

authority, so held by the courts, to conduct “warrantless” surveillance when it is reasonable for the surveillance for foreign intelligence purposes. This is a constitutional principle which has been established for centuries. Go back to the writings of our Founding Fathers, and from our first President, George Washington, to our current, President George Bush. Presidents have intercepted communications to determine the plans and intentions of our enemies.

A steady stream of Federal court cases has confirmed this Presidential authority, as Attorney General Gonzales pointed out on Monday before the Senate Judiciary Committee: In the face of overwhelming evidence for the President’s authority, opponents retort that the President must then be breaking the law by violating the 1978 Foreign Intelligence Surveillance Act, known as FISA. But—and this is important—Congress cannot extinguish the President’s constitutional authority by passing a law.

We in this body cannot take away the powers the Constitution gives the President. If the law is read in such a way as to encroach upon his constitutional authority, then I question whether that part of the FISA act would be constitutional.

This is not the first time a President has faced the issue of exercising his inherent constitutional powers for foreign intelligence surveillance in view of legislation that could be interpreted as infringing on that authority.

In 1940, President Roosevelt wrote to Attorney General Robert Jackson that despite section 605 of the Communications Act of 1934, and in this instance despite a Supreme Court ruling upholding the prohibition on electronic surveillance, President Roosevelt said he believed he had the inherent constitutional authority to authorize the Attorney General to “secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the government of the United States, including suspected spies.”

So does the President have *carte blanche* with respect to foreign intelligence surveillance? The answer is clearly no. Under the fourth amendment to the Constitution, the surveillance has to be “reasonable,” and it does not require a warrant. In the context of a war against al-Qaida and those who would do great harm by attacks on innocent American civilians within our country and with a constitutional resolution authorizing the use of “all necessary and appropriate force” to prevent attacks, who is the best to determine what is and isn’t “reasonable”?

When surveying communications in real time, who is best to make that determination? A judge or a lawyer or an intelligence analyst who has spent his or her professional life observing, listening, studying, and tracking the ter-

rorist personalities which make up groups such as al-Qaida? To me the answer is obvious: the analyst.

Consider this: If someone listened to your voice on a telephone call, who would be the best person to assess it by the voice intonation and word usage, whether it is your voice on the other end or a lawyer or someone who knows you well? Of course, the answer is the person who knows you. And I submit that the Americans who know these terrorist personalities better than anyone else are the analysts who have spent endless days over the past 4 years studying them.

Again, do the analysts have *carte blanche* to eavesdrop on international communications coming into or out of the United States to known suspected terrorists? No. Their decisions are reviewed by supervisors, and the program is reviewed by the NSA inspector general, the NSA general counsel, the White House Counsel, and numerous lawyers at the Justice Department who are ready to blow the whistle if they see anybody stepping out of line. The Attorney General also reviews the program, and the President reauthorizes it every 45 days with the determination that al-Qaida continues to pose a significant threat.

Did the President keep the Congress in the dark? No, he didn’t. He briefed the Congress in a manner consistent with the practice of Presidents over the past century. He briefed leaders of both parties in the House and Senate and the two leaders on each Intelligence Committee, Democrats and Republicans.

These leaders were elected by their constituents to represent them in Congress and elected or appointed by their parties to serve in these incredibly important positions, so if any one of them ever questioned the legality of this program, they had the responsibility to bring the matter to the leadership, discuss it with the administration, and if necessary to cut off funding for the program through congressional authority.

The reason the President briefed the Congress was to afford them the opportunity to do exactly that. Did anyone do that? No. There was a carefully couched letter written that simply expressed concern. There was no followup, no action taken, and no mention of it at all during subsequent program briefings, according to public statements by those in attendance.

Some Members of Congress may feel slighted because they were not briefed on the program. I am on the Senate Intelligence Committee. Do I feel slighted? Absolutely not. To the contrary, I recognize that the President has to keep these very important programs top secret, which the President is doing to protect my family, my constituents, and myself. That is his responsibility.

The bottom line is that I believe congressional oversight is a vital aspect of ensuring the proper execution of matters involving national security, and I

believe there was adequate oversight. We are not talking about the U.S. Government listening to phone calls from me to you or from my constituents in Missouri to their relatives in or out of State. We are talking about our best intelligence officials having the ability to assess whether al-Qaida affiliates are communicating internationally where one end of the communication takes place inside the United States and the other end takes place outside the United States, maybe discussing another attack like 9/11 on America.

These are times to stand up in arms over our civil liberties. I will do so when I believe they are infringed upon. This is not one.

I thank my colleagues for their indulgence, and I yield the floor.

Mr. BENNETT. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005

The PRESIDING OFFICER (Mr. CHAFEE). Under the previous order, the Senate will resume consideration of S. 852, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 852) to create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure, and for other purposes.

Mr. FRIST. With the authority of the majority of the Judiciary Committee, I withdraw the committee amendments, and I send a substitute amendment to the desk.

The PRESIDING OFFICER. The committee amendments are withdrawn.

