

Testimony of

# Hershel W. Gober

April 26, 2005

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Hershel W. Gober  
On Behalf of The Military Order of the Purple Heart  
Before the  
United States Senate  
Committee on the Judiciary

"The Fairness in Asbestos Injury Resolution Act"(S. 852)

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The Honorable Chairman Specter, Ranking Member Leahy, and other distinguished Members of the Committee, my name is Hershel W. Gober. As its National Legislative Director, I am appearing today on behalf of the Military Order of the Purple Heart. The Military Order of the Purple Heart is unique among all veterans service organizations in that our membership is comprised entirely of combat veterans who suffered wounds or injuries in service to our country for which they were awarded the Purple Heart Medal. I am honored to have this opportunity to testify on behalf of the Military Order of the Purple Heart in support of S. 852, the Fairness in Asbestos Injury Resolution Act or "FAIR Act."

Tragically, the asbestos litigation crisis has hit veterans especially hard. Men and women of our nation's armed forces were unknowingly exposed to asbestos due to its prevalent use by the military during and after World War II, particularly in insulation products built into ships for the U.S. Navy and bulkheads, pipes, ceilings, floors and machinery, which were all coated with asbestos. Moreover, those who worked in shipyards and dry docks, building and repairing Navy vessels, were also heavily exposed to asbestos. As late as 1979, the U.S. government continued to claim that asbestos use remained necessary "for purposes of national defense."

Due to the long latency period from the time of asbestos exposure to the first signs of symptoms of asbestos-related disease, veterans who served before the 1980's are still being diagnosed with life threatening and terminal illnesses. Individuals with military service make up a significant number of the total asbestos victims in the United States. In November 2003, the Wall Street Journal reported that data has shown that claims from individuals exposed in military and shipyard construction accounted for 26% of all mesothelioma cases, 16% of all other lung-cancer cases, and 13% of all disabling lungdisease cases.

The avenues open to veterans to seek compensation through the tort system, however, are very limited. The Federal government, as the members of this committee know, has sovereign immunity, thereby restricting veterans' ability to recover from the

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government; and most of the companies that supplied asbestos to the Federal government have either disappeared or are bankrupt and, therefore, are only able to provide a fraction of the compensation that should be paid to asbestos victims, if anything at all. Even if there is a solvent defendant company for a veteran or his/her family to pursue, there remains the lengthy, costly, and uncertain ordeal of filing a civil lawsuit and going through discovery and trial, where the plaintiff bears a heavy burden of proof and often has the very difficult to impossible task of establishing which defendant's product caused their injuries.

Moreover, under the current system, far too much money is being diverted to claimants with no discernable illness or injury, victims too often receive widely divergent recoveries depending simply on where their lawsuit is filed or who their attorney is, and attorneys'

fees and other transaction costs are consuming far too much money that would otherwise be available to compensate those that are ill.

The U.S. Department of Veterans Affairs continues to receive claims for benefits from veterans for illnesses related to asbestos exposure while serving in the military; however, due to the difficulty of proof, less than one-third of the known VA asbestos claimants receive service connected compensation for their asbestos disease. Veterans and their families with asbestos-related diseases desperately need and certainly deserve relief as the current system is simply not taking care of their needs or treating them fairly.

The Military Order of the Purple Heart supports S. 852, the FAIR Act, because it believes it will provide an immediate and effective solution to the asbestos litigation problem for victims and will provide many needed benefits for veterans, including the following:

(1) Establishment of a Streamlined, No-fault, Administrative System (Section 101(a)(1)-(2); Section 114(b),(c),(d)(1)(a) & (d)(2); Section 102) The FAIR Act will establish a new federal Office of Asbestos Disease Compensation (Office) for the processing and payment of asbestos claims. 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. 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.

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

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(3) Reduction of Evidentiary Burdens (Section 121(a)(16) & (c)) Unlike the tort system, there will be no requirement under the FAIR Act to prove exposure to a particular defendant's asbestos product. And, unlike Veterans' Benefits, there will be no "servicerelated" requirement, easing the burden of proof on those individuals who were exposed while in the military. The FAIR Act will also include heavier weighting for pre-1976 and World War II shipyard exposures and provide special provisions for take-home exposures. 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. It is well known and documented that certain individuals in some occupations within the military had high exposures to asbestos. Current asbestos bankruptcy trusts, which have used exposure presumptions for military service and occupations, will be looked to as a model by the Office's Administrator. These presumptions should help ease the burden of proof for veterans.

(4) Application to Exposures on U.S. Ships and Overseas (Section 121(c)(1)(B)) The FAIR Act 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.

(5) Allowance of Recoveries by Dependents (Section 113(a)) Under the FAIR Act, claimants will include family members of the victim, allowing spouses or children to recover in place of the 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.

(6) Providing Medical Monitoring (Section 132), Education and Medical Screening Programs (Section 225) The FAIR Act will provide medical monitoring, including reimbursement of an individual's costs for physical examinations in addition to x-rays and pulmonary function tests. Such examinations and tests could be conducted every three years. In addition, the FAIR 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.

(7) Establishment of a Claimant and Legal Assistance Program (Section 104)

The FAIR Act 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.

(8) Providing \$1,000,000 Grants to Mesothelioma Research and Treatment Centers (Section 222(c)) As noted above, an estimated 26% of mesothelioma cases involve individuals exposed to asbestos at military and shipyard constructions sites. Recognizing the need for more research on mesothelioma, the FAIR Act will provide \$1

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million in grants for each of fiscal years 2005 through 2009 for each of up to 10 mesothelioma disease research and treatment centers. These centers will be closely associated with 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."

As the Committee Members know, in addition to the Military Order of the Purple Heart, there are many other veterans service organizations that support the trust fund solution embodied in the FAIR Act, including the Veterans of Foreign Wars of the United States, the Non-Commissioned Officers Association, the Jewish War Veterans, the National Association for Black Veterans, the Paralyzed Veterans of America, the National Association for Uniformed Services, the Veterans of the Vietnam War, the Pearl Harbor Survivors Association, the Women in Military Service for America, the Marine Corp League Fleet Reserve Association, the Military Officers Association of America, the Blinded Veterans Association, the American Ex-Prisoners of War, the Retired Enlisted Association, the Arkansas Veterans' Coalition, the Florida Veterans of Foreign Wars, the Louisiana Veterans of Foreign Wars, the Texas Veterans of Foreign Wars, the West Virginia Veterans of Foreign Wars, the West Virginia American Legion, and the National Association of State Directors of Veterans Affairs.

Again, thank you for providing me this opportunity to testify today on behalf of the Military Order of the Purple Heart and our nation's veterans in support of the FAIR Act.