S. HRG. 109–594

S. 3274: THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2006

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 7, 2006

Serial No. J–109–82

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

30–086 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
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WEDNESDAY, JUNE 7, 2006

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

The hearing was convened, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Sessions, Cornyn, Coburn, Leahy, Kennedy, and Feinstein.

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

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed to consideration of Senate bill 3274, which was introduced by the distinguished Ranking Member, Senator Leahy, and myself before the Memorial Day recess, which updates the Asbestos Reform bill which came out of the Judiciary Committee and has been on the floor of the U.S. Senate.

There is a thoroughly established record about the need for reform on asbestos litigation. We have seen the situation where the Supreme Court of the United States, on a number of occasions, has called upon Congress to act because of the avalanche of litigation.

We have seen thousands of victims of exposure to asbestos with deadly diseases like mesothelioma unable to collect because they had the exposure to asbestos in the military service or exposure in the employ of companies which have since gone bankrupt. Some 77 companies have gone bankrupt as a major threat to the economy.

The Chamber of Commerce has projected the asbestos problem to be in the range of $500 billion. The Judiciary Committee has considered the issue at length on some occasions and, with Senator Hatch's leadership in the previous Congress, we came up with the trust fund concept, which has been modified very substantially.

We have, after consideration, submitted revised legislation which is a significant improvement with stronger medical criteria.

The revised bill now authorizes random audits of affidavits; it clarifies that a claimant's diagnosis must be made by a treating, rather than an examining, physician; it requires claimants to provide detail-specific and critical affidavits of proof of significant asbestos exposures; it has improved procedures for taking care of the sickest victims, yet has an improved allocation formula for companies who are called upon to pay, adopting Senator Kyl's amendment, which limits the contributions to 1.67 percent of the gross

revenues in lieu of the earlier formula set forth in the bill; and it also provides for assistance and relief to the well-insured defendants who currently pay little or no out-of-pocket costs into the tort system. There are also tighter controls on leakage.

The sponsors of the bill are, candidly, determined to succeed here. Senator Leahy and I, and others, have undertaken the process of going to Senators' offices in an unusual way, spending an hour at a time. It is unusual for Senators to do that.

We have called in specific companies and have listened to their problems, and we have sought answers to their problems. We are going to do what it takes to pass this legislation. We are going to do what it takes to pass this legislation.

We understand that there are substantial financial interests in opposition, but occasionally around here the public interest prevails and I think it is going to prevail in this situation.

Just one word on a personal note. Since we last met, there has been the passing of Judge Edward Becker, who did extraordinary work in the development of this legislation.

In his offices in August of 2003, he met with the so-called stakeholders and devoted countless hours to meeting with large groups where, in my conference room, 20 to 50 individuals assembled on dozens of occasions.

He talked to Senators on an individual basis and was concerned about this legislation right up until his last days. When we talked when I visited him, the first thing he wanted to know was, beyond my own health, what was the health of the asbestos reform bill. He quoted George Gipp in that famous Notre Dame movie, "Win one for the Gipper." So, we are pretty well motivated.

Senator Leahy?

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

Senator LEAHY. Well, Mr. Chairman, I thank you for demonstrating, again, your commitment to making some constructive changes in the asbestos litigation system. It is a broken system. We can change it. We can fix it. It fell on a procedural maneuver without being voted on earlier this year. We can go back and get to a real vote and we can pass this.

The Chairman mentioned Judge Becker, his friend of 50 years, I believe.

Chairman SPECTER. Fifty-six.

Senator LEAHY. Fifty-six years. Judge Becker, of course, was a distinguished Federal jurist. He had been Chief Judge of the Third Circuit, a member for years. I agree, without his extraordinary efforts, we would not have come as far as we did.

I also commend the Chairman, who, through a recent illness of his own, kept working on this. I know, I tried to sneak off to my farm in Vermont and not think about asbestos, and the phone would be ringing as I was walking in the door.

I think he had the place wired to know I was there, and say, Pat, you know, if we called Senator so and so, maybe we could get one more person. But what we did all the way through it, both Senator Specter and Judge Becker said, let us keep it bipartisan, which is

what I have insisted on, and let us bring all the stakeholders to the table. We did that.

We can have questions of tort reform, like insulating the makers of food products and things like this that are not going to go anywhere, and do divide us. But here we have a real problem that should be addressed, and we can do it.

The Supreme Court has declared that the current system of asbestos litigation cries out for a legislative solution, and the court is right on that. You will not find a member of the court who will disagree. We can do that. We have an improved bill.

We have been responsive to concerns of many interested parties, and we have refined the bill to accommodate many of these. We want to do what is right for the victims of asbestos exposure, and we want a bipartisan bill.

In an increasingly polarized Congress, only things done in a bipartisan way actually are going to pass. But let us not lose focus of what we want. We want, first and foremost, fair compensation for those who have been injured or killed from exposure to asbestos.

Some changes attempt to further balance the equities among the companies that have to contribute to the fund. I want to make it very clear, the medical criteria of the bill remains unchanged, but we put in further safeguards to ensure the integrity of the claims process.

For example, a provision for random audits, both medical and exposure evidence submitted by claimants; a provision requiring a detail-specific affidavit from a claimant attesting to their exposure. We are doing this to prevent fraud.

We also ensure that veterans who contracted asbestos-related illness during their service for this country can claim against the fund, with special status limitations for veterans who receive government benefits from the illness. So you remedy the situation of veterans being shut out from the tort system by virtue of government employees.

We preserve more preexisting legal settlements between claimants and dependents by allowing a plaintiff's representative or an authorized corporate attorney to sign an agreement.

There are a number of things in here. We make clear that civil rights of disability claims are not preempted by the legislation. We spent a lot of time, and we are doing it today, taking up things for partisan posturing, for show on the Senate floor.

Here, we have an historic chance to make a difference in the lives of many Americans who have suffered so tragically. It is not something that makes for good political reading. It is not something that is going to be a show like some of the things we do on the Senate floor. But it actually helps and gives us a chance to relieve our Federal and our State judicial systems from the crushing weight of what the Supreme Court has described as an elephantine mass of litigation. So, I thank everybody who is here.

Ironically, I am going to be required to go back to the floor to speak on what is the current political show on the floor. I want to get back to what is reality for this country, what we are looking at right here. Thank you, Mr. Chairman. I commend you. I also ap-

preciate you mentioning Judge Becker the way you did. He deserves the praise.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Kennedy, would you care to make an opening statement?

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

Senator KENNEDY. Just briefly, Mr. Chairman, and then I will include the statement in the record. But if I could say a brief word.

I think all of us on the committee want to thank you, Mr. Chairman and Senator Leahy, for your hard work and diligence on this issue. It is enormously important, and I admire your perseverance on it.

However, I do feel that the latest version of the asbestos trust fund does not correct the fundamental problems that made the original bill unacceptable. The new bill, 3274, would still create the trust fund that excludes many seriously ill victims of asbestos-induced disease from receiving compensation, and fails to provide a guarantee of adequate funding to make sure the victims who are eligible will actually receive what the bill promises them.

As I said before, the real crisis which confronts us is not an asbestos litigation crisis, it is an asbestos-induced disease crisis. Asbestos is the most lethal substance ever widely used in the workplace.

All too often, the tragedy these seriously ill workers and their families are enduring becomes lost in a complex debate about the economic impact of asbestos litigation. We should not allow that to happen.

The litigation did not create these costs, exposure to asbestos created them. There is the cost of medical leave, the lost wages, of incapacitated workers, the cost of providing for the families of workers who died before their time, and those costs are real. No legislative proposal can make them disappear. All legislation can do is shift those costs from one party to another.

So, I appreciate the enormous effort that Senator Specter and Senator Leahy have put into the issue. The latest proposal does not correct the basic flaws and earlier versions of the legislation.

The trust fund is seriously, I believe, under funded. It lacks sufficient financial resources to pay all the victims of asbestos disease that the legislation promises to compensate.

Major problems identified by the CBO are still present in the new bill. In addition, some of the changes in S. 3274 may actually create new problems for victims attempting to collect from the asbestos trust.

Most of the burden of asbestos-induced disease is being shifted back onto the victims. The new legislation does not provide a fair and reliable solution to the enormous problems of compensating the asbestos victims. If S. 3274 were to be enacted, it is probably that the asbestos trust fund created by the bill would soon become insolvent.

As Professor Green, who is with us today as one of our witnesses, states in his written testimony, "In the end, it is highly likely that a choice will have to be made between bailing out the fund with Federal funds or abandoning future claimants. Either way, the per-

petrators and the profiteers escape, while the needy and the innocent suffer."

It is not enough to say that there are serious inadequacies in the way asbestos cases are adjudicated today. That does not mean that any legislation is better than the current system. Our first obligation is to "do no harm," and I regret to say that, despite the best intentions, this legislation would do harm.

When the committee considered the original Specter-Leahy bill in May, it identified 10 areas in which the legislation was deficient, both unfair and unworkable. Unfortunately, all of those problems are still present in the latest version.

I ask consent that my full statement be part of the record. I thank the Chairman.

Chairman SPECTER. Your full statement will be made a part of the record, Senator Kennedy.

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

Chairman SPECTER. Senator Feinstein, do you care to make an opening statement?

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

Senator FEINSTEIN. Just a brief comment, Mr. Chairman. Thank you for all your work on it. As you know, I have been involved with this from the beginning. I do not know the particulars of the changes that have been made. I hope at some point that will become more apparent.

I am concerned about the classifications and that this fund really only deal with victims of asbestos. Perhaps that is enough for now. I guess, as the months have gone on, I have become more concerned as to whether we can ever get the kind of support that is necessary to move a bill like this, because so much is unknown about the impact of it.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

There are unknowable factors, beyond any question, and we have sought to accommodate them with sunset provisions and a variety of safeguards. But we will continue to work.

Will you all rise and take the oath, please?

[Whereupon, the witnesses were duly sworn by the Chairman.]

Chairman SPECTER. May the record show that each person has answered in the affirmative.

Our first witness today is the distinguished president of the National Association of Manufacturers, Governor John Engler, a three-term governor from the State of Michigan, 20 years in the State legislature, including 7 as State Senator Majority Leader. He graduated from Michigan State University, has a law degree from Thomas M. Cooley Law School.

Thank you very much for joining us, Governor Engler. We have the clock set at 5 minutes.

STATEMENT OF JOHN ENGLER, FORMER GOVERNOR OF MICHIGAN, PRESIDENT, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C.

Governor ENGLER. Thank you, Mr. Chairman. I am delighted to be here. Thank you for inviting me back to testify on behalf of the Asbestos Alliance of the National Association of Manufacturers.

I want to begin, as you did, by paying tribute and honoring the memory of Judge Edward Becker, acknowledging his tremendous contribution in mediating this critical legislation. He is missed, and we honor his memory.

I want to thank you, Mr. Chairman and Senator Leahy, for your unwavering commitment, and eloquently restated again this morning, to the passage of asbestos trust fund legislation.

The new FAIR Act is a win-win-win for victims, for workers, and the economy. Only a trust fund approach that takes asbestos cases out of the courts could end the asbestos litigation nightmare.

We recognize that some States have made progress in addressing some of the most egregious aspects of asbestos litigation, but State medical criteria legislation, while very welcome, does not prevent plaintiffs' attorneys from seeking out new, more friendly forums, as they have done for years.

It also does not end the litigation lottery in which some victims do fine, but many others face delayed and reduced compensation. More fundamentally, keeping asbestos claims in the courts ignores other problems. It costs U.S. businesses $2.38 to provide $1 of compensation to asbestos victims.

That is a lose-lose-lose proposition for victims, workers and the economy. In addition, plaintiffs' lawyers, in search of new pockets, will drag thousands of companies into court on the flimsiest basis, disrupting their business and sabotaging their credit.

Reform of the tort system alone cannot address these problems. The only way to fix asbestos once and for all is by getting these cases out of the tort system and into a privately funded, no-fault administrative process.

Along with ending the litigation for all companies, the trust fund bill will completely exempt SBA-eligible small businesses from paying into the trust fund; their asbestos litigation nightmare will finally be over and the companies contributing to the trust fund will have certainty about their financial obligations. The trust fund will also prevent future asbestos bankruptcies and their destructive impact on workers, their retirements, and their communities.

Far from being a tax itself, the FAIR Act actually eliminates the asbestos support tax that American business has been paying now for 40 years. The companies that will contribute to the trust fund today face expensive litigation, which hampers their ability to raise capital and expand and create jobs. The FAIR Act lifts the constant threat that asbestos litigation poses to their operations, and sometimes to their very survival.

S. 3274 is a major advance over previous versions of the FAIR Act. First, it incorporates, Mr. Chairman, as you mentioned, Senator Kyl's amendment, which limits the contribution of small- and mid-sized companies to 1.67 percent of their gross revenues and liberalizes the procedure for hardship adjustments. It also address-

es the concerns of small, deeply insured companies in Tier II, like Foster Wheeler, from whom you will hear today.

Next, Senate bill 3274 goes even further than the earlier bill to prevent fraudulent claiming. We commend Federal Judge Janice Jack for exposing all of the fraud rampant in silica litigation, but there are still hundreds of thousands of asbestos claims pending, and rampant fraud has been a problem for decades.

If we keep asbestos cases in the courts, the profit motive remains for trial lawyers to recruit unscrupulous doctors to deliver bogus diagnoses. A key advantage of the trust fund bill is that it will stop this madness and ensure that only the truly sick receive the compensation they deserve.

Another important improvement limits the filing of old or dormant claims with the trust fund for compensation. This will strengthen the fund's financial integrity.

Finally, the new bill explicitly states that the trust fund will not increase the deficit, will not impose any burden on the taxpayer, and will not create any taxpayer obligation.

The trust fund solution has always been based on private financing, with absolutely no obligation to the Federal Government to make up any shortfalls. S. 3274 also requires the Chief Financial Officer of the Department of Labor to certify annually that the fund will be financial solvent based on these private contributions.

This strengthens the earlier bill, which made this the responsibility of the trust fund administrator who may have had a special interest in keeping the fund going.

In short, the trust fund will ensure fair, fast, and certain compensation to victims, including many, many veterans. It will boost our economy. Navigant Consulting estimated it could create more than 800,000 jobs and increase economic growth by $64 billion.

As the U.S. Supreme Court said twice, asbestos litigation defies customary judicial administration and calls for national legislation. After decades of trying, the solution is at hand. It is time to act. I urge this Senate committee to move the trust fund forward for full Senate consideration.

Chairman SPECTER. Thank you very much, Governor Engler.

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

Chairman SPECTER. We now turn to Mr. Peter Ganz, Executive Vice President, General Counsel and Secretary of Foster Wheeler. Mr. Ganz is a summa cum laude graduate of Duke, and a magna cum laude graduate of the Harvard Law School.

Thank you for joining us, Mr. Ganz. We look forward to your testimony.

STATEMENT OF PETER GANZ, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, FOSTER WHEELER, CLINTON, NEW JERSEY

Mr. GANZ. Thank you, Mr. Chairman. I thank you, Senator Leahy, and the members of the committee for inviting me to provide testimony here today.

By way of background, Foster Wheeler is a global engineering and construction contractor and power equipment supplier. Foster Wheeler and its predecessors have been in business for well over

100 years, and Foster Wheeler currently employs over 9,000 people worldwide.

Over the course of its long history, Foster Wheeler designed, supplied, and erected numerous marine- and land-based steam generators and process plant facilities which required insulation, valves, pumps, and other equipment supplied by third parties to Foster Wheeler, or directly to Foster Wheeler's customers, which, in certain instances and in certain time periods—particularly World War II, I might add—may have contained asbestos.

Like many American companies engaged in the businesses in which we participated in decades past, Foster Wheeler subsidiaries have confronted many thousands of asbestos claims throughout this country.

In fact, we have resolved almost 300,000 asbestos claims to date, at a cost to the company and its insurers of almost $700 million. As of March 31 of this year, we had approximately 165,000 claims pending.

Over the years, not only has Foster Wheeler sought to defend itself as best it could in the tort system, but it also worked diligently to marshall its available insurance assets and carefully protect and manage these extremely valuable resources.

As a result, except for amounts allocated to insolvent insurers, we believe that substantially all of Foster Wheeler's asbestos-related expenses to date have been, or will be, covered by insurance. In addition, based upon current estimates, we expect that the bulk of our future asbestos-related expenditures would be covered by our insurance assets.

While Foster Wheeler consistently has supported the concept of a Federal legislative asbestos solution and believes that there may be different possible approaches which could be effective, including a trust fund/medical criteria approach, Foster Wheeler did not support the solution set forth in S. 852.

We made it very clear that our principal, although by no means only, criticism of that version of the legislation was that we considered the allocation formula contained therein to be unfair to companies such as ours by requiring us to make annual payments into the trust that were far in excess of what we otherwise would expect to pay net of our future insurance.

We believe that the allocation formula contained in S. 852, in effect, penalized us for having carefully collected, managed, and conserved our available insurance assets so that they would be available to us in the future.

It is because of Foster Wheeler's concern over this critical issue of allocation that, as early as the fall of 2004, we first reached out to other companies who might have similar concerns and, in early January of 2005, Foster Wheeler and these other so-called "well insured" companies communicated their position to the committee.

At about the same time, these companies formed the nucleus of the Coalition for Asbestos Reform, or CAR, a group which later attracted insurers and others also critical of various aspects of S. 852.

At this point, I would particularly like to express our appreciation for Senator Cornyn, who very early recognized the issue that we were raising about allocation and the fact that we were heavily

insured, and, in fact, had drafted and was prepared to offer an amendment to the S. 852 that would have corrected that imbalance, and we appreciate it.

Following the floor action on the bill, Chairman Specter and his staff invited our company, as well as others, to discuss possible revisions to the bill. Following what was clearly a lot of hard work on their part, Senator Specter, Senator Leahy, and their staffs incorporated a provision in the new bill which Foster Wheeler believes reflects a true recognition of our concerns on allocation and constitutes a fair and reasonable compromise on the issue.

This provision essentially provides that many small- and medium-sized companies like ours which have relied on insurance will be eligible for an adjustment to their allocation so that they can expect to pay no more than 5 percent of their annual adjusted cash flow.

While this solution is not perfect, it may still result in our company paying somewhat more out-of-pocket in any given year than we might otherwise have paid had we been able to rely upon our available insurance. We do support it as a fair compromise.

It provides a company like ours with a manageable, predictable contribution to the fund, which should allow us to focus our management resources on running and growing our business.

In conclusion, we thank Senator Specter, Senator Leahy, and their staffs for incorporating this provision which addresses the issue that we were so concerned about for so long. Thank you for this opportunity to express these concerns.

Chairman SPECTER. Thank you. Thank you, Mr. Ganz.

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

Chairman SPECTER. Our next witness is Professor Eric Green, Boston University law faculty since 1977, graduate of Brown, law degree from the Harvard Law School.

I thank you for coming in today, Professor Green. The floor is yours.

STATEMENT OF ERIC GREEN, FOUNDER, PRINCIPAL, RESOLUTIONS, LLC, AND PROFESSOR, BOSTON UNIVERSITY, BOSTON, MASSACHUSETTS

Mr. GREEN. Thank you, Senator Specter for the opportunity to testify on this important legislation. I thank Senator Leahy as well.

As you know, I have testified on this bill previously. My perspective is that of the court-appointed representative of the unknown future claimants, those who are not represented in the tort system currently.

I have never represented a plaintiff in the asbestos litigation. I have never represented a defendant. I have no personal stake in this matter whatsoever. Someone has to speak for the unknown future claimants who will be seriously affected by this legislation.

The problems which existed in the original legislation have not been cured by the amendments in S. 3274. In fact, I believe some of these amendments, in an effort to pick up opposition on one side, have simply exacerbated the problem of there being illusory promises of adequacy of funds to pay these liabilities into the future, and in fact these amendments have created greater uncertainty

about the sources of fund, and about what will happen to the victims on the back end of the fund.

There are no assurances in this bill that the fund will have resources to timely pay claims. As a matter of fact, it is fairly certain that in a number of years the trust will have to go heavily in debt, and the cost of that debt service, when added to the predictions of what will be necessary to pay claims, indicates that there is a great probability that the trust will face an insolvency problem in the not-too-distant future.

What happens when that occurs, of course, is extremely unclear. It has been attempted to be addressed with a very vague and Band-Aid solution in the form of this so-called master trust at the end.

It sounds good, but really does not demonstrate any solution to the problem that I am concerned with, and that we all should be concerned with, because we may be gone in 10 or 12 years. I do not know how much longer Senator Kennedy is going to represent my State.

Senator KENNEDY. Oh, that is a nice thought.

[Laughter].

What are you picking on me for?

[Laughter].

Mr. GREEN. I think you are one of the senior members of the Senate. We will be gone, but victims will not be. What a shame it will be when we leave them at the end with the mess that this legislation is going to leave them in. If there is not enough money at the end for the national trust that we are establishing to pay claimants, where does the money come from to fund this so-called master trust?

If there are insufficient funds, will the victims not simply be forced to take less, or the taxpayers of the United States will be forced to come in and fund the money? To simply say that no taxpayer money is going to be used is not correct and it is not being truthful with the American taxpayers, unless you want to say, victims at the end of the line, you are going to get shafted by this legislation.

I think it is incumbent upon our political leaders to face up to these problems honestly and not leave the least capable of fending for themselves with the problem at the end.

With some of the other amendments which have provided relief to small businesses and others who may be well insured, it is a zero-sum game, Senator. If they are paying less, someone is paying more. Who is it? It is not made clear.

I think that it is either going to be the taxpayers, it is going to be other companies and insurance companies, or, sadly, it may be the least powerful of them all, the victims. That is not consistent with our national values, it is not consistent with the promises we implicitly made to the workers who worked on the ships during World War II.

It is not consistent with the promise we should be making to our soldiers fighting in Afghanistan and Iraq now with asbestos in materials over there. It is not consistent with the workers who are sick and who are dying now.

I have nothing but the greatest respect for Judge Becker, who was a great jurist. But there are victims who have died also since our last hearing, Senator Specter, who should be mentioned. Larry Rice died May 13 of mesothelioma.

There are common people with no one to protect them but either the courts, the existing trusts, or this body, who are also in dire straits. It is those people I urge this body to remember.

Chairman SPECTER. Thank you, Professor Green.

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

Chairman SPECTER. Our next witness is Ms. Flora Green, who hails from Claysville, Pennsylvania. During World War II, she served as an overhead crane operator in a steel mill. How much did you weigh then, Ms. Green?

Ms. GREEN. That is not fair!

[Laughter].

Chairman SPECTER. You expect me to withdraw that question?

[Laughter].

Ms. GREEN. Well, I do.

Strike it from the record.

[Laughter].

Chairman SPECTER. She is here today representing the Seniors Coalition. Thank you very much for joining us, Ms. Green, and we look forward to your testimony.

STATEMENT OF FLORA GREEN, NATIONAL SPOKESPERSON, SENIORS COALITION, FAIRFAX, VIRGINIA

Ms. GREEN. Well, thank you for giving me the opportunity. I never thought in my lifetime in Claysville that I would be sitting among such famous, wonderful people. I am looking around, and I am the oldest one in the room—just remember that—as I usually am.

[Laughter].

Ms. GREEN. Unfortunately, I have a little vision impairment, so bear with me. I come under the auspices of the Seniors Coalition and I speak with seniors daily. I have had many, many calls from seniors who are suffering from the terrible maladies caused by exposure to asbestos, something that we least suspected.

You know, we did the job as we were required to do. We worked in defense factories. We were concerned about what was happening with our men and women overseas, so we did not care. We did the job. Then down the road, what happened? It is just a serious issue, and seniors are concerned.

Of course, this issue, the Fairness in Asbestos resolution is of prime importance to seniors. Again, many are suffering, not being paid, do not know what to do, may lose their house, they are trying to get money, and they are in serious, serious trouble.

As I said, I have spoken with many folks, and at their request I am urging the passage of the FAIR Act. This compensation issue has dragged on long enough. They are tied up in the court system and seem to go on forever. Many of us look around and think, well, are we going to live long enough to have the benefit of some compensation to care for us in our declining years?

I am fortunate. I am 84 and in wonderful health. I do not know about my mind some days—

[Laughter].

Ms. GREEN. But folks out there care, and I care, and I am sure the members of this panel care about the seniors—I am addressing them, particularly—that do suffer and long for health.

It seems to seniors that the whole issue is that the trial attorneys and the courts manage to eat up most of the compensation award, if it ever comes. That makes us pause. I wonder why? This needs to be addressed.