AMENDMENT NO. 2746

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Tennessee [Mr. FRIST], for Mr. SPECTER and Mr. LEAHY, proposes an amendment numbered 2746.

(The amendment is printed in today’s RECORD under “Text of Amendments.”)

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. DURBIN. I ask for the yeas and nays on the substitute amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. SPECTER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 2747 TO AMENDMENT NO. 2746

Mr. SPECTER. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Pennsylvania, [Mr. SPECTER] proposes an amendment numbered 2747 to amendment No. 2746.

Mr. SPECTER. I ask unanimous consent the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On the appropriate page, insert the following and number accordingly:

GUIDELINES.—In determining which defendant participants may receive inequity adjustments the administrator shall give preference in the following order:

(A) Defendant participants that have significant insurance coverage applicable to asbestos claims, such that on the date of enactment, 80 percent or more of their available primary insurance limits for asbestos claims remains available. (Note: I recognize that this may not be the most adequate indicator of insurance matching liabilities—however, it's a political reality that must be addressed).

(B) Defendant participants where, pursuant to the guidance set forth in section 404(a)(2)(E), 75% of its prior asbestos expenditures were caused by or arose from premise liability claims.

(C) Defendant participants who can demonstrate that their prior asbestos expenditures is inflated due to an unusually large, anomalous verdict and that such verdict has caused the defendant to be in a higher tier.

(D) Any other factor deemed reasonable by the administrator to have caused a serious inequity.

In determining whether a company has significant insurance coverage applicable to asbestos claims, such that on the date of enactment, 80% or more of their available primary insurance limits for asbestos claims remains available, the administrator shall inquire and duly consider:

(1) The defendant participant's expected future liability in the tort system and accordingly the adequacy of insurance available measured against future liability.

(2) Whether the insurance coverage is uncontested, or based on a final judgment or settlement.

Mr. SPECTER. Mr. President, there are a number of issues to be discussed, but the distinguished Senator from Utah has been awaiting recognition. I yield now to Senator BENNETT so he can make his comments. We managers will be here all day and can speak later and not tie up the Senate.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. I thank the Senator from Pennsylvania for his courtesy and pay tribute to him and the Judiciary Committee for their effort in dealing with this most vexatious problem.

When the asbestos problem burst into the American consciousness, everyone was concerned there would be a way to compensate those who are victims of this difficulty. Unfortunately, certain members of the trial bar developed what I would call a business plan that was based on two fundamental principles: No. 1, venue shopping; and No. 2, a deliberate pattern of overwhelming the legal system so the various cases could not be heard on their merits.

Those who adopted this business plan have been tremendously successful. They have driven 75 companies into bankruptcy. They have created enormous litigation all over the country. Unfortunately, the outcome in terms of the victims has not been what anyone would want, with the possible exception of those who were behind the creation of the business plan in the first place.

The net effect of what we have seen in the asbestos litigation is to take an American tragedy and turn it into an American disaster, with a relative pittance for the victims; an undeserved windfall for people who have no health problems; and an overwhelming bumper crop of cash for the trial lawyers who developed the plan in the first place.

There is a great uprising of demand that we do something about this. That demand is legitimate. The Congress should act. We do need a national solution, even though we have seen progress take place—not at the Federal level but at the State level. It is very interesting to watch what has been happening as various States have grappled with this challenge and done their best to deal with the two problems I have identified: the venue shopping and the strategy of overwhelming the system.

One breakthrough in this regard came from a Federal judge. Her name was Janis Jack. I am told she had something of a medical background. She was trained as a nurse. So when these cases came before her she instinctively realized there was something fundamentally wrong with the medical claims. Without going into the detail of what happened before Judge Jack, I quote the statements she made as she handed down her scathing decision:

These diagnoses were driven by neither health nor justice, they were manufactured for money. The court finds that filing and then persisting in the prosecution of silicosis claims, while recklessly disregarding the fact there is no reliable basis for believing that every plaintiff has silicosis, constitutes an unreasonable multiplication of the proceedings.

I pause here to say she is highlighting what I talked about before, that there was a conscious business plan to overwhelm the system. She calls it "an unreasonable multiplication of the proceedings."

Continuing the quote:

When factoring the obvious motivation, overwhelming the system to prevent examination of each individual claim, and to ex-

tract mass settlements, the behavior becomes vexatious, as well. Therefore, the court finds that the firm will be required to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.

I am not a lawyer, but I understand when a Federal judge uses the words "vexatious" it is probably not good for the people who are in her court listening to her. And she is requiring the law firm that brought the case to pay all of the costs of the case. That has sent a chill throughout the plaintiff's bar who thought they had a free ride with their business plan.

The other thing that has happened as various States have looked at this has been the setting up of inactive dockets, or deferral registries, two terms with which I was unfamiliar before I got into this. They make eminent good sense. All they do is say to those plaintiffs who, in fact, are not sick: We will let your claim stand, we will not dismiss it out of hand, but we will put it in an inactive docket or a deferral registry. In other words, your claim cannot be pursued until you get sick. Just because you have a doctor's certificate that says you might get sick does not mean you are entitled to damages.

