claimants by nearly ten to one. NERA further concluded that without legislation to reform the current system, asbestos litigation will cost the economy an additional \$96 billion.¹²

As previously mentioned, the unimpaired claimant has become one of the most troubling aspects to asbestos litigation. Nonmalignant claims accounted for roughly 80 percent of all claims entering the

⁸ *Ibid.*

⁹ For a more detailed discussion on the current status of asbestos litigation and the need for tort reform, see: *I Pay, You Pay, We All Pay: How the Growing Tort Crisis Undermines the U.S. Economy and the American System of Justice*, Chapter V, "The Asbestos Avalanche," Manufacturers Alliance/MAPI, 2003.

¹⁰ Carroll, *et al.*, *op. cit.*

¹¹ NERA Economic Consulting was formerly known as National Economic Research Associates.

¹² NERA Economic Consulting, *Costs of Asbestos Litigation and Benefits of Reform*, April 25, 2005.

system through the mid-1980s. By the early 2000s, more than 90 percent of all annual claims were filed by nonmalignant claimants.¹³ In 1999 and 2000, it was found that about 75 percent of the claims brought against one defendant in particular had no evidence of impairment.¹⁴ A similar trend was observed in claims filed against The Babcock & Wilcox Company in 2001 where it was concluded that “two-thirds of the claims . . . seek to recover for benign and harmless conditions such as pleural plaques, pleural thickening with no evidence of impaired lung function, or asbestosis with no evidence of impairment.”¹⁵

The high costs involved in defending these numerous asbestos suits have forced more than 70 U.S. companies into bankruptcy in the past 25 years. More than half of these bankruptcies have occurred since 2000—36 between 2000 and mid-2004.¹⁶ The bankruptcy of these companies has a drastic effect on each company’s success, but also on employee wages and retirement savings and claimant compensation rates, as well as on the nation’s economy as a whole. It has been estimated that the cost of reorganization of a company is equal to about 3 percent of the average company’s book value or about 6 percent of its market value. This suggests that asbestos-related bankruptcies have resulted in direct costs between \$325 million and \$650 million.¹⁷

A bankruptcy filing is also likely to cause a reduction in the size of the labor force. It is estimated that bankruptcies due to asbestos liabilities have led to a loss of an estimated 52,000 to 60,000 jobs. Federal-Mogul Corporation filed for bankruptcy on October 1, 2001. Prior to doing so, the company announced in January 2001 that it was closing up to 50 production units and then announced 1,100 lay-offs in February. Preceding Owens Corning Fiberglas Corporation’s filing of Chapter 11 protection in 2000, 1,500 layoffs were announced in 1998 and 1999. And the United

States Gypsum Company announced the elimination of 500 jobs in January 2001, just a couple of months prior to its bankruptcy filing.¹⁸

Each displaced worker at a bankrupt company will lose, on average, an estimated \$25,000 to \$50,000 in wages over his or her career because of periods of unemployment and the likelihood of having to take a new job paying a lower salary. The average worker with a 401(k) plan at one of these entities will suffer roughly \$8,300 in pension losses, which represents, on average, roughly a 25 percent reduction in the value of the 401(k) account.¹⁹

The bankruptcy filing of Johns-Manville Corporation²⁰ has shown other companies ridden by asbestos liabilities that filing for Chapter 11 may be the best option in dealing with enormous asbestos liabilities. Companies filing for bankruptcy receive a number of benefits. As noted in *The Economist*, “[b]ankruptcy may not sound like an attractive option, but it is often the best alternative for firms in the throes of asbestos litigation.”²¹ First, and most importantly, the filing enforces an automatic stay on any litigation in which a company is involved as the defendant.²² Also, it usually can obtain an injunction, which temporarily protects the parent—as well as subsidiaries that have not filed for bankruptcy—from asbestos liabilities. Furthermore, since reorganization often can take over five years, bankrupt companies may receive a relatively lengthy reprieve from paying asbestos liabilities. When payments do begin, they are typically substantially lower and on terms more favorable to the company than would have been the case if claims had been settled through litigation.

Many companies are now filing prepackaged bankruptcies, where a company and its creditors agree to a plan of reorganization before the company files a bankruptcy petition. In a true prepackaged bankruptcy, a plan of reorganization is circulated and approved by creditors before the petition is filed. Prepackaged bankruptcies have the

¹³ Carroll, *et al.*, *op. cit.*

¹⁴ National Economic Research Associates, *Unimpaired Claims Analysis*, February 26, 2001.

¹⁵ Joseph E. Stiglitz, *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, December 2002, p. 9, quoting Babcock & Wilcox’s Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claim Filed Here, at 32-37, and Road Map to Babcock & Wilcox’s Defenses to Asbestos Personal Injury Claims, VII-1&2, *In re The Babcock & Wilcox Co.*, Bcy. No. 00-10992 (Bankr. E.D. La. 2001).

¹⁶ Carroll, *et al.*, *op. cit.*

¹⁷ Stiglitz, *et al.*, *op. cit.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Johns-Manville manufactured virtually all of the asbestos in the United States and was inundated with litigation in the 1970s by plaintiffs who were exposed to asbestos at their facilities. By 1982, they had over 16,000 claims filed against them and opted to file for bankruptcy. Subsequently, a trust was set up from which payments are made from to compensate victims of asbestos exposure. Due to the increased number of claims being filed by unimpaired claimants, the Trust is now paying just 5 cents on the dollar—an average of \$2,000 per claim.

²¹ *The Economist*, September 19, 2002.

