Testimony of

Mr. Eric Green

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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,
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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.