Gordian Knot:
How the Senate's Asbestos "Reform" Bill Entangles Taxpayers

National Taxpayers Union Policy Paper 118

By
Jeff Dircksen

December 8, 2005

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Executive Summary

Due to the widespread usage of asbestos during much of the 20th century, an estimated 27 million to 100 million individuals have been exposed to the material, whether directly or indirectly, and more than 200,000 individuals are believed to have died from asbestos-related diseases. The RAND Corporation estimates that 730,000 individuals have filed lawsuits alleging an asbestos injury. An additional 50,000 to 75,000 new cases are filed each year, even though many of the claimants are not currently ill and may never become ill. More than 70 firms have gone bankrupt due to asbestos litigation. National economic productivity lost to date is $303 billion. But, a new legislative fix for this problem threatens the nation's taxpayers with additional losses.

The Supreme Court has twice struck down class action settlements and recommended legislative action. The latest such proposal is S. 852, the Fairness in Asbestos Injury Resolution (FAIR) Act. The goal of S. 852 is to remove the bulk of asbestos litigation from the court system and resolve it through a no-fault administrative process. The Fund would have $140 billion to pay claims. Defendant participants would contribute $90 billion, while insurers are expected to pay approximately $46 billion, with bankruptcy trusts adding $4 billion. The Fund faces a number of challenges that will create problems for victims, small businesses, and taxpayers and prevent it from functioning as intended. The failure of the Fund will dump victims back into the court system while leaving taxpayers with a substantial debt burden.

Attempts will be made to delay the implementation of the Fund. First, the Fund will face a constitutional challenge on the grounds that the act violates the Fifth Amendment's prohibitions on the taking of property without just compensation. Second, companies and insurers may refuse to provide the financial information necessary to determine their annual contributions to the Fund. Finally, the asbestos bar may attempt to flood the system with claims to prevent the Fund from obtaining operational certification, which would force cases back into the tort system.

The Fund uses medical criteria that are more liberal than those generally accepted in the tort system to evaluate an individual's claim of illness or impairment. Given the expected surge of filings in the early years, it is likely that the Fund will have to borrow heavily to pay claims and will be forced to terminate within a few years of opening – leaving taxpayers with the Fund's debt burden. This will either move claimants back into the legal system or prompt Congress to take political action that will increase taxpayers' financial exposure.

A more effective and less costly remedy for taxpayers would be the passage of legislation that contains strict medical criteria, while extending legal filing deadlines so that a claimant can pursue a case if he or she becomes ill in the future. Such a bill would benefit victims, businesses, and taxpayers by ensuring that only legitimate claims are considered by the court system.

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According to some ancient accounts, Alexander the Great spent several hours struggling to untie the Gordian Knot before making the forceful stroke for which he is most famous. Some in Washington are hoping that decisive action will soon loosen America's 21st century Gordian Knot – the entanglement of asbestos litigation that the Supreme Court has called an "elephantine mass." Supporters of S. 852, the Fairness in Asbestos Injury Resolution (FAIR) Act, believe that the bill offers the necessary bold solution to America's asbestos problems. While the asbestos issue needs resolution – and soon – the FAIR Act is not up to the job. Instead, the bill's flawed medical criteria and questionable financial estimates will only entrap taxpayers in the coils of asbestos.

This paper briefly explores the size and scope of the asbestos controversy as well as the status quo's failure to solve the problem. It then analyzes the FAIR Act and examines the weaknesses that prevent it from being an effective remedy. Finally, fiscally responsible alternatives are presented.

Introduction and Overview: The Asbestos "Curse"

Almost every article on this issue begins with the author mentioning that asbestos was once thought of as a "miracle mineral." Its ability to withstand heat led to its use in a variety of industries and products, ranging from home construction and shipbuilding to hair dryers and children's toys. While asbestos itself might have been a miracle at the time, its legacy has been more a curse – one that twists the lives of asbestos-exposure victims, chokes our legal system, and drags down our economy.

Before continuing, it is useful to define more precisely what the asbestos issue or problem is. As is often the case in the public policy arena, correctly pinpointing the problem is necessary for an effective outcome. For some stakeholders the asbestos problem is one of dollars and cents. For others, the problem is that of fraud being perpetrated on the legal system, and for still others, the problem is how to obtain fair compensation for an injury. Yet, none of these concerns can be viewed in isolation. It is important to realize that the numerous components come together to form an extremely complex dynamic. Barth highlights three crises that serve as a useful starting point. The first crisis arises "from the continuing emergence of disease among individuals exposed to asbestos, both on the job and unrelated to their work."[1] The second crisis "is the impact of victims of the disease seeking fair and reasonable compensation for their illnesses."[2] The final crisis "is the losses that the victims and their families have incurred as a result of the diseases. As those individuals who suffer from disease become disabled and in some cases die, some have been unable to receive adequate compensation."[3] Recognizing that a

particular constituency may perceive a single crisis as *the* problem helps to explain the intractability of the asbestos issue.

The Human Crisis

During the April 2005 hearing that the Senate Judiciary Committee held on the FAIR Act, Senator Ted Kennedy (D-MA) argued, "The real crisis which confronts us is not an asbestos litigation crisis. It is an asbestos-induced disease crisis."[4] Exposure to asbestos is obviously at the heart of this issue. Having an understanding of how many people were exposed, and how many are or might become ill, is essential to developing a solution.

Given the long latency period of the diseases associated with asbestos – usually two or more decades – it's difficult to know precisely how many people were exposed directly or indirectly to asbestos, but estimates range from 27 million to 100 million.[5] People who have the highest levels of exposure are those involved in the manufacture of asbestos products and those who installed asbestos in ships and buildings. Family members of these workers may have experienced "take-home exposure" where asbestos fibers or particles were carried home on clothing or tools. At the Committee's hearing in April, Dr. Philip Landrigan, Chairman of the Department of Community and Preventive Medicine at the Mount Sinai School of Medicine in New York, testified, "Asbestos has been responsible for over 200,000 deaths in the United States, and it will cause millions more deaths worldwide."[6]

Individuals with asbestos exposure face the prospect of contracting cancer or other disabling diseases. Perhaps the worst is mesothelioma, a cancer that affects the lining of the chest cavity. Exposure to asbestos is the only proven cause of mesothelioma.[7] It can occur even at low levels of exposure and is highly fatal (usually leading to death within one to two years). Causes other than inhalation of asbestos have been suggested, but these claims have not been established through clinical research.

The second condition associated with asbestos exposure is asbestosis, a disease where scar-like tissue builds up in the lungs.[8] This condition is often crippling because it frequently reduces lung volume and function, but it is not always fatal.

Asbestos exposure has also been linked to a number of other cancers, most particularly lung cancer. However, the question of whether exposure is the cause of the cancer is debated hotly. "Many believe that there is such a synergistic effect (i.e., when one is exposed to both asbestos and tobacco), the risk of lung cancer is enhanced greatly beyond the sum of the two factors independently."[9] This controversy is extremely important when discussing how to compensate asbestos victims, many of whom may have been smokers at some point during their lives. Asbestos is also associated with, although not proven to cause, a number of other cancers: bladder, breast, colon, esophagus, kidney, larynx, lip, liver, lymphoid, mouth, pancreas, prostate, rectum, stomach, throat, thyroid, tongue, and leukemia. The link between asbestos and cancer is further complicated by the fact that no federal agency monitors asbestos-related cancers other than mesothelioma.[10]

Exposure can also have non-cancerous side effects. The pleural, which is the membrane that lines the inside of the chest cavity and the outside of the lungs, is subject to plaques or scarring. Liquid can also build up in the pleural space, which leads to pleural effusion. Pleural changes lead to diminished lung capacity but are not associated, generally, with impairment or disability. Exposure to coal or silica dust can also lead to pleural changes.