²² 11 U.S.C. §362.

potential to substantially reduce the costs associated with reorganization, as well as shorten the Chapter 11 process—down to even three to six months.²³ For example, United States Bankruptcy Judge Robert McGuire and Judge Lynn Hughes of the Southern District of Texas confirmed a prepackaged bankruptcy plan for Utex Industries in July 2004. Utex filed its petition for Chapter 11 reorganization in March 2004, just four months earlier.²⁴

Despite warnings that asbestos litigation has become an epidemic, there are some who argue that the current legal regime has distinct advantages and should be allowed to remain as it is. As noted above, the civil justice system provides substantial awards to many victims. And in many cases, these victims do not have to pay lawyers' fees until compensation is received. A Congressional Research Services (CRS) report suggested that from a public policy perspective, "the fact that defendant companies are the ones financing the benefits may be considered broadly beneficial. That is, companies in all industries are being put on notice that allowing harm to occur to employees and the public can be fatal to their own financial well-being."²⁵

The Solution—Case Law and Legislative Attempts

The consensus is that asbestos litigation needs to undergo some sort of transformation. The Supreme Court has twice struck down attempted global asbestos settlements,²⁶ in both instances inviting Congress to craft a legislative solution. In *Amchem Products, Inc. v. Windsor*, Justice Ginsburg stated: "[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. Congress, however, has not adopted such a solution."²⁷ She further commented that "[t]he most objectionable aspects of this asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are

litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."²⁸ This sentiment was echoed in *Ortiz v. Fibreboard Corp.*, where the Court noted that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."²⁹ Most recently, the Supreme Court acknowledged that it "has recognized the danger that no compensation will be available for those with severe injuries caused by asbestos. . . . It is only a matter of time before inability to pay for real illness comes to pass."³⁰

In 2003, the Senate Judiciary Committee began an extensive series of hearings on the asbestos issue, and negotiations began among groups representing all sides. Unfortunately, all legislative attempts since then have stalled. Different approaches have been considered and debated. On May 22, 2003, S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, was introduced. S. 1125 would have established a national trust fund set at \$108 billion with a schedule of payments. Although S. 1125 was voted out of the Judiciary Committee, it was hit by strong opposition, mainly because opponents claimed that \$108 billion would not be sufficient to pay all pending and future asbestos claims. The Fairness in Asbestos Injury Resolution Act of 2004, S. 2290, was then introduced by Senator Orrin Hatch (R-UT); however, a Senate cloture vote on a motion to proceed failed.³¹ S. 2290, very similar to S. 1125, failed mainly due to concerns of fund insolvency. After failing the test vote, Senate leadership continued negotiations on the bill, and Senator Arlen Specter (R-PA) introduced the latest version—S. 852.

Other bills recently introduced in Congress would set out medical criteria for a cause of action before a case could proceed. S. 413 was introduced on February 13, 2003, by then-Senator Don Nickles (R-OK). S. 413 would have required a *prima facie* showing on behalf of claimants that they exhibited a physical impairment caused by asbestos exposure. The bill also included provisions to toll the statute

²³ Carroll, *et al.*, *op. cit.*

²⁴ *Ibid.*

²⁵ Edward B. Rappaport, CRS Report for Congress, *Asbestos Litigation: Prospects for Legislative Resolution*, p. 4 (2005).

²⁶ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In both cases, the Court held that the settlements did not satisfy Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal courts.

²⁷ 521 U.S. 591, 628-29 (1997).

²⁸ *Ibid.*, p. 598.

²⁹ 119 S. Ct. 2295, 2302 (1999).

³⁰ *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 168-69 (2003).

³¹ A cloture is a procedure by which the Senate can vote to place a time limit on consideration of a bill or other matter, and thereby overcome a filibuster. Under the cloture rule (Rule XXII), the Senate may limit consideration of a pending matter to 30 additional hours, but only by 60 votes.

of limitations for claimants until a physical impairment is discovered or should have been discovered and to limit the consolidation of claims for trial as well as on forum shopping. Similarly, the Asbestos Compensation Fairness Act of 2005, H.R. 1957, would set up a system where claimants would first have to make a *prima facie* case that they have a physical impairment and that exposure to asbestos has been a substantial contributing factor. The bill specifies the criteria for establishing these claims and requires that suits be brought in federal court only in the district where the plaintiff resides or experienced the asbestos exposure. H.R. 1957 was referred to the House Committee on the Judiciary on April 28, 2005, where it remains.

The FAIR Act and Its \$140 Billion Trust Fund

The FAIR Act (S. 852) was introduced in the Senate on April 19, 2005, by Senators Arlen Specter and Patrick Leahy (D-VT), respectively Chairman and Ranking Member of the Senate Judiciary Committee. After much debate, it was favorably reported by the Senate Judiciary Committee, with amendments, on May 26. If voted on and approved by the full Senate, the FAIR Act would establish a privately funded trust fund worth \$140 billion to compensate current and future asbestos claimants on a no-fault basis under standardized medical criteria and corresponding claims awards. It would take asbestos claims out of the civil tort system and process these claims through an administrative claims process, similar to that for workers' compensation and Social Security disability claims.

The Basics

The FAIR Act would establish the Office of Asbestos Disease Compensation (the Office), a newly created office housed in the Department of Labor, for the purpose of processing asbestos claims. Any person seeking recovery based on an asbestos-related injury would be required to file a claim for compensation with the Office. Only those claimants whose illnesses meet the medical requirements specified in the Act would be eligible to receive an award—an amount already determined and outlined in S. 852. This would be the exclusive remedy to recover for injuries caused by asbestos exposure, eliminating one's right to sue his or her employer in state or federal court.

An Administrator of the Office (the Administrator) would be appointed by the President, by and with the advice and consent of the Senate, serving a term of five years. This position would be

in charge of the management of the Office and the trust fund, processing of claims, collecting contributions from participants, program audits, the promulgation of rules and regulations, and any other necessary procedures.

The FAIR Act would require that claims be submitted to the Office within five years of the date of a medical diagnosis or medical test results that meet the diagnostic criteria outlined in the Act. It would not prohibit a claimant who receives an award for an eligible disease level under FAIR from receiving additional awards for higher disease levels at a later time if his or her illness progresses. In addition, it would not impose a statute of limitations on any claimant for filing a claim for an additional award relating to the progression of any nonmalignant disease. Any progression into a malignant disease level claim, however, would need to be filed with the Office within five years of receiving that medical diagnosis. If a claim is not filed with the Office within the limitations period, such claim would be extinguished, and any recovery thereafter would be prohibited.

A claim to the Office would be required to include, at a minimum, the following information: (1) name and information pertaining to the identity of the claimant; (2) information pertaining to the identity of any dependents 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 nonsmoker or ex-smoker status if the claimant asserts such status and seeks compensation under a malignant level. In some instances, the Administrator could request additional medical evidence to be submitted by the claimant, in which case the cost of obtaining this additional information or testing would be borne by the Office.

