Testimony of

Prof. Eric D. Green

June 4, 2003

TESTIMONY OF PROFESSOR ERIC D. GREEN TO
THE SENATE COMMITTEE ON THE JUDICIARY ON
"SOLVING THE ASBESTOS LITIGATION CRISIS: S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003" Scheduled For Wednesday, June 4, 2003, at 10:00 a.m.

INTRODUCTION

I would like to thank Chairman Hatch and Senator Leahy as well as the other members of the Judiciary Committee for giving me the opportunity to appear before you today to talk about the Fairness in Asbestos Injury Resolution Act of 2003.

Specifically, I would like to address the impact of the Act on the rights of the as-yet-unknown victims of exposure to asbestos. These victims, commonly referred to as "future claimants," are persons who have been exposed to asbestos and who have not yet brought a personal injury claim or lawsuit but will assert such a claim in the future. These are the overwhelming majority of people who will be affected by the Act. Although estimates vary, most epidemiologists predict that the number of future claimants is two to five times the number of current claimants. Predictions by the most highly-respected experts in this field range from 1.5 million to 2.5 million future claims.

I am currently the Court-appointed representative for future claimants in the Fuller-Austin, Federal-Mogul and Babcock & Wilcox bankruptcy cases, a position often referred to as a "futures representative." I also am a professor at Boston University School of Law, and I operate a firm specializing in alternative dispute resolution. I have served as a Special Master to several state and federal courts in asbestos litigation matters, and as a mediator I have settled tens of thousands of personal injury asbestos cases and resolved numerous asbestos insurance disputes. Like the other futures representatives, I have dedicated a large portion of my career to assisting in the fair resolution of asbestos claims. However, I have never directly brought or defended an asbestos personal injury lawsuit and have no personal stake in the outcome of any asbestos litigation or legislation.

My testimony is based on my own experience with resolving asbestos claims and on the collective views of other individuals who have been appointed to represent the interests of future claimants in asbestos-related bankruptcy proceedings. There are 13 such individuals, including myself, currently representing future claimants in the 18 pending bankruptcy cases in which courts have appointed futures representatives. Based on the number of asbestos bankruptcy cases and the overlap in exposure to many asbestos products that most claimants allege, the current group of futures representatives in all likelihood represents virtually all future claimants.

Congress previously has recognized the need for an independent representative to act on behalf of future claimants before the rights of future claimants can be effectively limited to recourse against a trust. The bankruptcy trust and "channeling injunction" structure codified at 11 U.S.C. § 524(g) in a 1994 amendment to the Bankruptcy Code was first implemented in 1982 in the Johns Manville bankruptcy proceedings. The mechanism provided pursuant to 11 U.S.C. § 524(g), which requires the participation of a futures representative, is currently the only means through which a company can fully resolve its asbestos liability. Since Manville, over 60 companies have sought bankruptcy protection because of liability from asbestos. Several other companies have negotiated pre-packaged bankruptcy plans with representatives of the current and future claimants and will file for reorganization and protection under section 524(g) in the coming months unless a better alternative - possibly such as legislative reform - presents itself. As reflected in the legislative history, the purpose of section 524(g) is to preserve the assets of companies faced with mass asbestos liability and protect the claims of future asbestos victims. Thus, the futures representatives have an appreciation for the economic issues that underlie the trust mechanism and the competing needs and rights of businesses and tort victims.

The futures representatives are also intimately familiar with the issues that arise in creating a limited fund to satisfy an as-yet-unknown number of asbestos claims. One of the futures representatives' primary responsibilities is to ensure that the trusts established in the bankruptcy cases for asbestos victims have adequate administrative and procedural safeguards to minimize the risk of future shortfalls in funding. Those safeguards are often developed through negotiations with representatives of holders of pending claims over such issues as the medical and exposure evidentiary criteria to be used by the trust and the size of the pro rata payment to be made by the trust to valid claims. Futures representatives 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. The primary mission of the futures representatives in chapter 11 bankruptcy proceedings is to ensure that the future claimants are treated fairly and similarly to current claimants - an essential due process ingredient that Congress recognized when it created section 524(g) as a mechanism for protecting the rights of unknown claimants from the competing and well-represented interests of both the current claimants and the defendant companies and their insurers.

Futures representatives bring a unique perspective to the subject of asbestos litigation and legislative reform. We are:

? focused on the plight of all unknown future claimants,

? 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 future claims.

Since the introduction of Senate Bill 1125, the futures representatives have devoted considerable time studying the bill. This past Sunday, we gathered to share our views and concerns, and my testimony today in large part is the product of those discussions. We also have attached an appendix reflecting additional concerns and suggestions from the futures representatives.