The Litigation Crisis

At the April hearing on the FAIR Act, Senator Dick Durbin (D-IL) stated, "This is about more than money. It's about justice. It's about fairness."[11] It is this very search for justice and fairness that has pushed tens of thousands of individuals into the tort system and created what the RAND Corporation calls "the longest-running mass tort litigation in the United States."[12]

Regulatory failures

The health concerns associated with asbestos exposure are not recent discoveries. The existence of asbestosis was first reported in British medical journals over 80 years ago. Asbestos workers were known to be such a bad risk for life insurance that companies in the U.S. and Canada stopped selling policies to them.[13] As White reports, "Safer substitutes for many uses of asbestos were known as early as the 1930s. Nonetheless, U.S. consumption of asbestos increased from 100,000 metric tons in 1932 to 700,000 metric tons in 1951 and peaked at 750,000 metric tons in 1974."[14]

Even though impaired asbestos workers in Britain were able to collect disability payments from their government beginning in 1931, American workers faced two hurdles that made it difficult to receive workers' compensation when they became ill. First, "Asbestos diseases develop slowly and symptoms are easily mistaken for other diseases, so that workers often left their jobs without knowing that they had asbestos diseases and this often meant that they did not quality [sic] for compensation."[15] Second, some employers and insurance companies apparently hid information from workers. Johns-Manville, the largest producer of asbestos in the U.S., conducted physical exams of workers but did not disclose whether the individual had asbestosis or not.[16] It has also been alleged in court that MetLife conducted studies into the health effects of asbestos in the 1930s but did not disclose the results of its research.[17] Until the 1970s, workers' compensation claims were the only recourse that workers had against their employers.

While the workers' compensation system generally failed asbestos workers, other regulations would lead to the exposure of those who did not mine or produce the material. For example, commercial building codes often required the use of asbestos insulation. When the insulation began to decay or was disturbed (or removed) during repair work, the fibers were blown throughout buildings and inhaled by office workers. Concerns about asbestos in public buildings, especially schools, led a number of communities to mandate the removal of asbestos in the late 1980s and early 1990s, thus creating an exposure problem where none existed before.

During the 1970s and 1980s, the federal government increased its asbestos oversight. Initially, the Occupational Health and Safety Administration set a maximum exposure threshold

of five asbestos fibers per cubic centimeter of air. The plan was for the level to decline to two fibers by 1976. However, some research suggested that even the lower level did not prevent asbestosis. In 1983, the agency reduced the limit to 0.5 fibers. Then in 1989, the Environmental Protection Agency (EPA) proposed banning the use of asbestos. A federal court decision overturned the ban in 1991, and EPA did not appeal the ruling. Consequently, the use of asbestos is still legal in the U.S.

The Shift to the Legal System[*]

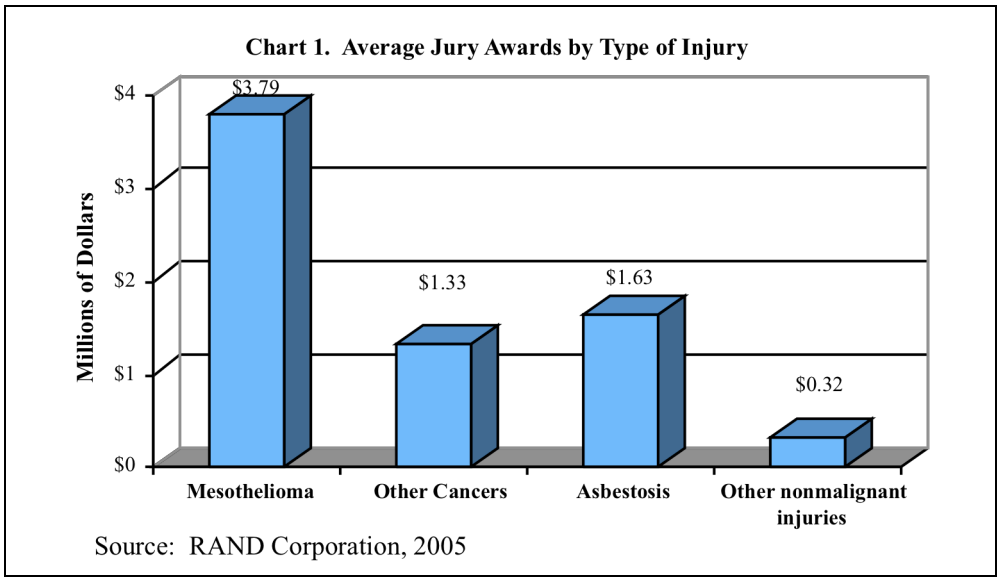
In the late 1960s and early 1970s, the focus of the asbestos issue shifted from workers to individuals who used and handled asbestos products. This development marked the emergence of the litigation phase, which would eventually lead to the "elephantine mass" of cases that exist today. Even though Johns-Manville paid almost $1 million in workers' compensation claims to 285 disabled employees in 1969, the company's potential financial liability rose as lawyers sought to sue the company, and other asbestos producers, on behalf of those who *used* asbestos products under the new strict liability legal doctrine. "Under the strict liability rule, producers are liable for damages to users regardless of whether they were negligent or not, as long as their products are 'unreasonably dangerous' or users were not adequately warned of the danger."[18] The combination of strict liability, the known linkage between asbestos use and disease, and the apparent cover-up by some asbestos manufacturers and insurance companies led to a court victory for insulation worker Clarence Borel in *Borel v. Fibreboard*, which was upheld by the Fifth Circuit Court of Appeals in 1973.[†]

Despite the initial victory by the plaintiff in *Borel*, the asbestos industry continued to defend itself vigorously in court until the mid-1980s. Then, plaintiffs' attorneys shifted their strategy. Rather than searching for single cases to present at trial, firms began to develop mass screening programs to recruit additional claimants. These firms would then file claims on behalf of hundreds of workers who might have been exposed to asbestos, although the individuals may not show any sign of physical impairment.

Average awards for those who are impaired range from several hundred thousand dollars to several million. Chart 1 contains the average jury awards by injury, as compiled by the RAND Corporation.

[*] This section draws upon the RAND analysis as well as White's paper on asbestos and mass torts. It is intended only as a brief overview of asbestos litigation. Individuals interested in a more detailed discussion of the issue should read both of those pieces as well as the works cited by those authors.

[†] 493 F.2nd 1076 (5th Cir. 1973).



Since few cases actually reach the trial stage, RAND acknowledges that the financial judgments used in their analysis might not be representative of all juries or claims, but they note, "[It] is widely assumed that trends in settlement values of cases reflect trends in jury awards (perhaps with some lag)."[19]

As White notes, "About one-sixth of all damage awards in asbestos trials from 1987-2002 included punitive damages – a high fraction compared to other types of litigation."[20] Since punitive damages are uninsurable, defendants, in response, often found it easier and less costly to settle claims, whether legitimate or not, than to contest lawsuits in court.

The willingness of defendants to settle cases has only encouraged the asbestos trial bar to become more aggressive in filing new lawsuits. "When defendants settle claims rather than going to trial, representing claimants becomes very profitable for plaintiffs' lawyers, since most of their costs are incurred at trial."[21] RAND estimates that total spending on asbestos litigation through 2002 is $70 billion and that claimant transaction costs totaled $19 billion, or 27 percent of all spending. What is even more interesting is that plaintiffs' attorneys are collecting nearly 40 percent of what RAND calls gross compensation, which is estimated to be approximately $49 billion.