In reviewing a claim, the Administrator would consider the claim filed, the factual and medical evidence submitted by the claimant in support of the claim, the medical determinations of any physicians' panel to which a claim is referred, and the results of such investigation as the Administrator might deem necessary to determine whether the claim satisfies the criteria for eligibility established by the Act.

After examining a claim, the Administrator would be required to issue a proposed decision as to whether the claimant is entitled to payment based on the medical criteria under the Act, and if so, the amount of the award. FAIR would require the decision to be in writing and contain findings of

fact, conclusions of law, and an explanation of the procedure for obtaining review of such decision. Under the Act, decisions would have to be made within 90 days of a claim being filed. If not made within 180 days, the claim would be accepted and the claimant would receive the award level requested in the claim.

After issuance of the proposed decision, a claimant would have 90 days from the date of issuance either to: (1) submit a written request for a hearing on the decision; or (2) make a written request for a review of the written record. The FAIR Act provides that any claimant would be entitled to a hearing if not satisfied with the proposed decision. At the hearing, the claimant would be permitted to submit additional oral and written evidence. In lieu of a hearing, any claimant would be allowed to request a review of the written record by a representative of the Administrator. This would be the appropriate time for the claimant to submit further written evidence in support of his or her claim. The Administrator thereafter would issue a final decision no later than: (1) 180 days after receiving the request for a hearing on the decision; or (2) 90 days after receiving the request for review of the written record. In the case where a claimant fails to request a hearing or review of the written record within the specified 90 days, the Administrator would issue a final decision.

FAIR would require each claimant to demonstrate that his or her exposure occurred at least 10 years prior to the medical diagnosis of an asbestos-related disease. This could be satisfied by submitting either a statement by a physician providing that at least ten years have elapsed between the date of the first exposure and the diagnosis, or a history of the claimant's exposure that is sufficient to establish a ten-year latency period between the date of first exposure and the diagnosis.

The FAIR Act would allow any claimant to seek judicial review of a final decision made by the Administrator in the United States Court of Appeals for the circuit in which the claimant resides. It would require that a petition for judicial review be filed within 90 days of the issuance of the decision. Upon review, the court would determine whether the Administrator's decision was supported by substantial evidence, contrary to law, or in accordance with procedure required by law.

If the Administrator finds that a claimant's medical condition satisfies the criteria under the FAIR Act and is otherwise entitled to receive compensation, payments would be expected to be made by the established trust fund over a period of three years, however, not longer than a four-year

period. The Act would establish a presumption that the claimant would receive 40 percent of the award in year one, 30 percent in year two, and the remaining 30 percent of the total award in year three. FAIR would include a provision for claimants living with mesothelioma to receive expedited payments within 30 days of approval of the claim, while providing that other claimants with exigent circumstances would receive full recovery in less than one year.³² The award levels for eligible claimants are predetermined by the FAIR Act; adjustments, however, could be made under certain circumstances. For instance, the Administrator would be permitted to increase awards for Level IX claimants (i.e., the Level IX disease category is reserved for mesothelioma victims, the most seriously ill claimants) who are less than 51 years of age with dependent children and decrease awards for Level IX claimants who are at least 65 years of age; but in no case could the award for Level IX disease be less than \$1 million. The Act also includes a provision for a cost of living adjustment.

What Happens to Pending Claims?

FAIR would impose a stay on any pending asbestos-injury claim, whether in state or federal court.³³ The Act would provide, however, that a suit would not be stayed if the presentation of evidence had begun before an impaneled jury or judge, as trier of fact, or if a verdict, final order, or final judgment had been entered by a trial court. In these cases, either the court proceedings would continue or, if a decision had been made, it would stand.

The Act also would allow claims to return to the court system in the event that the trust fund fails to become fully operational in an appropriate time frame. If, within 24 months of the date of the enactment, the trust fund were not up and running, claimants then would be permitted to pursue their claims in the state or federal court located within the state where the claimant resided or where the asbestos exposure arose. In the case of an exigent claim, if, after nine months, the trust fund were not fully operational, those claimants would be allowed to pursue their claims in the courts where they were pending prior to enactment of the Act.

Medical Criteria—Who Would

³² Exigent claimants are those individuals living with a terminal disease.

³³ A stay is the postponement or halting of a judicial proceeding.

Be Compensated?

To receive an award under FAIR, a claimant would have to show, by a preponderance of the evidence, that he or she suffers from an eligible disease or condition that satisfies the medical criteria outlined in the Act. The Act indicates that claimants could be required to submit the following to support their claim: x-rays, detailed results of pulmonary function tests, laboratory tests, tissue samples, results of medical examinations, reviews of other medical evidence, and medical evidence

that complies with recognized medical standards regarding equipment, testing methods, and procedures to ensure the reliability of such evidence.

Claimants would have to fall into one of the nine levels of asbestos-related diseases listed in the Act in order to be qualified to receive compensation. The award levels are based on the severity of the disease of the claimant. Figure 1 below lists the disease levels required under the FAIR Act with the corresponding award amounts.

Figure 1
Disease Categories and Awards Under the FAIR Act

Disease Category	Exposure Requirements	Award
I. Asbestosis/Pleural Disease A	5 years cumulative occupational exposure	Medical Monitoring
II. Mixed Disease with Impairment	5 or more weighted years of substantial occupational exposure*	\$25,000
III. Asbestosis/Pleural Disease B	5 or more weighted years of substantial occupational exposure	\$100,000
IV. Severe Asbestosis	5 or more weighted years of substantial occupational exposure	\$400,000
V. Disabling Asbestosis	5 or more weighted years of substantial occupational exposure	\$850,000
VI. Other Cancer	15 or more weighted years of substantial occupational exposure	\$200,000
VII. Lung Cancer with Pleural Disease	12 or more weighted years of substantial occupational exposure	Smokers - \$300,000 Ex-smokers** - \$725,000 Nonsmokers*** - \$800,000
VIII. Lung Cancer with Asbestosis	8 to 10 weighted years or more of substantial occupational exposure, depending on type of diagnosis****	Smokers - \$600,000 Ex-smokers - \$975,000 Nonsmokers - \$1,100,000
IX. Mesothelioma	<ul style="list-style-type: none"> • Occupational exposure • Exposure to asbestos fibers brought into the home of the claimant by a worker occupationally exposed • Exposure resulting from living or working in the proximate vicinity of a factory, shipyard, building demolition site, or other operation that regularly released asbestos fibers into the air due to operations involving asbestos at that site • Other identifiable exposure 	\$1,100,000