DISCUSSION

The futures representatives support a national legislative resolution to the asbestos litigation crisis that provides an efficient, low-cost and effective national fund to fairly compensate present and future asbestos victims. Indeed, we are supportive of a national resolution even though such a resolution likely will eliminate the need for futures representatives. Our support is reserved, however, only for legislation that produces a result for future asbestos victims as good as or better than what the future asbestos victims will obtain absent legislation.

This is critical. Any legislation that replaces the current system must protect future asbestos victims from the risks of error and uncertainty associated with the limited national Fund contemplated by Senate Bill 1125. Such protection is all the more essential since there will be no one with the statutory authority to protect the interests of the future claimants. If a single national Fund is to be the sole source of compensation for future claimants, it must have access to sufficient resources to pay all future claims and be designed to operate in a way that will ensure that future 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 for payment.

Thus, the futures representatives' concerns mainly fall into three categories: (1) whether the Fund will have the resources to timely pay future claims, (2) whether the administrative procedures established under the Act are unduly burdensome and whether such procedures will result in a backlog of claims with long delays in payment, and (3) whether the Act's compensation criteria are fair and consistent with those currently applied by the tort system and by the established asbestos trusts.

Unfortunately, several key characteristics of the Act in its present form fall short of meeting these concerns and must be addressed if we are not to disenfranchise future claimants.

I. FUNDING

From our collective perspective, our greatest concern about the Act is that it does not provide any assurance that all claims that are eligible for compensation will get paid. In enacting section 524(g), Congress imposed a requirement that every asbestos trust provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future claims in substantially the same manner. Every trust created since 1994, as well as the trusts created in the Johns Manville case and its progeny, assures future asbestos claimants that funds will be available to pay their claims. Such assurances protect the future claimants from the risk of error in predicting the number and magnitude of all the claims that will ultimately be presented for payment to the trust. Senate Bill 1125 should provide future claimants with similar assurances and protections against underfunding.

The Act faces two underfunding risks. The first risk arises from the absence of any assurance that the defendant and insurer participants will in fact contribute $45 billion each. The second risk arises from the absence of any assurance that additional funds will be available if the actual claims exceed the forecasts of claims. Without protection against underfunding, the Act will shift all of the risks of inadequate funding onto the shoulders of asbestos claimants. This risk is most profound for the future claimants because they will be last in line for payment. Moreover, if the amount of funding from industry and the insurers proves insufficient to pay future asbestos claims, the Act provides no mechanism for the Administrator to obtain additional funding. Additionally, the Act provides no tools to the Administrator to manage the use of the Fund in a way that ensures that all asbestos victims will receive some

payment, even if not full payment. The only option the Act gives the Administrator for managing a funding shortfall is to delay payment to claimants.

My concern about the Act's ability to fairly address future claims is heightened by the fact that the Act proposes to dismantle the existing trusts created under the Bankruptcy Code. Doing so would reverse Congress' decision in 1994 when it created section 524(g). Every future asbestos victim with a claim against an existing section 524(g) trust is assured that he or she will receive compensation in substantially the same manner as present asbestos victims. Not so under the Act. The Act takes the money now reserved for future claimants and uses it to create the Fund without any assurance that money will remain available to pay future claimants.

The Act also ignores the risk that the projected number of future asbestos claims filings upon which the Fund's contribution requirements are based may turn out to be inaccurate. In our experience, in every instance where companies or trusts have attempted to project future asbestos claims they have always seriously underestimated. The actuaries with whom the futures representatives have consulted tell us we have no reason to expect that the forecasts upon which the funding requirements of the Act are based will be any more accurate than prior estimates. Indeed, the Act changes many of the assumptions upon which prior forecasts have been based and the effect of those changes is untested. If the forecasts prove too low, the future claimants will be the losers.

I am also skeptical about the proposition that up to an additional $14 billion may be collected from what is defined in the Act as "additional contributing participants." We believe it unlikely that the Administrator will have the ability to identify additional contributing participants once the Act eliminates the opportunity for claimants to pursue additional defendants in the tort system.