With their ability to capture nearly 40 cents of every dollar awarded as compensation, the asbestos bar has a significant economic incentive to flood the courts with as many cases as possible, regardless of merit, in the hopes of forcing defendants to settle. This motive may help to explain the recent surge in cases.

The torrent of cases inundating the court system is one of the primary challenges to Senator Durbin's search for justice and fairness. How many individuals are sick? How many individuals will become sick in the future? How many individuals have filed claims but will never become sick? These questions are at the root of the asbestos crisis, and they are central to any possible resolution of this issue, including the trust fund legislation now being considered by the Senate.

Sizeable Number of Claimants

With multiple plaintiffs suing multiple defendants, White notes that the total number of claims is somewhere in the millions. Yet, that does not provide us with an idea of how many *individuals* are claiming some level of injury. RAND points out the difficulty in determining the exact number of claimants. "There is no national registry of asbestos claimants. Some claims are not filed formally in court as lawsuits. Federal courts report the number of asbestos lawsuits filed, but in recent years most lawsuits have been filed in state courts, which do not routinely identify and report annual asbestos lawsuit filings."[22‡]

"Between 1982 and 2001, the total number of asbestos claimants grew from 1,000 to 600,000."[23] Because lawyers make multiple filings on behalf of multiple plaintiffs against multiple defendants, over counting claimants is a clear problem. RAND estimates the unique number of claimants to be 730,000 through 2002, but also admits that number is low. "We believe this number is probably an underestimate. It is possible that some individuals brought asbestos claims but did not name any of the defendants from whom we had obtained data and therefore were not included on any of the lists of claimants that defendants made available to us."[24]

Sizeable Number of Defendants

According to White, the number of defendants swelled from 300 to 6,000 between 1982 and 2001. The American Bar Association also uses the 6,000-firm estimate in its discussion of asbestos litigation.[25] RAND calculates a significantly higher number, finding that 8,391 unique entities were named in lawsuits through 2002.[§]

The number of lawsuits is continuing to expand and draw in new defendants. In a search for additional claimants and revenues, the asbestos bar has started to target "usage" industries, where firms used asbestos products or sold items containing asbestos. For example, Sears is being sued because it sold various products that contained asbestos. Newspaper publisher Dow Jones & Co. and baby food manufacturer Gerber have been targets because of asbestos in the workplace. GM and Ford produced vehicle brakes that contained asbestos, and 3M has been sued because it "produced a respirator that did not protect users from asbestos."[26] Schlomach wryly notes that many of these nontraditional firms are now being sued "with little or no justification other than their checkbooks."[27] Table 1 shows the rise in claims for nontraditional industries over a three-year period.

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‡ This problem is made more difficult as RAND notes because over time plaintiffs' lawyers have shifted filings from federal courts to state courts. Before 1988, 41 percent of claims were filed in the federal court system. After federal cases were transferred to Judge Charles Weiner in 1991 by the Judicial Panel on Multidistrict Litigation, firms representing claimants moved more cases into state courts. RAND estimates that only 13 percent of new cases were filed in federal court after 1998. This switch might be to avoid Judge Weiner, "whose rulings many plaintiff attorneys perceived as antithetical to their clients' interests," to find venues with plaintiff-friendly juries, or both. (RAND p. 61)

§ "The result suggests that we can be 95 percent confident that the number of unique defendants is at least 8,025 and no more than 8,756." (RAND, p. 79)

Table 1. Claims in Nontraditional versus Traditional Industries					
	Number of Claims			Percentage Increase	
	1999	2000	2001	1999-2000	2000-2001
Traditional	16,997	31,496	43,397	85	38*
Nontraditional[+]	11,420	23,582	40,453	107	71

[+] Food and beverage, textiles, paper, glass, iron/steel/nonferrous metals, durable (metal) goods, and other industries.

Source: RAND Corporation, p. 77. *Figure has been adjusted for possible mathematical error in original report.

Not surprisingly, these industries are also shouldering an increasing share of defense costs. According to a private study on legal costs obtained by RAND for its analysis, traditional defendants accounted for nearly 75 percent of asbestos costs in the early 1980s. By the late 1990s, however, nontraditional industries were paying 60 percent of asbestos expenditures.

The ensnarement of nontraditional industries is now the primary driver of new claims entering the legal system. The massive recruitment efforts of the asbestos bar have opened the courts to any individual who can meet the legal threshold for asbestos exposure, whether or not the individual has suffered any actual impairment. The American Bar Association estimates that between 50,000 and 75,000 new asbestos-related lawsuits are filed each year.[28]

Increases in Mesothelioma and Nonmalignant Claims

During the 1980s, claims for mesothelioma, other cancers, and nonmalignant conditions grew at approximately the same rate but that pattern shifted during the late 1980s and 1990s with the surge of new cases. Mesothelioma claims, which had accounted for 6 to 7 percent of all claims filed during the 1970s and early 1980s, fell to between 4 and 5 percent of all cases during the mid-80s.[29] Even though the absolute number of these cases increased during the 1990s, they have continued to fall as a percentage of all cases and now represent 3 percent of all claims filed.[30]

In contrast, the percentage of claims for nonmalignant injuries has been steadily increasing over time. These cases represented 80 percent of all filings until the mid-80s, but increased significantly after that. "The fraction of claims that asserted nonmalignant conditions grew through the late 1980s and early 1990s, rising to more than 90 percent of annual claims in the 1990s and early 2000s."[31] Again, this increase has coincided with the rise in lawsuits against nontraditional industries where exposure levels are believed to be lower than for traditional industries. The authors of the RAND analysis point out that many of the individuals they interviewed during the course of their research "cited the rapid growth in the annual number of claims for nonmalignant injuries as the most important recent trend in the litigation."[32]

The challenge for the legal system, and again for Senator Durbin's search for justice and fairness, is that many of these individuals are not currently ill. Some cases may have been filed to ensure that the claimant meets a statutory filing deadline. Others may result from aggressive

recruitment efforts by asbestos litigation firms. Stiglitz argues that the rise in claims does not reflect expected rates of disease for asbestos-exposure victims:

> The dramatic acceleration in claims does *not* appear to be associated with an acceleration in the number of severely affected people. Indeed, the American Academy of Actuaries has concluded that about 2,000 new mesothelioma cases are filed each year, a flow which is largely unchanged over the past decade, and the annual number of other cancer cases at least partly related to asbestos exposure amounts to between 2,000 and 3,000. Such cases cannot come close to explaining the increase in asbestos claims being filed, which increased by almost 60,000 between 1999 and 2001.[33]

Even the Bar Association acknowledges that many of these litigants do not and may never suffer from an asbestos-related disease.[34]

How Many Claims Are Not Valid?