* The term "substantial occupational exposure" means employment in an industry and an occupation where for a substantial portion of a normal work year for that occupation, the claimant: (i) handled raw asbestos fibers; (ii) fabricated asbestos-containing products so that the claimant in the fabrication process was exposed to raw asbestos fibers; (iii) altered, repaired, or otherwise worked with an asbestos-containing product such that the claimant was exposed on a regular basis to asbestos fibers; or (iv) worked in close proximity to other workers engaged in the activities described under clauses (i), (ii), or (iii) such that the claimant was exposed on a regular basis to asbestos fibers.

** The term "ex-smoker" means a claimant who has not smoked during any portion of the 12-year period preceding the diagnosis of lung cancer.

*** The term "nonsmoker" means a claimant who never smoked or has smoked fewer than 100 cigarettes or the equivalent of other tobacco products during the claimant's lifetime.

**** With the diagnosis of primary lung cancer, ten or more weighted years of substantial occupational exposure; with a diagnosis of asbestosis based on a chest x-ray, eight or more weighted years of substantial occupational exposure; and, with a diagnosis of asbestosis determined by pathology, ten or more weighted years of substantial occupational exposure.

As shown in Figure 1, FAIR would require a claimant to have had a minimum amount of exposure in order to be entitled to compensation. Specifically, the Act uses the term “weighted occupational exposure,” which means exposure for a period of years calculated according to the following exposure weighting formula. Moderate exposure is considered working in an occupation that involved working in areas immediate to where asbestos-containing products were being installed, repaired, or removed under circumstances that involved regular airborne emissions of asbestos fibers. Each year that a claimant worked under moderate exposure would count as one year of substantial occupational exposure under the Act. Heavy exposure, where each year that a claimant works would count as two years of substantial occupational exposure, involves the direct installation, repair, or removal of asbestos-containing products such that the person was exposed on a regular basis to asbestos fibers. Claimants with very heavy exposure, those involved in primary asbestos manufacturing, a World War II shipyard, or the asbestos insulation trades, would be allowed four years of substantial occupational exposure for each year of work in this occupation.

In addition, FAIR would discount exposure levels post-1976, presumably because exposure levels were more intense prior to that time. Each year of exposure that occurred before 1976 would be counted at its full value, while each year from 1976 to 1986 would be counted as one-half of its value. Each year after 1986 would be counted as one-tenth of its value.

One of the more controversial aspects of the FAIR Act is its approach in dealing with those claimants who were not only exposed to asbestos, but also smoked at one point in his or her life. Notice that categories VII and VIII distinguish between those claimants who are smokers, ex-smokers, and nonsmokers, allocating smaller awards for smokers and ex-smokers. The discrepancy in the levels of compensation can be attributed to the fact that experts estimate that nonsmoking asbestos workers have five times the background risk of lung cancer, while workers with asbestos exposure who also smoke or smoked have 55 times the background risk of lung cancer.³⁴

It is also worth noting that those claimants whose injuries fall under Level I—Asbestosis/Pleural Disease A, would be entitled to medical monitoring, as opposed to a monetary award. This provision would enable claimants to seek reimbursement for the difference between the cost of medical monitoring covered by a claimant’s health insurance and a claimant’s out-of-pocket expense for monitoring. As previously noted, however, if a claimant’s condition under Level I further progresses into a disease falling under another category, he or she would be entitled to file a supplemental claim based on that disease.

Asbestos Injury Claims Resolution Fund

The FAIR Act would create the Asbestos Injury Claims Resolution Fund (the Fund) to compensate all current and future claimants suffering from illness due to asbestos exposure. Currently, after much debate, the Fund would be worth \$140 billion over its lifetime. The financing for the Fund is expected to be provided by companies that have previously been sued for asbestos-related injuries, as well as the insurers of such companies. Such companies, known as defendant participants, would be required to contribute an aggregate of \$90 billion to the Fund over its lifetime, while the insurers or insurer participants would contribute \$46 billion to the Fund. The remaining \$4 billion would come from existing asbestos compensation trusts that have been established to pay off asbestos liabilities. The Administrator would be authorized to borrow to enhance the Fund’s liquidity and to sue any participant for failure to pay an obligation imposed under the Act.

Contribution amounts would vary among defendant participants depending on past asbestos liabilities and revenues. To determine contribution amounts, each entity would initially be placed in one of seven tiers that are defined by prior company expenditures incurred defending asbestos claims. These expenditures include defense, indemnity, judgment, and settlement costs. Each defendant then would be placed into a subtier based on its revenue levels for the year ending December 31, 2002. After each company is assigned to a subtier, it then would be identified with a corresponding annual contribution amount that it would be obligated to pay into the Fund. Each subtier would contain as close to an equal number of the total defendant participants as possible. Figure 2 illustrates each tier and who is assigned to it based on the prior asbestos expenditures, along with compensation levels of each subtier.