Potential changes to the Act that may provide some assurance that the Fund will be able to timely pay all claims, including future claims, include:

? Authorizing the Administrator to impose contingent calls on insurer and defendant participants after the Fund has had actual experience with handling and paying claims to ensure that all eligible claims receive compensation at the proposed levels;

? Adding a Federal guarantee that all eligible claims will be paid at the scheduled values and that the holders of such claims will not be required to endure unreasonable delay before receiving payment from the Fund;

? Imposing joint and several liability on the defendants and the insurers to the extent necessary to ensure that the proposed funding levels will be attained. Joint and several liability in the tort system provides some assurance that plaintiffs will recover in full. The same purpose would be served if joint and several liability were imposed by the Act;

? Limiting the applicability of the Act's bar on the further pursuit of asbestos claims in the tort system to protect only those companies that are contributors to the Fund. This would provide market incentives for the so-called additional contributing participants to voluntarily contribute to the Fund. It would also make the tort system a useful tool to assist the Administrator in identifying additional contributing participants;

? Authorizing the Administrator to extend past 27 years the contribution obligations of defendants and insurers; and

? Authorizing the Administrator to require additional contributions from reinsurers.

II. CLAIM RESOLUTION PROCEDURES

In addition to the risks inherent in the Act's funding provision, the futures representatives are also concerned that the Act's claims resolution procedures may further reduce the likelihood that future claimants will be treated in a manner similar to those who will be first in line to recover under the Act. The Act creates a claims handling bureaucracy that likely will be significantly more inefficient and cumbersome than we have seen in any of the trusts created to date, and that is likely to create delay.

The claims administration and processing methodologies described in the Act are, at once, unnecessarily expensive, very time consuming, likely to result in inconsistent awards by the large number of decision makers, and very unlikely to attract experienced and otherwise qualified claims personnel. As to the expense and likelihood of delay, we estimate that as many as 500 magistrates - perhaps slightly fewer - will be necessary to examine, in the detail described in the Act, the claims submitted. Wholly apart from the lack of horizontal justice that is likely to emerge, that is, inconsistent rulings by this many decision makers, the "fly specking" of claims that appears to be contemplated will lead to innumerable delays and an endless stream of appeals - further delaying the process and increasing the expense. In addition, we believe that the claims review performed by the Judges of the Asbestos Court is essentially duplicative of the same task performed by the magistrates.

Over fifteen years of claims administration experience has taught that the cumbersome claims resolution system described in the legislation is unnecessary to ensure the fair resolution of asbestos claims. Worse, there appear to be at least implicit instructions in the legislation to resolve all claim submission doubts against the claimant regardless of the evidence submitted in support of the claim.

Finally, with a jurisdictional imperative requiring the judges of the Asbestos Court to live within 50 miles of Washington, D.C., coupled with the restrictions on salary based on federal civil service compensation, we are unclear as to where the hiring authority will find magistrates and other personnel who are experienced in asbestos medicine,

exposure theory, and the other knowledge and skills that must be employed in order to resolve fairly personal injury asbestos claims. One is forced to speculate that absent the opportunity to hire from a larger experienced personnel cadre than is likely to be available, it will take many, many months of recruitment and training, not to mention systems testing, before the first claim can be considered.

Potential improvements to the administrative provisions of the Act include:

? Give consideration to placing claims handling in the private sector. The private sector, because of at least fifteen years of asbestos claims handling experience, is better equipped to undertake this important responsibility, and nobody should dispute the efficacy of having the private sector pay for claims processing.

? Having claims review in this no-fault, single payer system consist principally of documenting that a claim file is complete, that the enumerated exposure criteria have been met, that the medical evidence supports the diagnosis of an asbestos-related disease pursuant to the disease levels, and that the medical documentation is consistent with medical standards. Based on that review, compensation, if any, should be determined at the appropriate level. Appeals, pursuant to the administrative review standards already described in the Act, may then be taken to the Asbestos Court.

? While section 101 of the Act empowers the Chief Judge to "appoint or contract for the services of such personnel as may be necessary and appropriate to carry out responsibilities of the Court of Asbestos Claims," and while section 114 of the Act authorizes the Asbestos Court to "contract for the services of qualified individuals to assist magistrates by conducting eligibility reviews of asbestos claims," it is not clear to what extent the Act includes the authority to contract out claims administration services in the event that private sector administration, as described above, is rejected. Such authority should be broadly and explicitly granted in the Act.

III. COMPENSATION CRITERIA

The claim values in the Act are significantly below the amounts available to claimants in the tort system and from the existing asbestos trusts. Moreover, thousands of persons exposed to asbestos who could recover compensation from the current asbestos trusts or in the tort system will be unable to recover anything under the proposed Act. Both of these defects must be addressed to prevent serious unfairness to future claimants.