While a large portion of claimants may not be impaired, it appears that some of the cases might be fraudulent. Over the past 20 years, the asbestos bar has become a very specialized niche industry that has been very aggressive in its recruitment efforts. Law Professor Lester Brickman estimates that over 1,000,000 construction and plant workers have been processed through attorney-sponsored screening programs over the past 17 years.[35] According to the *Mobile Register*, asbestos screening companies may help lawyers find up to 90 percent of nonmalignant asbestos claims.[36] The paper launched a special investigation of local screening companies after learning about the involvement of the firms in asbestos litigation. Dr. Marc S. Gottlieb, a Mobile-area pulmonologist, told the paper:

> Unfortunately, the percentage of people who go through these testing mills and test positive is probably real high, like 75 percent. 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 [asbestosis] would be on the order of 20 to 25 percent, and people who are really disabled by it, like 5 to 10 percent.[37]

Given the large sums of money involved, perhaps the presence of unsavory individuals was inevitable. According to Brickman:

> Asbestos screenings are not intended to detect disease for purposes of treatment; rather they are intended to identify 'litigants' with the requisite characteristics that will generate tens of millions of dollars in fees and payments to screening companies and the doctors they hire and billions of dollars for lawyers who charge contingency fees typically ranging from 33% to 40%.[38]

An after-the-fact review also suggests that some claims have been overblown. According to the RAND study, the Manville Bankruptcy Trust began a program in 1995 to audit X-rays from a random sample of claimants. "A claim was downgraded only if [both readers] independently determined that they saw no indication of even low-level, sub-diagnostic X-ray

evidence of interstitial fibrosis."[39] The report then cites a court affidavit that concludes "… of the X-rays the Trust actually received, approximately 50% failed independent B-reader review."[40] White notes that several studies suggest that between two-thirds and nine-tenths of claims are either filed on behalf of unimpaired individuals or are fraudulent. According to *The Wall Street Journal*, the U.S. Attorney for the Southern District of New York has convened a grand jury to look into the practices of law firm-sponsored screenings.[41]

The Economic Crisis

Despite Senator Durbin's assertion that the asbestos issue is about more than just money, unquestionably money plays a very important role. It is the means of compensating those who are sick or those families who have lost loved ones to asbestos-induced diseases. It is perhaps the only measure of whether a portion of the fairness and justice that Durbin seeks has been achieved. Senator Kennedy may not believe that asbestos woes add up to a litigation crisis, but decades of litigation have had significant macro- and microeconomic consequences for victims, businesses, and workers, whether they were actually in the court system or not.

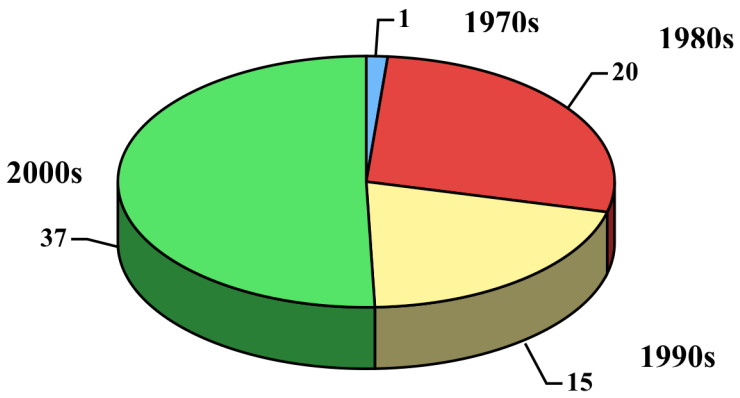
RAND estimates that defendants have spent more than $21 billion in legal fees and expenses through 2002. This represents approximately 31 percent of the total costs associated with litigation. These costs have considerable economic effects. According to John Engler, President and CEO of the National Association of Manufacturers, the tangle of asbestos litigation has reduced economic productivity to date by $303 billion, with some yearly losses as high as $50 billion.[42]

The worst consequence associated with ongoing litigation is the forcing of firms into bankruptcy. Asbestos-related bankruptcies are not a completely new phenomenon. By 1982, three major firms (North American Asbestos, Union Asbestos and Rubber, and Johns-Manville) had all sought bankruptcy protection.[**] According to RAND's data, 20 firms were dissolved or filed for Chapter 11 during the 1980s.

Even into the 1990s, the perception was that bankruptcies were under control. That assessment changed after 2000, however, with as many companies seeking Chapter 11 protection in the current decade as during the previous two decades combined.[43] Through the summer of 2004, RAND identified 73 defendants who have been forced into bankruptcy. Chart 2 shows asbestos-related bankruptcy filings by decade.

[**] The Johns-Manville bankruptcy led to the establishment of the Manville Trust, which was designed to pay the company's future claims (estimated to be about $2 billion). The Trust received cash, company stock, interest-bearing notes, bonds, insurance payments, and a pledge of future company profits that totaled more than $3 billion. This arrangement has served as a model for subsequent bankruptcy filings.

Chart 2. Asbestos-Related Bankruptcy Filings by Decade



Source: Rand Corporation, 2005

The recent increase is more problematic. As one unidentified business source told *The Wall Street Journal*, "If nothing is done, the plaintiffs lawyers will own the world's largest wall board company in USG, the world's largest insulation company in Owens Corning, the world's largest ceiling and floors company in Armstrong, and the world's largest roofing company in GAF. It's like a hostile takeover by the asbestos trial bar of the construction industry."[44]

A firm's bankruptcy can have negative consequences for claimants. "Claims can be put on hold for five years or more, and in some cases the [bankruptcy] trusts established to take care of victims have been able to pay only 5% to 10% of what was expected."[45] After facing long delays in the handling of their claims, victims might be forced to wait years more if a firm is forced into bankruptcy.

Asbestos-induced bankruptcies also have negative consequences for workers and their communities. Stiglitz analyzed 61 companies that were driven to seek Chapter 11 protection due to asbestos lawsuits.[46] The results of that analysis show that the bankruptcies led to the loss of an estimated 50,000 to 60,000 jobs, and that each displaced worker lost $25,000 to $50,000 in wages over the course of his or her career. Stiglitz estimated that employees of these firms lost, on average, $8,300 from their 401(k) plans, or approximately 25 percent of the plans' value.

Schlomach suggests that the overall effect on employment is much larger than the direct losses predicted by Stiglitz and range from 543,000 to 702,000.[47] This is due to the impact that the direct losses have on affiliated businesses and communities. In his written testimony, Engler cites a study from NERA Economic Consulting that calculates substantial associated job losses: 8 additional jobs are lost within a community for every 10 jobs lost to an asbestos-related bankruptcy.[48]

These bankruptcies also have consequences for the insurance industry. Schlomach notes that a 2002 study from Lehman Brothers concludes that the insurance industry's asbestos exposure has reduced earnings, on average, between 8 and 12 percent. With potential liabilities as high as $65 billion, losses for the insurance industry could exceed those for Hurricane Andrew and the terrorist attacks of September 11, 2001 combined.

The Failure of the Status Quo

It is unlikely that additional bankruptcy filings will end the stranglehold that asbestos litigation now has on the judicial system – and more likely than not, the problem will become worse in the future. Analysts at Tillinghast-Towers Perrin estimate that one million claims will be filed before this issue is finally resolved, with litigation costs totaling $200 billion. Milliman analysts predict that 1.1 million claims will be brought, costing defendants and insurers more than $265 billion. This would suggest that thousands, perhaps hundreds of thousands, of claims are still outstanding and could be filed in the future. RAND concludes, "Regardless of the differences among the various projections, they all suggest that, at most, only about 70 percent of the final number of claimants have come forward and, possibly, only a fourth. Based on these projections, the future costs of asbestos litigation could total $130 billion to $195 billion."[49] An alternative, or alternatives, to forcing more and more firms into bankruptcy must be found if this crisis is to be dealt with effectively.

Bankruptcy (and by extension bankruptcy trusts) has been one but not the only vehicle that the judicial system has used to move toward a resolution of asbestos litigation. Many jurisdictions, such as California, have changed the statute of limitations for filing an asbestos claim to reflect the latency period of asbestos diseases. Traditionally, workers had to submit a claim within one or two years of exposure, whether they were sick at the time or not. Under the revised rules, a worker faces a statute of limitations based on when the worker was diagnosed with a disease or became too impaired to work.

