Testimony of

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TESTIMONY OF PROFESSOR ERIC D. GREEN
BEFORE THE SENATE COMMITTEE ON THE
JUDICIARY ON S. 852, THE FAIRNESS IN
ASBESTOS INJURY RESOLUTION ACT OF 2005

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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 today to talk about the Fairness in Asbestos Injury Resolution Act of 2005.

My remarks will address the impact of the Bill primarily on the rights of asbestos victims but also highlight some of the dangers that the Bill as currently drafted poses for companies, insurers, and, possibly, 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), 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. 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.

At present, the rights of 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.

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 enormous 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

The enactment of federal legislation to manage the tide of asbestos personal injury claims is a commendable goal, so long as it can be realistically carried out with the knowing support of all the essential participants: companies, insurers, claimants, regulatory and administrative bodies, and other affected parties. A national plan without that support cannot succeed, and if pursued, it will place efforts to resolve asbestos claims on a worse footing than they are now. 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. My backing for any legislation is therefore tempered to the extent that the legislation does not 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 Senate Bill 852. 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, I have two main areas of concern about Senate Bill 852: First, whether the Fund will have the resources to timely pay claims; and second, whether claimants will be fairly and sufficiently provided for if the Fund becomes unable to meet its obligations.

Unfortunately, the Bill in its present form falls short of meeting these concerns. The tough issues avoided in the current Bill must be addressed if we are not to replace the legal rights and viable compensation trusts that victims already have with an underfunded system that at best, will be gamed and litigated to death, and, at worst, will lead to widespread chaos, failure, delays, and unanticipated demands for a government bailout or massive infusion of additional funds from already otherwise compliant insurers and companies.

I. FUNDING

My greatest concern about the Bill is its lack of certainty and clarity regarding whether, and when, the necessary contributions will be made by industry and insurers. In its current form, the Bill sets forth total contribution amounts but fails to address the resistance that will stand in the way of ever collecting those amounts. 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. What makes anyone think they will now accept their allocated responsibilities and pay up their shares on time and without a fuss? Indeed, only those firms that know they are getting the deal of the century will do so. In the case of one such firm, for example, it is estimated that the amount of money the company has agreed to pay into the 524(g) trust versus what it will pay into the national Fund will drop from $750 million to a meager $2.5 million. Only companies in that position will cooperate; the rest will resist, as they have done for years. The litigation won't diminish; it will only shift in focus.

The Bill places industrial firms in tiers and subtiers based on whether or not they are in bankruptcy, how much they have spent responding to asbestos liability, and what their revenues were in 2002. For each subtier, the annual contribution amount is stated. But the actual receipt of funds 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.

The Bill's treatment of insurers offers further opportunities to create delay. The Bill states only the total contributions expected from insurers, with no criteria for tiers or subtiers. How the total contributions will be allocated among the insurers will not even be known until after a full-blown rulemaking process, with hearings and public comment and an opportunity for judicial review. Then, 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 set up and running, funded with hard-won assets and approved by federal courts, receiving, processing and paying claims, are already making plans to mount serious 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.

Frankly, it is just plain irresponsible to essentially "punt" on the issue of the contributions expected from specific insurance companies and defendant firms. I fear that this approach is designed simply to sweep under the rug until after passage the sharp reality that the insurance industry and defendant firms must face and accept if this scheme is to have any hope of actually succeeding.

The delays that are all but built into the Bill are especially troublesome because the Fund will face a tremendous backlog of claims and a correspondingly burdensome payment obligation in its early years. Judge Fullam estimated in the Owens Corning bankruptcy case that there are $7 billion in valid claims against that defendant alone. Given the number of estimated pending claims against all companies, by its fourth year the Fund would need to borrow $50 billion to meet its liabilities -- an amount that is approximately $10 billion more than the maximum permitted under the Bill. Such a loan would cause all future contributions -- assuming they are timely made -- to go to debt service. The Fund's liabilities will outstrip its revenues from the beginning.

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

Absent a federal guarantee, the Bill's uncertain funding and weak enforcement provisions shift onto the backs of the sick and needy asbestos victims, especially those in the future, the risk of delay and failure. While the Bill does provide for a sunset if the Administrator concludes that the funding under the Bill is insufficient, the sunset remedy is flawed in many ways and fails entirely to address the burden on asbestos victims created by delay and uncertainty.

One solution, and perhaps the only solution under this version of the Bill, would be for the federal government to provide the money to bridge the payment gap caused by delay and uncertainty. 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, is probably unworkable and will only exacerbate the uncertainty companies and insurers already face on the payment side.

II. CHAOS IN THE EVENT OF SUNSET

Given the problems I have just outlined, there is a real likelihood that the Fund will find itself unable to meet its obligations and will therefore sunset according to the provisions in the current 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. This attempt to revive the status quo that existed prior to the Bill's enactment is a recipe for disaster.

In its current form, 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.

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 provides no practical transition plan to enable claimants to go back to the tort system or to the trusts.

Moreover, the operation of the Bill's sunset provisions is vague at best. The Administrator is to report annually on the financial condition of the national Fund. If the Administrator determines that the Fund will not be able to pay all of the then-resolved claims if it resolves any additional claims, the Bill sunsets, and the national claims-resolution system terminates. The Bill does not require, however, that the Administrator determine that the claims will be paid at all

timely. Given the backlog of claims and demand for payment at the outset of the life of the national Fund, the Administrator may fall many years behind in making payments. Nevertheless, based on his or her forecasts, the Administrator may predict that all claims will be paid someday and therefore opt to keep the Fund in operation, postponing the day of reckoning indefinitely while the sick and dying are left without compensation.

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.

In conclusion, while I support the motives behind this legislation and its ostensible objectives, I cannot support the overly optimistic creation of a scheme that does not spell out clearly the specific sources and amounts of funding and guaranty collection. My experience tells me that such a program 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 in the most critical area -- specific and 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.