³⁴ Statement of Philip J. Landrigan, MD, MSc, DIH, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

Figure 2
Contribution Levels From Participating Companies

Tier	Prior Asbestos Expenditures	Subtiers and Annual Contribution Levels
I	All debtors* that, together with all of their direct or indirect majority-owned subsidiaries, have prior asbestos expenditures greater than \$1 million	1 – Operational companies would pay an annual basis of 1.67024 percent of the debtor's 2002 revenues 2 – Nonoperational company debtors other than class action trusts must assign all of the unencumbered assets earmarked for the settlement of asbestos claims no later than 90 days after the enactment 3. – Nonoperational companies with no assets earmarked for the settlement of asbestos claims shall contribute 50 percent of all unencumbered assets no later than 90 days after the date of enactment
II	\$75 million or greater	1 – \$27.5 million (highest revenues) 2 – \$24.75 million (next highest revenues) 3 – \$22 million (remaining) 4 – \$19.25 million (next to lowest revenues) 5 – \$16.5 million (lowest revenues)
III	\$50 million or greater, but less than \$75 million	1 – \$16.5 million (highest revenues) 2 – \$13.75 million (next highest revenues) 3 – \$11 million (remaining) 4 - \$8.25 million (next to lowest revenues) 5 - \$5.5 million (lowest revenues)
IV	\$10 million or greater, but less than \$50 million	1 - \$3.85 million (highest revenues) 2 - \$2.475 million (next highest revenues) 3 - \$1.65 million (remaining) 4 - \$550,000 (lowest revenues)
V	\$5 million or greater, but less than \$10 million	1 - \$1 million (highest revenues) 2 - \$500,000 (remaining) 3 - \$200,000 (lowest revenues)
VI	\$1 million or greater, but less than \$5 million	1 - \$500,000 (highest revenues) 2 - \$250,000 (remaining) 3 - \$100,000 (lowest revenues)**
VII	\$5 million or more in liabilities under the Federal Employer Liability Act (FELA)	1 - \$11 million (railroad or common carriers with revenues of \$6 billion or more) 2 - \$5.5 million (railroad or common carriers with revenues of less than \$6 billion, but more than \$4 billion) 3 - \$550,000 (railroad or common carriers with revenues of less than \$4 billion, but more than \$500 million)

* Under the FAIR Act, a “debtor” means: (i) a person that is subject to a case pending under a chapter of Title 11, United States Code, on the date of enactment of this Act or at any time during the one-year period immediately preceding that date, irrespective of whether the debtor’s case under that title has been dismissed; and (ii) all of the direct or indirect majority-owned subsidiaries of a person described under clause (i), regardless of whether any such majority-owned subsidiary has a case pending under Title 11, United States Code.

** If a participant’s required subtier payment under Tier VI would exceed the amount the participant paid in asbestos expenditures during the eight 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 years prior to the enactment of the Act for settlements and judgments, then the participant shall not have to make payments into the Fund.

The defendant participants would be required to pay an aggregate total of \$3 billion into the Fund annually for 30 years under the FAIR Act. A defendant participant would remain in the tier and subtier to which it was assigned for the life of the Fund, regardless of subsequent events, unless the Administrator finds sufficient evidence to conclude that inclusion within a tier was initially inaccurate.

Insurers that have paid, or been assessed by a legal judgment or settlement, at least \$1 million in defense and indemnity costs before the date of enactment of the FAIR Act in response to claims for compensation for asbestos injuries arising from a policy of liability insurance or contract of liability reinsurance would be considered insurer participants under the Act. The FAIR Act would establish

a separate Asbestos Insurers Commission (the Commission), which would have the responsibility of determining the contribution levels of each insurer participant after enactment of S. 852. The Commission would be required to set contribution levels based on several factors, including premiums from asbestos policies, losses paid, reserve levels, and future liability.

Silica and Mixed Dust Claims³⁵

Under the FAIR Act, silica claims would continue to be administered by the court system. Anyone seeking to recover on the basis of suffering from a silica-related injury would be required to plead with particularity and establish by a preponderance of the evidence that: (1) 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; (2) the injury was caused by exposure to silica; and (3) 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 he or she would not meet the exposure requirements set out in S. 852. If an individual is not able to meet these requirements, then the claim would be preempted by this Act.

Last Resort—The Sunset Provision

The FAIR Act would provide for a “sunset” or termination of the Fund in the situation where it is unable to fulfill its liabilities. Specifically, the Fund would terminate if the Administrator has: (1) begun processing claims; and (2) conducted an operational review of the Fund in preparation for the annual report and found that there were 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 would terminate within 180 days of this determination. Should that occur, claimants would be permitted to pursue sunset

claims.³⁶ Any individual wishing to do so could file a civil action to obtain relief in any federal district court or in state court in the state where the claimant resides or where the asbestos exposure occurred. The applicable statute of limitations would be tolled for the filing of sunset claims. For anyone who chose to pursue a claim in court, the relevant statute of limitations would continue to run, except that those who filed a claim with the Fund before its termination would have two years after the date of termination to file a claim in court.

Ban on Asbestos-Containing Products

Under FAIR, the Administrator would establish regulations prohibiting the manufacturing, processing, or distribution in commerce of products containing asbestos. Exceptions would be permitted where doing so would not unreasonably risk injury to the public health or the environment and those seeking the exemptions have made good faith, unsuccessful efforts to find minerals to substitute for asbestos in their products. It specifically would exempt from the prohibition two asbestos-containing products: (1) asbestos diaphragms used in the manufacture of chloralkali and its derivatives; and (2) roofing cements, coatings, and mastics containing asbestos that is totally encapsulated by asphalt.

The Sticking Points of FAIR

After years of negotiations and various drafts of differing legislation on asbestos litigation reform, the latest version of the FAIR Act remains divisive. S. 852 has attracted supporters on both sides of the political aisle, while it also faces much bipartisan resistance. The following section discusses the most critical issues surrounding S. 852 and the resistance it faces in becoming law.

The trust fund—is \$140 billion enough?—The creation of a trust fund to compensate victims of asbestos exposure has previously failed in the legislature mainly because an agreement on funding levels could not be reached. The funding level of FAIR is the most hotly contested provision and passage of the bill could ultimately come down to this single issue. Unfortunately, no one can be certain of how much money will be needed to pay out existing and all future asbestos claims. One would think because asbestos exposure hit its peak prior to the 1970s that asbestos-related diseases would be on a down slope; this, however, is not the case. On the contrary, many predict that claims will

³⁵ In *In re: Silica Products Liability Litigation*, MDL Docket No. 1553 (S.D. Texas), U.S. District Judge Janis Graham Jack cast doubt on the legitimacy of the majority of 10,000 consolidated silicosis claims. Judge Jack stated that the cases “were manufactured for money” and criticized both the attorneys and doctors involved. This case has initiated an investigation into the increasing number of silica claims being filed. Manufacturers Alliance/MAPI is researching this issue and will be distributing a publication to its membership.