Other jurisdictions have developed inactive dockets, or pleural registries, which allow claimants who show some sign of exposure to meet the filing requirements but delay moving the cases forward until the individual shows some sign of illness. "Nonmalignant claims are removable from the inactive docket only if they meet prespecified clinical criteria (e.g., diagnosis of malignancy, certain radiological exam results, and pulmonary function test ratings) or if a claimant's lawyer is otherwise able to persuade the court that a claim should be activated."[50]

Perhaps the most logical option for resolution is the class action settlement. As White points out, that method has solved a number of mass torts ranging from Agent Orange to Fen-Phen.[51] On two occasions global asbestos settlements have been reached and then eventually dismissed by the Supreme Court.[††] According to Rappaport, the key features of the *Amchem Products* case were: "(1) definitive criteria for proving exposure and illness, in a simplified and expedited process, (2) standardized compensation for actual illness only, (3) preservation of the right to compensation later if disease (or worsened disease) occurs later, (4) a cap on attorney fees, and (5) a limited right to opt out and rely on one's ordinary right to sue."[52] The Supreme Court overturned the certification of both cases under various provisions of Federal Rule of Civil Procedure 23. The collapse of these two settlement agreements, according to White, promptly led 22 defendants to file for bankruptcy.[53]

In rejecting the *Ortiz* settlement, Justice David Souter wrote, "this litigation defies customary judicial administration and calls for national legislation."[54] Yet, this too has been tried before as more than 15 bills have been introduced in Congress since the 1970s. Despite the

[††] *Amchem Products* v. *Windsor*, 521 U.S. 591 (1997) and *Ortiz* v. *Fibreboard*, 527 U.S. 815 (1999).

lack of legislative progress in the past, the Senate leadership has announced plans to advance a bill to the floor early next year that uses a no-fault trust fund to compensate individuals and bring an end to the asbestos crisis. It is to that bill, S. 852, that we now turn our attention.

The FAIR Act: Problems and Pitfalls

S. 852 was introduced by Senate Judiciary Committee Chairman Arlen Specter (R-PA) on April 19th. The bill builds upon the Committee's work from the 108th Congress, when it produced S. 1125 (Fairness in Asbestos Injury Resolution Act of 2003) and S. 2290 (Fairness in Asbestos Injury Resolution Act of 2004), neither of which passed the Senate.

The objective of S. 852 is to remove the bulk of asbestos claims from the court system and resolve them through a no-fault administrative process. The bill establishes the Office of Asbestos Disease Compensation within the Department of Labor, headed by an Administrator who reports directly to the Assistant Secretary of Labor for the Employment Standards Administration. The bill also creates the Asbestos Injury Claims Resolution Fund. The Fund is expected to receive approximately $140 billion over the next 30 years. It is the responsibility of the Administrator to ensure the solvency of the Fund and to pay claims from the Fund in a timely manner.

Upon enactment of S. 852, most pending legal claims would be stayed. However, some non-consolidated cases that are at the evidentiary stage and cases that have final verdicts, judgments, or orders are allowed to remain in the court system. Plaintiffs would face a five-year statute of limitations for submitting their claim to the Fund. New claims would have to be filed "no later than five years after the claimant receives a medical diagnosis of an eligible disease or condition, or discovers facts that would lead a reasonable person to seek a diagnosis."[55]

S. 852 sets several important deadlines for the Administrator. The bill requires the Administrator to certify within nine months of enactment that the Fund is able to review and compensate individuals who have exigent health claims, i.e., terminal illnesses. Mesothelioma payments are to be made within 30 days of approval. All other claims would be handled within two years and payments made over a four-year period. If these targets are not met, claimants may return to the court system and pursue a legal resolution.

To receive compensation from the Fund, a claimant is required to demonstrate "by a preponderance of the evidence" that the claimant is ill and meets the medical criteria for an award.[56] To meet the evidentiary burden, a claimant must show an occupational exposure to asbestos as well as submit the individual's history of tobacco use and medical records including physical exams, pulmonary function tests, x-rays, and pathology reports. Screeners would then evaluate the evidence and determine each claimant's eligibility for any of the nine disease-related tiers in the bill. Claimants are to be placed in the highest tier for their disease. "The goal is a non-adversarial system that is prompt, efficient, and as accurate as possible in a field where there are substantial scientific uncertainties."[57]

The nine disease tiers and their corresponding awards are contained in the following table. Awards are to be adjusted for inflation. It is important to note that the bill does allow

individuals whose injuries do not fit into one of the nine categories to seek compensation for "exceptional medical claims."[58]

Table 2. Disease Tiers and Award Levels under S. 842		
Level	**Disease**	**Amount of Award**
I	Asbestosis – normal lung function	Medical monitoring only
II	Mixed disease with impairment	$25,000
III	Asbestosis – total lung capacity 60-80 percent	$100,000
IV	Severe asbestosis – total lung capacity 50-60 percent	$400,000
V	Disabling asbestosis – total lung capacity < 50 percent	$850,000
VI	"Other" cancers	$200,000
VII A	Lung cancer with pleural disease – smokers	$300,000
VII B	Lung cancer with pleural disease – former smokers	$725,000
VII C	Lung cancer with pleural disease – non-smokers	$800,000
VIII A	Lung cancer with asbestosis – smokers	$600,000
VIII B	Lung cancer with asbestosis – former smokers	$975,000
VIII C	Lung cancer with asbestosis – non-smokers	$1,100,000
IX	Mesothelioma	$1,100,000
Source: United States Senate Committee on the Judiciary, Committee Report 109-97, June 30, 2005, p. 46.		

The Fund would pay claims from contributions that it receives from defendant participants, insurer participants, and bankruptcy trusts. Defendant participants are those companies that have spent at least $1 million on litigation, while insurer participants are those firms that have made payments in excess of $1 million. Defendants are expected to contribute $90 billion, less any credits for payments to a bankruptcy trust fund that was established after July 31, 2004. Insurers are expected to contribute $46.025 billion, less any approved credits. The Administrator is permitted to assess additional surcharges to prevent contributions from falling below a minimum aggregate level of $3 billion, less any bankruptcy credits. The Administrator is also authorized to borrow from the Federal Financing Bank and private entities to finance the payment of claims as well as sue participants who fail to make their required contributions.

To determine their contributions to the Fund, defendant companies would be grouped into tiers and sub-tiers based upon prior asbestos expenditures and whether the company is facing bankruptcy proceedings. One tier is specifically reserved for participants that file for bankruptcy in the year before the bill's enactment. Depending upon the tier in which a company finds itself, its annual contribution could range from $100,000 to $27.5 million. S. 852 does allow a defendant participant to petition the Administrator for a reduction in payment due to financial hardship.

Insurer participants are not included in the tier structure. Instead, the bill creates the Asbestos Insurers Commission. This body is charged with developing a methodology that would determine the amount owed by each insurer. Companies are allowed to appeal their assessments to the federal appeals court for the District of Columbia, and firms may also petition the Insurers

Commission for a lower payment because of financial hardship. The bill requires insurers to pay $2.7 billion in the first year, of which no more than 50 percent of that amount is due 90 days after enactment of the legislation. However, the Congressional Budget Office (CBO) notes that "initial payment amounts would not be considered final until the Insurers Commission has been formed, promulgated its allocation methodology, and issued its final determination of liability of the insurers."[59] Participants would then be expected to pay another $2.7 billion in year 2, $5.075 billion in years 3 through 5, $1.147 billion for years 6 through 27, and then $166 million in year 28.[60]

The bill also requires the Administrator to establish a claimant assistance program that would provide information and legal help. Attorneys' fees would be limited to no more than 5 percent of final awards for submitting an initial claim or 20 percent for claims that are under administrative review. Even with a cap of 5 percent, attorneys could potentially collect up to $7 billion (five percent of $140 billion). This provides some incentive for them to submit as many claims as possible to maximize their potential revenues.