As I understand it, the FAIR Act is not going to cost the taxpayers or the government to fund. It is going to come from companies that actually were at the base root of the issue.

Now, another one of our members sent this to me. "I know you talk to Members of Congress. Tell them this for me: act now. I may be dead and gone before I get any compensation. Just give them hell, Grandma." I have done my best to follow his advice.

One last thought. I was a bill collector back in my real life before I came to Washington, and we had a phrase that was our golden rule. It was "be firm, be fair, expect to be paid."

I am going to throw that right back to you. Just think: we have been firm, we expect you to be fair, and then we will be paid. What more can you ask? So, please bear with me in my observation, and I will tell you, shame on you if you do not pass this bill.

I am a grandmother of 24 and great-grandmother of 28, and two more coming. Thank you.

Chairman SPECTER. Thank you very much, Ms. Green. You are inspirational. Thank you. Thank you.

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

Chairman SPECTER. We are midway through a vote, so we will take a brief recess and reconvene.

Senator KENNEDY. Mr. Chairman, can I include the AFL–CIO letters in the record?

Chairman SPECTER. Sure. We will be glad to have them made a part of the record.

Senator KENNEDY. Thank you.

Chairman SPECTER. We stand in recess and we will be back shortly after the vote.

[Whereupon, at 10:10 a.m. the hearing was recessed and resumed back on the record at 10:45 a.m.]

Chairman SPECTER. I regret the delay. We will now proceed with the testimony of Mr. James Grogan, president of the International Association of Heat and Frost Insulators and Asbestos Workers.

He serves as vice president of the Building and Construction Trades Council of the AFL–CIO, and served as president of the New Jersey State Building and Construction Trade Council for 14 years.

Thank you very much for coming in, Mr. Grogan. We look forward to your testimony.

STATEMENT OF JAMES A. GROGAN, GENERAL PRESIDENT, INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LANHAM, MARYLAND

Mr. GROGAN. Thank you, Senator. Good morning, Senator Leahy, distinguished Senators. I am Jim Grogan. I am president of the International Association of Heat and Frost Insulators and Asbestos Workers.

Our union is a member of the Building and Construction Trades Department of the AFL–CIO. Our members insulate pipes, boilers, tanks, and equipment at powerhouses, oil refineries, pharmaceuticals, shipyards, and other major industrial locations across North America.

From the 1920s to the 1970s, we applied asbestos pipe covering and asbestos block side by side with numerous trades, including the boilermakers, the pipe fitters, the electricians, and others.

Our union comes before you once again to strongly support your continued efforts to pass a bipartisan bill, S. 3274, that will ensure true, fair, and just compensation to current victims and future victims of asbestos exposure.

As we understand, today's substitute legislation is dealing with the ongoing developments on asbestos reform and is a continuation of the previous legislation that has encountered many obstacles and basically brought no relief.

This legislation, as we read it, provides assurances of equitable compensation to asbestos victims and assurances to manufacturers and insurers to resolve asbestos claims with finality.

Senator Specter and Senator Leahy have provided a thorough and fair process of negotiations for this detailed legislation. They have listened to all sides and have created a balanced compromise.

For 30 years, solutions to the asbestos crisis have eluded Congress and the courts and penalized the victims. Even our U.S. Supreme Court has begged the Congress to fix this national asbestos litigation problem. Over 70 companies have gone bankrupt and thousands upon thousands of individuals exposed to asbestos have developed asbestos-induced diseases.

For example, mesothelioma is a signal cancer for asbestos exposure unrelated to tobacco or other industrial carcinogens. Mesothelioma will cause over 2,500 deaths in the U.S. each year for the foreseeable future. Asbestos-induced lung cancer and asbestosis will account for thousands of additional deaths per year.

We now know that exposure to asbestos, with as little as 3 months' duration, is sufficient to cause mesothelioma. Today, wives and children of asbestos workers who grew up in the 1960s and 1970s are getting mesothelioma, not from washing their father's clothing, but just from living in the common house.

From the 1930s to the 1970s, industry, insurance companies, and even our own government hid or suppressed information about the dangers of asbestos. Companies that suppressed, downplayed, or hid the information about the hazards of asbestos have not taken responsibility for their outrageous conduct. This legislation hopefully will bring that practice to an end.

No one was more patriotic than those of us who were exposed to asbestos dust while constructing, repairing, or living aboard naval ships or building governmental facilities.

If those who knew that asbestos was harmful would have told us of the dangers, we would have taken measures to protect ourselves. We never would have taken our asbestos-laden clothes home and exposed our families.

Many ask why our union is involved in this legislation. They say there are remedies in the courts through the tort system. They also say people are being taken care of.

While it is true that there is an asbestos litigation system out there, the system is broken. Many who cannot identify where they were exposed to asbestos recover nothing. The asbestos crisis is a national tragedy and we need a national legislative solution that is fair and equitable to all. That is what S. 3274 provides.

There are other victims of asbestos litigation. Those victims are employees, retirees, shareholders, companies' savings and retirement plans, an entire group of individuals who are in a tidal wave of asbestos lawsuits.

The most objectionable aspects of asbestos litigation, as cited by Senators Specter and Leahy, are that the dockets in both the Federal and State courts continue to grow. The same issues are litigated over and over. Only 42 cents of every dollar goes to the victims and their families. Attorneys fees and transaction costs exceed the victims' recovery by nearly two to one.

We support this bipartisan solution to the asbestos compensation crisis, but we also caution that victims of asbestos disease must not be victimized again by passage of legislation that is unfair. Timely and full payments must be made to the asbestos victims, as S. 3274 provides.

If that cannot be accomplished, access to appropriate State court forums must be preserved, specifically, a speedy return to the tort system if the trust fails to timely meet its obligations. We join with those Senators who are trying to bring about this bipartisan legislation that will help solve the national asbestos problem.

We will continue to work in a constructive way with those of you who wish to see a fair, equitable, and adequately funded bill. If all fails, then we will fight for the right of any asbestos victim, union or non-union, through a trial of a jury of their peers. Fundamental fairness demands no less, and neither do we.

Thank you for the opportunity to testify here today, Senator.

Chairman SPECTER. Thank you, Mr. Grogan, for that very persuasive testimony.

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

Chairman SPECTER. We now turn to Dr. Douglas Holtz-Eakin, Director of the Maurice Greenberg Center for Geoeconomic Studies at the Council on Foreign Relations, and Director of CBO from February of 2003 to December of 2005. He has a bachelor's degree from Dennison and a Ph.D. from Princeton.

The floor is yours, Dr. Holtz-Eakin.

STATEMENT OF DOUGLAS HOLTZ-EAKIN, DIRECTOR, MAURICE R. GREENBERG CENTER FOR GEOECONOMIC STUDIES, PAUL A. VOLCKER CHAIR IN INTERNATIONAL ECONOMICS, COUNCIL ON FOREIGN RELATIONS, WASHINGTON, D.C.

Mr. HOLTZ-EAKIN. Mr. Chairman and members of the committee, thank you for the chance to be here today.

Injury from asbestos exposure and the cost of asbestos litigation are an important public policy problem and the committee, and the Chairman in particular, are to be commended for their attention to this matter.

As my written statement makes clear, my focus on S. 3274 is on its budgetary impact and its fiscal policy merits. The strategy, as outlined in the bill, is to isolate from broad budgetary consideration particular Federal revenues and particular Federal mandatory spending identified with the asbestos fund, and then attempt to cease operations when the former are insufficient to cover the latter.

The impact of such legislation, I think, would be very different. As a broad budgetary matter, it is generally not desirable to take particular revenues or spending off the level playing field for policy consideration, and it is not obvious that S. 3274 contains an automatic sunset of such a fund. Instead, discretion will be left with an administrator and the judgment required to terminate the fund in a timely fashion.

This is important because the administrator will necessarily have to borrow at the start-up of the fund as a matter of economic reality. There will be tremendous uncertainty regarding the overall scale of claims, with most of the likely risk on the up side, given the difficulties in anticipating take-home exposures, dormant claims, and other episodes like Libby, Montana, and the like. There will be comparable uncertainty on the revenue side, with all of the risks on the down side, falling short of the $140 billion.

So as a technical matter, any such administrator will have a difficult time judging the appropriate sunset. However, the most certain part of the future is that there will be political pressure to continue the spending.

The structure of the fund, as I mentioned in my written testimony, is very similar in spirit to the Pension Benefit Guaranty Corporation, which, in principal, places the taxpayer at no risk to additional funding.

However, in practice, the promise of pension benefit insurance is a powerful one and it is extremely unlikely that any future Congress would let future retirees go short of their pensions.

In the same way, having made the commitment to compensate victims of asbestos exposure, I find it extremely unlikely that a future Congress will stop and allow such a fund to terminate. It will be fundamentally unfair as a matter of timing, and very difficult to resist as a matter of politics.

What does this mean? It means that we will now have on the books a new Federal mandatory spending program at a particularly bad time. As I hope the members of the committee are well aware, our primary fiscal challenge in the United States is to scale back, not to expand, mandatory spending at the Federal level.

To pick the most dramatic examples, under what I would consider optimistic projections for the future of Social Security, Medicare and Medicaid, those three programs alone will rise from about 9 cents on the national dollar at this time to nearly 20 cents on the national dollar over the 50 years envisioned in the consideration of this fund.

That would bring those three programs alone to the current size of the entire Federal Government. It is incumbent upon the Congress to scale back, not to expand, mandatory spending at this point in time.

One might think that mechanical measures are a good approach to this, but I think the experience of things like the sustainable growth rate mechanism, in which Congress relies on an automatic mechanism to cut back on physician payments in Medicare, the experience has been, again and again, the Congress cannot find itself the power to do that. Instead, we see physicians getting updates in Medicare that are in excess of what the formula provides.

Instead of relying on mechanical sunsets and mechanical cutbacks, it is incumbent upon the Congress to broadly put all spending on a level playing field, consider the public policy merits, and be the force itself for slower growth in spending over the next five decades.

I thank you for the chance to appear here today, and I look forward to the chance to answer your questions.

Chairman SPECTER. Thank you, Dr. Holtz-Eakin.

[The prepared statement of Dr. Holtz-Eakin appears as a submission for the record.]

Chairman SPECTER. Our next witness is Mr. Edmund Kelly, president and chief executive officer of Liberty Mutual Group, a graduate of Queens University in Belfast, Ireland, with a Ph.D. from MIT.

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

STATEMENT OF EDMUND F. KELLY, CHAIRMAN, LIBERTY MUTUAL INSURANCE COMPANY, BOSTON, MASSACHUSETTS

Mr. KELLY. Good morning, Mr. Chairman. I thank you for the opportunity to testify.

Liberty Mutual is a member of the PCI, the Property and Casualty Insurers Association of America, and a member of CAR, the Coalition for Asbestos Reform. Both organizations join in supporting my testimony today.

The question we have all wrestled with, is would a trust fund work? We at Liberty worked long and hard to try to come up with a trust fund that would work.

As we look at this, we need to look at four issues: 1) is the trust fund proposal in the bill fair and equitable? 2) does it provide an exclusive remedy for all asbestos claims? 3) is it viable and sustainable? 4) is there a better alternative?

First, is the trust fund that is proposed fair? Fairness requires that each participant pay approximately its relative share of liability in the tort system. This core principle of fairness cannot be met through the trust fund in S. 3274. In fact, it guarantees billion-dollar windfalls to some Fortune 100 companies.

For example, the reported settlements of Owens Corning and USG. There, if the trust fund is enacted, billions of dollars of liability for those two companies will be eradicated, and obviously, since it is a zero-sum game, picked up by all the participants in the trust fund.

Ms. Green has said that the trust fund approach would allocate costs to the people who are the base root of the problem. Clearly, the Owens Corning and USG example shows that this bill does not meet that standard.

The next question: does the trust fund provide exclusive remedy, as promised, for all asbestos claims? Unfortunately, we believe the answer is no. There are far too many exceptions that allow asbestos claims to continue outside the trust fund, thereby violating this bedrock principle.

One particularly egregious example is in Worker's Compensation. By preventing the operation of State Worker's Compensation lien laws, the FAIR Act guarantees double payment of claims, adding billions of dollars of new liability to employer insurance obligations. It is estimated that this additional liability is in the range of $39 to $88 billion.

Current law in most States prevents "double-dipping." This overriding of State law increases insurers' potential liability to $65 to $80 billion, far in excess of the explicit $46 billion mentioned in the bill.

The next key question is, is the trust fund sustainable and viable? I believe several other witnesses have addressed this sufficiently. Suffice it to say, solvency will be threatened before very long.

So the final question for us is, is there a viable alternative, a better alternative to the trust fund? As we look around, the answer can be found in the growing list of State medical criterion venue reforms, as well as good judicial case management orders that, together, are changing the face of asbestos litigation.

In addition to the comprehensive medical criteria laws in Ohio, Texas, Florida, Georgia, Kansas, and South Carolina, a dozen other States are addressing asbestos abuse through venue reform, inactive dockets, and related legislative and judicial activities.

The impact has been truly extraordinary. In the three States that account for 80 percent of the asbestos claims filed against Liberty Mutual's insureds, the claim decrease following reform has been 90 percent in Mississippi, 65 percent in Texas, and 35 percent in Ohio.

These numbers are substantial evidence that State-driven initiatives are working, and should be allowed to continue to work and not be negated by the passage of the FAIR Act.

To the contrary, these efforts could be replicated at the Federal level, as proposed in Representative Cannon's legislation, H.R. 1957.

In conclusion, we at Liberty Mutual very much support asbestos litigation reform. However, we unfortunately are led to believe that the trust fund embodied in the FAIR Act is not the solution, as it fails to meet the test of fairness, exclusive remedy, and sustainability. There is a better solution, one that has proven itself as we

speak, in the State courts and the State legislation, medical criteria and venue reform.

Thank you, Mr. Chairman.

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

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

Chairman SPECTER. Our next, and final, witness is Mr. Dennis Cullinan, Director of the National Legislative Service, Veterans of Foreign Wars. He served in the U.S. Navy on the U.S.S. Intrepid, with three tours in Vietnam. He did his undergraduate work in the State University of New York at Buffalo.

Thank you very much for coming in today, Mr. Cullinan. We look forward to your testimony.

STATEMENT OF DENNIS CULLINAN, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS, WASHINGTON, D.C.

Mr. CULLINAN. Thank you very much, Chairman Specter.

Chairman Specter, distinguished members of the committee, it is a great honor to appear before you today representing the 2.4 million men and women of the Veterans of Foreign Wars of the United States, and our auxiliaries.

Founded in 1899, the VFW is this Nation's largest organization of combat veterans. Our members come from across the country, and even around the world.

Thank you for this opportunity to testify on the Fairness Act. I want to especially thank Chairman Specter and Senator Leahy for their recognition of veterans' stake in this critical piece of legislation, and the many provisions included in the legislation, including important changes incorporated into the newly introduced bill which are specifically intended to ensure that this bill will provide much-needed relief to veterans who are seriously ill because of their exposure to asbestos during their military service.

Tragically, tens of thousands of veterans who served between World War II and Vietnam were unknowingly exposed to asbestos during their tours of duty. Because of the long latency period of asbestos-related diseases, many veterans who served before the mid-1970s are just now being diagnosed with life-threatening asbestos-related diseases.

Veterans and other asbestos victims face countless, and sometimes insurmountable, hurdles in their pursuit of fair compensation under the current tort system. A flood of asbestos claims is overwhelming the court today, with as many as 300,000 or more claims currently pending, according to one recent study by the actuarial firm, Towers Perrin.

Today, truly ill asbestos victims are forced to compete in the court system with unimpaired claimants, many of whom will never get sick, for scarce space on court dockets. Too often, the sick die waiting for their day in court, while many of those who do receive awards or settlements receive only pennies on the dollar of the true value of their claims.

Veterans are also faced with the other particularly unique obstacles under the current system. First, because they were employed by the Federal Government during their military service, they are

restricted in their ability to recover from the government as a result of sovereign immunity.

Second, most of the companies that supplied asbestos to the Federal Government have either gone out of business altogether or have gone into bankruptcy and are able to provide only a fraction of the compensation that should be paid to asbestos victims, if anything at all.

Finally, even if there is a solvent defendant to sue for relief, there remains the time-consuming, expensive, uncertain, and emotionally draining ordeal of filing a court case and getting a trial. Once at trial, the plaintiff bears a difficult burden of proof—that has often proven impossible—to prove which defendant's product caused their injuries.

The VFW testifies here today because veterans with asbestos-related disease desperately need relief in the current system, which is not taking care of their needs, nor treating them fairly.

We support the FAIR Act because we strongly believe it is the only viable means to provide veterans and other asbestos victims with the long overdue relief that they need and deserve.

S. 3274 is not only a fair solution for veterans, it is, in our view, the only solution that will effectively address their unique plight. The so-called medical criteria solution, whether at the State or Federal level, which some promote as an alternative to the solution embodied in the FAIR Act, will do nothing to help veterans who, as I have already explained, have little or no fair avenue for receiving fair compensation under the current broken system, a system which a medical criteria solution would leave largely unchanged.

We believe the national trust fund solution embodied in FAIR can deliver certainty to our members afflicted with asbestos-related disease and provide the fairest outcome so that the right people are fairly compensated with the greatest speed and the lowest transactional cost.

Mr. Chairman, we have highlighted in our written in some detail the many provisions that are included in the FAIR Act that will particularly benefit the needs of veterans and other asbestos victims.

Again, thank you and Senator Leahy, and the committee, for recognizing and addressing their special situation.

Finally, Mr. Chairman, I would like to submit for the hearing a copy of a letter the VFW and several other veteran service organization and military service organizations have recently sent to the Senate Majority Leader, requesting that the legislation be brought up again before the full Senate as soon as possible.

Again, thank you for providing me and the Veterans of Foreign Wars in this Nation the opportunity to appear before this committee.

Thank you very much.

Chairman SPECTER. Thank you, Mr. Cullinan.

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

Chairman SPECTER. We now go to the 5-minute rounds by members.

Let me begin with you, Dr. Holtz-Eakin. I am a little surprised by the difference in your testimony today from the materials sub-

mitted by you when you were Director of the Congressional Budget Office.

The statement which you submitted as head of CBO said, "CBO expects the value of valid claims likely to be submitted to the fund over the next 50 years can be between $120 billion and $150 billion."

In the written statement which you submitted for today's hearing, you say, "Both the scale of the mandatory spending and the size of the revenues are highly uncertain."

There is a 180-degree difference between what you said when you were head of CBO, that the claims would be between $120 and $150 billion, very close to the $140 billion mark, contrasted with what you say now, that "mandatory spending and the size of the revenues are highly uncertain." We know what the revenues are going to be.

When you submitted your testimony to this committee last year, your statement was, referring to Section 406, "The legislation would not obligate the Federal Government to pay any part of an award under the bill if the asbestos funds are inadequate because, as we know, we revert to the tort system," contrasted to your testimony submitted today, that a future Congress and administration are guaranteed to turn to the taxpayer to make up the shortfall.

Now, that is palpably untrue and directly in variance with what you said before. Now, I note that since leaving CBO, you have become the director of the Maurice R. Greenberg Center. Mr. Greenberg is an outspoken critic of this bill, and has been since before the bill was even written. He is an outspoken critic of the trust fund, and AIG has a very material financial interest in opposing the bill.

Now, is the difference between your statements then and now attributable to your position working for the Greenberg Center, and in effect, AIG?

Mr. HOLTZ-EAKIN. Let me do those in reverse order. First, I am the director of that center. I am funded by the Council on Foreign Relations. My funding is from the Paul Volcker Chair in International Economics. I receive no funds from AIG, and my views today are my own.

Chairman SPECTER. Well, let us take up your own views, if you are not influenced by these other factors. How do you account for the statement that you make here that there is mandatory spending, and how do you account for the fact that you say "a future Congress and administration are guaranteed to turn to the taxpayer." How can you say that?

Mr. HOLTZ-EAKIN. Let me explain. The first statement, when I was Director of CBO, remains true today. It is the case that this will be mandatory spending in the Federal budget. It will not be subject to appropriation. It will fit every common-sense definition of mandatory spending.

Chairman SPECTER. It is mandatory until it runs out, Dr. Holtz-Eakin.

Mr. HOLTZ-EAKIN. It will be the case that the legislation provides for a sunset—that is what I said, and that remains true today—automatic, or at the discretion of the administrator, depending on the eyes of the—

Chairman SPECTER. Well, is there mandatory spending after the fund runs out?

Mr. HOLTZ-EAKIN. There is a program in place that requires money to be spent.

Chairman SPECTER. Wait a minute. Does it require—

Mr. HOLTZ-EAKIN. My judgment—

Chairman SPECTER. Wait a minute. Does it require the money to be spent or does it require Congress to act? Now, you say in your oral testimony here, "there will be political pressure to spend" and you challenge the Congress on any fiscal restraint.

How can you say what a Congress in the future will do? Congress will not be obligated to spend the money once the $140 billion is gone, will it?

Mr. HOLTZ-EAKIN. The administrator will have the option to terminate the fund, is my reading of it. We can debate whether you think that is correct reading. It is my judgment, and my judgment alone, that in the future Congress would continue this program and an administrator would have an enormous technical difficulty in sunsetting it at the appropriate time. It would be very hard to forecast. The uncertainties associated with this bill with not disappear with its passage.

As a result, there will be people who have been promised payments that may not be able to receive them from the $140 billion. It is my judgment—and the word "guarantee" is my judgment—that a future Congress will, in fact, continue the program. That is not in the law, and cannot be.

Chairman SPECTER. Well, my red light is on, so I will not ask another question. I will return after Senator Cornyn comments. But it seems highly, highly presumptuous for you to put your judgment, and your judgment alone, impugning what good sense a future Congress may have. Maybe this Congress has no good sense, but let us not sell every Congress in the future short.

[Laughter].

Senator Cornyn, you are one of the exceptions to any question about good sense.

Senator CORNYN. Thank you, Mr. Chairman. Let me say, again, you have demonstrated that you are not easily deterred by the difficulty of the subject matter. I congratulate you on this effort to try to move a resolution to this issue forward.

I continue to be concerned about the sheer complexity of the trust fund proposal and the necessarily speculative nature of whether it will actually be adequate to solve the problem in the way that we are trying our very hardest to manage.

The goal all along, I think for all of us, is to make sure that sick people get paid, and those who are not sick do not get paid. Of course, I am also very sympathetic to Mr. Cullinan's comments about the veterans.

Let me just ask you, Mr. Cullinan, is it your position that the only way that veterans can be compensated for exposure to asbestos is through the trust fund?

Mr. CULLINAN. Thank you, Senator Cornyn. As a practical matter, as it stands right now, veterans who are sick with various asbestos-related disabilities are not getting compensated. I think it is only one out of three claims, through the Department of Veterans

Affairs, for compensation for an asbestos-related disability is granted. It is a very rare occasion.

The experience in the court system, as I have testified, has not been good, the majority of those. So, yes, this seems to be best, and the surest means of providing redress to those veterans.

Senator CORNYN. I think you would agree with me that Congress has shown itself to be both very appreciative and very receptive to our veterans and their service, and very receptive to suggestions about how we can address their concerns, whatever they may be, as a result of their service to our Nation.

It seems to me that we should not exclude the possibility that there is some other mechanism that might be able to be created or that would address those concerns directly. I appreciate your testimony about what the present obstacles are, but maybe there is some other way to get at that.

Dr. Holtz-Eakin, let me ask you, this current version of the bill specifically identifies victims of 9/11 and Hurricanes Katrina and Rita to apply for the Exceptional Medical Claims provision.

Notwithstanding the merits of covering these individuals in the fund, is it fair to say that such a provision adds significant costs to the fund which jeopardize its ability to satisfy the claims of those who have been exposed to, and are sick from, asbestos-related diseases?

Mr. HOLTZ-EAKIN. It certainly raises the pool of claimants. I do not have a particular number on the scale of the additional costs that that might imply, but it adds to the numbers that are out there already. Those numbers already did not include a number of potential claims on the fund from exceptional medical claims, and others.

Senator CORNYN. So essentially this expands the universe of potential claimants under the fund.

Mr. Chairman, if I may ask unanimous consent, I have four documents that I would like to ask be made part of the record. One, is a statement from a constituent of mine, Mr. W.D. Hilton, who manages two asbestos settlement trusts. Second, is a letter from Mark Roscoe, president of the American Insurance Association. Third, is from the Reinsurance Association of America, Franklin Nutter. Fourth, is the statement of Hopeman Brothers, Incorporated.

Chairman SPECTER. Senator Cornyn, without objection, those will all be made a part of the record.