³⁶ The term “sunset claim” refers to a claim filed with the Fund, but not yet resolved when the Fund is terminated.

hit an all-time high in the near future because asbestos-related deaths are not expected to peak for another 10 years. This makes it extremely difficult for legislators to determine the amount of funding needed to compensate all potential claimants. This uncertainty has engendered criticism and skepticism about the success of reform such as that proposed in the FAIR Act. Groups such as the AFL-CIO are opposing approval of S. 852 because of this uncertainty associated with the costs of the Fund.³⁷

The Congressional Budget Office (CBO) recently released a report predicting that the FAIR Act would generate about \$132 billion in claims over its lifetime.³⁸ If accurate, the Fund could remain viable, avoiding sunset. In its report, however, CBO warned that long-term projections about asbestos claims “must be viewed with considerable caution.”³⁹ The value of valid asbestos claims likely to be submitted to the proposed trust fund over 50 years could range anywhere from \$120 billion to \$150 billion, the report said. The report also cautioned that “projections that have been made in recent decades of the number of asbestos claims likely to be filed were, in hindsight, much too low, suggesting that there might be a significant risk of underestimating the number of future asbestos claims.”⁴⁰ “Consequently, the fund may have sufficient resources to pay all asbestos claims over the next 50 years, but depending on claim rates, borrowing, and other factors, its resources may be insufficient to pay all such claims,” the budget office concluded.⁴¹

Reaction to CBO’s report has differed depending on support for the bill.⁴² Senators Specter and Leahy issued a joint statement praising the CBO forecast that the Fund would generate \$132 billion worth of claims, allowing it to remain viable. They added, “[O]ur legislation with \$140 billion is

reasonable and realistically calculated to cover the claims.”⁴³ Michael Baroody, speaking for the Asbestos Alliance, a group of companies and trade groups in favor of the bill, saw “plenty of good news” in the CBO report and said, “[I]t is important to remember that borrowing and related costs would be borne by contributors to the fund, not the federal government.”⁴⁴

Opponents of the FAIR Act interpreted the CBO report as an indication that the Fund would not remain viable. The Association of Trial Lawyers of America (ATLA), which opposes the bill, said in a statement that the report raises a number of “financial red flags” that should give Senators pause during a floor vote.⁴⁵ An official with the Coalition for Asbestos Reform (CAR), a business-led lobbying group that opposes the bill, called CBO’s report “schizophrenic.” “They paint an overall picture of uncertainty,” the official told BNA. “But when [the report] gets to the numbers, it assumes all the stars are going to align. . . .”⁴⁶

According to a report by Bates White, LLC⁴⁷ (a Washington, D.C.-based economic consulting firm), the FAIR Act would create entitlements valued at \$300 billion, causing the Fund to sunset within three years of its inception and with debt of more than \$45 billion.⁴⁸ According to this report, 59 percent of qualifying individuals would have to choose not to collect awards for which they qualify under the FAIR Act in order for the Fund to avoid termination. The Bates White report focuses on two factors that pose the biggest threat to the Fund’s financial viability not identified in other analyses: (1) the FAIR Act would create an entitlement for many individuals with lung and other cancers who were not otherwise compensated in the tort system, resulting in at least a ten-fold increase in the number of lung and other cancer claims relative to

³⁷ AFL-CIO Legislative Update, May 27, 2005, states in discussing S. 852: “Our bottom line is that the costs and uncertainty associated with the fund must be borne by the defendant companies and insurers, not the victims of asbestos-related disease.” AFL-CIO Position: Oppose, found at <http://www.aflcio.org/issues/legislativealert/toolkit/upload/05-27-05.pdf>.

³⁸ Congressional Budget Office Cost Estimate, S. 852, Fairness in Asbestos Injury Resolution Act of 2005, as Reported by the Senate Committee on the Judiciary, June 16, 2005.

³⁹ *Ibid.*, p. 15.

⁴⁰ *Ibid.*, p. 16.

⁴¹ *Ibid.*, p. 2.

⁴² Bureau of National Affairs, Inc., *CBO Predicts Asbestos Trust Fund Would Generate \$132 Billion in Claims*, August 29, 2005.

⁴³ Press Release, U.S. Senator Patrick Leahy, Specter-Leahy Statement on CBO Report on Asbestos Trust Fund (August 26, 2005) (found at <http://leahy.senate.gov/press/200508/082605.a.html>).

⁴⁴ “Analysis Says Asbestos Plan Might Work,” *The Washington Post*, August 27, 2005, D-3.

⁴⁵ Press Release, Association of Trial Lawyers of America, “CBO Report Confirms Proposed Asbestos Fund Is Underfunded, Untested, & Unfair,” August 26, 2005, found at <http://www.atla.org/pressroom/pressreleases/2005/august26.aspx>.

⁴⁶ Bureau of National Affairs, Inc., *op. cit.*

⁴⁷ The report issued by Bates White, LLC was commissioned by the American Legislative Exchange Council (ALEC), an association of conservative state lawmakers.

⁴⁸ Bates White, LLC, *Analysis of S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act*, September 2005.

the tort system; and (2) the FAIR Act may compensate dormant claimants who have settled with most but not all defendants. According to its report, the cost of these dormant claimants would be borne entirely in the first few years of the Fund's operation. In a highly unusual move, the Senate Judiciary Committee has scheduled another hearing to discuss projections of future asbestos claims based on added concerns amid this report. It is rare for a Senate committee to hold a hearing on issues related to proposed legislation that already has been approved by the committee.