S. 852 would also allow individuals who worked at a vermiculite mine in Libby, Montana, to receive compensation. Family members of these workers as well as individuals living near Libby would also be eligible for compensation. Cancer and lung disease rates for Libby residents are estimated to be 40 to 60 times higher than normal.[61] The ore from the mine, which was owned by W.R. Grace, was transported to a number of other Grace-owned facilities for processing. This may have exposed other workers and their families. The bill would require the Agency for Toxic Substances and Disease Registry to conduct a study of 28 communities where most of the vermiculite was handled. The residents of any area that is found to have problems similar to those in Libby would then be eligible for the same level of awards as the residents of Libby.

The Administrator is required to make annual reports to Congress on the Fund's solvency and ability to pay claims due in the next five years. If shortfalls are expected, the Administrator is required to forward recommendations on how to improve the viability of the Fund to a commission, which would then hold hearings and submit a report to Congress, or to terminate the program. If the Fund is "sunset" by the Administrator, any unresolved claims would revert back to the court system. All new claims would also require judicial action.

The question that must now be asked is whether S. 852 is the masterstroke that unties the Gordian Knot of asbestos litigation. In the statement that he submitted to the Judiciary Committee in April, Dr. James Crapo noted that the primary challenge of the Fund "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."[62] Unfortunately, the Fund created by S. 852 faces a number of challenges that will create problems for victims, small businesses, and taxpayers – in turn preventing the Fund from functioning as intended. The result will most likely dump victims back into the court system while leaving taxpayers with an additional debt burden.

Victims to See Additional Delays

Victims could see two different efforts to prevent the Fund from achieving operational certification. The first hurdle that the Fund is likely to face is a legal challenge on the grounds that the act violates the Constitution by taking property without just compensation. Senator Dianne Feinstein (D-CA) expressed this concern at the Judiciary Committee's April 26th hearing:

> … [I]t abrogates rights secured by valid contracts of insurance, while requiring the firms that hold those rights to contribute to the trust fund, [it] is kind of double exaction, requiring firms to contribute to the trust fund as a substitute for tort liability while simultaneously taking from firms the very assets they have accumulated in order to discharge those liabilities – [it] cannot, in my judgment, be squared with basic constitutional principles.[63]

In its written report, the Committee tries to downplay this issue by citing an analysis from Harvard Professor Laurence Tribe. In 2003, Tribe testified, "My conclusion, in brief, is that the FAIR Act is well within Congress's authority to enact and does not offend the constitutional guarantees of due process, equal protection, or right to jury trial."[64] Even though he agreed with Tribe's assessment on the constitutionality of the act, Judge Edward Becker nonetheless told the Committee, "I suppose there will be a constitutional challenge. I don't know how we can avoid it."[65] And, a challenge seems quite likely as evidenced by a letter former Solicitor General Ted Olson sent to Senator John Cornyn (R-TX), excerpts of which Cornyn included in the Committee's written report. Olson writes:

> 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.[66]

Senator Cornyn, along with Senators Jon Kyl (R-AZ) and Tom Coburn (R-OK), worry that a successful Fifth Amendment challenge would be detrimental to the solvency of the Fund. "Without these funds, the liquidity of the trust fund within the earliest years would be seriously jeopardized."[67] Whether a takings claim would be upheld or not is impossible to know at this point. However, it does pose a threat to the viability of the Fund, and even an expedited review could delay the implementation of the Fund for an indeterminate period of time, leaving claimants in a form of legal limbo.

S. 852 also provides self-interested members of the legal profession the opportunity, and the incentives, to try and prevent the Fund from obtaining operational certification. If the asbestos bar can overwhelm the system with claims, it could force claims back into the judicial system where plaintiffs' attorneys would again be able to reap 40 cents of every dollar awarded as compensation rather than just five. Professor Eric Green told the Committee that both defendant participants and insurers "will have ample opportunities and incentives to challenge the system and delay the day of reckoning."[68]

Small Businesses to Face Undue Financial Hardships

S. 852 may also have a perverse impact upon small businesses – who have worked to protect themselves against potential liabilities – by stripping them of their insurance assets and then requiring them to pay into the Fund. As Carol Morgan, President and General Counsel of National Services Industries informed the Committee, "Because of their prior asbestos expenditures, many smaller companies are going to find themselves in Tier II. Now, they may be at the sub-tier, the bottom sub-tier of Tier II, but even so, their payments will be $16.5 million a year for 30 years."[69] The result is that smaller companies would be forced to pay a larger percentage of their annual revenues into the Fund than would larger firms. Senators Cornyn, Kyl, and Coburn raise this very same point: "[It] is clear that while certain companies will benefit from the legislation it is probable that some companies will be worse off by the trust fund, not better."[70] Small firms may face severe financial hardships as they struggle to make these rather substantial, and inequitable, payments.

Two troubling legal questions arise from the likely collapse of the Fund. First, will the Fund be able to, or be required to, restore insurance assets that it has acquired from participants, especially small firms? What liability protections would a small business have if it were not able to reclaim its insurance? Having to purchase new policies, possibly at much higher rates, would seem to be a sizeable financial burden for some firms.

Second, when the Fund sunsets, will its questionable medical criteria become the standard for the tort system? Will the asbestos bar be able to mine the medical screening firms for even more claimants, further clogging the courts and hampering our economy?

Taxpayers Are Left with Billions in Additional Debt

The viability of the Fund is based on two critical assumptions: (1) that all claims will not exceed $140 billion over the life of the program, and (2) that payments to claimants will not significantly exceed receipts from businesses and insurers for any length of time. It is highly unlikely that these assumptions will be met.

While S. 852 assumes that participants will contribute $140 billion, it is important to remember that number "is a goal or estimate rather than a fixed mandate."[71] In his written testimony, Professor Green was even more skeptical:

> For the Fund to be economically feasible, the precise contributions must be determined before its enactment, and binding commitments must be obtained from the contributing firms. Currently, these do not exist. A substantial number of expected contributors from industry and insurance are on public record as rejecting any commitment to fund the legislation. Their resistance will result in years of post-enactment rancor, controversy, and litigation. The delay and uncertainty that will dog the Fund under the current Bill should not be accepted, since the intended beneficiaries of the Bill, asbestos victims, will be made to wait still longer for compensation, while their conditions worsen, their medical costs increase, and their number escalates.[72]

Senators Cornyn, Kyl, and Coburn echo this sentiment and lament the lack of available information: "Generally, we have heard estimates of total contributing companies from fewer than 1,000 to over 1,700."[73] Even though CBO placed 500 firms in various tiers for its analysis, it appears that few firms have voluntarily provided the data necessary to determine their tier and sub-tier. Even with the tier research that it conducted, CBO acknowledges that the actual amount of funds that will be collected from participants rests on a number of unknown factors:

- The number of subject companies and the tiers into which they would fall;
- Which of those companies would be subject to exemption or modification of their contributions and whether some affiliated entities would elect to be treated separately or jointly;
- The size and nature of the assets of firms in liquidation;
- The number and characteristics of subject firms that may go into bankruptcy during the assessment period; and
- How much funding is needed to satisfy claims and other expenses of the Fund.[74]

Despite the fact that the Committee authorized the use of subpoenas to acquire this type of information, *Congressional Quarterly* reports that firms have been reluctant to hand over "information that might make them targets for additional lawsuits in the event that a trust fund is not created."[75] It is probable that the assumed level of funding may not materialize once the bill is enacted.