Senator CORNYN. Thank you.

I do not have any other questions at this time, Mr. Chairman. Thank you very much.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Mr. Grogan, in our workings with the AFL–CIO, Mr. John Sweeney and Mr. Richard Trumpka, we have gone over a great many issues, trying to determine and nail down a great many questions. I think we made considerable progress. Candidly, we are not there yet, but we are still working to try to win the approval of the AFL–CIO.

But in the large grouping in your labor organization, you speak for a very unique group. You speak for the asbestos workers who have the direct exposure and have obviously suffered the most.

What has been the impact with your workers and the many, many bankruptcies which have occurred precluding any meaningful recovery for the people who have been exposed to asbestos and their employers that have gone under?

Mr. GROGAN. Well, obviously, Senator, our members have been devastated by the causes of asbestos illness, and others—many others—that worked right alongside them. We are in a situation where, because of many class action suits that precluded many people who were unaware, and bankrupt companies where, if just the people who were sick were taken care of, those companies might not have gone bankrupt and they would be viable and able to pay out compensation to our workers.

There is a never-ending debate within the AFL, back and forth amongst us, on the issue of who should be compensated and who should not. I am here to say to you, the people that are sick are the ones that need to be compensated.

Not questionable claims, not claims that cannot be substantiated, because that is part of the problem of what happened, in my opinion, in the tort system. That is why it has everything all tied up.

So, in addition, we have members who, because of the latency period, and then come down with mesothelioma, their wives do not know exactly where they worked, who they need to go after to get compensated for the death of their loved ones, and a lot of times fall right through the cracks and get no compensation whatsoever.

I think the legislation that you have brought forth and are working hard to get passed at least gives fairness to those who are sick.

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

Mr. Ganz, you are general counsel for Foster Wheeler, and executive vice president. You took the lead in forming the Coalition for Asbestos Reform, as I understand it, your company and some others. As you have explained it, you had a concern about the obligations under the bill, contrasted with your being insured.

I think it would be useful for you to amplify our approach as illustrative of what the committee and our staff have been trying to do to deal with individual companies. We understand the impact is more than just a generalized language and a very complicated bill. And it is complicated, because we are dealing with a very complicated subject.

But we have dealt with your company, as we have dealt with many companies. Your company is illustrative of what we are trying to do, and we are still open to do, to deal with the individual needs and to try to find some allocation.

Your company would have much less exposure than, say, some of the giants, where you have Tom Donahue, head of the Chamber of Commerce, projecting a loss as high as $500 billion, half a trillion dollars. But I would like you to amplify for the record just what we did with you and the extent we went to try to, and finally did, solve your problem.

Mr. GANZ. Certainly. I would be glad to, Senator.

Yes. As you said, our position has been consistent throughout this very complicated debate, that we are in favor of an asbestos legislative solution on the Federal level, if one can be constructed that is fair and equitable.

We made it very clear, as the trust fund was in the initial stages of being developed, that because of our position—and it is not unique to us—a position that we had carefully marshalled, conserved, and managed our insurance assets so that it would last us through the asbestos litigation era, and that was a preeminent concern to us, that whatever solution was constructed, that that be taken account of. That was our consistent position. We were one of the founders of CAR, and that was what we were trying to bring to the fore.

Obviously, there were some discussions along the way. It was not in 852 in terms of an adjustment for our situation, and we opposed 852. To your tremendous credit, the credit of your staff, and Senator Leahy and Senator Leahy's staff, after February, you all and your staffs approached us and other companies to say, please come in, let us talk about the issues that are of concern to you. We did, and we explained them. You listened to us.

Chairman SPECTER. Did you get tired of talking to me about the subject?

Mr. GANZ. Never got tired of talking to you, Senator. Not at all.

Chairman SPECTER. Getting close, we have so many meetings.

Mr. GANZ. We had a lot of meetings, and a lot of hard work by your staff, I know. You all suggested a compromise. It is not a perfect fit. Nothing in this bill, I think, is perfect. But it is reasonable and fair and it would take account of our situation. It was creative. It allows us to budget, allows us to predict our asbestos payments and allows us to manage our business.

Our net out-of-pocket expenditures some years may be somewhat more than we would pay if we had been allowed to keep our insurance in the tort system, some years it might be somewhat less, but what you have given us is predictability, and that is important and it is manageable. We support that. We strongly support moving the bill forward with this provision in it.

It does not mean that there could not be other changes and work on the bill as it moves through the process, but we do think that you have answered what we said very early on and consistently was our preeminent concern, that the allocation to us needed to be something that was fair and equitable to our situation. You and Senator Leahy have done that, and we appreciate that and we thank you.

Chairman SPECTER. Thank you for that amplification, Mr. Ganz.

Senator Coburn? Before Senator Coburn begins, let me pay special tribute to his contribution to the committee on many subjects, but especially this one. Senator Coburn is also Dr. Coburn, and raised issues which we submitted to the Institute of Medicine—just had a report yesterday—ruling out finding insufficient evidence on a number of categories of cancer, trying to compensate the people who were injured.

As yuo said, Mr. Grogan, right now you can collect if you have asbestos exposure and a jury makes a determination that you will be injured in the future, which is highly speculative. But this bill only compensates people who are currently sick, really sick, and with a causal connection.

Senator Coburn raised a number of issues, which we took to the Institute of Medicine, and found that the liability is not genuinely

there, and makes available funds to pay other people who are not sick.

Senator Coburn?

Senator COBURN. Thank you for your kind words, Mr. Chairman, and your leadership.

Dr. Holtz-Eakin, I just want to kind of visit with you for a few minutes on your feelings. I have read your testimony. Give us a feeling, with the changes in this bill as compared to what we had before, what do you see are the major differences in terms of the cost of the trust fund, the early run-out of the cost of the trust fund, the borrowing cost of the trust fund, and the long-term liability if, in fact, assessments are attempted to be made and are not collected?

Mr. HOLTZ-EAKIN. In its structure, the trust fund has always been very sensitive to timing, with the broad anticipation being that most of the claims—over half—would arrive in the first 10 years, the revenue being distributed much more evenly over a longer period.

That requires borrowing up front, the accumulation of interest costs which are charged against the total collected in assessments. The most recent changes allow for hardship, which reduces things coming in. It allows for these changes for those who have got insurance, and that changes the assessments.

To the extent that that reduces the total that comes in up front, you have got more borrowing costs—and again, my judgment is that the Congress will not renege on honoring the borrowing costs—in the continuation of the program.

If it is the case that the administrator makes up for the shortfalls relative to the schedule in some way, that places firms at an unknown risk for paying more in assessments. It strikes me as a source of uncertainty in business planning.

So, I think there is a long-term liability, most likely present to the taxpayer. To the extent that it is not picked up by the taxpayer, it will be picked up by the private sector in the form of an unanticipated higher payment by a firm somewhere. Both of those strike me as problematic at this point in time.

Senator COBURN. Somebody is going to pay for it.

Mr. HOLTZ-EAKIN. Certainly. All the money is in the private sector. It has to come from there.

Senator COBURN. You also made a comparison between this fund and the Pension Benefit Guaranty Corporation, for which we are presently struggling with to try to straighten out because there is a significant long-term liability to the American taxpayer with that.

Could you offer any constructive criticism of the bill to where we would not get in that situation with this bill, where we would not bring it eventually to the American taxpayers so the cost would be attributable to those that were responsible for the costs?

Mr. HOLTZ-EAKIN. I think a fair reading of the history of the PBGC is one that, importantly, nobody broke the law. We find ourselves in the situation where a sensible estimate of the PBGC under-funding is $100 billion, so over a 10-year horizon.

How could that happen? It happens when there is insufficient transparency about the actual funding status. The PBGC is very

hard to understand. It happens when the funding formulas are complicated or at variance with economic reality. You get credit for things that do not really exist, they are only on paper.

In moving to any new system that involves a trust fund, I think it is imperative that there be tremendous amounts of transparency up front about what will go in and what will come out, and those get updated to reflect economic reality each and every time you have more information. Those are the keys to making us more immune from situations like the PBGC.

Senator COBURN. So your suggestion is, we could improve this bill by putting those two components into the trust fund.

Mr. HOLTZ-EAKIN. It would certainly improve the bill. It is very difficult to anticipate what will go on in this bill as it plays out, should it be enacted.

Senator COBURN. Let me ask anybody that would want to comment, what about the position of the fact that there have been trust funds established for asbestos liability now, and the impact of this bill on those trust funds? Does anybody want to comment on that?

Mr. GREEN. Senator, I will take a crack at that. I have been involved as the legal representative in the formation of four of them. Two of them are up and running and paying claims, doing quite nicely. One of them, the Haliburton Fund, the Dresser Fund, is paying 100 cents on the dollar.

Of course, the impact of this legislation on those trust funds would be, they would be wiped out, terminated, and their funds taken and subsumed in this bill, staffs would be disbanded, the trustees would be fired. I guess they would close up. Claimants who are receiving compensation from, or who expect to receive compensation from them, would have to wait for this fund to be up and running and available.

There are also many others in the pipeline that we have spent several years in, working, creating, and negotiating on that are about to come into the system, providing billions of dollars of compensation to victims.

The companies that were responsible for creating those liabilities are compensating their victims by putting in stock, insurance proceeds, or borrowing in cash for those. I do not think they have had any negative effect on the other legitimate operations of these companies. They are doing fine.

But I think the elimination of these trusts is a serious problem. I know that the trustees of some of these trusts plan to mount challenges to this legislation, even constitutional attacks.

Senator COBURN. That was going to be my next question. Does anybody on our panel of witnesses anticipate that there will be legal challenges to this trust fund so that it will not be implemented?

Mr. GREEN. I can guarantee that there will be. I have been involved in those discussions. I am not taking the lead in any of those, but I know that Mr. Hilton, who apparently sent a letter to Senator Cornyn, is very much involved in that.

They are lining up the legal talent to bring such a challenge and take it all the way to the Supreme Court. So, that is going to hap-

pen, Senator. I do not know what the outcome of that will be, but that is another complicating factor.

Senator COBURN. All right.

Mr. Chairman, thank you.

Chairman SPECTER. Thank you very much, Senator Coburn.

Just a couple more questions. You have all been very patient.

Mr. Kelly, I am advised that Liberty Mutual has increased its asbestos reserves by in excess of $200 million annually over the past 6 years, and stated in its 2005 annual report that there have been "significant increase in the number of asbestos-related claims filed," and you specify a number of circumstances causing the increase in filing.

But your written testimony today says "across all States, from 2004 to 2005, we have seen a 50 percent decrease in the number of new claims filed, a trend that continued in 2006." Which is accurate, Mr. Kelly?

Mr. KELLY. Thank you, Mr. Chairman. Actually, our liability reserves for asbestos are approximately $1 billion, and we did increase them twice significantly in the last several years based on a bottom-up study.

My testimony is quite clear. We did see a large and dramatic influx of claims, particularly from the State of Mississippi. There was some forum shopping. As I mentioned and made clear, it has made us extremely optimistic.

But the current situation is, in fact, with the reforms in Mississippi, Texas, and Ohio, we are seeing a significant—a significant—drop in those claims, in fact, because they are deemed without merit. So the current system is working to reduce that large influx that did emerge, particularly four or 5 years ago.

Chairman SPECTER. Mr. Kelly, I do not understand. Your written statement does say that "across all States, from 2004 to 2005, we have seen over a 50 percent decrease in the number of new claims filed, a trend that continued to 2006." Is that accurate?

Mr. KELLY. That is accurate.

Chairman SPECTER. That is accurate.

Well, how about the statement which I am told appears in your 2005 annual report, that there is "a significant increase in the number of asbestos claims filed." Is that accurate?

Mr. KELLY. I will stand by our annual report. The 2005 annual report would have been based on a protracted period where we look at our overall liabilities. Now, we are looking at the emergence of claims over a significant period of time to determine liabilities. What we are seeing in recent history is a significant decline in those States where there has been legislative or judicial reform addressing this issue.

Chairman SPECTER. Well, the 2005 annual report does not talk about liability, it talks specifically about the number of asbestos-related claims, "a significant increase in the number of asbestos-related claims filed." Are you saying that while there has been a decrease across the country, when I ask Liberty Mutual, your company, there has been an increase?

Mr. KELLY. No Sir: You have to look at asbestos over the longer haul. There have been roughly four surges in asbestos claims over-

all in a 25- to 30-year period. There was a significant surge started in the late 1990s and peaked in more recent years.

But it is fair to say that there is no question, from the 1990s up through around, say, 10 years earlier, there was a dramatic increase in claims. That led us all in the industry to look at our reserves, to hire outside experts to make sure that, where properly, we have a financial obligation.

In fact, we stand proudly behind, and we are most of the insurance behind, Mr. Ganz's company. We are the insurer that makes sure Mr. Ganz has very little to pay. It is that sort of discipline and that sort of recognition of financial liability that made us look at emerging claims over that period of time.

I can say happily, in recent years—in the last 2 years, and particularly in the last year since the enactment of reform in Mississippi, there has been a dramatic decrease in claims.

Chairman SPECTER. When this bill is passed, Mr. Ganz will not need your insurance, will he?

Mr. KELLY. No. But if this bill is passed, not only will we have to pay the liability, which we have now under the current system estimated on a moderately conservative basis, our belief is, given the uncertainty in the nature, that in fact our liability will dramatically increase.

Additionally, you will create, by abrogating State law, an additional liability on the workers compensation side that may be—may be—equal to the liability under asbestos.

Chairman SPECTER. Well, I do not understand. If this bill were passed, would Mr. Ganz's company need your insurance or would he not need our insurance?

Mr. KELLY. No, he will not need our insurance. It is all paid for, fully reserved for and we fully recognize that in our financial statement. It is fully funded and those funds are now being paid. You will transfer those funds from Mr. Ganz to the trust fund, but it does not change our financial obligations.

Chairman SPECTER. All right. So Mr. Ganz's company would not need your insurance.

Mr. KELLY. Mr. Ganz's company would not need our insurance. However, you would take our assets. Additionally, you would create a new liability in the Worker's Compensation system additionally, over and above our current estimate, which is based on a moderately conservative views of outside experts. Our belief, looking at the numbers and the uncertainty, that it would, in fact, increase our liability.

So we have fully allocated in the financial statements for the current liability. You will create new liability, in essence, taking up our assets to pay a liability for which we are not currently responsible under the current system.

Chairman SPECTER. But as you say, there is uncertainty.

Mr. KELLY. The uncertainty, unfortunately, is all in one direction, Mr. Chairman.

Chairman SPECTER. The uncertainty might not lead to decreasing your responsibility?

Mr. KELLY. In our opinion, there is no way that our liability, under S. 3274, will be less than our current liability.

Chairman SPECTER. All right. You have accurately described your opinion. But I am coming back to these two statements about an increase or decrease in asbestos claims filed. I still do not understand. You have amplified your answers to my questions, and quite candidly, I got lost.

Mr. KELLY. All right. We are comparing different periods of time.

Chairman SPECTER. Wait. Let me pose a question.

Mr. KELLY. Sure.

Chairman SPECTER. Is your written testimony accurate that "across all States, from 2004 to 2005, we have seen a 50 percent decrease in the number of new asbestos claims filed, a trend that continued to 2006"?

Mr. KELLY. It is accurate.

Chairman SPECTER. All right.

Now, my next question is, is it accurate, in your 2005 annual report, that there has been a "significant increase in the number of asbestos claims filed"? Is that accurate?

Mr. KELLY. It is, but we are comparing different periods.

Chairman SPECTER. Wait. How are you comparing different periods when it is the 2005 annual report, and your written testimony covers 2005 and 2006?

Mr. KELLY. What the 2005 annual report is, it is based on, looking financially at the end of 2005, what we had to establish for liability, financially. Over that period, we have to look at longer term trends. We do not establish liability based on recent periods.

As we have learned, unfortunately, in an asbestos claim, one has to take a very long-term view. But if you compare the period from 2000 through 2005 and the period of 1995 through 2000, there was a huge increase in claims. That, of course, is what led to the bankruptcy trusts we have alluded to here.

Chairman SPECTER. One other question. When you had in your annual report that the increase was due to a number of factors, "intensive advertising by lawyers seeking asbestos claimants", in this bill we have reduced lawyers' fees to 5 percent, and under some circumstances it can go to 10 percent, rather than the typical 30 to 40 percent, or sometimes even higher, contingent fees.

We are looking at a situation where the transaction costs and attorneys fees on both sides amount to more than 40 percent, and that the claimants ended up with about 58 cents on the dollar.

Would you not think that if you reduced the attorneys' fees, as this bill does, that there would be less motivation for, as you put it, "intensive advertising by lawyers seeking asbestos claimants"?

Mr. KELLY. I believe, in the bill, it is 5 percent. Obviously the bill is complex; we are all digesting it. Again, as I stated before, I admire the determination with which you have pursued this. But our understanding at this moment is, the 5 percent is hardly a hard cap. But it is significantly lower than the 40 percent.

Chairman SPECTER. Do you think 5 percent is too much?

Mr. KELLY. Well, some of my best friends are lawyers.

[Laughter].

Mr. KELLY. No. I am not saying 5 percent is too much.

Chairman SPECTER. I am trying to find some best friends in the insurance industry.

[Laughter].

Mr. KELLY. Well, we will always be good friends. You are admired. Despite the fact that we have seen some of these issues differently, I admire the grace you have approached this with, and thank you.

Chairman SPECTER. Let the record show, I spent every bit as much time with Mr. Kelly privately as with Mr. Ganz.

Mr. KELLY. You absolutely did.

Chairman SPECTER. I even bought him lunch 1 day. That is sort of a violation of the Senate Code of Ethics for a lawyer to buy a corporate executive or a lobbyist lunch, but I do it any way from time to time.

Mr. KELLY. Well, let the record show that my opinion was not changed by the delicious lunch.

[Laughter].

Chairman SPECTER. Well, let us hope we are all laughing when this bill is finished.

[Laughter].

Chairman SPECTER. For the record, I want to introduce a number of documents. First, the testimony of former Congressman Jack Kemp, a strong supporter of this bill. Congressman Kemp, regrettably, has some medical issues which keep him from testifying today.

Also, a letter in support from the NFIB, a letter in support from 24 veterans group to support what Mr. Cullinan has had to say here, a letter from the wife of a veteran, Ms. Marylou Kenner, and a statement in support by the Citizens Against Government Waste.

We are going to try to meet the concerns that Mr. Kelly has registered and that Professor Green has registered, and that Dr. Holtz-Eakin has registered. We are still open for business to try to find a way to bring as many parties together as we can.

A comment?

Senator COBURN. I just had one additional question. I wondered if any of the panelists might respond. Are any of the panelists concerned at all with the use of a CAT scan in the diagnosis, or qualification of using CAT scans to create a diagnosis of asbestosis and how it might play out in the costs associated with the trust fund? Any comments on that? [No response].

Thank you.

Chairman SPECTER. Thank you, Senator Coburn.

Well, ladies and gentlemen, thank you all very much. We are going to continue to work on this matter. We are very much concerned with all the injured people, especially the asbestos workers, frankly, and the veterans. Mr. Pat Eidinger, president in Philadelphia, has been very, very helpful. I want to note that for the record.

That concludes the hearing. Thank you all.

[Whereupon, at 11:43 a.m. the hearing was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

815 SIXTEENTH STREET, N.W.
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LEGISLATIVE ALERT!

(202) 637-5090

June 6, 2006

Honorable Arlen Specter, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Patrick J. Leahy,
Ranking Minority Member
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter and Ranking Minority Member Leahy:

On May 26, Senator Specter introduced a revised asbestos litigation reform bill, the "Fairness in Asbestos Injury Resolution Act of 2006" (S. 3274). When the Senate considered the last version of this legislation (S. 852) in February, we expressed the view that the trust fund created by the bill would fall short of its promise to fairly compensate the victims of this devastating disease. Unfortunately, the revised bill only addresses one of the objections we raised at the time. Most of the other changes in the revised bill address concerns that have been raised by businesses seeking to reduce their payments into the trust fund and limit their exposure to future tort claims should the fund become unworkable or insolvent.

The AFL-CIO remains deeply dismayed by the bill's start-up provisions, where the needs of victims are a secondary consideration. Like S.852, the new bill places the burdens and risks of the fund's start-up squarely on the shoulders of those who are sick. Under the revised bill, the rights of all claimants to proceed in court are immediately stayed upon enactment. Terminally ill (" exigent") claimants can accept an offer of judgment or payment through a claims facility during the start-up period, or exercise limited rights to continue to file claims with the existing asbestos bankruptcy trusts. However, all other victims, no matter how seriously ill they may be, would be barred from pursuing any remedy until the fund is operational. This could leave tens of thousands of victims with nowhere to go for compensation for as long as 24 months if the operation of the fund is delayed.

In our view, it is unfair to leave victims with serious illnesses without a remedy for up to two years. The uncertainty associated with the start-up of the fund should be borne by those responsible for the asbestos disease crisis – the defendant companies – not by asbestos disease victims. For nearly a year, we have been urging the bill's sponsors to correct this flaw by permitting the asbestos bankruptcy trusts to remain in place to pay claims by impaired claimants until the national trust fund is fully operational. Unfortunately, S. 3274 includes no such provision.

Furthermore, the new bill, like S. 852, unfairly restricts the legal rights of victims with silica disease. It establishes medical criteria for lawsuits by individuals who have both asbestos-related disease and silica-related disease, which would bar many of them from seeking compensation for their silica-related injury. The only recourse for victims of both diseases would be to seek compensation for their asbestos disease from the asbestos fund, which in most cases will be limited to $25,000 for Level II "mixed disease." All victims with silica-related disease, including those who also have asbestos disease, should have the right to seek redress in the courts for their silica injury, with any damages limited to the injury attributable to their silica exposure.

In addition, the sunset provisions of the bill remain problematic and may leave the fund with a shortfall that it cannot make up. Further, nothing in the new bill addresses our concern about the overly broad definition of an asbestos claim. The bill is intended to provide an alternative remedy for personal injury claims related to asbestos, and preempts these claims from being pursued in the tort system. But rather than limit the bill's application to such claims, the bill defines asbestos claims very broadly to include virtually any civil actions that are directly or indirectly related to the health effects of exposure to asbestos, and then includes a list of the specific types of claims that are excluded. This overly broad definition of asbestos claims could have the unintended effect of preempting many civil actions "related to" asbestos that are not personal injury claims.

Last February, we urged the Senate to request that the Congressional Budget Office conduct a full review of new information suggesting that future mesothelioma cases, as well as the number of pending claims, may be significantly higher than previously estimated. In the intervening four months, we are unaware of any further analysis that takes into account that new information. As a result, we remain deeply concerned that the fund may be significantly under-funded, particularly in the crucial start-up years.

We acknowledge that some important improvements to the legislation have been made since S. 852 was introduced in April 2005, and the revised bill does correct language in the previous bill that would have nullified otherwise legally binding settlements between plaintiffs and defendants if they were not personally signed by the settling defendant before enactment of the bill. This change should make it more difficult for defendant companies to abrogate those agreements, and we appreciate the fact that our recommendation was adopted.

Throughout the legislative process, our goal has been to craft a bill that establishes a truly workable trust fund that provides fair and timely compensation to asbestos claimants. But this latest draft again fails to fulfill this promise to the victims of asbestos disease.

Sincerely,

c: All members of the Senate Committee on the Judiciary

American Insurance Association

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June 6, 2006

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

Dear Chairman Specter:

As the challenging effort to enact meaningful federal asbestos litigation reform continues, we want to thank you for your ongoing leadership and dedication to this important issue. We are encouraged that you are trying to address some of the fundamental flaws in the version brought to the Senate floor earlier this year. Unfortunately, the new bill (S. 3274) still does not address insurance industry concerns; as a result, we must remain opposed to The Fairness in Asbestos Injury Resolution Act of 2006.

Property-casualty insurers are deeply committed to constructing a meaningful, comprehensive solution to our national asbestos litigation crisis. Since the Senate decided to pursue a trust fund, our industry has stressed that this approach must provide insurers with both certainty and finality for our asbestos exposure – and this certainty and finality must come at an equitable, affordable cost.

To provide certainty and finality, the bill must provide the exclusive administrative remedy for resolution of asbestos-related claims. Absent inclusion of all such claims in the fund or a credit for claims left in the litigation system, there can be no real finality for insurers. Our industry would inevitably find itself paying both substantial sums to the fund *and* additional large sums in the tort system for claims permitted to "leak" outside of the fund. This would present insurers with an even more untenable, expensive situation than that posed by the current, highly dysfunctional litigation system.