Several interested parties are particularly concerned with the availability of funds during the initial start-up of the Fund. In testimony Peg Seminario, Director of the AFL-CIO, remarked that her organization is "deeply concerned that there is not adequate upfront funding to cover the large volume of claims that will be filed in the early years of the program."⁴⁹ The CBO estimate reported that the Fund would collect about \$63 billion in the first 10 years and would pay out nearly \$70 billion in claims and other costs, such as start-up costs, investment transactions, and administrative expenses. The Fund would have to borrow the rest to make up the difference. The CBO admitted that the interest cost of this borrowing would add significantly to the long-term costs faced by the Fund and could increase the possibility that the Fund might become insolvent. CBO did predict, however, that asbestos claims would taper off in the later years, perhaps making it possible for the Fund to meet all of its financial obligations.⁵⁰

Others are anticipating strong resistance by those participants required to pay into the Fund under FAIR. In particular, Eric D. Green, Professor at Boston University Law School and the Legal Representative for future asbestos bodily-injury claimants in the Halliburton, Fuller-Austin, Federal-Mogul, and Babcock & Wilcox bankruptcy cases, notes that "[i]n 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."⁵¹

Claimants may find longer delays than in current system—Though the current civil justice system is flawed by delays—claimants even dying before their cases are heard in court—some critics foresee FAIR causing even longer delays in the processing of asbestos claims. In particular, the AFL-CIO insists that thousands of claimants will be left in limbo because of the length of time it will take for the Fund to become fully operational and able to compensate claimants, regardless of the safeguards written into the Act to avoid this dilemma.⁵²

Professor Green also testified that he does not believe claimants will be paid in a timely manner after enactment of the bill. He believes that resistance on the part of payers, along with the process needed to establish contribution amounts from insurers, will cause lengthy delays in the establishment of the Fund. Green further commented that "[t]he 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." As a potential solution, Green proffers that determinations on contribution amounts be made and binding commitments received from participants of the Fund prior to its enactment.⁵³

According to the CBO, however, if enacted by the end of calendar year 2005, the Fund could become fully operational during fiscal year 2007 and certain pending exigent asbestos claims would be paid by the Fund in 2006.⁵⁴

Who are the real winners under FAIR?—While the purpose of the FAIR Act is to "provide the necessary resources for a fair and efficient system to resolve asbestos injury claims that will provide compensation for legitimate present and future claimants,"⁵⁵ skeptics, such as Public Citizen, feel that the real beneficiaries of the Act would be the defendant companies. In its opinion, FAIR is essentially a "bail out" bill for those companies facing huge liabilities due to asbestos use. "What we need is a system that doesn't impose some artificial limit on corporate liability but instead compensates all victims fairly, according to the severity of their injuries," said Frank Clement,

⁴⁹ Statement of Peg Seminario, Director, AFL-CIO, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

⁵⁰ Congressional Budget Office, *op. cit.*, p. 2.

⁵¹ Statement of Eric D. Green, Professor, Boston University Law School and the Legal Representative for future asbestos bodily-injury claimants in the Halliburton, Fuller-Austin, Federal-Mogul, and Babcock & Wilcox bankruptcy cases, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

⁵² Statement of Peg Seminario, *op. cit.*

⁵³ Statement of Eric D. Green, *op. cit.*

⁵⁴ Congressional Budget Office, *op. cit.*, p. 3.

⁵⁵ The Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Congress (2005).

director of Public Citizen's Congress Watch division. "S. 852 is all about holding down corporate liability but not nearly enough about helping people."⁵⁶

Public Citizen conducted a study that alleges that the ten largest firms facing asbestos claims would pay nearly \$26 billion under current law for asbestos liabilities. Under the FAIR Act, these same companies would pay just \$5.6 billion.⁵⁷ Public Citizen argues that these companies already have seen profitable impacts from mere speculation of passage of the bill with the increase in stock prices. Joan Claybrook, president of Public Citizen, commented that "[W]ith the stock prices of asbestos firms rising with each step in the legislative process, investors are clearly signaling that the bill is a big winner for the companies . . . [b]ut when the companies win, the victims lose, because victim compensation depends directly on how much the companies contribute. With hundreds of thousands of people likely to die because the industry covered up the dangers of asbestos exposure for so long, this devastating human toll should be the priority of Congress."⁵⁸

Who should be compensated?—While many argue that the FAIR Act is too exclusive in who it will give awards to, other critics suggest that the current medical criteria in the FAIR Act will award too many individuals with no impairment or who are suffering from a cancer not caused by asbestos exposure. For example, James Crapo, Chairman, Department of Medicine at the National Jewish Medical and Research Center, who testified before Congress on behalf of the Asbestos Alliance, argued that 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 other cancers. Therefore, he suggests that the final version of the bill eliminate Level VI—Other Cancers. Furthermore, Dr. Crapo testified that the Act should include medical criteria for payment of claims for pleural reactions only when there is evidence of significant impairment related to extensive pleural disease. Dr. Crapo explained that

most pleural reactions are asymptomatic and do not cause any impairment. As he said in his testimony, "[i]n medical textbooks these are most commonly referred to as 'benign pleural plaques' and not 'pleural disease.'"⁵⁹

The inclusion of Level I—Asbestosis/Pleural Disease A and its eligibility for medical monitoring has attracted much debate. "Some dispute the rationale for monitoring, arguing that being at Level I does not imply any higher probability of subsequent illness than for other workers who are not at Level I."⁶⁰ Therefore, the Fund should not provide financial assistance to these individuals not suffering from any physical impairment. Doing so, he argues, would waste resources of the Fund already under fire as to whether it is sufficiently financed.

Award levels are too low—The past century has seen an upward trend of awards in personal injury lawsuits as a whole, and asbestos suits have been no exception. The average jury awards in asbestos cases are broken down as follows by injury type: \$3,785,829 for mesothelioma claimants; \$1,634,777 for asbestosis claimants; \$1,329,483 for other cancers; and \$321,838 for other nonmalignant injuries.⁶¹ As illustrated in Figure 1, mesothelioma claimants will receive \$1,100,000 under FAIR, while asbestosis victims will be compensated anywhere from \$100,000 to \$1,100,000, depending on the severity and their length of exposure. Without legislation, however, trends in awards likely will continue to rise. In 1998, a jury in Texas awarded \$5.6 million to each of 18 asbestosis plaintiffs whose cases were tried together. Three years later, a jury in Mississippi awarded \$25 million to each of six plaintiffs whose asbestosis claims were consolidated, far more than any asbestosis award ever before delivered. That same year, two Texas juries awarded asbestosis plaintiffs \$7.5 million and \$18 million. Despite the difference in awards available under FAIR and the court system, many claim that the current trends in litigation threaten payments to the truly sick, while

⁵⁶ Press Release, Public Citizen, "As Retooled Asbestos Legislation Emerges, Wall Street's Thumbs-Up Confirms the Deal is Good for Companies, Bad for Victims," June 22, 2005, found at http://www.citizen.org/pressroom/print_release.cfm?ID=1973.