Even if one were to assume that participating firms did not attempt to minimize their payments and that the Administrator took whatever measures were necessary to ensure collection of the maximum contribution level, the rather liberal medical criteria included in S. 852 makes it uncertain that the Fund would remain solvent for more than a few years. As a result, taxpayers will be left to pay the insolvent Fund's debt for years to come.

In its cost estimate, CBO expects the Fund to collect the entire $140 billion, plus a small amount of interest income. Yet, CBO forecasts claims ranging from $120 billion to $150 billion, in addition to debt-service costs and administrative expenses.[‡‡] To keep the estimate within the range of the $140 billion level, CBO makes two important assumptions regarding the timing and eligibility of claimants: (1) claimants with lung and other cancers will continue to file claims at the same rate as they do in the tort system; and (2) individuals who have dormant or inactive, but still pending, claims would not seek compensation. CBO does acknowledge that, "If the claimants' lawyers actively seek out those individuals to file a claim against the fund, the number of claimants seeking compensation from the fund in the first four years could be significantly higher."[76]

Green believes that a substantial number of claimants who have pending cases would take advantage of the Fund in its early years. The result is that "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

[‡‡] One should not forget that RAND predicts future liabilities could range from $130 billion to $195 billion.

contributions assuming they are timely made to go to debt service. The Fund's liabilities will outstrip its revenues from the beginning."[77]

At the Committee hearing in April, Mark Peterson, President of Legal Analysis Systems Inc., predicted an even more distressing outcome for the Fund. He testified that with an expected increase in mesothelioma claims, perhaps as many as 3,000 per year, the Fund's revenue stream will not be sufficient and the Administrator would be forced to begin borrowing very early on. Given the possibility of legal action by businesses, insurers, and bankruptcy trusts, Peterson predicts that any such delays would simply compound the cost of borrowing. He estimates that the Fund will need to borrow approximately $60 to $70 billion and cease operating within five years of its inception. Once the Fund sunsets, taxpayers will be left to repay the $60 to $70 billion in debt since there will be "little prospect that it will ever be repaid, because the companies that will have to pay that over 30 years will now be subject to a double burden of asbestos litigation plus payments under the bills."[78] He concludes with a chilling warning: "[T]here should be a more careful scrutiny and determination of how defendants and insurance companies would pay off that debt, because they are stiffing the taxpayers."[79]

While much of Green's and Peterson's criticisms revolve around timing, Crapo's responses to follow-up questions from Senator Kyl regarding the bill's flawed medical criteria and their implications for the Fund's solvency are equally troubling. Dr. Crapo was asked this question: "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?"[80] This is Crapo's response:[§§]

> 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 [diffusing capacity] 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

[§§] Dr. Crapo's response is quoted in its entirety, since the author of this paper is not a physician and does not wish to summarize incorrectly the medical implications of the material.

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

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

There are 100,000 lung cancers in the United States today. If one-half of them were blue collar workers in industries with some type of asbestos exposure (or bystanders or families of those workers) and if only half of these lung cancers had the expected 'positive' CT scan, 25,000 cases per year would qualify. This would cost the Trust $15 billion to $25 billion per year for this level alone.[81]

As startling as this critique is, taxpayers face an even bleaker future should either of the two scenarios produced by the economic consulting firm Bates White, LLC come to pass. In their analysis, the authors, Bates and Mullin, account for the two simplifying assumptions that CBO used in its cost estimate: compensation for individuals with lung and other cancers, and individuals with dormant claims who will attempt to seek compensation from the Fund. By removing these constraints and adjusting for additional risk factors, Bates and Mullin predict massive debt levels and a very short life for the Fund.

In their "conservative" scenario, Bates and Mullin assume the prevalence of pleural changes in the population to be 10 percent. They exclude dormant claimants and rule out take-home exposure, with which Dr. Crapo appeared to be greatly concerned. Bates and Mullin also use a lower-exposed population figure and omit environmental-related claims as well as claims from the inhabitants of the Libby, Montana, area.[82] Under these "conservative" assumptions, Bates and Mullin estimate that S. 852 would create a $300 billion entitlement. Given that the Fund is only allowed to raise $140 billion over its lifetime, it would face a $160 billion deficit. "As a result of the shortfall, the Trust Fund would sunset within three years of its inception with a debt of more than $45 billion."[83] The authors conclude that if the Fund is to remain viable under this scenario, "59 percent of qualifying individuals would have to decide not to collect their [average] $525,000 entitlement."[84] Table 4 shows the disease categories and their aggregate compensation levels.

Table 3. Estimated Awards Under Bates White "Conservative" Scenario			
Disease	**Category**	**Count**	**Dollars (in billions)**
Mesothelioma	IX	49,000	$64
Lung cancer	VIII	67,000	$58
	VII	139,000	$102
Other cancer	VI	212,000	$55
Non-malignant	II-V	94,000	$16
	I	N/A	$0
Administrative cost	N/A	N/A	$5
Source: Charles E. Bates and Charles H. Mullin, "Analysis of S. 852, Fairness in Asbestos Injury Resolution (FAIR) Act," Bates White, LLC, September 2005, p. 10.			

Using the above scenario as a base, Bates and Mullin then create an additional scenario that more closely reflects a number of additional risk factors contained in S. 852. The results are almost mind-boggling:

- Increasing the prevalence of pleural changes adds $235 billion.
- Expanding the eligible population adds $90 billion.
- Allowing for take-home exposure adds $45 billion.
- Including dormant tort claims adds $25 billion.[85]

These four risk factors increase the potential Fund liability to $695 billion, far in excess of the $140 billion that the Fund is predicted to collect.

Regardless of the scenario considered, whether produced by RAND, CBO, Green, Crapo, or Bates White, the Fund will likely face significant financial shortfalls that will lead to the Fund's early dissolution. This concern led Senate Budget Committee Chairman Judd Gregg (R-NH) and Ranking Member Kent Conrad (D-ND) to send a letter to Specter questioning the Fund's potential solvency. Gregg and Conrad asked for additional information because of "major unresolved questions about the budgetary impact of the bill."[86]

Readers may be skeptical that after years of struggling to unravel the knot of asbestos litigation, Congress would establish an entitlement program – albeit a privately funded one – that so badly misses the mark. One must remember that S. 852 is a political compromise designed to attract enough votes on the Senate floor. One should also remember that legislative cost estimates in Washington tend to be rather low, at least initially, and then grow significantly after the bill has been enacted into law. Lawmakers may also underestimate the demand for the service, causing costs to skyrocket. The Medicare program provides not one but two examples of this curious Beltway phenomenon. When Medicare was first passed in 1965, it was expected to cost $26 billion in 2003. In reality, it cost $245 billion. In 2003, Congress added a prescription drug plan to the program, which was supposed to cost $400 billion over the next ten years. In a not so surprising – but still unfortunate – turn of events for taxpayers, Medicare's

Chief Actuary would just months later announce that the program would exceed the $400 billion mark, costing somewhere between $500 billion and $600 billion.[87]

Readers should also be concerned that despite language in the bill intended to limit taxpayer exposure and assurances given by Judiciary Committee Chairman Specter at the Committee hearing in April, taxpayers will likely find themselves wrapped tightly in the Fund's debt. As Senators Sam Brownback (R-KS) and Coburn note, the "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."[88] Given that the Fund is allowed to borrow up to five years' worth of anticipated assessments from the Federal Financing Bank, a default could prove costly to taxpayers.[***]