While the new bill represents a good faith effort to address some of our concerns, it fails to provide the certainty promised insurers in early trust fund deliberations. As we have stressed since last summer, until our critical issues are adequately addressed, we must continue to oppose the legislation.

We look forward to working with you as you endeavor to construct a true resolution to our nation's asbestos litigation crisis.

Sincerely,

Marc Racicot
President

Statement of the Common Interest Group Concerning S. 3274
(The FAIR Act of 2006)

Submitted to the Senate Committee on the Judiciary
June 7, 2006

My name is W.D. Hilton, Jr. I am the Executive Director of the NGC Bodily Injury Trust and the Managing Trustee of the Fuller-Austin Asbestos Settlement Trust. I am also a representative and member of the Steering Committee of the Common Interest Group of Trusts (CIG Trusts), consisting of the Celotex Asbestos Settlement Trust, the NGC Bodily Injury Trust, the Fuller-Austin Asbestos Settlement Trust, the DII Industries, LLC Asbestos PI Trust, and the Western Asbestos Settlement Trust.

Each of the CIG Trusts was created, pursuant to the provisions of section 524(g) of the Bankruptcy Code, to resolve the claims of victims of asbestos exposure. They were created through confirmed chapter 11 plans of reorganization and currently have assets of approximately $5.5 billion. Thank you for giving me the opportunity to submit this written testimony concerning S. 3274.

While S. 3274 may be intended to ameliorate some of the CIG Trusts' concerns about its predecessor (S. 852, the FAIR Act of 2005), none of the new provisions addresses the central constitutional issue. S. 3274, like S. 852, violates the Takings Clause of the Constitution by eliminating the vested rights of the trusts' beneficiaries to be compensated for their asbestos-related injuries and by requiring the trustees to transfer the trusts' assets to the federal government.

We believe this issue should be of great importance to both proponents and opponents of this legislation. For the proponents, it makes little sense to base the success of the national fund on trust assets which will immediately be subject to a strong Constitutional challenge. For the bill's opponents, a successful Constitutional challenge will undoubtedly add to the ultimate cost to the federal government.

Under S. 852, 100 percent of the CIG Trusts' assets would have been seized shortly after enactment. S. 3274 initially takes 88-90 percent of the assets and permits the each trust to temporarily maintain 10-12 percent of its beneficiaries' assets until such time as the Administrator of the national fund created under the bill deems it fully operational. The simple fact that this Taking occurs in two phases does not negate the constitutional violation. Just compensation is still not provided to the CIG Trusts' beneficiaries for this congressionally mandated extinguishment of their vested property rights. The bill also sets limits upon whom the trusts may compensate during this interim period with their remaining funds that are different than the court-approved criteria that now govern the CIG Trusts.

Furthermore, nothing in the new bill addresses the fundamental concern that many beneficiaries of the CIG Trusts would receive no compensation under S. 3274, and thousands more would receive less than they are currently entitled to receive. In addition, the national fund created under the new bill, like its predecessor, will run out of money quickly because the funding is inadequate to pay the claims that will be submitted to the national fund.

In anticipation of running out of money, S. 3274 has an early sunset provision that creates a new creature known as the "Master Trust." This Master Trust would receive the funds to be returned from the insolvent national fund to satisfy the remaining obligations of the CIG Trusts and other asbestos bankruptcy settlement trusts. However, only a portion of the funds taken from the trusts will be transferred to the Master Trust. Moreover, the bill gives the trustees of the Master Trust broad discretion to impose procedures and criteria for the review of claims and payment to beneficiaries. In essence, this means that trust beneficiaries -- whose vested property rights were extinguished with the creation of the national fund -- will be plunged into a virtual lottery system once the national fund becomes insolvent, and one that is likely to be poorly funded at that. The trustees of the so-called Master Trust would determine whether persons entitled to payment from the CIG Trusts will receive any compensation whatsoever, and if so, how much, regardless of what the courts have mandated -- and the beneficiaries have agreed to -- under the 524(g) bankruptcy process.

When an asbestos settlement trust is created under Section 524(g) it must receive the support of at least 75 percent of the asbestos victims who have claims against a particular defendant company. In contrast, asbestos victims have no say whatever about the rules that will govern who gets paid, and how much, by the Master Trust under the substitute bill. The rights conveyed by orders of federal district courts are eliminated.

As was the case under S. 852, the answer remains simple. S. 3274 should be amended to permit all existing asbestos bankruptcy trusts to opt out of the national fund. By extension, the trusts that choose to opt out of the national fund should also be free of any post-sunset Master Trust. This cures the constitutional flaws inherent in the bill as to the existing asbestos bankruptcy trusts and, most importantly, preserves the ability of the existing trusts to fulfill their legal and moral commitment to their beneficiaries.

For Immediate Release June 1, 2006

Contact: Tom Finnigan
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CCAGW Applauds Sens. Specter and Leahy for Reintroducing FAIR Act

Washington, D.C. The Council for Citizens Against Government Waste (CCAGW) today applauded Sens. Arlen Specter (R-Pa.) and Patrick Leahy (D-Vt.) for reintroducing the Fairness in Injury Resolution (FAIR) Act on May 26. The legislation establishes a trust fund to reimburse victims of asbestos exposure while limiting the actions of trial lawyers.

"The flood of fraudulent lawsuits concerning asbestos exposure prevents true victims from getting the compensation they deserve," CCAGW President Tom Schatz said.

More than 730,000 individuals have brought forward legal claims related to asbestos, with an estimated 300,000 claims currently pending. Studies have found that up to 90 percent of these claims were by people who have not suffered any physical impairment. The trust fund established by the FAIR Act would be funded by corporations and their insurers; no taxpayer or government funds would be involved.

"Fraudulent suits clog the courts and waste millions of tax dollars," Schatz continued. "The endless litigation also leads to job losses in industry."

CCAGW endorsed the FAIR Act and encouraged the Senate to pass it as quickly as possible.

The Council for Citizens Against Government Waste is the lobbying arm of Citizens Against Government Waste, a nonpartisan, nonprofit organization dedicated to eliminating waste, fraud, abuse, and mismanagement in government.

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STATEMENT OF

DENNIS M. CULLINAN, DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

WITH RESPECT TO
S. 3274, "FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT"

WASHINGTON, D.C. JUNE 7, 2006

MR. CHAIRMAN, RANKING MEMBER LEAHY, AND MEMBERS OF THE COMMITTEE:

It is a great honor to appear before you today representing the 2.4 million men and women of the Veterans of Foreign Wars of the United States and our Auxiliaries. Founded in 1899, the VFW is this nation's largest organization of combat veterans. Our members come from across the country and even around the world.

Thank you for the opportunity to testify today on the "Fairness in Asbestos Injury Resolution Act of 2006" ("FAIR Act"). I want to especially thank Chairman Specter and Senator Leahy for their recognition of the veterans' stake in this critical piece of legislation and the many provisions they have included in the legislation, including important changes incorporated in the newly introduced bill, S. 3274, which are specifically intended to ensure the legislation will provide much needed relief to the many veterans who have become seriously ill because of their exposure to asbestos during their military service.

Tens of thousands of veterans who served between the World War II and Vietnam eras were unknowingly exposed to asbestos during their tours of duty. Because of the long latency period of asbestos-related disease, many veterans who served before the mid-1970s are just now being diagnosed with life threatening asbestos-related diseases.

Veterans and other asbestos victims face countless and sometimes insurmountable hurdles in their pursuit of fair compensation under the current tort system. A flood of claims is overwhelming the courts today, with as many as 300,000 or more claims currently pending, according to one recent study by the actuarial firm Towers Perrin.

Today, truly ill asbestos victims are forced to compete in the court system with unimpaired claimants – many of whom will never get sick – for scarce space on the court dockets. And too often the sick die waiting for their day in court, while many of those who do receive awards or settlements only

receive pennies on the dollar of the true worth of their claims.

Veterans are also faced with some other particularly unique obstacles under the current system. First, because they were "employed" by the federal government during their military service, they are restricted in their ability to recover from the government as a result of its sovereign immunity. Second, most of the companies that supplied asbestos to the federal government have either gone out of business or gone into bankruptcy and are only able to provide a fraction of the compensation that should be paid to asbestos victims, if anything at all. Third, even if there is a solvent defendant to pursue for relief, there remains the time-consuming, expensive, uncertain, and draining ordeal of filing a court case and wading through discovery to get to trial, where the plaintiff bears a difficult burden of proof and often has the impossible task of proving which defendant's product caused their injuries.

In short, veterans with asbestos-related diseases and their families desperately need relief from the current system, which is not taking care of their needs or treating them fairly. The VFW supports S. 3274 because it strongly believes it will provide veterans and other asbestos victims with the long overdue relief they both need and deserve.

The VFW believes S. 3274 is not only a *fair* solution for veterans, it is the *only* solution that will effectively address the unique plight of veterans. The so-called medical criteria solution, whether at the state or federal level, which some promote as an alternative to the solution embodied in the FAIR Act, would do *nothing* to help veterans who, as I have explained, have little or no avenue for receiving fair compensation under the current broken system which a medical criteria solution would leave largely unchanged.

We believe the national trust fund solution embodied in S. 3274 can deliver certainty to our members afflicted with asbestos-related disease and provide the fairest outcome so that the right people are compensated with the greatest speed and the fewest transaction costs.

The many provisions contained in S. 3274 that the VFW believes will effectively serve the needs of veterans include the following:

- *Establishment of a Streamlined, No-fault, Administrative System.*

S. 3274 will establish a new federal Office of Asbestos Disease Compensation for the processing and payment of asbestos claims. (§§ 101(a)(1)-(2)). Administrative review of claims will occur through an efficient, streamlined, and no-fault process, with strict time lines on when eligibility determinations must be made. (§§ 114(b), (c),(d)(1)(a),(d)(2), & (e)(2)). The new administrative system is expressly designed to ensure that eligible claimants will receive timely, fair and certain compensation based on clearly defined eligibility criteria. (§§ 121 & 131).

- *Protection of Veterans' Benefits.*

S. 3274 will preempt all claims for asbestos-related injuries, but will preserve claims brought under Workers' Compensation and Veterans' Benefits Programs. (§ 3(3)(B)). The FAIR Act will, therefore, keep intact all of the benefits currently available to veterans if they choose to pursue those benefits. The Act will also exclude any recoveries under Veterans' Benefits Programs from the requirement that awards under the Act be reduced by prior recoveries. (§ 3(6); § 134(b)).

- *Provides Relief for Veterans Who Could Face Statute of Limitations Problems.*

As noted above, veterans whose asbestos illnesses are service related are left with little to no effective avenues for obtaining meaningful relief under the current system.
S. 3274's statute of limitations takes into account the unique circumstances of veterans by providing veterans who are receiving veterans' benefits for disability caused by asbestos exposure at the time of the enactment of the Act with the opportunity to file a claim with the new Fund for up to 5 years after the date of enactment. (§ 113(b)(4)(B)).

- *Reduction of Evidentiary Burdens.*

Unlike the tort system, there will be no requirement under S. 3274 to prove exposure to a particular defendant's asbestos product. (§ 121(c)). S. 3274 will also include heavier weighting for pre-1976 and World War II shipyard exposures and provide special provisions for take-home exposures. (§§121(a)(16),(c)(3)). The Act will further reduce the burden on claimants through simplified claims requirements and the requirement that exposure presumptions for certain industries, occupations and time periods be developed. (§§ 113, 121(c)(5)). It is well known and documented that certain individuals in certain occupations within the military had high exposures to asbestos. These presumptions should help ease the burden of proof for veterans.

- *Application to Exposures on U.S. Ships and Overseas.*

S. 3274 will expressly apply to exposures to U.S. citizens occurring on U.S.-owned or flagged ships and occurring overseas while working for U.S. entities. (§ 121(c)(1)(B)).

- *Allowance of Recoveries by Dependants.*

Under S. 3274, claimants will include family members of victims, allowing spouses or children to recover in place of a family member who is a victim. The Act will provide a definition of "personal representative" to ensure that the Office will not become embroiled in disputes over who is the proper beneficiary. (§§ 113(a)(1),(2)).

- *Providing Medical Monitoring, Education, and Medical Screening Programs.*

S. 3274 will provide medical monitoring, including reimbursement of an individual's costs for physical examinations in addition to x-rays and pulmonary function tests. (§§ 132, 225(e)). Such examinations and tests could be conducted every three years. Under this provision, veterans would be able to seek additional medical help outside of the VA system. In addition, the Act will establish a medical screening program for claimants considered to be at high risk of asbestos-related disease and provide an outreach and education program about asbestos-related medical conditions. (§§ 225(b),(c)).

- *Establishment of a Claimant and Legal Assistance Program.*

S. 3274 will establish a claimant and legal assistance program to assist claimants in submitting claims or to find free legal representation to help file their claims. Among other things, the Act will require that the claimant assistance program include outreach, training of individuals providing assistance, and resource centers established in areas with a high concentration of potential claimants. The Administrator will also be authorized to contract with local community and labor organizations to provide such assistance. (§ 104).

- *Providing Grants to Mesothelioma Research and Treatment Centers.*

Recognizing the need for more research on mesothelioma, the Act will provide for $1.5 million from the Fund and $1 million from the Director of the National Institutes of Health for each of fiscal

years 2006 through 2015 for the establishment of each of 10 mesothelioma disease research and treatment centers. These centers will be closely associated with the U.S. Department of Veterans Affairs' medical centers to provide research benefits and care to veterans. These research grants will help advance the current treatments available for mesothelioma, especially for veterans, which the legislation recognizes as having "suffered excessively from mesothelioma." (§ 222(b)).

Again, thank you for the opportunity to testify today on behalf of the Veterans of Foreign Wars in support of S. 3274.

Gov. John Engler's Oral Testimony/Asbestos

June 7, 2006

Senate Judiciary Committee

Chairman Specter, Senator Leahy, and committee members: Thank you for inviting me to testify today on behalf of the National Association of Manufacturers' Asbestos Alliance.

I would like to begin by honoring the memory of Judge Edward Becker and acknowledging his tremendous contribution to moving this critical legislation forward. He will be missed.

And, I want to thank you, Senators Specter and Leahy, for your unwavering commitment to passage of asbestos trust fund legislation. The new FAIR Act is a win-win-win for asbestos victims, particularly veterans, workers and our economy. Only a trust fund approach, which takes asbestos cases out of the courts, can end the asbestos litigation nightmare.

We recognize that some states have made progress in addressing some of the most egregious aspects of asbestos litigation. But state medical criteria legislation, while very welcome, does not prevent plaintiffs' attorneys from seeking out new, more friendly forums, as they have done for years. It also does not end the litigation lottery, in which some victims do fine, but many others face delayed and reduced compensation.

More fundamentally, keeping asbestos claims in the courts ignores other problems. It costs U.S. business $2.38 to provide $1.00 of compensation to asbestos victims. That is a lose-lose-lose for victims, workers and the economy. In addition, plaintiffs' lawyers in search of new pockets have dragged thousands of companies into

court on the flimsiest basis, disrupting their business and sabotaging their credit. Reform of the tort system alone cannot address these problems.

The only way to fix asbestos once and for all is by getting out of the tort system and into a privately-funded, no-fault administrative process.

Along with ending the litigation for all companies, the trust fund bill will exempt SBA-eligible small businesses from paying into the trust fund. Their asbestos litigation nightmare will finally be over. And the companies contributing to the trust fund will have certainty about their financial obligations. The trust fund will also prevent future asbestos bankruptcies and their destructive impact on workers, their retirement savings and their communities.

Far from being a tax itself, the FAIR Act actually eliminates the "asbestos tort tax" that American business has been paying for 40 years. The companies that will contribute to the trust fund today face expensive litigation, which hampers their ability to raise capital, expand and create jobs. The FAIR Act lifts the constant threat that asbestos litigation poses to their operations and sometimes, even their survival.

S. 3274 is a major advance over previous versions of the FAIR Act.

First, it adopts Senator Kyl's amendment, which limits the contribution of small and midsize companies to 1.67 percent of their gross revenues and liberalizes the procedure for hardship adjustments. It also addresses concerns of small, deeply insured companies in Tier II like Foster Wheeler, from whom you will hear today.

Next, S.3274 goes even further than the earlier bill to prevent fraudulent claiming. We commend Judge Janis Jack for exposing all of the fraud rampant in silica litigation. But there are still hundreds of thousands of asbestos claims pending and rampant fraud

has been a problem for decades. If we keep asbestos cases in the courts, the profit motive remains for trial lawyers to recruit unscrupulous doctors to deliver bogus diagnoses. A key advantage of the trust fund bill is that it will stop this madness and ensure that only the truly sick receive the compensation they deserve.

Another important improvement limits the filing of old or "dormant claims," with the trust fund for compensation. This will strengthen the fund's financial integrity.

Finally, the new bill explicitly states that the trust fund will not increase the deficit, will not impose any burden on the taxpayer and will not create any taxpayer obligation. The trust fund solution has always been based on a private financing, with absolutely no obligation to the federal government to make up any shortfalls.

S.3274 also requires the chief financial officer of the Department of Labor to certify annually that the fund will be financially solvent based on private contributions. This strengthens the earlier bill, which made this the responsibility of the trust fund administrator, who may have a special interest in keeping the fund going.

In short, the trust fund will ensure fair, fast and certain compensation to victims. It will also boost our economy. Navigant Consulting estimated that it could create more than 800,000 jobs and increase economic growth by $64 billion.

As the U.S. Supreme Court has twice said, asbestos litigation "defies customary judicial administration and calls for national legislation." After decades of trying, the solution is at hand and it is time to act on it. I urge the Senate to move trust fund legislation forward and onto the House. Time is short, but it can and must be done this year.

Testimony

Peter J. Ganz
Executive Vice President, General Counsel & Secretary
Foster Wheeler Ltd.

United States Senate Committee on the Judiciary
S.3274: The Fairness In Asbestos Injury Resolution Act of 2006

June 7, 2006

My name is Peter J. Ganz, and I am the Executive Vice President, General Counsel and Secretary of Foster Wheeler Ltd. and its subsidiaries ("Foster Wheeler"). I thank Chairman Specter, Senator Leahy and the members of the Committee for inviting me to provide testimony concerning S.3274, "The Fairness In Asbestos Injury Resolution Act of 2006." In particular, I am pleased to provide Foster Wheeler's perspective on the provisions of Section 204(a)(4) entitled, "Tier II Adjustments For Well-Insured Defendant Participants."

By way of background, Foster Wheeler is a global engineering and construction contractor and power equipment supplier. Foster Wheeler and its predecessor companies have been in business for well over 100 years, and the company currently employs over 9,000 people world-wide. Foster Wheeler operates through two business units, a Global Engineering and Construction (E&C) Group which provides front-end design, engineering, procurement, construction and project management in a variety of industries and a Global Power Group which designs, manufactures and erects steam generating and auxiliary equipment for electric power stations and industrial markets.

Over the course of its long history, Foster Wheeler designed, supplied and erected numerous marine and land-based steam generators and process plant facilities which required insulation, valves, and pumps supplied by third parties either to Foster Wheeler or to Foster Wheeler customers, and which in certain instances and during certain periods of time may have contained asbestos. For example, during World War II Foster Wheeler supplied marine boilers and auxiliary equipment for battleships, destroyers, liberty ships and other vessels under strict specifications prescribed by the U.S. Navy or the U.S. Maritime Commission that often required that asbestos-containing components such as gaskets, refractory or insulation be included.

Like many American companies engaged in the businesses in which Foster Wheeler participated in decades past, Foster Wheeler subsidiaries have confronted and continue to face many thousands of asbestos claims in jurisdictions throughout this country. We have resolved almost 300,000 asbestos claims to date at a cost to Foster Wheeler and its insurers of almost $700 million, and as of March 31, 2006, we had approximately 165,000 claims pending. Notwithstanding the many problems, challenges, and abuses which have plagued the asbestos litigation system over the years and about which this Committee is very well aware as a result of its important work in this area, Foster Wheeler always has endeavored to deal fairly with legitimate claimants who can demonstrate an asbestos-related disease and a sufficient nexus to a Foster Wheeler boiler or other equipment containing asbestos.

Over the years, not only has Foster Wheeler sought to defend itself as best it could given the difficulties faced by any defendant confronting thousands upon thousands of asbestos claims in the court system, but it also worked diligently to marshal its available insurance assets and carefully protect and manage these extremely valuable resources. As a result, except for amounts allocated to insolvent insurers, we believe substantially all of Foster Wheeler's asbestos-related defense and indemnity costs incurred to date have been, or will be, covered by insurance. In addition, based upon current estimates as reflected in our SEC filings, we expect that the bulk of our future asbestos-related expenditures also will be covered by our available insurance assets.

Foster Wheeler has long supported the goal of enacting fair, reasonable federal legislation to address the asbestos litigation crisis. We are cognizant of the repeated calls of the Supreme Court imploring Congress to act in this arena. Nevertheless, while Foster Wheeler consistently has supported the concept of a federal legislative asbestos solution and believes there may be different possible approaches which could be effective, including a trust fund or medical criteria framework, Foster Wheeler did not support the solution set forth in S.852. We made it very clear that our principal, although by no means only, criticism of that version of the asbestos trust fund legislation was that we considered the allocation formula contained therein to be grossly unfair to companies such as ours by requiring us to make annual payments into the trust far in excess of what we otherwise would expect to pay out-of-pocket net of future insurance receipts. We believe that the allocation formula contained in S.852, in effect, penalized us for having

carefully collected, managed and conserved our available insurance assets so that they would be available to us to pay a substantial part of our future asbestos-related liabilities.

It is because of Foster Wheeler's concern over this critical issue that as early as the fall of 2004, we first reached out to other companies who might have similar concerns over the trust fund bill. In early January 2005, Foster Wheeler and several of these other so-called "well-insured" companies formally communicated their position to this Committee, and at about the same time these companies formed the nucleus of the Coalition for Asbestos Reform, or "CAR", a group which later attracted insurers and others also critical of various aspects of S.852. Of course, I am only here today to speak on behalf of my own company, Foster Wheeler, but it always was our preference to achieve what we believed to be necessary changes to the proposed asbestos legislation, not the end of meaningful efforts at reform. Nevertheless, we felt it necessary to strongly oppose the bill in the form in which it was brought to the floor of the Senate earlier this year since it did not address our concerns on the critical issue of allocation.

Following the floor action on the bill, Chairman Specter and his staff invited our company, as well as several others, to discuss possible revisions to the bill in an attempt to seek to address our concerns with regard to the allocation issue upon which we had been directing so much of our attention and criticism. Following what appeared to us to be a great deal of hard work and careful balancing of interests, Senator Specter, Senator Leahy and their staffs incorporated a provision in the new bill which Foster Wheeler believes reflects a true recognition of our concerns on allocation and constitutes a fair and

reasonable compromise on the issue. As the Committee is aware, this provision, embodied in Section 204(a)(4), essentially provides that many small and medium size companies like ours which have relied on extensive insurance assets will be eligible for an adjustment to their allocation so that they can expect to pay into the Fund no more than 5 percent their annual adjusted cash flow, subject to an annual minimum and an aggregate cap. While this solution is not perfect and may still result in our company paying somewhat more out of pocket in any given year than we might otherwise have paid had we been able to rely upon our available insurance, we support it as a fair compromise. It provides a company like ours with a manageable, predictable, contribution to the Fund which should allow us to focus our management resources on running and growing our businesses.

In conclusion, we thank Senator Specter, Senator Leahy and their staffs for incorporating a provision in the revised legislation which provides a fair and reasonable solution to the allocation issue about which we have been concerned since the early discussions of the trust fund bill. We also would commend their work to improve other aspects of the bill including strengthening the medical criteria and claim procedures. That is not to say that there cannot, and should not, be further improvements to the legislation as it works its way through the legislative process in the Congress, but in light of the aforementioned significant changes in the allocation methodology, we would strongly support S.3274 moving forward at this time.

Thank you for the opportunity to express these views to the Committee.

TESTIMONY OF PROFESSOR ERIC D. GREEN BEFORE THE SENATE COMMITTEE ON THE JUDICIARY ON S. 3274, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2006, Scheduled for Wednesday, June 7, 2006, at 9:30 a.m.

INTRODUCTION

I would like to thank Senator Specter and Senator Leahy as well as the other members of the Judiciary Committee for giving me the opportunity to appear before you once again today to talk about the Fairness in Asbestos Injury Resolution Act of 2006.