While there is not a consensus among the futures representatives regarding which types or levels of asbestos diseases that should be eligible for compensation or the appropriate claim values for each level of disease, the reduced values for the diseases compensable under the Act as compared to what claimants would receive in the tort system is particularly troubling to all the futures representatives when coupled with the Act's reduction in awards on account of payments from collateral sources. The Act proposes to reduce awards of compensation from the Fund by the amount a claimant receives not only from defendants, insurers of defendants and compensation trusts, but also from health insurance, Medicare, Medicaid, and death benefit programs (but not life insurance).

The futures representatives share the view that the offset of collateral compensation from the awards to be paid under the Act is unfair and inequitable. Claimants with the more debilitating of the asbestos diseases, cancer and Mesothelioma, may very well receive amounts from Medicare, Medicaid and health insurance in connection with their medical treatments that could easily exceed the levels of awards available for such diseases under the Act. In those instances, claimants with the most serious of injuries would not be entitled to receive any compensation from the Fund.

Even if the collateral source offset is eliminated, the currently proposed levels of compensation appear to be significantly less than the value placed on such claims by the tort system, less than the combined value that a claimant could expect to receive from the asbestos trusts and the companies and insurers not in trusts, and less than the amounts that Congress has decided that victims with comparable non-asbestos-related injuries should receive from other non-asbestos trusts, thus rendering the amounts inadequate.

Without venturing into the public policy issues of which injuries are worthy of compensation and precisely how much those injuries are worth, there are several other issues in the claiming criteria that the futures representatives would like to bring to the Committee's attention.

? The Act should include colo-rectal cancer among the other cancers scheduled at Disease Level 5. In our experience, colo-rectal cancer is commonly compensable in the tort system and by the existing bankruptcy trusts as an asbestos-related disease;

? The limitation on compensation to only those claimants who can demonstrate asbestos exposure within the United States or its territories unfairly excludes U.S. citizens exposed to asbestos while working for U.S. companies overseas or while on U.S.-flagged ships;

? The Act's scheduled disease values should be indexed to inflation.

? The limitation on compensation to only those claimants who can demonstrate asbestos exposure prior to 1982 unfairly excludes many asbestos victims. In a no-fault system, there is no reason to adopt a cut off date.

CONCLUSION

In conclusion, I want to re-emphasize the view of the futures representatives that a national legislative resolution to the asbestos litigation crisis is in the national interest and can be a benefit to all concerned - current and future victims, companies, insurers, and the community at large. The futures representatives applaud this legislative effort and would like to assist the Committee in any way that we 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.

APPENDIX TO
TESTIMONY OF PROFESSOR ERIC D. GREEN TO
THE SENATE COMMITTEE ON THE JUDICIARY ON
"SOLVING THE ASBESTOS LITIGATION CRISIS: S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003" Scheduled For Wednesday, June 4, 2003, at 10:00 a.m.
Section 101 - Establishment of Asbestos Court
The Act creates the United States Court of Asbestos Claims. Five judges appointed by the President under Article 1 of the Constitution are to preside over the Court for fifteen-year staggered terms. The Court is to sit in the District of Columbia.
The creation and use of the Asbestos Court to oversee and participate in the administrative function of reviewing and allowing claims is likely to create a significant bottleneck in claims administration, as well as the potential for delay in administering the Fund while judges are selected and approved. If a public agency structure is to be used to administer claims under the Act, experience suggests that an efficient process would be to allow an agency to handle the administrative function of claims review and allowance and allow the courts, perhaps a specialized court of asbestos claims, to handle disputes.
Section 114 - Eligibility Determinations and Claim Award
Section 114 establishes an aggressive timetable for claim review and determination, as follows: Within 20 days of filing with the Asbestos Court, the Court refers the claim to a magistrate. The magistrate then conducts an initial review to determine what additional information, if any, may be required from the claimant. Within 60 days of the magistrate's receipt of all required information, the magistrate is to make an eligibility determination and transmit a recommendation of compensation to the Asbestos Court. Within 30 days after receipt of a recommendation, a judge of the Asbestos Court is to make a final decision on compensation. If a judge of the Asbestos Court determines that a claim is entitled to compensation, the Administrator is notified to award the claimant compensation from the Fund in the amount of the judge's decision.
The timetable imposed by Section 114 appears to be quite unrealistic, especially given that the Fund likely will receive 600,000 to 700,000 claims upon its inception. It is likely that the proposed timetable, particularly during the processing of the backlog of pending claims, will impose such a burden on the Asbestos Court that processing claims will become unduly expensive to the detriment of future claimants.
Section 125 - Exposure Criteria Requirements
This section authorizes, but does not require, the Asbestos Court to collect information about specific industries and occupations within those industries, among other things, to allow it to prepare lists of sites and occupations that would allow claimant to qualify for payment based on those known sites and occupations. The passage of time will render this an issue of particular importance for future claimants because memories will fade and records will be lost. From the point of view of future claimants it will be desirable to make mandatory the collection of data and the creation of site and job lists for which there is a rebuttable presumption of significant occupational exposure.
Section 132 - Medical Monitoring
A claimant may receive a reimbursement every three years for medical monitoring costs not covered by health insurance (including x-ray tests and pulmonary function tests).
Reading Section 132 in conjunction with the collateral source rule in Section 134 suggests that the collateral source rule may apply to medical monitoring payments. The ambiguity should be clarified by eliminating the application of the collateral source rule.
Section 203 - Sub-Tier Assessments
The Act creates Sub-Tiers for each of the Tiers. In Tier 1, the Tier comprising debtors in bankruptcy, Sub-Tier 1 comprises the majority of all of the pending bankruptcy cases and requires the debtors to pay a percentage of their gross revenues each year through year 27 following enactment of the statute. The percentage of gross revenue begins for years 1 through 5 at 1.5005% and declines over the life of the payment obligation to 0.1794% in year 27. Sub-Tiers 2 and 3 of Tier 1 address debtors with no material continuing business operations.
Defendant contributions to section 524(g) trusts, excluding contributions by their insurers, by and large would exceed by a substantial amount the payments required under the Act. Two examples follow and others are available:
Armstrong (Tier 1): Armstrong's gross revenue for 2002 was approximately $3.172 billion. Under the Act, the net