Hard Lessons from the Past

The Black Lung Fund

The Department of Labor is already ensnared in another disability trust fund that it administers – the Black Lung Trust Fund. The number of parallels between the proposed asbestos compensation fund and the Black Lung Fund are striking and should give policymakers pause. First, the Black Lung program was intended to provide medical and financial assistance to coal miners who suffer disability or death due to coal workers' pneumoconiosis (CWP). Second, the program was designed to address inadequacies in workers' compensation laws.[89] Third, the Black Lung program relied upon vague medical criteria for award compensation:

> 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.[90]

Fourth, the initial cost estimate was intended to be quite reasonable. According to Barth, the law was estimated to cost between $155 million and $384 million for the first year, and between $1.2 billion and $3.0 billion over the next 20 years.[91] He notes that, "The estimate was

[***] For those not familiar with the Federal Financing Bank (FFB), it is "a government corporation, created by Congress in 1973 under the general supervision of the Secretary of the Treasury. The FFB was established to centralize and reduce the cost of federal borrowing, as well as federally-assisted borrowing from the public. The FFB was also established to deal with federal budget management issues which occurred when off-budget financing flooded the government securities market with offers of a variety of government-backed securities that were competing with Treasury securities. Today the FFB has statutory authority to purchase any obligation issued, sold, or guaranteed by a federal agency to ensure that fully guaranteed obligations are financed efficiently." Source: http://www.treas.gov/ffb/.

ridiculed by Congressman Carl Perkins, who claimed that the … estimates were excessively high and politically motivated to undermine support for the bill. Congressman Burton attacked the estimate as politically motivated as well and called it an ignoble effort to deny any meaningful help to black lung widows and miners."[92] The rhetoric might have been ignoble but the estimate turned out to be low. In the first 10 years of the program, 357,000 claims were approved providing almost $8 billion in benefits.[93]

The final parallel is that the Black Lung Trust Fund is supposed to be self-financing. Amendments made in 1977 attempted to shift most of the Fund's financing from the federal government to the mining industry via an excise tax on coal production. As mining companies have gone out of business, the excise tax has been raised and extended several times in an attempt to achieve Trust Fund solvency. Yet, these efforts have failed to realize that goal. "Due to high and rising medical costs, the trust has been in deficit every year since its inception in 1978."[94] Consequently, the Fund has borrowed heavily from the Treasury and has not been able to retire its debts.

Senators Kyl and Coburn worry that the Senate is building the flaws of the Black Lung program into the asbestos Trust Fund. The two Senators believe that the asbestos 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."[95]

Rather than tie taxpayers to a system that is doomed from the start, the Senate should explore options that could resolve the litigation crisis and allow truly sick individuals to receive just compensation.

The S&L Bailout

The history of the Black Lung Fund demonstrates Congress's willingness to institute systems without a clear understanding of the potential negative consequences to taxpayers. The bailout of the savings and loan (S&L) industry during the 1990s not only shows Congress's inability to realize potential problems as they arise but also its inability to respond quickly before the problem reaches the crisis stage.

Throughout the 1950s and 1960s, the S&L industry grew as the construction of post-WWII housing boomed. The 1970s brought significant economic and structural changes to the financial sector. As these challenges grew, the government's response remained inadequate. The National Commission on Financial Institution Reform, Recovery and Enforcement observed, "[G]overnment proved singularly ill-prepared to deal with the S&L crisis."[96] While several factors contributed to the S&L debacle, the Commission concluded that, "*A systematic breakdown in the political system* involving Congress, the independent regulators, and the Administration prevented corrective actions," which intensified and prolonged the crisis.[97]

When Congress finally responded, it was assumed that the cost of the cleanup would be relatively low and could be dealt with easily. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 authorized $50 billion. The Resolution Trust Corporation (RTC)

Funding Act of 1991 provided $30 billion more. In 1991, Congress also passed the RTC Refinancing, Restructuring, and Improvement Act, which allowed the RTC to obligate $25 billion in funds, but the agency only used $6.7 billion. It did, however, borrow $37.2 billion from the Federal Financing Bank. Including recoveries from receiverships, the cost of the S&L bailout through calendar year 1992 was $206.4 billion.[98] Delaying difficult decisions may have cost taxpayers billions of dollars.

The implications of the S&L debacle for the Fund are twofold. First, Congress may be too far removed from any true political accountability. Even with the reporting requirement imposed upon the Fund's Administrator, Congress may fail to act on any suggested reforms or provide any significant relief until the Fund is on the brink of insolvency.

Second, a publicly-sponsored fund not only suggests public financial backing, it creates a constituency who has a sense of entitlement. If the Fund approaches insolvency, or becomes insolvent, it seems unlikely that Members of Congress would wish to offend asbestos victims by allowing the Fund to be terminated, thus throwing uncompensated claimants back into a clogged legal system. The politically expedient move would be for Congress to replenish the Fund, as many times as necessary, using funds from one group of taxpayers or another.

An Alternative Solution

The Fund established by the FAIR Act is larger than its predecessors were in the 108th Congress. Yet, many of the bill's critics believe that the Fund is too small. Based on the experience of today's bankruptcy trust funds, it is easy to conclude that a national compensation fund will never have enough money to pay 100 percent of potential claims regardless of the Fund's resources.

Instead, Congress should consider legislation that contains the following elements:

- Extended filing deadlines or the creation of pleural registries;
- Limitations on punitive damages;
- Restrictions of trial venues to either federal courts or the claimant's place of residence;
- Requirements for the disclosure of collateral source payments;
- Requirements for the disclosure of an individual's smoking history;
- Definitions of occupational exposure standards;
- Requirements that claimants show asbestos was a substantial contributing factor; and
- Requirements for strict medical guidelines for evaluating cases before they can come to trial.

Many of these components are included in legislation already introduced by Congressman Chris Cannon (R-UT) – H.R. 1957, the Asbestos Compensation Fairness Act of 2005 – or in model legislation proposed by the American Legislative Exchange Council.

This type of approach offers a number of benefits to victims, businesses, and taxpayers. First, extended statutes of limitations, or pleural registries, allow individuals who may been exposed to asbestos, but who are not ill, to file a claim without losing their rights to the court

system. If their claims need to be moved to an active docket for trial, then the strict medical screening would allow the courts to weed out potentially bogus claims.

Second, legislation similar to H.R. 1957 should reduce the number of cases being brought and perhaps eliminate questionable screening practices. This would benefit victims by freeing the court system from spurious claims, while making the process more orderly for both claimants and defendants.

Third, it would restrict forum shopping. If we are to achieve a measure of the justice and fairness that Senator Durbin spoke of, then victims and defendants need to be treated fairly in the courtroom. Searching out judges or venues that are inclined to support questionable lawsuits does not reach the Senator's goals.

Finally, a bill that reforms the litigation process should not establish a new, costly federal bureaucracy nor should it create an open-ended taxpayer-backed entitlement system that could cost billions of dollars.

Conclusion: Untangling the Knot

For nearly thirty years, the legacy of asbestos use has been to tie up the legal system and to hold back economic growth. Thousands of victims wait amongst individuals who are not ill for some amount of compensation. Workers face the loss of their jobs or a sizable reduction in their living standards. It is long past time to solve this problem. Congress now has before it a choice of weapons that it may use to slice the Gordian Knot. It may select a medical standards and litigation reform bill that cuts victims, businesses, and taxpayers free of the asbestos tangle, or it may chose the FAIR Act, which will pull those groups ever deeper into the mess.

About the Author

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Notes

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