My remarks will address the proposed changes in the Bill and the risks it continues to pose not only for asbestos victims but also for defendant companies, insurers, and, potentially, the taxpaying public. My testimony is based on my own experience with resolving asbestos claims and on the collective views of myself and other individuals who have been appointed by federal courts to represent the interests of future claimants in asbestos-related bankruptcy proceedings. Although I speak for myself, I know that my views are shared by most of the other court-appointed individuals who represent future claimants.

I am currently the court-appointed Legal Representative for future asbestos bodily-injury claimants in the Halliburton (or Dresser Industries) and Babcock & Wilcox post-bankruptcy trusts, as well as the Fuller-Austin and Federal-Mogul bankruptcy cases, a position often referred to as a "futures

representative." I also am a professor at Boston University School of Law, and I operate a firm specializing in alternative dispute resolution. I have served as a Special Master or Guardian Ad Litem to several state and federal courts in asbestos litigation matters, and as a mediator I have settled tens of thousands of personal injury asbestos cases and resolved numerous asbestos insurance disputes. However, I have never directly brought or defended an asbestos personal injury lawsuit and have never had any personal stake in the outcome of any asbestos litigation or legislation.

At present, the rights of many future asbestos claimants, along with current claimants, are protected by the bankruptcy trust and "channeling injunction" structure that Congress created and codified at 11 U.S.C. § 524(g) in a 1994 amendment to the Bankruptcy Code. The mechanism provided pursuant to section 524(g), which requires the participation of a futures representative, is currently the only means through which a company can fully resolve all of its present and future asbestos liabilities.

As I discussed with the Committee the last time I appeared before you, while the system under section 524(g) is not perfect, contrary to what some would have you believe, it is in fact operating fairly well. As an example, I cited to the Halliburton, or Dresser Industries, asbestos bankruptcy case. Halliburton successfully used section 524(g) to create a trust to pay the claims of all past,

current and future asbestos victims with claims against it arising out of exposure to asbestos caused by its subsidiaries. The trust was created through negotiations with the company, the company's insurers, asbestos victims with claims pending against the company, and me as the representative of the future victims. The entire process took about a year and was accomplished without any governmental regulation or pressure.

The results were a spectacular win-win for the company, its insurers, and the asbestos victims. Ultimately, Halliburton stepped up and paid 100 cents on the dollar to the victims, using cash, its own stock and insurance proceeds to do so without jeopardizing its on-going operations. At the time it agreed to give some stock in the company to the future victims of its past behavior, the shares were trading at under $20 per share. Soon after the trust was created, it sold 59.5 million shares at $42.50 a share, making $2.5 billion available for the payment of future victims. This arrangement was met with tremendous applause from the capital markets: upon consummation of the reorganization plan and the establishment of the asbestos personal injury trust, Halliburton stock took off and at one point was trading at $74.25 per share. Not a job was lost, not a retirement plan was threatened. The victims are all being fairly treated, and the claims are being handled out of court in a very professional and competent manner by Trustees without the need for a gigantic federally sponsored and supported bureaucracy.

The same approach that Halliburton, Fuller Austin, Johns Manville, Owens Corning, and other companies with large asbestos liabilities are following to deal with this tragic legacy is available to other companies without the need for any further legislation by Congress. Now that the 524(g) model has been created and refined and tested in the judicial system, many more companies can be expected to follow this path to successfully and fairly meet their responsibilities to the victims created by their past behavior. The only thing that has been stopping more of them from using this process in recent years is the hope that they can convince Congress to bail them out at the taxpayers' or others' (the victims') expense. Doing so would create a moral hazard of serious dimensions. I believe that once this unreasonable expectation of a congressional deus ex machina is put to rest, many more companies will start to come to grips with their asbestos problems in a fair and responsible manner, as some have already shown can be done without undermining the economic vitality of the enterprise.

Since the purpose of section 524(g) is to preserve the assets of companies faced with mass asbestos liability and to protect the claims of asbestos victims, the futures representatives have an appreciation for the economic issues that underlie the trust mechanism and the competing needs and rights of businesses, insurers and tort victims. I and the other futures representatives are intimately familiar with the issues that arise in creating a limited fund to satisfy an

as-yet-unknown number of asbestos claims. I am familiar with the logistical and administrative challenges that go with setting up even a single trust for the victims of one company's asbestos liabilities. From this perspective and experience, I would like to offer the Committee some realistic thoughts on what actually is involved in setting up a single national fund to review, administer, process, and pay millions of claims involving hundreds or thousands of manufacturers, distributors, and their insurers, especially when the allocated contributions expected from the manufacturers, distributors, and insurers are not clearly defined, agreed upon, and ready to be paid by those firms.

Futures representatives bring a unique perspective to the subject of asbestos litigation and legislative reform, because they are non-partisan participants in the world of asbestos litigation. They include judges, law professors and practicing lawyers, all of whom have substantial experience with asbestos personal injury litigation and asbestos-related bankruptcies. None of us, however, is an asbestos personal injury plaintiff's lawyer or an employee of a defendant company or insurance company. We are:

- dedicated to the equitable distribution of scarce resources in the face of substantial uncertainty;
- concerned with the sustainability of companies and insurers — not only to provide for current and future asbestos claimants, but to

provide employment and a livelihood for current and future workers and value for shareholders;

- unbiased and not motivated by any contingent fee arrangement or duty to preserve and maximize shareholder value; and
- grounded in detailed, practical experience in coping with an unknown but overwhelming number of claims.

DISCUSSION

In my testimony on the Bill as it was drafted in April 2005, I expressed two main concerns: first, that the Fund created under the Bill would not have the resources to timely pay claims, and second, that claimants would not be fairly and sufficiently provided for if the Fund became unable to meet its obligations. Specifically, the Bill lacked any certainty and transparency regarding whether, and when, the necessary contributions would be made to the Fund by defendant companies and insurers. Moreover, in the likely event of the Fund's failure, the Bill's only solution was to send claimants back to trusts that would have been depleted by the Fund and the costs of establishing it. The Bill at that time was therefore overly optimistic in its assumption of contributions and contemplated a legislative plan that was not workable.

The changes that have since been made to the Bill have not remedied those problems.

I. FUNDING

The claims-resolution systems that are already in place, including bankruptcy trusts established under section 524(g), should not be abandoned unless their replacement is reasonably certain to produce results for asbestos victims at least as good as what they are currently likely to receive. Any legislative solution must therefore clearly, realistically, fairly, and definitively provide up front, at the time of its passage, for allocation and collection of the contributions necessary to fund payments to claimants on a reasonably timely basis.

This is critical. Any legislation that replaces the current system must protect asbestos victims from the risks of error and uncertainty associated with the limited national Fund contemplated by the Bill. If a single national Fund is to be the sole source of compensation for asbestos victims, it must have access to sufficient resources to pay all current and future claims and be designed to operate in a way that will ensure that asbestos victims will be paid in full and in a timely manner. In short, we must be certain that the Fund will not run out of money before all the victims of asbestos have been identified and paid, and that the Fund will not run short of money and make victims of asbestos wait longer for payment than they would under the current system.

Thus, my greatest concern about the Bill remains its lack of certainty and clarity regarding whether, and when, the necessary contributions will be made

by industry and insurers. While stating total contribution amounts, the Bill still fails to address the resistance that will stand in the way of ever collecting those amounts. Based on statements that persons in the industry and insurance sectors have already made with respect to this Bill and prior versions, the resistance to collection will be as stubborn and as time-consuming to overcome as possible.

It is wishful thinking and a major mistake to underestimate this problem. In the entire history of asbestos litigation, only a handful of industrial firms and even fewer insurers have ever voluntarily faced up to the cost of resolving their full asbestos liabilities. The rest of the firms and insurers that are being counted on under this Bill to pay their allocated contributions have by and large fought and resisted every attempt to hold them accountable. Indeed, only those firms that know they are getting the deal of the century will do so. The rest will resist, as they have done for years. The litigation won't diminish; it will only shift in focus.

The changes to the Bill have not changed the fact that the national claims-handling system will commence without any guarantee that it will receive the contributions needed if the national Fund is to have any chance of success. Annual contribution amounts are stated for the various categories of defendant companies, but the actual receipt of moneys by the Fund will have to wait until the firms have submitted their information, the Fund Administrator has reviewed that

information to place the firms in subtiers, and the firms have actually made their contributions. Along the way, the firms will have ample opportunities and incentives to challenge the system and delay the day of reckoning. This risk of delay is not alleviated by the Bill's provision banning court orders against its enforcement, since there is no guarantee that a court will find that provision itself permissible.

Moreover, the changes to the Bill providing certain relief to small and medium-size companies and to defendants with premises liability will only further throw the actual amount to be collected into uncertainty. There is no way to know now which companies will seek and will be granted the relief by the Administrator. And the bill does not provide for how the loss of those contributions will be made up to the Fund.

In addition, the Fund will be required from its inception to start processing terminal and other priority claims, which, in concept, is a good thing. However, to do so, it will have to borrow massive amounts, creating a burden of debt that will reduce what subsequent claimants can receive. That debt burden will only increase as contributors to the Fund do everything in their power to delay paying into the Fund.

The Bill's treatment of insurers offers further opportunities to create delay. The Bill states only the total contributions expected from insurers. How the

total contributions will be allocated among the insurers will not be known until after hearings, public comment, and an opportunity for judicial review. Once the allocation criteria have been established, the insurers will have another chance to comment on and seek judicial review of how the criteria are applied to each of them in particular. Although the Fund Administrator is authorized to seek "interim payments" from insurers while those procedures are being worked through, the Bill is silent as to how the interim payments will be collected from unwilling participants. Likewise, although the Bill foresees the need to increase contribution amounts if some insurers default on their payments, it says nothing about how those increases are to be made and enforced.

Moreover, the Trustees of several of the bankruptcy trusts that are currently funded, approved by federal courts, and processing and paying claims, intend to mount determined legal challenges to the confiscation of their property under the Bill. These legal challenges are likely to throw the critical initial funding of the national Fund into question for a significant and critical period of time.

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, at a

minimum, result in delay and uncertainty while the intended beneficiaries of the Bill, asbestos victims, will be made to wait still longer for compensation.

The changes to the Bill include statements underlining the intention that the national Fund not be bailed out by taxpayers. If that is the case, then the Bill's uncertain funding will shift the risk of delay and failure in one direction only: onto the backs of the sick and needy asbestos victims, especially those in the future. The temporary solution of borrowing needed funds will harm future claimants still more, since the Fund will be constrained by the costs of debt service. Alternatively the payment gap will have to be closed by supplemental assessments to other companies and insurers upon whom the risk of reallocation would fall. This alternative, however, probably remains unworkable and will only exacerbate the uncertainty companies and insurers already face on the payment side. In the end, it is highly likely that a choice will have to be made between bailing out the Fund with federal tax dollars or abandoning future claimants. Either way, the perpetrators and profiteers escape while the needy and innocent suffer. Is this consistent with our nation's values?

II. CHAOS IN THE EVENT OF SUNSET

Given the funding problems I have outlined, there continues to be a real likelihood that the Fund will be unable to meet its obligations and will therefore sunset according to the provisions in the Bill. When that happens, the

Fund's remaining assets, if any, will be redistributed in some unspecified fashion to the bankruptcy trusts that were disbanded when the Fund was created. Asbestos claimants will then be shunted back to filing claims against those resurrected trusts or to some semblance of a tort system. This attempt to revive the status quo that existed prior to the Bill's enactment is a recipe for disaster that the recent changes have done nothing to avert.

The Bill requires that all the monies now held in trust for current and future claimants be transferred to the national Fund. This transfer would cause the existing trusts, with assets in the billions, to be shut down. The hundreds of skilled employees around the country who have been processing claims would be fired. In some cases, those trusts and their claims processing units have been adjusting claims for nearly twenty years with considerable expertise. For the sake of efficiency and economies of scale, many of the trusts have combined facilities.

The Bill would require all claimants, present and future, to come to the national Fund for payment of claims. The initial monies for the national Fund would come from established and funded asbestos trusts that are operating now and paying victims pursuant to court order. The Bill requires that these working trusts be abandoned in favor of a system that will not even begin paying claims until many months after the Bill takes effect, and that will not reach the trusts' level of efficiency and stability until years later, if ever. Despite the new

provisions that would allow the Administrator to draw upon the resources of the Department of Labor, the fact remains that the expertise to handle claims of this magnitude will be lost, and it will take months, if not years, to get it back. Moreover, allowing the Administrator to contract with existing trusts to handle claims resolutions immediately will not solve the problem. There is no guarantee the existing bankruptcy trusts will agree to handle the claims, and if they do, they will likely be overwhelmed by the number of initial claims filed against the national Fund.

If the national Fund's projected shortfall becomes a reality, then the trusts that exist today are to be revived. But it will take tens of millions of dollars to recreate what already exists in the private sector today. The trusts' claims adjustment facilities will have been dismantled, their claims adjusters fired, their trustees discharged, and their final tax returns filed. The Bill continues to provide no practical transition plan to enable claimants to go back to the tort system or to the trusts.

As I noted in my prior testimony, the Bill is speculating with victims' money by taking funds dedicated to them; spending much of those funds on establishing, defending, and administering a system that at best will merely replace the claims facilities that already exist; and if that effort fails, using still more of those funds to recreate the existing system. Although these flaws can be remedied

by guaranteeing that there will be no failure under the Bill, that solution has not been proposed.

CONCLUSION

I continue to support the motives behind this legislation and its ostensible objectives. However, I cannot support a scheme in which the specific sources and amounts of funding are not clearly specified and their collection guaranteed. Without such guarantees, the program contemplated by the Bill will not work. A national legislative resolution to the asbestos litigation crisis is in the national interest and can be a benefit to all concerned — if it has the necessary, advance support of industry and insurers and their knowing pledges of funds. I would like to assist the Committee in any way that I can be of service in achieving a solution that satisfies the concerns of all parties in interest.

I am happy to answer any questions the Committee may have.

Testimony of Flora M. Green
The Seniors Coalition

S. 3274, "Fairness in Asbestos Injury Resolution Act of 2006"

Before the
U.S. Senate
Committee on the Judiciary
June 7, 2006

On behalf of our more than 4 million members of The Seniors Coalition across the country, I would like to thank the members of the Judiciary Committee for this opportunity to testify in support of S. 3274, the Fairness in Asbestos Injury Resolution Act of 2006 (the FAIR Act). The Seniors Coalition is the nation's leading free-market senior education and advocacy organization. We are a non-partisan, non-profit 501(c)(4) organization. I would also like to thank Chairman Specter and Senator Leahy for their unflagging commitment to enacting bipartisan national asbestos litigation reform legislation.

Some may wonder why The Seniors Coalition has chosen to advocate on behalf of the asbestos trust fund legislation. I am here to tell you today that the current asbestos litigation crisis is a seniors' issue. And finding a solution to this seemingly intractable problem is a priority for seniors.

The simple fact is that many of today's asbestos victims are senior citizens. These men and women made up our nation's work force and military at a time when asbestos was commonly used in manufacturing, residential and commercial construction and in many, many other ways. Because of the long latency periods associated with asbestos-related diseases, many victims are not diagnosed until they are seniors, long after the time of their harmful exposure.

Seniors who worked during the World War II era up until the 1970's, when asbestos was still widely in use, are even today still being diagnosed with asbestos-related illnesses. Countless victims had no idea they were being exposed to asbestos until long after the fact.

As the members of this committee are well aware, a flood of asbestos claims has overwhelmed the courts, jeopardizing all victims' prospects for compensation. Over 730,000 individuals have brought claims, and as many as 300,000 claims are currently pending in the courts. Even though large-dose exposures to asbestos ended in the 1970s, and reports indicate that asbestos disease incidence is on the decline, claim filings continue and have even surged over the past decade.

Because the courts are overrun with claims, seriously ill asbestos victims often have to wait years for a court date; many die without ever seeing the inside of a court room or a penny of compensation.

The lengthy delays that are built into today's broken system are particularly harmful for seniors, who don't have the time to wait.

Victims who finally get compensation through the courts often receive only a small portion of the actual money expended on asbestos litigation in the current system – the rest is consumed by exorbitant and wasteful transaction costs. Much of the growth in asbestos claims can be attributed to for-profit mass screening programs conducted under dubious medical standards. The result is a massive influx of claims by unimpaired claimants that exhausts resources that could otherwise be used to compensate genuinely ill individuals.

The sheer volume of claims, both legitimate and questionable, and the resulting liability have forced at least 75 U.S. companies into bankruptcy. And asbestos bankruptcies hurt all victims, including seniors.

For starters, bankruptcies hurt the sick because they diminish the compensation available for sick victims and result in long delays in compensation becoming available to victims. When companies file for bankruptcy, victims often face years and years of delay before being compensated only pennies on the dollar, or nothing at all. Again, this is time that seniors simply don't have.

Asbestos-related bankruptcies also harm American seniors who aren't sick. Workers at many bankrupt companies have seen their retirements devastated as the value of their 401(k)s collapse along with their companies' stock prices. These bankruptcies and resulting stock losses make it even harder for seniors, especially those living on fixed incomes, to support themselves in their retirement years.

The FAIR Act's trust fund approach is the only solution to the asbestos litigation crisis that will ensure fair and timely compensation for victims and certainty and finality for businesses, workers, retirees and the U.S. economy.

The Fund's streamlined, administrative system will process claims efficiently and fairly, with clear eligibility requirements and fair award amounts based on clearly defined criteria that will ensure that funds will only be directed to those claimants who are truly ill due to asbestos. Moreover, the legislation provides for an accelerated start-up of the Fund, which will ensure it will be established and processing and paying claims quickly.

The FAIR Act will eliminate the fraud found in today's system by taking asbestos claims out of the courts and setting up a no-fault, privately funded victims' compensation fund. Claimants would no longer need to hire an attorney to obtain compensation. By removing the financial incentives for attorneys and unscrupulous doctors to game the system, the FAIR Act will ensure that the money will end up where it rightfully belongs – in the pockets of sick asbestos victims.

The Seniors Coalition applauds the recent improvements in the revised bill, S. 3274. Specifically, we are pleased to see that provisions have been added to protect the World Trade Center and Hurricane Katrina and Rita victims who were exposed to asbestos and that stronger medical criteria are now in place to make sure that only the truly impaired will be compensated. We welcome administrative changes aimed at ensuring that the sickest will be compensated first, and also, changes that will ensure veterans who are sick from asbestos exposure that occurred during their military service will have access to the Fund. As you know, veterans currently have limited avenues for seeking meaningful compensation in today's system.

Finally, the new and improved bill includes significant safeguards to ensure that in the unlikely scenario that the Fund should run out of money, the burden will *not* fall on the backs of the U.S. government and the taxpayers.

Too much time has gone by without a solution to this pressing national problem. For the sake of victims, and especially for senior victims, it is critical that this bill be passed this year.

When the prior version of the FAIR Act was on the floor earlier this year, it was regrettably stymied by opponents who used procedural maneuvers to prevent a full debate on the bill. Clearly, given what's at stake here, the Senate should have an opportunity to fully debate this important bill on its merits.

We are confident that with your leadership, this new version of the asbestos victims' trust fund legislation, S. 3274, can be brought to the Senate floor for the up-or-down vote it deserves. Be assured that our members stand ready to help in any way we can to help see that asbestos victims finally get the relief they desperately need.

INTERNATIONAL ASSOCIATION OF
Heat & Frost Insulators & Asbestos Workers
International Headquarters
James A. Grogan, General President
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Chairman Arlen Specter
Senator Patrick Leahy
Distinguished Senators--

I am Jim Grogan, President of the International Association of Heat and Frost Insulators and Asbestos Workers. Our union is a member of the Building and Construction Trades Department of the AFL-CIO.

Our members insulate pipes, boilers, tanks and equipment at power houses, oil refineries, pharmaceuticals, shipyards and other major industrial locations across North America. From the 1920s to the 1970s we applied asbestos pipe covering and asbestos block side by side with numerous trades including the Boilermaker, the Pipefitter, the Electrician and others.

Our union comes before you once again to strongly support your continued efforts to pass a bi-partisan Bill S.3274 that will ensure true, fair and just compensation to current victims and future victims of asbestos exposure.

As we understand, today's substitute legislation is dealing with the ongoing developments on asbestos reform and is a continuation of previous legislation that has encountered many obstacles and basically brought no relief.

This legislation, as we read it, provides assurances of equitable compensation to asbestos victims and assurances to manufacturers and insurers to resolve asbestos claims with finality. Senator Specter and Senator Leahy have provided a thorough and fair process of negotiations for this detailed legislation. They have listened to all sides and have created a balanced compromise.

For 30 years solutions to the asbestos crisis have eluded Congress and the courts and penalized the victims. Even our U.S. Supreme Court has begged the Congress to fix this national asbestos litigation problem. Over 70 companies have gone bankrupt. Thousands upon thousands of individuals exposed to asbestos have developed asbestos induced diseases.

For example, mesothelioma is a signal cancer for asbestos exposure, unrelated to tobacco or other industrial carcinogens. Mesothelioma will cause over 2,500 deaths in the U.S. each year for the foreseeable future. Asbestos induced lung cancer and asbestosis will account for thousands of additional deaths per year.

We now know that exposure to asbestos with as little as three months duration is sufficient to cause mesothelioma.

Today, wives and children of asbestos workers who grew up in the 60's and 70's are getting mesothelioma. Not from washing their father's clothing, but just from living in a common home.

From the 1930's through the 1970's industry, insurance companies and even our own government hid or suppressed information about the dangers of asbestos. Companies that suppressed or downplayed or hid the information about the hazards

of asbestos have not taken responsibility for their outrageous conduct. This legislation hopefully will bring that practice to an end.

No one was more patriotic than those of us who were exposed to asbestos dust while constructing, repairing or living aboard naval ships or building governmental facilities. If those who knew that asbestos was harmful would have told us of the dangers, we would have taken measures to protect ourselves. We never would have taken our asbestos laden clothes home and exposed our families.

Many ask why our union is involved in this legislation. They say, there are remedies in the courts through the tort system. They also say people are being taken care of. While it is true that there is an asbestos litigation system out there, the system is broken. Many who cannot identify where they were exposed to asbestos recover nothing. The asbestos crisis is a national tragedy and we need a national legislative solution that is fair and equitable to all. That is what S.3274 provides.

There are other victims of asbestos litigation. Those victims are employees, retirees, shareholders, companies, savings and retirement plans, an entire group of individuals who are in the tidal wave of asbestos lawsuits. The most objectionable aspects of asbestos litigation as cited by Senators Specter and Leahy are that the dockets in both federal and state courts continue to grow. The same issues are litigated over and over. Only 42 cents of every dollar goes to the victims and their families. Attorneys' fees and transaction costs exceed the victims' recovery by nearly 2-1.

We support this bi-partisan solution to the asbestos compensation crisis, but we also caution that victims of asbestos disease must not be victimized again by passage of legislation that is unfair. Timely and full payments must be made to asbestos victims as S.3274 provides. If that cannot be accomplished access to appropriate state court forums must be preserved. Specifically, there must be a speedy return to the tort system if the trust fails to timely meet its obligations.

We join with those Senators who are trying to bring about this bi-partisan legislation that will help solve this national asbestos problem. We will continue to work in a constructive way with those who wish to see a fair, equitable and adequately funded Bill. If all fails, then we will fight for the right of any asbestos victim, union or non-union to a trial by a jury of their peers. Fundamental fairness demands no less and neither do we.

Thank you

Testimony of Douglas Holtz-Eakin
Director, Maurice R. Greenberg Center for Geoeconomic Studies
Paul A.Volcker Chair in International Economics
Council on Foreign Relations

before

Committee on the Judiciary
U.S. Senate
June 7, 2006

Chairman Specter, Ranking Member Leahy, and members of the committee thank you for the privilege of appearing today to discuss S. 3274: The Fairness in Asbestos Injury Resolution (FAIR) Act of 2006. In doing so, let me emphasize that the views that I present today are my own; the Council on Foreign Relations is a non-partisan think tank that does not take advocacy positions on legislation.

To begin, I wish to make a few points:

- The FAIR Act would create a new mandatory federal spending program.
- The FAIR Act would raise new federal revenues.
- Both the scale of the mandatory spending and the size of the revenues are highly uncertain; there is no guaranteed relation between them. Regardless of their ultimate scale, however, most of the spending will occur quite quickly and necessitate new federal borrowing. Revenues raised under the Act will flow in much later.