⁵⁷ Public Citizen, *Federal Asbestos Legislation: The Winners Are*, May 2005.

⁵⁸ Public Citizen, *op. cit.*

⁵⁹ Statement of Dr. James Crapo, Chairman, Department of Medicine, National Jewish Medical and Research Center, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

⁶⁰ Rappaport, *op. cit.*, p. 10.

⁶¹ These averages represent the full amount awarded to plaintiffs—prior to any deductions for attorney fees and/or court costs.

disproportionately compensating unimpaired claimants.⁶²

What Others Are Saying

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) has voiced its continuing support for the FAIR Act. The UAW represents 1,150,000 active and retired employees in the automobile, aerospace, agricultural implement, and other industries. In testimony given to the Senate Judiciary Committee, Alan Reuther, UAW's Legislative Director, commented that the no-fault administrative system created by S. 852 "would provide victims with speedier compensation, while reducing the substantial lawyers' fees and other transaction costs in the current adversarial litigation system."⁶³ Reuther further noted that FAIR is essential because it would "ensure that the costs of compensating victims of asbestos-related diseases are spread broadly across defendant companies and insurers in a rational, predictable manner."⁶⁴ This would create more stability among these companies, and ultimately, reduce the bankruptcies and their effects on the economy.

The Military Order of the Purple Heart, whose members consist of combat veterans who suffered wounds or injuries in service and were awarded the Purple Heart medal, also has voiced its desire to have S. 852 become law. According to the Order, the Act would provide recourse for veterans to be compensated for their asbestos-related illnesses. Under the current system, options available to veterans are minimal because their exposure to asbestos occurred while they were employed by the federal government. They are unable to sue the federal government because it is immune from such claims, and the companies that supplied the asbestos to the government either have disappeared or have gone bankrupt, leaving many ill veterans

with no options to seek compensation for their injuries. FAIR would finally give veterans an outlet to seek compensation for asbestos-related injuries that they incurred while employed by the government.⁶⁵

Also supporting the passage of the FAIR Act is The National Association of Manufacturers (NAM). NAM is the nation's largest industrial trade association, representing small and large manufacturers. In its appearance before Congress to discuss the FAIR Act, NAM argued that this legislation is essential for the sake of asbestos victims, America's workers, and the economy. According to Governor John Engler, NAM President, the FAIR Act would "[p]rovide sure, fair and timely compensation of medical victims of asbestos exposure . . . comply at long last with repeated Supreme Court exhortations that Congress step in and solve the problem as only it can . . . and by getting it out of the courts, limit and in many cases, eliminate the flow of funds to lawyers instead of victims."⁶⁶

On the other spectrum, the American Insurance Association (AIA) has yet to support the FAIR Act. AIA is a casualty insurance trade organization with more than 435 member companies that write insurance and reinsurance around the world. Craig A. Berrington, Senior Vice President and General Counsel, has acknowledged that a national trust fund for asbestos victims could provide the most comprehensive answer to the asbestos litigation nightmare; however, he added that his organization was unable to support FAIR as it is currently constructed. AIA's main issue is whether the start-up of the Fund would be done quickly enough and in an effective manner. In his testimony, Berrington expressed the concern that because some claims would be able to continue under the tort system, insurers could potentially undergo double liability. He also expressed displeasure in the \$46 billion in trust fund financing to be assigned to the insurance industry. He believes that that is too great a financial burden for the relatively few individual insurers required to participate.⁶⁷

⁶² Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Report, December 17, 2001, p. 36 (quoting Oakland, California, plaintiffs' lawyer Steve Kazan as stating that weak asbestos cases result in recoveries that could go to mesothelioma victims); Trisha L. Howard, *Plaintiffs' Lawyers Seek Limit on Asbestos Lawsuits by People With Nonmalignant Illnesses*, St. Louis Post-Dispatch, December 11, 2001 (explaining that lawyers representing plaintiffs with malignancies believe steps should be taken to "preserve the integrity of these companies and their assets for people who are truly sick").

⁶³ Statement of Alan Reuther, Legislative Director, UAW, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

⁶⁴ *Ibid.*

⁶⁵ Statement of Hershel W. Gober, National Legislative Director, Military Order of the Purple Heart, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

⁶⁶ Statement of John Engler, President & CEO, National Association of Manufacturers, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

⁶⁷ Statement of Craig Berrington, Senior Vice President and General Counsel, American Insurance Association, at hearing on S. 852 before the Senate Committee on the Judiciary, April 26, 2005.

Conclusion

Although sponsors of the bill hoped that a vote would be scheduled on the FAIR Act this fall, due to lack of support—along with the Senate’s preoccupation with Hurricane Katrina relief, spending bills, and the confirmation of two Supreme Court justices—it is doubtful that a vote will occur by year’s end. Acknowledging this, Majority Leader Bill Frist (R-TN) has pledged to bring the bill to a vote early in 2006. While this is still possible, especially given strong support by industry, FAIR faces strong opposition which at this point appears difficult to overcome. More concerted effort by the Administration in support of FAIR would be one factor helping to break the logjam.

With the numbers of claims continuing to rise each year, the asbestos litigation epidemic will only

continue to grow. Legislative action needs to take place in order to curtail this nationwide problem. While the FAIR Act attempts to do just this, there may be other options available. Congress could proceed, for example, with H.R. 1957, following the lead taken by some state legislatures—Florida, Louisiana, Ohio, and Texas—which have all enacted asbestos medical criteria reform statutes. This option may be the best route to take if the trust fund approach cannot be worked out. While not perfect, it does represent an improvement over the current situation. Until Congress comes up with a suitable solution, victims will continue to lose award monies to litigation costs, manufacturers will continue to declare bankruptcy, workers will continue to lose jobs, and the American economy will continue to suffer.