Testimony of

Craig Berrington

April 26, 2005

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING ON "THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT"
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Craig A. Berrington, Senior Vice President and General Counsel,
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Chairman Specter, Ranking Member Leahy, and members of the Committee, I appear here today on behalf of the American Insurance Association and the Reinsurance Association of America. Our members write insurance and reinsurance in every state and around the world. As major stakeholders in the asbestos litigation reform process, we very much appreciate the opportunity to testify about S. 852, the Fairness in Asbestos Injury Resolution Act of 2005 (FAIR Act).

Mr. Chairman, we would like to commend your leadership on, and commitment to, asbestos litigation reform. Senator Leahy, we also appreciate your long-standing commitment to resolving this crisis. As you know, insurers remain deeply committed to seeing real reform enacted - reform that is fair both to victims of asbestos-induced disease and to those entities that are compensating claimants.

Done correctly, a national trust fund for asbestos victims could provide the most comprehensive answer to our nation's asbestos litigation nightmare. A well-constructed trust fund could live up to the best aspirations of such an undertaking. It would provide not only an efficient and exclusive remedy for victims, but equity, certainty and finality for all stakeholders. While S. 852 as introduced does contain important improvements over prior proposals, we believe it still falls significantly short of these laudable, core goals for reform.

Let me first speak to the improvements in the current version of the FAIR Act.

The major enhancement is removal of the so-called "Level VII" claims made by smokers and ex-smokers who have never developed any underlying asbestos disease. As we noted in our January 11, 2005, testimony before the committee, allowing such claims to come to the trust fund would have grievously misdirected precious asbestos compensation dollars in order to pay lung cancer victims generally, rather than compensating only lung cancers caused by asbestos exposure. This was one of the features that caused our concern that the earlier version of the trust fund was being "designed to fail."

Another improvement in S. 852 is the addition of language making it clear that individual claimants at all levels only are eligible for trust fund compensation if asbestos has been a substantial contributing factor to their illness or impairment. This will further the critical need for the bill to appropriately link asbestos exposure to compensable illness under the Act. In this way, it also will help to direct the fund's assets to individuals who actually have an asbestos-induced disease.

Unfortunately, while improved in these ways, S. 852 still retains many provisions that are dangerous for insurers, and falls well short of our threshold for supporting trust fund legislation - a threshold which we have consistently articulated over the past couple of years.

Specifically, a national trust fund must provide an exclusive remedy for resolution of all asbestos claims. Otherwise, there is no real certainty or finality for insurers or other funding participants; in fact, we could find ourselves paying both substantial sums into the fund and in the tort system for claims permitted to "leak" outside the fund. In S. 852, leakage would occur before the fund is operational (during the start-up period), while the fund is up and running, and in the event the fund sunsets. This could well present insurers with an even more untenable, expensive situation than that posed by the current, highly dysfunctional litigation system.

We are particularly concerned about leakage during the fund's start-up, and the potential it provides for gamesmanship by the trial bar and others as they seek to keep the fund from obtaining "operational certification," while at the same time requiring insurers and defendant corporations to pay into it. This will give us the worst of all possible worlds: simultaneous trust fund financing obligations and litigation system liabilities.

This issue did not exist in the trust fund as laid out in S. 2290, introduced by Senator Frist last year. However, S. 852 permits certain cases in trial or on appeal on the date of enactment to continue moving forward in the tort system. We believe the policy choice in S. 2290, which would have applied the exclusive remedy provisions to any litigation action outstanding upon date of enactment, was the much better approach. It would have established an understandable bright-line test, making it clear that the moment the President signed the new law, the old litigation system ended and the new trust fund system began, cutting off the opportunity for litigation game playing.

These same types of concerns arise with respect to exigent claims, i.e., those claims from individuals who have mesothelioma or whose other asbestos illness is at such a critical stage that they likely have less than a year to live. Our hearts go out to these people, and we believe the trust fund - not continuing the litigation system - would work best for these cases. However, S. 852 does not guarantee establishment of the trust fund as the immediate sole venue for handling exigent cases. Instead, it keeps current exigent claims going in the litigation system after the bill is enacted and even allows new exigent claims to be filed in court.

The bill creates a new "offer of judgment" provision for exigent claims. While obviously created in good faith to speed review and payment for exigent claims, the provision not only provides opportunity for new litigation, but with its 200-day process is likely to be substantially slower than the Labor Department's processing of these types of claims under the bill's expedited administrative procedures provision.

Beyond this, the bill provides for the reemergence of litigation for all claims if the Labor Department does not grant "operational certification" for the fund, or is tied up in court fighting off litigation brought by those who never want to see the trust fund supplant the litigation system.

With all of these specific concerns in mind, I would like to say a few more words about the start-up issue in general. Simply put, if the new law does not have a fast and effective start-up, it will fail - and with that failure will come recriminations all around. So this is no small matter. In our judgment, to make the start-up happen, all of the bill's incentives must be aimed toward obtaining that fast, efficient implementation.

S. 2290 met this test by having a legislative "red light-green light" approach, with the President's signature resulting in an immediate red light for the old litigation system, and an equally immediate green light for the new trust fund. Embedded in this approach was language giving the Labor Secretary all the authority she would need to enable the program to review and decide claims quickly, including the use of outside contractors and a priority for exigent claims. Moreover, S. 2290's "red light-green light" approach made it crystal clear to everyone (including the trial bar) that once the bill was enacted, it was time to quit fighting and get to work implementing the Act.

S. 852 adopts a very different approach, therefore jeopardizing the ability of the new law to be quickly and efficiently implemented. Indeed, S. 852 actually provides incentives to those who believe that the loss of the legislative battle on this bill need only be a skirmish in the longer-term war over keeping the litigation system going. The result would be stress on this new law of enormous proportions, which should be avoided at all costs.

Another problem that occurs during the fund's lifetime is caused by the bill's prohibition on workers' compensation subrogation. In earlier drafts of the bill, compromise language on this topic had been included; we urge that this language be reinstated. We have been surprised at the opposition to the subrogation concept, because subrogation

in this bill merely would mirror what occurs in every state under state workers' compensation systems - to prevent double recoveries.

The bill's sunset provision also is troubling. As we have previously testified, we do not think there should be any opportunity for asbestos litigation to ever return to the same state court system that is closely identified with the current crisis. Therefore, in the event that the trust fund should sunset, we believe that proper jurisdiction would be federal courts, not state courts. Yet S. 852 would allow individuals to bring tort action in either federal or state court, although subject to certain venue limitations.

Turning to another critical issue for insurers, I would like to state clearly for the record that the $46.025 billion (nominal) in trust fund financing that has been assigned to our industry will present great financial burdens for the relatively few individual insurers and reinsurers required to participate. This burden is not only exacerbated by the leakage issues noted earlier, but by the requirement that there be an orphan share obligation for annual funding shortfalls. This is very problematic, because it likely will result in the U.S. insurance and reinsurance industry assuming funding obligations for our nonpaying foreign competitors.

My comments today do not reflect an exhaustive list of our concerns with S. 852, but are illustrative of the many problems posed by this new bill in our view. As you know, these and other substantial concerns leave us unable to support S. 852 as currently constructed.

Again, we deeply appreciate the time and effort you have invested in finding a solution to the asbestos litigation crisis. We remain committed to staying at the table and continuing our joint work toward a true, much-needed resolution to our nation's asbestos litigation crisis.

Thank you very much for the opportunity to present our industry's views here today.