These observations do not differ in any way from those that I made during my previous appearance before this Committee. However, my position at that time – Director of the Congressional Budget Office – required that my analysis take the law

at face value and be devoid of recommendations. At this time, I would make the additional points:

- It is implausible to take the FAIR Act at face value. The fund envisioned is similar in spirit to the Pension Benefit Guaranty Corporation. Under current law, the PBGC is expected to rely exclusively on "private money" (assets of pension funds and premiums). It is widely agreed that these sources will be insufficient to meet pension commitments and that a future Congress and administration are guaranteed to turn to the taxpayer to make up the shortfall. When FAIR Act benefits exceed fund resources, a future Congress and administration are equally likely to turn to the taxpayer for the shortfall.

- This is the wrong time to create new federal mandatory spending. Indeed, the most central budget challenge is the need to have *less* mandatory spending in the years to come.

- Recent modifications to the FAIR Act have not significantly changed these fundamental features of its design.

Let me discuss these issues further in turn.

A New Mandatory Spending Program

The FAIR Act would establish the Asbestos Injury Claims Resolution Fund (the "Fund") to compensate those injured by asbestos. The Fund would be located within the Department of Labor. Individuals could no longer pursue damages in any federal or state court. Instead, they would submit claims to the Administrator. If judged to be valid, awards would be paid based on criteria and amounts in the legislation.

In its initial cost estimate of the FAIR Act, the Congressional Budget Office has stated that "amounts expended to pay claims and administer the fund would be considered new federal direct spending." Although the exact amounts of future

mandatory spending are difficult to project, the CBO has estimated that the legitimate claims could grow to between $120 billion and $150 billion over the next 50 years (a total that does not include outlays for debt service and administrative expenses).

As is obvious, there is tremendous uncertainty surrounding any projection over a period as long as 50 years. Moreover, there are significant shortcomings in the data on which to base such a projection – limited data on settlements that have already occurred and pending claims. Moreover, it is necessary to anticipate the behavior of claimants in an entirely new environment, leading to greater uncertainty of future claims. Finally, the projection will face the usual difficulties concerning the future of economic variables such as interest rates. The overall scale of new mandatory spending is quite difficult to ascertain.

In sum, given the act of removing asbestos litigation from the tort system, the establishment of medical criteria and damage award amounts, and the location of the Fund in the Department of Labor, it is straightforward that dollars flowing out of the Fund constitute mandatory federal spending – and on a potentially very large scale.

New Federal Receipts

The dollars paid into the Fund would be treated in the budget as federal revenues. The FAIR Act is intended to collect a total of roughly $140 billion over the first three decades of its existence. However, the maximum revenues collected could fall short of this amount – very little is known regarding the viability of firms over such a long period.

In addition to uncertainty regarding the total revenues collected, the Administrator of the Fund has considerable discretion to adjust assessments in order to raise revenues needed to meet the funds operations. Accordingly, individual firms face risks of payments that may rise over time.

The Need for Federal Borrowing

The CBO (and others) estimate that the fund would face substantial start-up pressure and spend more than half of the total outlays in the first 10 years. In contrast, the anticipated revenue will arrive much more evenly over the first 30 years. As a consequence, the Administrator of the fund will need to borrow funds to bridge the shortfall. This borrowing will exacerbate Treasury borrowing at time when the retirement of the baby-boom generation and the demands of existing mandatory spending programs (especially Medicare, Medicaid, and Social Security) will likely already be straining federal fiscal policy.

The additional borrowing will carry interest costs that will add to the level of mandatory spending and contribute to the long-term costs faced by the fund – and thus the federal budget – and raise the odds that the Fund might become insolvent.

The "Sunset" Provisions Should Not Be Taken At Face Value

As written, the FAIR Act provides that the Fund will "sunset" in the event that it becomes foreseeable that revenues specified in the legislation are not sufficient to meet obligations for awards, administrative expenses, debt service, and borrowing.

This approach is extremely unlikely to insulate taxpayers from meeting the demands of the new mandatory spending. First, as has been clear throughout debate over the FAIR Act, the entire exercise is fraught with uncertainty. This uncertainty will not dissipate with the enactment of the legislation. Rather, it will continue and confound the ability of Fund administrators and the federal government to identify the need to sunset the Fund.

Second, the sunset provision raises a fundamental question of equity. *When* a claimant files will in part determine the compensation for injuries. Two individuals with identical cases could file only weeks apart: one would be processed and receive and award from the Fund; the second returned to a future tort system with unknown outcomes.

Third, the most likely outcome is that a future Congress faced with the precedent of having paid awards, an unexpected need to sunset the Fund, and the prospect of transparent inequities among claimants will choose to modify the legislation and avoid a sunset. Mandatory spending will continue; any revenues will be raised from an unknown source and the remainder of the necessary funds will be borrowed.

As noted earlier, these new spending pressures will arrive at precisely the wrong time. At present mandatory spending is the core component of a federal fiscal policy that is unsustainable over the next 50 years. The demands for spending generated by the existing Social Security, Medicare, and Medicaid programs will soon exceed one-half of all federal spending and contribute to a rising demand for budgetary resources. The growth – largely fueled by health care costs – will likely be of such a scale that the United States economy cannot grow fast enough to alleviate budgetary pressure. Moreover, a strategy of "taxing our way out of it" would likely raise federal revenues to levels that so damage economic performance as to be unsuccessful. Put simply, mandatory spending growth must fall; not rise.

Recent Changes to the FAIR Act Do Not Alter the Basic Problems

The FAIR Act has evolved considerably over time and continues to be modified. On the revenue side, provisions have been added to address hardships for firms and inequities. Unfortunately, at present no one can tell who will receive the adjustments and for how long. Moreover, once a few firms receive an adjustment it seems likely that more will seek to reduce their payments, cutting into the revenues. At the same time, the Administrator can employ surcharges to offset these adjustments. How will this process work out?

On the spending side, a provision was included to add consideration to victims of hurricane Katrina and the devastation at the World Trade Center. This provision appears to have been added to address concerns from the debate on the FAIR Act that these and other victims are left out of the bill, while extraordinary consideration is

given to residents of Libby, Montana. But while this new provision stops short of providing hurricane and terrorism victims the same benefits afforded to Libby victims, the addition of any new class of claimants will raise demands for spending to an uncertain degree. Moreover, while the language of the new bill limits this additional class of victims solely to those from 9/11 and the 2005 natural disasters, this inclusion sets a new precedent for future Congresses to be sympathetic each time there is another devastating hurricane or natural disaster that calls for eligibility of new victims.

In addition, recent changes to the provisions for dormant claims may turn out to do little to reduce the potential demands of these claimants on the fund. It is not obvious how many claims will be eliminated as the Act continues to allow claims against manufacturers if they have not established trusts.

Conclusion

Injury and illness resulting from the past use of asbestos is an important policy problem and there are legitimate concerns about the current system: (a) the potential economic consequences (*e.g.*, bankruptcy) of the cost of asbestos cases to firms and insurance companies; (b) the uncertainty to claimants of the ability of firms to pay compensation, and the parallel uncertainty to firms of their overall exposure to claims; and (c) the degree to which the tort system permits and rewards "frivolous" claims on the basis of either undesirably low standards of proof or even fraudulent evidence.

Viewed from these perspectives, the FAIR Act is a puzzling initiative in that it does not directly solve any single of these perceived problems. It relieves companies of tort liabilities, but provides no certainty on payments by companies because assessments are unknown at this time and the legislation a putative sunset that would result in companies again facing court settlements. It provides a schedule of claimant compensation, but the same sunset provisions make the ultimate receipt of compensation uncertain. Finally, it establishes medical criteria for and damage caps

for specific awards, policies that could be could directly addressed in the context of the current tort system without exposing the U.S. taxpayer to the risk of meeting the costs left over from an under-funded trust fund.

HOPEMAN BROTHERS, INC.
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June 7, 2006

The Honorable Arlen Specter
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC. 20150

Dear Mr. Chairman and Senator Leahy:

I have reviewed the impact on Hopeman Brothers of S. 3274, "The Fairness in Asbestos Injury Resolution Act of 2006," and submit the attached written statement, which I respectfully ask that you include in the official record of the Wednesday, June 7 full committee hearing on the bill. Two other small companies, A. W. Chesterton Company and National Service Industries, Inc., join Hopeman Brothers in this statement.

Sincerely,

David Lascell

David M. Lascell

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

Statement Of
Hopeman Brothers, Inc.,
National Service Industries, Inc. and
A. W. Chesterton Company

In Opposition to S. 3274

Our three companies continue to oppose the most recent version of S. 852, the FAIR ACT, now renumbered S. 3274. When last we met with the Chairman, his key staff, and a representative from Senator Leahy's staff, we expressed our appreciation for the efforts directed at changing the allocation formula in S. 852. Nevertheless, although incorporation of the Kyl hardship amendment and use of a cash flow formula are improvements over the earlier versions of S.852, those proposed changes do not for our three small well-insured companies mean that the trust fund legislation is now acceptable.

As proposed, the Act will tax small well-insured companies like ours in a way that is almost unconscionable. Either the proposed cash flow/EBITDA calculation or the cap proposed by Senator Kyl – both intended to assist small well insured companies – falls short. Taking away a large portion of a small company's profits for the next 30 years, based on the proposed formula, almost guarantees failure of that company. Given the $100 million annual cap on total adjustments, it is likely that our companies will be required to pay additional, unlimited amounts to cover any shortfall. In addition, given the $500,000 minimum payment -- regardless of negative cash flow/EBITDA – companies may not have the funds to make payments. For a bill that was designed to provide "certainty" to companies, we would be in the untenable position of not knowing the amount or whether we could make our payments from year to year. Our three well-insured companies have paid virtually nothing from our own resources to defend asbestos

litigation. Under the Act, even including the proposals intended to help small companies, we will be required to pay for the next 30 years a substantial amount out of our own pockets, despite having adequate amounts of insurance coverage still available to us. The unassailable conclusion is that the assessment in this Act is unfair to small well-insured businesses like ours.

From our point of view, the trust fund still is the wrong approach. It establishes a large federal bureaucracy, the adequacy of its funding remains subject to considerable question, its constitutionality is suspect, and its benefits are disproportionately advantageous to large companies. Most important, this legislative approach is unnecessarily complicated. If the Congress would establish nationwide medical criteria for asbestos related disease, we are confident that the asbestos problem would disappear.

In fact, legislative and judicial reforms in a number of states, including Texas, Florida, Georgia, Ohio, and Mississippi, have already resulted in a dramatic decline of new filings and a significant number of dismissals. In addition, Judge Jack's findings in the federal silica MDL in Texas are also having a positive, remedial impact in the asbestos arena. The proposed legislation, if enacted, will effectively eviscerate these self-correcting reforms by legislatures and judges.

We urge the Congress to adopt a simple solution to the asbestos litigation problem. Support the efforts already undertaken by many states. Pass federal medical criteria legislation.

Thank you for your consideration.

THE HONORABLE MARY LOU KEENER
6 JASMINE DRIVE
PALM COAST, FLORIDA
32137

June 7, 2006

The Honorable Arlen Specter,
Chairman

The Honorable Patrick Leahy,
Ranking Democrat

Committee on Judiciary
United States Senate
Washington, DC 20510

Dear Senators Specter and Leahy,

As someone who testified before the Senate Judiciary Committee in January of last year on the need for asbestos litigation reform, and as the daughter of a Navy veteran who lost his life to a deadly asbestos-related disease, I would like to underscore once again the importance of a national trust fund solution to the asbestos crisis for veterans suffering with asbestos illnesses. Without S. 3274, the Fairness in Asbestos Injury Resolution Act, asbestos victims sickened by asbestos exposure that occurred during their military service have little to no recourse for receiving fair compensation.

My father died of mesothelioma, the most aggressive of asbestos-related cancers and a disease that is caused only by asbestos, on Veterans Day 2001, approximately six months after he was diagnosed with the disease. Following his death, I helped my mother file a lawsuit seeking compensation on my father's behalf.

In my previous testimony before this Committee on January 11, 2005, I provided an account of my mother's experiences in the legal system to that point.

I would like to take this opportunity to provide the Committee with an update of our story. Nearly four years after filing a wrongful death lawsuit, my mother was finally given a court date, and on February 10, 2006, after a long and emotionally draining trial, a jury awarded my mother nothing to compensate her for my father's death. The jury found that although the defendants in the case were negligent, the amount of exposure from their asbestos products – when compared to all the other asbestos insulation products my father was exposed to on board Navy ships – was too small to have caused his death.

This sad story illustrates the problem today's veterans encounter when they try to obtain compensation through the tort system.

Sick civilian victims who were exposed to asbestos on the job can hold their employers and others liable for their exposure. Sick veterans, however, don't have these same options. They are barred by law from suing the federal government, their employer while they were in the military. So veterans with asbestos-related diseases must instead try to find and sue the companies that provided the military with asbestos. This is a tall, if not impossible, order, since many of the military's original suppliers of asbestos have literally disappeared or gone into bankruptcy.

In my father's case, there were only two defendant companies that could be brought to trial. The other companies that supplied the asbestos my father was exposed to during his service in the Navy simply don't exist anymore. This is what is known as the "empty chair defense," in the parlance of the asbestos tort bar.

To date, my mother has received about $141,000 in settlements from bankrupt defendant trusts and has paid $84,000 in trial costs and incidental expenses out of these settlements. Her trial lawyers have received more than $104,000. My mother is still owed for remaining settlements totaling $155,000 from various other bankrupt defendant settlements. However, after her trial lawyers take out their cut, most of the outstanding amount from these other bankruptcy settlements may go to cover trial expenses. Given the length of the trial, the number of expert witnesses involved, the extensive travel, and other costly expenses involved in a case like my mother's, there will be very little left at the end of the day for my mother.

In summary: after fighting a legal battle for nearly four years, my mother will end up with perhaps more than nothing – but certainly not an amount that in anyway compensates her for the loss of her husband, my father. It doesn't have to be this way.

S. 3274 would ensure that all victims, including sick veterans, get the compensation they and their families deserve. Victims of mesothelioma and their survivors – like my mother – would be entitled to $1.1 million in compensation within a short period of time after the filing of a claim and their award would not have to be reduced by expensive attorney's fees and other wasteful transaction costs. The victims' trust fund established by S. 3274 would ensure that all sick victims – including veterans – would get the fast, fair and certain compensation they need and deserve.

This bill would help thousands of families that are stuck in the current tort system today – and the thousands more that may be diagnosed with asbestos-related diseases in the future – to avoid the hardship my mother had to endure in her ultimately unsuccessful effort to obtain fair compensation for my father's illness and wrongful death. Not only is the trust fund solution the best solution for our country, it is the <u>only solution</u> that will help veterans and their loved ones in their pursuit of relief.

As a Navy veteran myself, and as the daughter of an asbestos victim who also proudly served his country, I thank you both for your continued pursuit of a solution for the broken asbestos claims system.

Sincerely,

Mary Lou Keener

Testimony of Edmund F. Kelly
Chairman, President& CEO
Liberty Mutual Group

Before the Senate Judiciary Committee Hearing on S.3274
"Fairness in Asbestos Injury Resolution Act of 2006"
June 7, 2006

Mr. Chairman and Members of the Committee, I am Ted Kelly, Chairman, President and Chief Executive Officer of Liberty Mutual Group. Liberty Mutual is a leading global insurer and the sixth largest property and casualty insurer in the United States with headquarters located in Boston, Massachusetts and 900 offices worldwide. Our company is a member of PCI, the Property and Casualty Insurers Association of America, and a member of CAR, the Coalition for Asbestos Reform. Both organizations join in supporting my testimony today.

Thank you for the opportunity to testify and to work with you to address the asbestos litigation abuses that have resulted in denying sick claimants their just compensation, bankrupted approximately seventy companies and jeopardized a bedrock principle of American justice; namely, all parties involved in the tort system will be treated fairly and no one person, whether an individual or a corporation, will get special treatment. It is this fundamental principle that protects a corporation, whatever its size, and guarantees that it will have its "day in court" so that, when there is a valid claim, it will be judged on its own conduct and assessed its fair share of any wrong it caused.

At the outset, I, like many others, wish to acknowledge and praise the extraordinary commitment of the Chairman and the Ranking Member for their efforts to fix the asbestos litigation quagmire. Were Judge Becker still alive, I would also thank him, particularly because his tireless and selfless efforts are a very large part of the reason why we are all here today.

The question we have all wrestled with is would the Trust Fund as envisioned in the Fair Act work? To answer that question we need to look at four issues: (1) Is the Trust Fund fair and equitable? (2) Does it provide an exclusive remedy for all asbestos claims? (3) Is it viable and sustainable so that it provides "global peace" for asbestos victims, asbestos defendants and asbestos insurers at a known cost? (4) Is there a better alternative to the Trust Fund with a proven record of success? When originally proposed, the Trust Fund's purpose was to extinguish all asbestos-related tort system liability in exchange for a simple, no-fault administrative system at a single fixed price fair to all contributors. I will now address in turn each of these issues to determine if S.3274 meets these goals and, if not, what should be done in its place.

(1) Is the Trust Fund fair? As originally contemplated, each participant – whether a defendant or an insurer – would contribute to the Trust Fund based upon its *relative* share of liability in the tort system. No participant would receive special treatment to the disadvantage of another participant. This over-arching principle of fairness was absolutely fundamental to the integrity of the Trust Fund because the fault-based tort system was being replaced by the no-fault Trust Fund. That core principle of fairness, however, has now been violated. Rather than have the Trust Fund allocate payments to correspond to liability, the Trust Fund guarantees a complete windfall to certain Fortune 100 companies facing significant asbestos-related exposure. For example, one such company, whose own projections estimated its future asbestos liability at $1.6 - $2.2 billion for the next 15 years, will only pay $378.5 million for the next 30 years under S.3274. The recent settlements of Owens Corning and USG further prove the gross inequities embedded in this legislation. In January, USG settled its asbestos liability for $4 billion and, less than a month ago, Owens Corning settled for $5.2 billion. Both of these settlements, which occurred in the context of a bankruptcy court, have FAIR Act "carve-outs" or exceptions which,

in the event of enactment of the Trust Fund, extinguish billions of dollars of obligations and reduce their remaining payments to $378.5 million. While that is good news for these companies, it is grossly unfair to the rest of the defendants. Under this wealth transfer, companies with dramatically lower revenues and dramatically lower asbestos exposure will be called upon to pay not only their own share, but now be obligated to pay a much greater amount solely because of this multi-billion dollar windfall to a few Fortune 100 companies. A corporate bailout, to enrich a few companies at the expense of numerous other companies, is unacceptable as both a business proposition and a matter of public policy.

This special treatment is not limited to defendant companies. S.3274 contains a provision whereby insurers, who have made asbestos-related payments as the result of a bankruptcy judicially confirmed after May 22, 2003 but before enactment, will get a dollar-for-dollar offset against their Trust Fund contribution. Again, while that is good news for those few insurers, it is completely unfair to the remaining insurers who will be responsible for the shortfall created by this special interest exception. While S.3274 now mandates a reserve-driven study for all insurers as a predicate to determining the amount of each insurer's contribution, S. 3274 continues to allow special treatment to a very small handful of insurers, an outcome that, as with the special treatment for a select few defendant companies, is unjustifiable as either a business practice or public policy.

Collectively, these windfalls are the antithesis of fairness. As the CEO of a mutual company, I cannot support legislation that hurts our policyholders – many of whom are smaller companies who will be required to shoulder an unfair economic burden – and likewise demands that Liberty Mutual pay its policyholders' equity to their and Liberty Mutual's own disadvantage. For example, as David Lascell, principal owner of Hopeman Brothers, Inc., a

small company which Liberty Mutual has insured for decades, has testified, Hopeman will be required to absorb a liability on its books for 30 years that is grossly disproportionate to its own liability in the tort system today. It simply is not fair to Hopeman or any other company to have to pay into the Trust Fund an amount of money that does not reflect that company's own liability while at the same time allowing other companies to pay materially less than their own fair share.

Equally unfair is a requirement that mandates that the insurers' aggregate contribution "shall be equal to" $46.025 billion whereas the defendants' aggregate contribution "shall not exceed" $90 billion. While both insurers and defendants may benefit from certain bankruptcy trust credits and funding holidays, there is no requirement that the defendants actually pay $90 billion – only that they not pay more than $90 billion. Insurers, however, must pay in every penny of our $46.025 billion contribution and on a schedule that dramatically accelerates our obligation ($20.63 billion in the first five years) exposing us disproportionately to the risk that the Trust Fund fails. Whether looked at alone or altogether, these provisions completely lack the hallmarks of fairness. Consequently, S.3274 fails the test of fairness.

(2) Does the Trust Fund provide an exclusive remedy for all asbestos claims? As is apparent throughout S. 3274, there are numerous exceptions that allow asbestos claims to continue *outside* the Trust Fund thereby violating the second cornerstone principle of the Trust Fund; namely, the Trust Fund would be the sole remedy for all claimants and the sole obligation for all participants.

In particular, S.3274 specifically entitles a claimant to recover both (i) an award from the Trust Fund and (ii) benefits under state workers' compensation programs. Consequently, as a result of this "double-dipping", workers' compensation insurers, such as Liberty Mutual, are required to pay twice – once for the Trust Fund awards and again for the workers' compensation

benefits. Critically, S. 3274 eliminates the right to offset any workers' compensation benefits because of the Trust Fund awards, an outcome that not only violates and encroaches upon state workers' compensation laws but also will add tens of billions of dollars in costs to the state workers' compensation system. By preventing the operation of state workers' compensation lien laws, the National Council on Compensation Insurance, Inc. (NCCI), using CBO projections, has estimated the ultimate additional cost to state-based workers' compensation systems to be between $39 billion - $88 billion which implies an increase of 20% - 50% in total workers' compensation system reserves. The American Academy of Actuaries, in its September 8, 2005 letter to the Chairman and Ranking Member, predicted equally ominous results.

The Trust Fund was intended to "bring an end to asbestos litigation, as we know it."[1] The public policy behind this straightforward maxim was obvious: if defendants are going to pay into the Trust Fund, and insurers in particular are going to pay in their statutorily-required asbestos reserves, they cannot also be called upon to pay costs for asbestos claims handled outside the Trust Fund. S.3274, however, requires just that result. First, where evidence has been introduced, lawsuits are allowed to continue in the tort system even after S.3274 is enacted. Thus, participants will have to incur both transaction costs and make indemnity payments above and beyond their contributions to the Trust Fund. Second, for certain pre-Act settlements, those payments are also required to be made and likewise do not reduce the participants' Trust Fund contributions. Third, with the passage of tort reform in key states and the threat of federal asbestos legislation, we have all seen the burst of claiming activity for allegedly newly-found silica claims. Asbestos claims recycled as silica claims would have been prevented under prior iterations of S.3274. Now, however, with the "silica-mixed dust" loophole that allows asbestos

[1] See Lester Brickman, *An Analysis of the Financial Impact of S. 852:TheFairness in Asbestos Injury Resolution Act of 2005, Cardozo L.REV.* Vol. 27; 2 (2005) at xiii.

claims to be retread as silica claims outside the Trust Fund, this carve-out equally undermines any argument that the Trust Fund is an exclusive remedy.

Fourth, in an effort to accommodate the needs of the terminally ill, a cumbersome "start-up" program has been designed whereby such victims are to be paid either before the Trust Fund has been "certified" by the Fund Administrator as operational or through the tort system. While payments to such claimants may result in an offset against a participant's Trust Fund obligation, the "start-up" program is riddled with critical flaws that undercut the Trust Fund's goal of being an exclusive remedy. For example, if the Trust Fund Administrator does not conclude that the Trust Fund is operational within certain time limits, the Trust Fund is shut down and all asbestos claims revert to the tort system. Under that scenario, the exclusive remedy promised by the Trust Fund has evaporated with the anomalous result that the participants will have paid billions into the Trust Fund only to face continuing exposure in the tort system. For Liberty Mutual this is a particularly acute issue, given the insurers' accelerated payment obligations and that, within the first 2-3 years of the Fund, insurers will have paid over $6 billion.

Thus, far from channeling all asbestos claims into the Trust Fund as the exclusive remedy, S.3274 actually creates, in addition to the Trust Fund itself, at least three overlapping pathways for the handling and payment of asbestos claims: (1) the tort system for cases where evidence has started, for certain settlements and for terminally ill claimants who opt out of the early "start-up" program, (2) the workers' compensation system and (3) the tort system for asbestos claims masquerading as silica claims.

(3) Is the Trust Fund sustainable and viable? Given that insurers will have paid in their asbestos reserves, it is critical that the Trust Fund be able to sustain itself. Solvency is threatened in two basic and obvious ways: too many dollars paid out or too few dollars paid in. As to the

former, diluted medical and exposure criteria, with ineffective efforts to eliminate the very doctors and screening companies who have provided invalid diagnoses in the tort system, serve no legitimate public policy purpose and can only result in the payment of claims that should never be allowed, thereby rewarding vast numbers of unimpaired claimants and dissipating the assets of the Fund.