present value of Armstrong's required contribution for years 1 - 27 is $600 million ($914 million nominal). The estimated value of Armstrong's contribution to the § 524(g) trust under the pending plan is $1.8 billion, exclusive of insurance.

Babcock & Wilcox (Tier 1): Babcock & Wilcox's gross revenue for 2002 was approximately $1.497 billion. Under the Act, the net present value of Babcock & Wilcox's required contribution for years 1 - 27 is $283 million ($432 million nominal). The estimated value of the equity that Babcock & Wilcox will contribute to the § 524(g) trust under the pending plan is approximately $400 - 500 million.

Section 204 - Assessment Administration

Under Section 204(g), an affiliate group that includes more than one defendant participant may irrevocably elect to report on a consolidated basis and be treated as a single participating defendant. Several asbestos defendant corporations are members of larger conglomerates. To date, we have seen no data that evaluates the impact of elections by conglomerates under Section 204(g) to report on a consolidated basis. A preliminary analysis suggests, however, that the application of Section 204(g) may significantly impact the ability of the Fund to raise $45 billion from defendant participants. Eliminating consolidated reporting would help assure that the $45 billion goal will be achieved.

Additionally, when computing an entity's prior asbestos expenditures under Section 204, payments by an indemnitor are counted as part of the indemnitor's prior asbestos expenditures, rather than the indemnitee's prior asbestos expenditures. A number of examples exist of asbestos manufacturing defendant companies passing from owner to owner through a series of sales and acquisitions. In many of these cases indemnities are granted by either the purchaser or the seller, and in many cases the indemnitee and indemnitor relationships among the past and present owners of the asbestos manufacturing defendant create a complex interrelationship of obligations. As it is drafted, the Act does not appear to account for these complexities and may create an opportunity for considerable delay and debate in determining defendant participants' shares. Some attention needs to be given to modeling how the indemnitor rules will apply in several specific examples.

Section 212 - Duties of Asbestos Insurers Commission

The commission is charged with responsibility for allocating among the participating insurers the $45 billion contribution to be made by insurers. Any insurer that has paid or has been assessed at least $1 million in defense and indemnity costs is a mandatory participant.

Unlike the contribution levels required of defendants by Tiers and Sub-Tiers, the Act does not delineate the contribution levels for individual insurers. Instead, the Act contemplates that the Asbestos Insurers Commission will conduct hearings and make a final determination of the obligation of each insurer participant. The determination of the Asbestos Insurers Commission is subject to judicial review pursuant to Title III of the Act.

The Act's deferral of the determination regarding insurer participation to a commission and judicial review process likely will create opportunities for delay in the commencement of contributions by insurer participants. Imposing a tier system similar to that imposed upon defendant participants as part of the Act likely would significantly reduce the risk of delay.

Additionally, under the Act, the contribution required of all insurer participants is capped at $45 billion, while defendant participant contributions do not have a per se cap, rather a goal of $45 billion. To help insure that the Fund will have sufficient funds, and to create parity with the defendant participants, the Act should provide that the Asbestos Insurers Commission is charged with raising at least $45 billion.