Consequently, instead of weeding out the unimpaireds and the attorney's fees they generate, the Trust Fund creates a defined benefit at the expense of the truly sick and the participants funding those payments. More importantly, however, with a Trust Fund "welcome mat," the solvency of the Fund is placed at risk, all the more so by the efforts throughout the legislation to placate special interest groups by expanding the pool of Fund claimants. Clearly anyone knowledgeable about asbestos litigation feels a special concern for the residents of Libby, Montana. The exception created for the residents of Libby, Montana, however, creates the potential for other Libby-like exceptions. This expanding pool of claimants now includes the victims of the September 11, 2001 attack on the World Trade Center and Hurricanes Katrina and Rita. While all of our sympathies lie with those victims, it is difficult to see how this expansion of the Fund-claiming population and its elimination of any occupational exposure criteria will not be yet another threat to the solvency of the Fund. Inclusion of these sympathetic groups demonstrates one of the fundamental weaknesses of the Trust Fund approach. To state the obvious, exponential growth of the claimant pool, where such members were not even factored into the claimant forecasts made years ago, dangerously imperils the solvency of the Trust Fund

The Fund's viability is further called into question by the start-up program discussed earlier. Under this protocol, neither Liberty Mutual nor anyone else has any assurance

whatsoever that the Fund Administrator will find the Fund operational and thereby guarantee the viability of the Fund. Whether looking at the CBO analysis, the Bates White study or the testimony of numerous witnesses before this Committee, the only certainty is that there is enormous uncertainty about the number of claims that will be made and the amount of dollars paid out.

With respect to certainty about the amount of dollars paid into the Fund, again, there is none. First, notwithstanding repeated requests for public transparency of the funding process and particularly with respect to which defendant is in which tier and subtier, no such information has been forthcoming. It is inconceivable that the funding for at least $90 billion of a $140 billion government-created Trust Fund is a virtual mystery. Without identification of which companies are in which tier and subtier there is no opportunity to challenge the economic forecasts, no basis to believe that such funding exists and no basis to believe that the Trust Fund has any real chance to sustain itself for a few, let alone, 30 years. Second, this violation of the core principle of viability is exacerbated further by the looming constitutional challenges to the Act, the assumption that *all* defendants will be in business for the next 30 years and able to make their payments for all 30 years – an assumption that ignores the business reality in the global economy – and that the payment obligations of insurers and reinsurers beyond the jurisdiction of United States courts can be enforced. Well-managed and well-reserved companies simply cannot trade their future – and their policyholders' future – for the uncertainty of S.3274.

In the end, the Trust Fund lacks fundamental fairness, no longer provides an exclusive remedy and is not economically sustainable and viable. Because S.3274 fails to meet these three basic tests, Liberty Mutual, the members of PCI and the members of CAR do not support S.3274

– particularly when there are viable alternatives that have been tested and proven to work, alternatives that Liberty Mutual, PCI and CAR very much do support.

In 2003, in the absence of reforms in key states, the seminal silica MDL decision issued by Judge Janis Jack in Texas and the willingness of judges to reject manufactured claims, the Trust Fund was a creative concept that showed great potential. But, we are in 2006. Over the last three years, no doubt motivated by the hard work of this very Committee, there has been a sea change in asbestos litigation which has begun to yield profound results. It is because of (i) the successes at the state level, (ii) the influx of case management orders and inactive dockets in countless jurisdictions, (iii) the changes in case law in, for example, Mississippi and (iv) the impact of Judge Jack's ruling that we have concluded that, while the Trust Fund is now the wrong fix at the wrong time, medical criteria, coupled with venue and case-consolidation reform, are the right fix in the current litigation environment.

(4) Is there a viable alternative to S.3274 with a proven track of success? Liberty Mutual's goal is not to make light or dismiss the efforts that lead to S.3274. Indeed, for some time Liberty Mutual supported the efforts to develop a viable trust fund. Rather, Liberty Mutual's goal is to identify what will work and to collaborate in the efforts to pass such legislation so that all asbestos claimants and participants are treated fairly, in whatever forum the claim is pursued---state, federal or bankruptcy court. Tremendous progress has been made at the state level and should not be ignored, particularly where there is abundant information to show that the impact of state medical criteria, venue and case-consolidation reform has been dramatic. For example, the Texas medical criteria legislation, S.B. 15 (effective September 1, 2005), contains medical criteria such that each plaintiff with a non-malignant claim must provide a qualifying medical report in order to activate his or her case. According to the judge overseeing

the S.B. 15 cases, his docket contains approximately 30,000 plaintiffs who allege a non-malignant claim. To date, no non-malignancy claimant has filed a medical report qualified by the Court as meeting the requirements of S.B. 15. To date, only six claimants have even attempted to file reports to qualify under S.B. 15's medical criteria.

Texas is not an isolated situation. To the contrary, no less than 16 states have tackled asbestos litigation abuses, many through legislation, many through inactive dockets and yet others through case law. In addition to Texas, Georgia, Ohio, Florida, Kansas and South Carolina have each passed legislation that imposes medical criteria to guarantee that physical impairment is a predicate to filing an asbestos claim. The following state courts have also reached the same result through either inactive dockets or case management orders that preclude prosecution of a claim without physical impairment: Syracuse, NY; New York City, NY; Baltimore City, MD; Chicago, IL; Boston, MA; St. Clair County, IL; Portsmouth, VA.; King County (Seattle), WA; Madison County, IL; Cuyahoga County (Cleveland) OH; Minnesota (coordinated litigation). The states of Pennsylvania, Maine, Maryland and Mississippi have each resolved the abuses associated with forum shopping or unimpaired claimants through case law.

The beneficial impact of these efforts cannot be overstated. Historically Texas, Ohio and Mississippi have been the leading states to generate claims filed against Liberty Mutual's policyholders, collectively accounting for approximately 80% of the asbestos claims filed against Liberty Mutual's insureds. Since the statutory and judicial reforms in those three key states, the decrease in the volume of claims has been truly remarkable. In Mississippi, the decrease has been 90%, in Texas nearly 65% and, in Ohio, approximately 35%. Across all states, from 2004 to 2005 we have seen over a 50% decrease in the number of new claims filed, a trend that has continued in 2006. These numbers are the best evidence that state-driven initiatives are working

and should not be negated by the passage of S. 3274. To the contrary, these efforts should be replicated at the federal level. Rep. Cannon's pending legislation, H.R. 1957: Asbestos Compensation Fairness Act of 2005, with over sixty sponsors, is the model that should be followed. Forum-shopping, case consolidation and ineffective medical criteria cannot be tolerated, especially at the expense of the truly sick. Federal legislation that mirrors these successful models, with conforming changes to the Bankruptcy Code, would eliminate once and for all the historic abuses that have plagued the truly sick, the courts and the global business community.

In conclusion, Liberty Mutual very much supports asbestos litigation reform. However, we believe the Trust Fund embodied in S.3274 is not the solution, as it fails to meet the tests of fairness, exclusive remedy, and sustainability. There is a better solution, one that is proving itself in numerous states – medical criteria and venue and case consolidation reform.

United States Senate Committee on the Judiciary

The Fairness in Asbestos Injury Resolution Act (FAIR) Act of 2006

June 7, 2006

Testimony of Jack Kemp

I appreciate the opportunity to testify today before the United States Senate Committee on the Judiciary with respect to the Fairness in Asbestos Injury Resolution (FAIR) Act of 2006. I regret that I am unavailable to testify in person but value the chance to submit these written remarks on an issue critical to our nation's economy as well as our system of justice.

I will begin with the uncontroversial premise that great harm has come to many people exposed to asbestos, particularly U.S. veterans, shipyard workers and other laborers. Each personal story is a tragedy that must be recognized and addressed.

It should also be acknowledged at the outset that our current court system is not helping these victims; innocent people with debilitating disease often die long before achieving justice. The estates of these victims eventually receive only a small portion of deserved financial compensation as bankrupt asbestos-tainted companies pay no more than pennies on the dollar. The government is completely protected by sovereign immunity and attorney contingency fees consume up to half of settlement awards. Even the few but well-known "jackpot" awards are fleeting, as they are stayed – and often overturned – on appeal years after a victim's death. The Supreme Court has recognized this travesty of justice many times, opining on more than one occasion that "the elephantine mass of asbestos cases...defies customary judicial administration and calls for national legislation."

Every United States Senate Judiciary Committee Chairman since 2002 has taken an active interest in resolving the asbestos litigation crisis. Our current Chairman has been tenacious in his search for an acceptable solution. Issue after issue has been raised and addressed over a long series of meetings, each one well attended by representatives offering all points of view. Through this involved process, the FAIR Act has steadily gained support from a cross section of stakeholders, including our nation's governors, veterans, industry, labor, senior citizens and small business, including the National Federation of Independent Businesses (NFIB).

The FAIR Act is innovative and progressive. It relies on private marketplace factors, including the resources of companies caught in the current and ineffective system, to implement a creative solution. The FAIR Act enables the government to provide a framework for a streamlined and efficient solution while empowering the market to solve its own problems through a privately-funded trust fund. The courts are freed from their crushing "elephantine mass of asbestos cases," U.S. industry receives certainty from spiraling and unpredictable costs, and victims receive quick and streamlined justice during their own lifetimes.

Yet there is a fear of moving forward with this proposal. Opponents criticize the adequacy of the $140 billion funding despite the fact that a 2005 RAND report found that total asbestos spending through 2002 totaled $70 billion, of which only $30 billion went to victims. A funding stream nearly five times this size, covering an era in which most exposed individuals benefited from the asbestos regulations promulgated in the 1970's, should be more than adequate. In addition, the size of the trust fund has grown considerably since the first version of this bill (S. 1125), which provided for $108 billion plus a $45 billion contingency fund. Moreover, the Congressional Budget Office (CBO) has spoken on the FAIR Act numerous times, most recently concluding that "the legislation would be deficit-neutral over the life of the fund." The adequacy of the FAIR Act's funding has been proven to a level of certainly rarely found anywhere in the legislative process.

There is also a fear that taxpayers may eventually be forced to contribute to the fund. This fear has been addressed throughout the legislation in concrete terms – explicitly limiting the Administrator's borrowing authority, ensuring that the anticipated contributions will be made, and protecting the U.S. taxpayer and U.S. Treasury from ever having to contribute to the fund. The legislation could not be clearer in placing the federal budget out of reach.

FAIR Act opponents appear to be waiting for 100% certainty that every component of this complex solution will work immediately. Nothing in life comes with 100% certainty; certainly nothing ever passed by Congress. The FAIR Act encourages innovation and progress while providing numerous specific safeguards throughout the bill and granting as much certainty as humanly possible. There is at least as much certainty in this bill as in any other legislative initiative pending before Congress. Requiring any more would cripple the ability of Congress to do its job of tackling the nation's problems.

Fear of failure is not productive. Members of the Senate Judiciary Committee along with many others have collectively built a solid vehicle for change, and it is now up to Congress to put this idea in the marketplace and give it an up or down vote. It is ready to be implemented and advanced in a changing world in need of new, privately funded solutions to national issues. Any impediments to this process would dismantle years of progress. Congress must move forward and cultivate new and innovative solutions to problems facing our country, and the FAIR Act represents the best attempt at such a solution pending before Congress.

Opponents of the FAIR Act, on both sides of the aisle, have suggested a preference for a bill limited to the imposition of stronger medical criteria standards. Such a partial solution wastes the opportunity to put in place a more comprehensive reform as called for by the U.S. Supreme Court and does nothing to stem the waste from transactional costs that characterizes the current system. Some of those same opponents also raise the suggestion that state-level reform has obviated the need for the FAIR Act. While these state efforts are laudable and, in fact, complementary to the FAIR Act, by definition state level reform cannot provide a comprehensive solution. In fact, even with the aggressive efforts by the proponents of state-based reform, only a handful of states have yet enacted medical criteria legislation. Asbestos litigation is a fifty-state problem.

The FAIR Act is a private sector-based solution to a serious national crisis. It is an innovative, progressive and forward-thinking solution to a well documented problem. The proposed trust fund is enabled by the government but not dependent on it, and inspired by a market-based solution. We also have a unique opportunity in which Congress can step up to the plate and get something done. Everyone has had their say. Let's not let this opportunity pass us by.

Statement of Senator Edward M. Kennedy Regarding the Asbestos Trust Legislation Before the Senate Judiciary Committee

June 7, 2006

This latest version of the Asbestos Trust Fund legislation does not correct the fundamental problems that made the original bill unacceptable. The new bill, S. 3274, would still create an Asbestos Trust Fund that excludes many seriously ill victims of asbestos-induced disease from receiving compensation and that fails to provide a guarantee of adequate funding to make sure the victims who are eligible will actually receive what the bill promises them.

As I have said before, the real crisis which confronts us is not an "asbestos litigation crisis," it is an asbestos-induced disease crisis. Asbestos is the most lethal substance ever widely used in the workplace.

All too often, the tragedy these seriously ill workers and their families are enduring becomes lost in a complex debate about the economic impact of asbestos litigation. We should not allow that to happen. The litigation did not create these costs. Exposure to asbestos created them. They are the costs of medical care, the lost wages of incapacitated workers, and the cost of providing for the families of workers who died years before their time. Those costs are real. No legislative proposal can make them disappear. All legislation can do is shift those costs from one party to another.

While I appreciate the enormous effort that Senators Specter and Leahy have put into this issue, their latest proposal does not correct the basic flaws in earlier versions of the legislation. The Trust Fund is still seriously underfunded. It lacks

sufficient financial resources to pay all the victims of asbestos diseases that the legislation promises to compensate. The major problems identified by the Congressional Budget Office are still present in the new bill. In addition some of the changes in S. 3274 may actually create new problems for victims attempting to collect from the Asbestos Trust. More of the burden of asbestos induced disease is being shifted back onto the victims. This new legislation does not provide a fair and reliable solution to the enormous problem of compensating asbestos victims.

If S. 3274 were to be enacted it is probable that the Asbestos Trust Fund created by the bill would soon become insolvent. As Professor Eric Green of Boston University Law School, one of today's witnesses, states in his written testimony:

> "In the end, it is highly likely that a choice will have to be made between bailing out the Fund with federal dollars or abandoning future claimants. Either way, the perpetrators and profiteers escape while the needy and the innocent suffer."

It is not enough to say that there are serious inadequacies in the way asbestos cases are adjudicated today. That does not mean that any legislation is better than the current system. Our first obligation is to do no harm. I regret to say that, despite the best intentions of its sponsors, this legislation would do harm.

When this Committee considered the original Specter-Leahy bill in May of 2005, I identified ten areas in which the legislation was seriously deficient –both unfair and unworkable. Unfortunately, all of those problems are still present in the latest version.

There are major flaws in the bill.

1) Experts have repeatedly told us that the Asbestos Trust created by this legislation is seriously underfunded. The funding plan in this bill relies on very substantial borrowing in the early years as the only way to pay the flood of claims. The result will be huge debt service costs over the life of the Trust that could reduce the $140 billion intended to pay claims by as much as 40% or more. The amount remaining would be far too little to pay the claims of all of those who are entitled to compensation under the terms of the bill. The legislation does not guarantee that sufficient resources will be available to keep the commitments which this bill makes to eligible victims.

2) Seriously ill victims are not allowed to continue their cases in court until the Trust Fund is ready to process and pay claims. These victims will be left in a legal limbo, unable to recover either in the courts or from the Trust Fund, while time is running out for them.

3) Thousands of lung cancer victims who have had very substantial asbestos exposure are denied any compensation from the Trust Fund. Under the legislation, these victims are losing their right to go to court, but receiving nothing from the Fund.

4) The bill makes it harder for asbestos victims to recover compensation from the Trust Fund by unfairly raising the standard of proof. Victims should simply have to prove that asbestos exposure was a contributing factor to their disease. That is the standard used in most state courts and workers' compensation proceedings today. This bill requires a much tougher standard.

5) Some victims whose claims are nearly resolved in court will have to start pursuing their claims all over again. Years of work by these victims to obtain compensation are being wiped out

6) The bill lacks a clear, automatic sunset that allows victims to quickly seek compensation in the courts if the Trust Fund becomes insolvent and unable to pay their claims. The Committee's 2003 legislation contained such a provision, but this bill does not. Under the current bill, workers could end up trapped in the Trust with reduced benefits and long delays in receiving their payments.

7) Residents of other asbestos-contaminated communities are denied the same opportunity to receive compensation from the Trust Fund that the residents of Libby, Montana have under the bill.

8) Victims with complex cases will be unable to get a qualified attorney to pursue their claims because the legislation unreasonably limits attorneys' fees in complex cases.

9) The bill takes rights away from victims of silica disease even though they are not eligible to receive any benefits from the Trust Fund.

10) Before victims lose their right to proceed in court, the legislation should require full disclosure of the corporations and insurers who will fund the trust and the amounts each of them will pay. It does not.

These shortcomings cannot be overlooked. They are too fundamental. They will end up hurting the seriously ill victims of asbestos disease who we are trying to help. The Senate should reject this new bill. It has not solved the problems that made earlier versions unacceptable.

Statement of Senator Patrick Leahy,
Ranking Member, Committee On The Judiciary
Hearing On Asbestos Legislation
June 7, 2006

By calling this hearing, Chairman Specter has once again demonstrated his commitment to making constructive changes to the current broken system of asbestos litigation. Today we renew our discussion about legislation that will provide fair and quick compensation to asbestos victims and their families. Unfortunately, this bill fell last February on a procedural maneuver without getting the consideration it deserved. I hope this time around we can put this bill to a vote on its merits, because millions of Americans who suffer or have suffered from asbestos disease need our help. I thank the Chairman for this hearing, and I thank our distinguished witnesses for their willingness to discuss such an important issue with the Committee.

I want to mention the recent passing of Judge Edward R. Becker. Judge Becker was a distinguished Federal jurist and member of the United States Court of Appeals for the Third Circuit, where he served as Chief Judge from 1998 to 2003. Without Judge Becker's extraordinary efforts in helping us to develop this legislation – at the invitation of Senator Specter -- we would not be where we are today with an asbestos reform bill pending before the Senate, and we would not have a bipartisan bill that balances the equities as skillfully as this one does. Judge Becker brought numerous stakeholders to the table, and through his efforts he helped us accomplish a truly monumental task. We are deeply indebted to Judge Becker for his selfless work on behalf of so many Americans affected by asbestos-related illness, and on behalf of the judicial system to which he contributed significantly. We are grateful for his efforts, and our best wishes go to his family.

Tort reform has been a popular political issue to some, but too often we find ourselves considering bills that attempt to force a partisan solution on a non-existent problem. We have recently seen unsuccessful efforts to cap liability in medical malpractice lawsuits, and we are likely to deal with proposals to unnecessarily insulate the makers of food products from accountability as well. But unlike some of the politically expedient efforts at litigation reform that we have seen in the past, today we discuss a real problem, which desperately needs to be addressed. The Supreme Court has declared that the current system of asbestos litigation "cries out for a legislative solution." Chairman Specter and I and others on this Committee have answered the call, and I hope that Senators will look at this improved bill long and hard and carefully compare it to the status quo.

Today we discuss an improved bill. The Chairman and I have been responsive to concerns from many interested parties, and we have refined the bill to accommodate many of these concerns. These changes reflect the bipartisan nature of this process, as well as our desire to do the right thing for the victims of asbestos exposure. We must not lose focus of what we want to accomplish, which first and foremost is the fair compensation for those who have been injured or killed from exposure to asbestos. While some changes attempt to further balance the equities among the companies

required to contribute to the Fund, the majority of the improvements are geared towards improving the system of victim compensation in the bill.

I want to make clear that the medical criteria in the bill remain unchanged. But additional safeguards have been put in place to ensure the integrity of the claims process. For example, the bill now includes a provision for random audits of both medical and exposure evidence submitted by claimants, as well as a provision requiring a detailed and specific affidavit from a claimant attesting to their exposure. This will prevent fraud in the claims process, thereby ensuring that compensation gets to those who need it.

The bill now ensures that veterans who contracted an asbestos-related illness during their service can claim against the Fund. By providing a special statute of limitations for veterans who have received government benefits for their illness, the bill remedies the injustice of veterans being shut out of the tort system by virtue of their government employment. I am especially pleased to be able to report this improvement, as it respects those veterans who have been unable to get the compensation they deserve simply because they were injured during their service to our country.

Additionally, the improved bill will preserve more preexisting legal settlements between plaintiffs and defendants by allowing a plaintiff's representative or an authorized corporate attorney to sign an agreement. The new bill allows asbestos victims to claim against existing bankruptcy trusts during the startup period, which will now withhold some resources for this purpose but will exclude claims by unimpaired claimants. The new bill also makes clear that civil rights suits and disability claims are not preempted by the legislation. All of these changes were considered with an eye towards creating a bill that will help those people who suffer disease as the result of asbestos exposure, and which has a chance of passage in the Senate.

At a time when the Senate seems to be taking up one partisan political issue after another -- for show, and not for real solutions to the real priorities of the American people – here we have an historic chance to make a difference in the lives of many Americans who suffer so tragically. We also have a chance to relieve our Federal and State judicial systems from the crushing weight of what the Supreme Court has described as an "elephantine mass" of litigation. Let us compensate asbestos victims without delay, and equitably.

I want to thank all of our distinguished witnesses. I look forward to hearing their insights into the latest changes to this critically important piece of legislation.

# # # # #

June 06, 2006

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

On behalf of the 600,000 members of the National Federation of Independent Business, I am writing to express our support for S. 3274, "The Fairness in Asbestos Injury Resolution (FAIR) Act of 2006." The improvements made by this bill to the legislation considered earlier this year will help protect innocent small-business owners from the asbestos litigation crisis that now threatens their business.

Asbestos lawsuits against small businesses are on the rise. After years of suing large corporations for multi-million dollar damage awards, "traditional" asbestos manufacturers and defendants are mostly bankrupt. As a result, asbestos litigation now targets companies far removed from any potential wrongdoing, including small businesses. This relatively untapped pool of defendants is an attractive target for trial lawyers since small-business owners and their insurers can be forced to pay millions of dollars in damages. Horrifying for a small-business owner is the prospect that they can be hauled into court without having any relationship to asbestos or the plaintiff. Many small businesses are forced to settle because they don't have the money or time to be away from their businesses. Not only do they face the stigma of having to settle, and the loss of time and money, but they will likely also experience higher insurance rates.

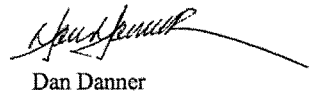
By creating an alternative compensation system to resolve asbestos claims, S. 3274 will fix a badly broken system that is not working and, in the process, compensate victims faster. In addition to lawsuit relief, the legislation relieves small businesses with either low or no asbestos liability from having to pay into the compensation fund. No business that meets the Small Business Administration description of a small business can be required to pay a penny into the fund. Nor will any small business that has carried less than $1 million in asbestos expenditures before December 31, 2002 have to pay into the fund.

National Federation of Independent Business
1201 F Street NW * Suite 200 * Washington, DC 20004 * 202-554-9000 * Fax 202-554-0496 * www.NFIB.com

This legislation will help prevent small businesses from having to spend the time and money to defend themselves in asbestos lawsuits. It takes a significant step towards fixing part of our litigation crisis that hurts business, big and small, and ultimately keeps the victim from receiving compensation.

Thank you for your support of small business.

Sincerely,



Dan Danner
Executive Vice President
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June 6, 2006

Senator Arlen Specter
Senator Patrick Leahy
Committee on the Judiciary
United States Senate

Dear Gentlemen:

I write to comment on S.3274, the substitute for S.852 "The Fairness in Asbestos Injury Resolution Act of 2006" and on recent developments and trends that have significantly changed asbestos litigation.

As you recall, I testified and provided a written statement to the Committee on November 17, 2005 about the fiscal unsoundness of S.852 and testified before the Committee at two prior hearings on predecessors to S.852 and now S.3274. My research and quantitative analyses of the Fair Act has been undertaken for asbestos trusts, but I submit this letter as my statement on these issues rather than as a position by the trusts.

Changes in S.3274 that have been made from S.852 do not improve the fiscal prospects for the National Fund that would be created by these bills. Rather, the changes reduce Fund revenues (or make their receipt less likely) while increasing Fund liabilities. Changes in S.3274 heighten rather then lessen the certainty that the Fair Act National Fund will become quickly insolvent, within the first or second year, leaving a $64 billion debt to the U.S. Treasury that will be unlikely to be repaid, because the asbestos defendants and insurers who must repay this debt will then face a double liability of renewed asbestos litigation on top of new, Fair Act tax liabilities of $124 billion to repay the debt and interest. I attach two February 2006 documents of my analysis of S.852, "Discussion of S.852 Fallout," February 8, 2006, and "Comments on CBO Letter of February 13, 2006," February 14, 2006. As I discuss below, changes in S.3274 worsen the prospects for the National Fund that I discussed in these two February 2006 documents.

S.3274 Increases the Risks to National Fund Revenues

Significant S.3274 changes in the National Fund's revenue process will further jeopardize the Fund's ability to pay claims and repay the enormous indebtedness that the Fund will owe to the U.S. Treasury.

S.3274 introduces a new cap on payment for any company in Tier II or lower and a new "adjustment" that allows "well-insured" defendants to reduce their payments to the National Fund. Under the new cap, no company will be required to pay more than 1.67024 percent of its annual annual revenue (p. 173 et. seq.). Neither the bill nor its supporting documents quantify how much contribution payments will be reduced for companies subject to the cap, nor how much other defendants will have to pay to make up for revenues lost to the Fund because of the cap.

Because the 1.67024 percent cap will require companies not subject to the cap to pay more to make up for reduced payments by capped companies, the 1.67024 percent cap will increase use of the bill's four other "adjustments," including the new "well-insured adjustment," each of which

reduces revenue obligations for particular groups of defendants. The 1.67024 percent cap would be added to and contribute to a cascading eligibility for and use of these "adjustments," further jeopardizing revenues and the integrity of the revenue-raising process.

First, because the 1.67024 percent cap increases their costs, more uncapped companies will seek and obtain "financial hardship adjustments" (pp. 176). S.3274 provides no limitation on the aggregate amount of such hardship adjustments. Revenues lost to the Fund from increased applications for and unlimited allowances of hardship adjustments on top of unlimited revenue losses from the 1.67024 percent cap will together place particular jeopardy on the Fund's ability to generate revenues after sunset that are needed to repay the U. S. Treasury's $60 to $70 billion dollar loan to the National Fund.

Second, the 1.67024 percent cap will increase applications for and allowances of "inequity adjustments" (p. 180, et. seq). Qualification for inequity adjustments are determined by comparing a defendant's payment obligations under the Fair Act to what it would have had to pay in asbestos litigation net of insurance if there had been no Fair Act. Because the 1.67024 percent cap increases payment obligations from uncapped companies, more of these uncapped companies will become eligible for an inequity adjustment and more will seek the adjustment. S.3274 permits aggregated reductions in contributions up to $6 billion for these "inequity adjustments," amounts that are lost as fund revenues and that would have to be made up through further increases in payments by other defendants (i.e. those who are uncapped and not eligible for either the "financial hardship" or "inequity" adjustment).

Next, companies' use of the 1.67024 percent cap, the "financial hardship" and the "inequity" adjustment will in turn increase use of the "well-insured companies" adjustments (p. 187 et seq), which would cost another $3 billion in revenue, and the "Distributor" adjustments (p. 213 et seq), which would cost another $1.5 billion in revenue.

With each of these cascading steps, risks to the Fund's $140 billion in revenue become greater.

S.3274 Does Not Decrease Liabilities

While the changes of S.3274 will significantly increase the risk that the National Fund's $140 billion in revenues will not be achieved, the bill does nothing to reduce the Fund's liabilities. None of the changes in S.3274 will result in meaningful savings in liabilities.

First, few if any claims will be excluded by S.3274's new "dormant claim" provisions. As S.3274 provides: "The failure to take such action to prosecute the pending asbestos claim [actions which would protect a claimant from the "dormant claim" provisions] shall not preclude the special limitations period under subsection (A) if the claimant shows ... that prosecution of the claim was stayed during all or part of the 3-year period ending May 25, 2006 by court order or operation of law...." (p. 74). Because courts in more than a dozen bankruptcies imposed such stays during this time period, virtually every pending claim will be protected from the Dormant Claim provisions.

Second, the various new S.3274 provisions about audits (p. 99), affidavits (pp. 97-99), declarations (p. 44), and disqualification of certain x-ray B-readers (p. 85) are already in place among existing asbestos trusts; asbestos claimants are already subject to and comply with these provisions; and forecasts of Fair Act liabilities already assume compliance with these provisions.

Third, S.3274's restrictions on certain B-readers or other doctors will have little effect because plaintiffs have already reacted to recent judicial and defendant criticism and stopped using these criticized doctors.

S.3274 Adds New Liabilities

If anything, changes in S.3274 will increase the indemnity obligations and interest costs of the National Fund and uncertainties about such obligations and costs.

First, S.3274 imposes new liabilities on the National Fund. The Fund will receive new claims from:

Extension of the Libby, Montana procedures to tremolite exposures in other jurisdictions (pp.3-6). S.3274 requires a National Asbestos Exposure Review of facilities receiving vermiculite ore from Libby, Montana (p. 122, et. seq.). For those receiving facilities and areas that present levels of emissions, contamination, risks and disease substantially equivalent to Libby, the National Fund must "treat claims from residents surrounding such facilities the same as residents of Libby, Montana, and such residents shall have all the rights of residents of Libby, Montana, under this Act" (p. 124). This provision could add many additional claimants and significant additional liability.

Persons who were exposed to naturally occurring asbestos (p. 124), exposures that are common in California and other locations and that result in asbestos-related disease (especially mesothelioma) that is not compensated in litigation and, therefore, has not been included in past estimates of National Fund liabilities.

Asbestos exposures from the September 11, 2001 attack on the World Trade Center, Hurricane Katrina or Hurricane Rita (p.125). These disasters, particularly the World Trade Center attack, exposed many (potentially millions) of persons to asbestos. Some will develop mesothelioma and other cancers, will claim against the Fund and should qualify for payment under the Fund. Claims from these victims of national disasters must be included as potential liabilities of the National Fund. However, persons who are victimized both by national disasters and also by asbestos disease might never be paid under the Fair Act, if the Fund denies payment to these "exceptional" claims or, even more likely, because the Fund will run out of money years before victims manifest the diseases caused by asbestos exposures from these disasters.

Second, S.3274 increases amounts that the National Fund must pay to the "Master Trust" at sunset, in lieu of repayments of money that the Fund would have taken from asbestos trusts (pp. 375-376). These increased obligations must be considered in determining when the Fund becomes insolvent.

Third, by shifting payment priorities to the highest value claims, claims with the greatest "severity of illness and likelihood that exposure to asbestos was a substantial contributing factor of the illness" (p. 46; pp. 118-119), S.3274 increases the Fund's initial liability and further increases its need to borrow.

Passage of Time Places the National Fund at Greater Risk

Independently of the changes in S.3274 that erode the financial viability of an asbestos National Fund, other events since the Committee's November 2005 hearing further jeopardize the bill.

First, every day new victims suffer asbestos diseases that would be compensated by the Fund. As CBO forecasts, new claims arise at the rate of about 80,000, almost 7,000 a month. Every month of delay in enactment and start-up of this proposed legislation adds to the already overwhelming liability that the Fund will face when it begins. With every month of delay, the Fund's immediate borrowing requirements increase, its interest on such borrowings increase and the time until the Fund will sunset decreases. The prospects of the National Fund are worse today than they were in March when the Senate voted on S.852 and prospects will be even worse six months from now.

Second, increasing interest rates continue to add to the impossible burden of the National Fund. As interest rates rise, so do the Fund's cost of borrowing. All other things equal, the higher current interest rates that apply now compared to the fall of 2005 when I testified to this Committee, have significantly increased the National Fund's obligations.

Recent Information Shows that the Fair Act Is Less Likely than Litigation to Achieve the Act's Purposes

While time has not been good for the prospects of a Fair Act National Fund since the Fair Act was first considered in early 2003, during this same period asbestos litigation has changed significantly and for the better. The focus of asbestos litigation both in terms of the numbers of claims and the amounts paid to claimants has shifted toward cancer victims.

The number of new cancer claim filings has increased in recent years, even while nonmalignancy filings (and total filings which simply reflect trends in nonmalignancy filings) have dropped precipitously because of uncertainties created by the Senate's consideration of the Fair Act. Figures 1 and 2 show both trends for claims filed with the Manville Trust (filings in 2003 through 2005 are averaged because the Trust's adoption of new, stricter claims procedures in October 2003, its "2002 TDP," created accelerated filings that distort year-to-year trends during this period).

Figure 1: Trends in Manville Cancer Filings

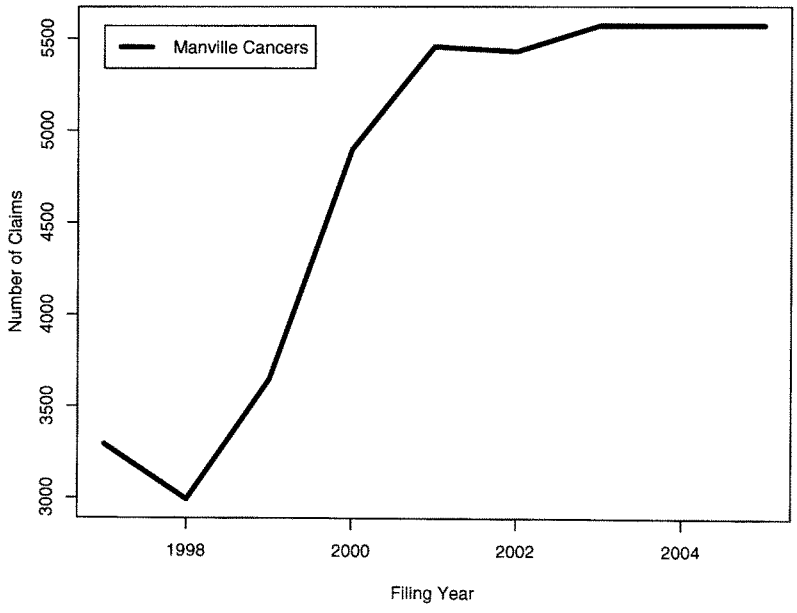
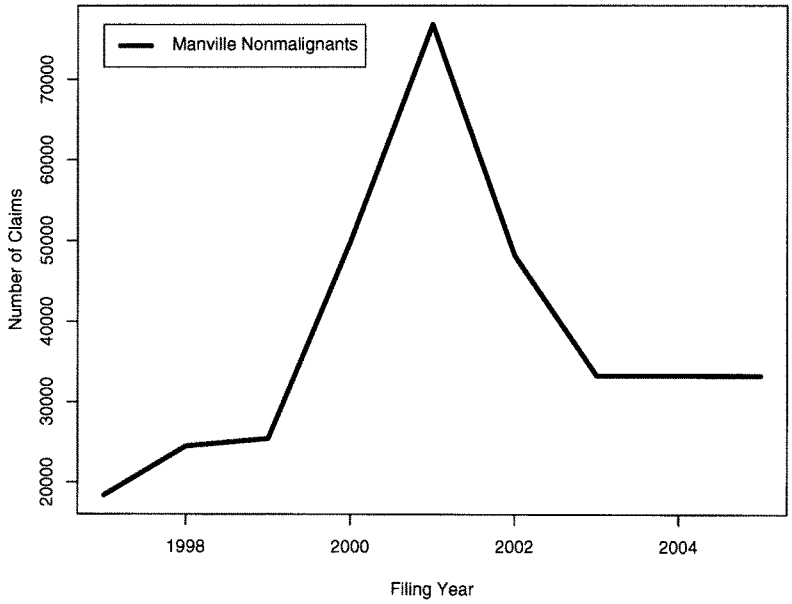


Figure 2: Trends in Manville Nonmalignant Filings



Payments to cancer claimants have also increased greatly. Settlement averages for mesothelioma and lung cancers rose steadily for fifteen years with even sharper increases since 2000. The total amount paid to mesothelioma plaintiffs across all defendants has doubled or tripled in recent years: from an "all-in" average of $2 to $3 million in 2000 to between $5 to $8 million in 2006 (May 2006 testimony in the bankruptcy court's estimation for Armstrong World Industries by an experienced defendant claims negotiator who continues to negotiate settlements for former CCR members). This testimony is corroborated by RAND's 2005 report on asbestos litigation, which calculated that mesothelioma verdicts averaged $5 million in 2002 and observed that settlements tracked these increased verdicts.

With these changes money paid to indemnify asbestos plaintiffs now goes primarily to asbestos cancer victims, particularly mesothelioma victims. Liability forecasts incorporating these recent changes in asbestos litigation show cancer claimants receiving over 70 percent of all indemnity paid in tort litigation by Armstrong World Industries, with 60 percent of payments going to mesothelioma claimants. Cancer claimants would receive 73 percent of all indemnity that would have been paid by U.S. Gypsum, with mesothelioma claimants again receiving 60 percent. Compensation paid by asbestos trusts is concentrated even more on cancer victims: 85 percent of Manville Trust payments go to mesothelioma victims, 68 percent of Western Asbestos Trust payments go to mesothelioma victims.

At best, the Fair Act's National Fund can not match the current performance of asbestos litigation and the asbestos trusts. The Fair Act has been promoted as a system that would "look out for" asbestos cancer victims: Even the harshest critics of asbestos litigation have never asserted that these asbestos cancer victims are undeserving or that their compensation should be reduced. Yet

the Fair Act does just that, paying mesothelioma victims only 23 to 37 percent what they are now receiving in litigation settlements ($1.1 million / .6 x $5 million = 37%; $1.1 million / .6 x $8 million).

Moreover, the financing of S.3274 ignores the actual increases occurring now in mesothelioma claims filings. As I have repeatedly demonstrated, the revenue streams under S.3274 are inadequate to pay the great number of mesothelioma and other cancer claims that are already pending and that will be filed immediately with the National Fund. As I have described above and in my previous testimony and submissions to this Committee, because the forecasts and financing of S.3274 ignore actual cancer claim filings, the National Fund cannot last beyond a year or two before it becomes insolvent from its heavy debt and interest obligations. After that victims of mesothelioma and other asbestos diseases, defendants and insurers would all be returned to an uncertain litigation system. This post-Fair Act litigation would be conducted in a world in which many, perhaps most asbestos defendants and insurers would face great insolvency risks because they would be subject to renewed litigation and $124 billion in future tax payment to fund the then-defunct Fair Act.

Please do not hesitate to contact me if you have any questions concerning the above.

Sincerely,

/s/ Mark A. Peterson

Mark A. Peterson

Cc:
Members of Committee on the Judiciary, U.S. Senate

Statement of Ernst Csiszar
President and Chief Executive Officer
Property Casualty Insurers Association of America
United States Senate Committee on the Judiciary
S.3274, the Fairness in Asbestos Injury Resolution Act of 2006
June 7, 2006

The Property Casualty Insurers Association of America (PCI) is committed to finding a fair, equitable and workable solution to the nation's asbestos litigation crisis. PCI is grateful to Senate Judiciary Committee Chairman Arlen Specter, Ranking Member Patrick Leahy, and the other Committee members for their tireless efforts to resolve this exceedingly complex matter.

The Property Casualty Insurers Association of America has previously communicated to you our deep concern about S.852. In January, we stated that due to the inherent flaws included in S.852, we did not believe that S.852 could be amended to serve as a basis for a workable trust fund. While S.3274, the Fairness in Asbestos Injury Resolution Act of 2006, does contain some improvements pertaining to dormant claims, B-readers, and fighting fraud abuse, the same fundamental flaws contained in S.852 remain in S. 3274. Unfortunately, S.3274 does not meet the basic requirements of fairness, certainty, finality, feasibility and affordability that our members believe are necessary for a successful national trust fund for asbestos victims.

The legislation would require insurers to contribute $46.025 billion to the trust fund, without any assurances that the program would end the current abusive asbestos lawsuit system. We recognize that S. 3274 represents a good faith effort to address concerns raised during the floor debate. However, PCI believes that the legislation fails to correct the key fundamental flaws contained in S. 852. Thus, PCI must continue to oppose this legislation.

The following is a list of the serious problems we continue to see in the bill:

Funding

- Insurers are required to provide approximately 44.8% of the industry asbestos reserves in the first five years. Defendant companies are required to provide only 18.5% of their aggregate funding level during this same time period. Insurers are required to front-load their payments to the fund, while the defendant companies are only required to provide a specified annual payment, which remains constant over the life of the fund. This payment scheme raises a strong question of fairness between the defendant companies and insurers.
- In the event the fund fails for any reason in its early years, insurers will have contributed a substantial portion of their asbestos reserves, only to find themselves back in the tort system, possibly in state courts, with insufficient reserves to pay remaining asbestos claims, transaction costs, and other non-asbestos claims.
- S.3274 potentially allows thousands of claims outside the trust fund and clearly undermines the effectiveness of the fund to operate properly. At virtually every turn throughout the life of the fund, the possibility of a claim remaining in the tort system is an option.
- Individual insurers and reinsurers could face substantially increased costs under several orphan share provisions of the bill. The implications of requiring insurers to pay for the so-called "orphan shares" of others unable to pay imposes a potentially large, but unknowable, financial burden on insurers, especially in the first five years of the fund.

Start-Up

- Upon enactment, S. 3274 is to be the exclusive remedy for all pending claims, except for all claims that have commenced trial or have reached a final verdict. Insurers will be held to an aggressive funding schedule during the first five years of the fund, while a significant number of pending claims will be left in the tort system.

Sunset

- S.3274 contains a provision that could prematurely terminate the Fund and return all claims to state and Federal court. If or when the program sunsets, insurers will have been placed in the untenable position of having utilized their reserves to pay their trust fund contributions, and then, having to pay potentially excessive tort litigation costs.

Workers Compensation Subrogation

- S. 3274 preempts the well-established right of subrogation under the workers compensation system. The legislation does not contain any language prohibiting a workers compensation claimant from collecting twice for the same claim -- once from the no-fault trust fund and again in the no-fault workers compensation system.

Cost Projections

- The bill now allows the Administrator to apply the special eligibility provisions established for Libby, Montana to the victims of 9/11 and Hurricanes Katrina and Rita. PCI strongly questions how these exposures are related to the initial purpose and scope of this legislation. Certainly, PCI is sympathetic to these victims. However, expanding the pool of claimants will only place more stress on the fund's financial strength and solvency. In addition, S. 3274 continues to allow the expansion of the Libby provisions to other sites, if supported by the federal Agency for Toxic Substances and Disease Registry. This expansion does not require approval by Congress and raises concerns about the fund's ultimate financial viability.

- In its August 2005 report on S.852, the Congressional Budget Office forecasted the claims from S. 852 could be between $120 billion and $150 billion. In December 2005, the Congressional Budget Office (CBO) was requested by Senator Specter to re-evaluate its August study. The CBO completed its study and has reaffirmed its original cost estimate. However, the CBO acknowledged that the proposed trust fund might or might not have adequate resources to pay all valid claims and there is a significant likelihood that the fund's revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. With the expansion of the claimant pool, the cost projections can only grow exponentially.

The trust fund as structured by S. 3274 remains unfair, unworkable, and lacks the certainty and finality we believe is needed. The reality is that under S. 3274, we could find ourselves paying both substantial sums into the fund and in the tort system for claims permitted to "leak" outside the fund. Accordingly, we are respectfully requesting that you abandon efforts to bring this bill to the Senate floor for consideration.

RAA
REINSURANCE ASSOCIATION OF AMERICA

Telephone: (202) 783-8311
Facsimile: (202) 638-0936
http://www.reinsurance.org

June 6, 2006

The Honorable Bill Frist, M.D.
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Majority Leader Frist:

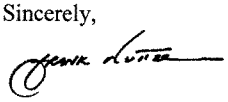
As the Senate Judiciary Committee prepares to hold a hearing on S. 3274, the FAIR Act, the Reinsurance Association of America (RAA) wishes to express its strong opposition to the newly introduced legislation.

We commend Chairman Specter for his persistence and dedication to asbestos litigation reform. The RAA shares his concerns and over the last several years, we have worked with the Senate to try and achieve a meaningful, comprehensive solution to the asbestos litigation crisis. Unfortunately, despite these efforts, S. 3274 falls well short of meeting RAA's key principles for any asbestos trust fund legislation: certainty, finality, and reasonable economic cost. We have attached a previous letter that highlights how the FAIR Act violates these principles.

In addition to the concerns listed in our January 31, 2006 correspondence, the RAA believes the newly introduced version further undermines the desire for certainty for the reinsurance industry. The lack of certainty is amplified due to changes made to Section 212 addressing determination of insurer payments. First, S. 3274 strips the language that allowed for the Commission to establish a separate allocation method for each insurer participant (primary, reinsurers, etc.) and now requires one methodology for all insurer participants. Although some insurers have been unable to agree on an allocation methodology, the U.S. reinsurance industry agreed over two years ago on how the allocation of any reinsurance share will be calculated. Second, the new version amends the reserve study language and allows for the reserve calculations to be based on assumptions and projections of future unfiled claims and allows for the Commission to extrapolate reserve assumptions. Third, S. 3274 deletes the orphan share language that allowed insurers to get credit for funding obligations in the first 5 years. These changes only exaggerate the lack of certainty, finality and reasonable economic cost the legislation provides for the U.S. reinsurance industry.

Since 2003, when the Senate decided to pursue a trust fund approach to the asbestos litigation crisis, the RAA has openly communicated to the Senate the need for any proposed trust fund to meet the principles of certainty, finality, and reasonable economic cost. We cannot support a trust fund that falls short of these principles.

Sincerely,



Franklin W. Nutter
President

cc: Chairman Specter
Ranking Member Leahy
Judiciary Committee Members

June 6, 2006
Via Fax

The Honorable Bill Frist
Majority Leader
United States Senate
Washington, DC 20510

Dear Senator Frist:

The undersigned Veteran and Military Service Organizations, representing nearly 3 million U.S. veterans, have written to you in the past on the need for asbestos litigation reform. Today, we are writing to express our support for the asbestos victims' compensation fund solution embodied in S. 3274, a revised bill recently introduced by Senate Judiciary Committee Chairman Arlen Specter, and Senator Patrick Leahy. We urge you to bring this bill up for consideration before the full Senate at the earliest possible date.

While veteran and military service organizations have long supported the Specter-Leahy efforts to fix the current broken asbestos claims system, it is worth noting that their recently introduced version of asbestos victims' compensation fund legislation includes additional provisions intended to address the unique challenges faced by veterans today.

For example, the bill includes new language that would change the statute of limitation requirements for veterans, effectively giving veterans more time to bring their claims to the victims' compensation fund.

The current asbestos litigation morass leaves few avenues for veterans exposed to asbestos to seek compensation, and veterans too often end up with nothing at all for their asbestos-related injuries.

The privately funded victims' compensation fund at the heart of this bill is not only a good solution, but it is the *only* solution that will address the unique plight of veterans. The so-called medical criteria approach, which some have mentioned as an alternative to the Specter-Leahy legislation, would do *nothing* to help sick veterans who currently have no guaranteed avenue for compensation.

In the wake of the recent observance of Memorial Day, a time when many Americans reflect on veterans and their sacrifices for our country, we would urge you and the rest of the Senate leadership to consider the importance of S. 3274 for veterans and to schedule full Senate consideration of this bipartisan legislation as soon as possible.

With war dominating today's news and creating a new generation of veterans, it is only fitting that lawmakers focus ever more intently on both those who have served our country in past and those who wear the uniform today. It is our solemn obligation as Americans to support those who have worn a uniform in defense of this great nation, and to compensate them for their sacrifices.

We thank you for your service and your attention to this matter of great importance to our nation's veterans.

Sincerely,

Air Force Sergeant Association
American Ex-Prisoners of War
Blinded American Veterans Foundation
Blinded Veterans Association
Fleet Reserve Association
Jewish War Veterans of the United States
The Marine Corps League
Military Officers Association of America
Military Order of the Purple Heart
National Association for Black Veterans
Non Commissioned Officers Association
National Association for Uniformed Services
National Association of State Directors of Veterans Affairs
Paralyzed Veterans of America
Pearl Harbor Survivors Association
The Retired Enlisted Association
Veterans of the Vietnam War, Inc.
Veterans of Foreign Wars of the United States
Women in Military Service for America Memorial Foundation, Inc
U.S. Submarine Veterans, Inc.
U.S. Submarine Veterans of WWII
U.S. Submarine Veterans, Rhode Island Base
U.S. Submarine Veterans WWII, Thames River Chapter
U.S. Submarine Veterans WWII, Central CT Chapter

cc: All U.S. Senators

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