Interestingly enough, the fallout from Judge Jack's ruling where she found that doctors had gone beyond medical practice in order to give these certifications that would allow people to come forward as if they were plaintiffs, means that some doctors are facing jail time and some lawyers are facing jail time as a result of the findings in Judge Jack's court.

The combination of a judge who finally says, You need to focus on whether people are ill, and State legislation that says, We will not allow the courts to be overwhelmed by the claims of those who are not ill, has begun to taper off the level of asbestos cases and has caused some people to say we have turned the corner; that the trust fund established in the bill before us is an idea whose time has gone; that it is not necessary to have a trust fund to deal with these issues. Others say: No, we have to have the trust fund. We have to have the bill before us.

One of the perplexing things to me, as I listened to people in the business community discuss this, has been to discuss how split the business community is, how there are so many companies that come to me passionate in their insistence this bill be passed, or they say there will be disaster going on uninterrupted into the unknown future.

Just as passionate are other companies who come to my office, sit down with me and say: This bill is the biggest disaster we have ever seen. You cannot allow it to happen. If this bill happens, we will go out of business.

That is not a minor gulf between the proponents and the opponents. I have tried to figure out why business men and women examining this as dispassionately as they can have come to

such diametrically opposite positions. I have found, for me, what is an explanation. I have prepared two charts that will demonstrate this. Both of these are based on assumptions. We must understand that this entire debate is based on assumptions. No one really knows.

There are those who say the \$140 billion called for in the trust fund will be more than enough to take care of all of the claims. There are those who say it is nowhere near enough.

There are those who say the claims will go down as a result of the trust fund, and there are those who say the claims will increase as a result of the trust fund. No matter how you slice it, every argument everybody is making, including the ones I will make, is based on an assumption that is not provable. But I have done the very best I can to come up with sources that are reliable.

So here is why I think the business community is split. It has to do with where you fall on the trust fund chart, what tier you are in, and basically how much money you have to pay.

Here is the first list that comes up, and this is compiled by a consulting firm to the bankruptcy court that looked at asbestos claims. I have summarized in this column of the chart, if there is no trust fund, the estimated liabilities of the companies listed. That means, Armstrong World Industries, according to the consulting firm, if there is no trust fund, will face a liability of roughly \$2 billion. Babcock & Wilcox will face a liability of roughly \$2 billion—and so on all the way down—U.S. Gypsum, \$4 billion. I will come back to U.S. Gypsum in a minute because it helps make my point. So this is the column that shows the liability of these 10 companies if the trust fund is not enacted.

Now, this is the column that shows what they will pay to the trust fund. In other words, their liability will go from this number to this number, if the trust fund is established. Here in this column is the difference. For these 10 companies, it is \$20 billion.

If I were the CEO of any one of those companies, I would be very strongly for the trust fund. Now, I reject the idea this is being driven by K Street and lobbyists. This is a very logical business decision on the part of the CEOs of these companies, and I do not think any of them had anything to do with this allocation. It is the way the trust fund was structured. As they read the details, they said: This makes good sense for us. Let's be for it.

But out of this chart comes a fundamental question that I have at the bottom of the chart. If there is a \$20 billion difference between their liabilities and their contributions, who will make up the difference?

So now let's go to the second chart.

On this chart is a list of companies with estimated outlays, if there is no trust fund, that will be substantially less than those on the first chart. Foster Wheeler—I understand this number

may change. These are estimates. All of these numbers may change. But I have heard, just this morning: Hey, we are trying to recalculate that, Senator. We want you to be exactly accurate. It might be \$79 million, but it may not. But it will be relatively low compared to the number on the next chart. So let's understand all of these.

But here is Foster Wheeler, Oglebay Norton. They will have no obligation—no obligation—if the trust fund does not pass. Why? Because they have insurance. They took precautions. They have insurance that will pay the claims. They will have no obligation. National Service Industries will have \$11 million if the trust fund is not enacted, and so on.

Now, Oglebay Norton will owe the trust fund \$495 million in order to be relieved of zero obligation if the trust fund does not pass. Who will make up the difference? It will be made up by companies like these, some of which earn so much lower numbers than the numbers that are here that this could very easily jeopardize their survival. Some of the companies on this chart might not survive if the trust fund is passed. You have no obligation, but you have to pay half a billion dollars over a 30-year period?

There are some companies here whose total revenue is \$100 million a year, and their annual responsibility to the trust fund is \$19 million. Twenty percent of their total revenues will be required, and they have no exposure or relatively no exposure. There is not a company here with exposure, no matter how high it may be, that would not be satisfied by 2 or 3 years' contribution to the trust fund, but they are going to have to make that contribution for 30 years.

The companies on the first chart will see their stocks go up dramatically as soon as this bill is passed, and I do not begrudge them that. I think that is wonderful. But the other companies that will make up the difference will not only see their stocks fall, they may disappear and see their employees put out of jobs, their employees put on the unemployment line.

I do not think there was anything sinister about the way in which the trust fund decisions were made. But I do not think it has been analyzed properly with respect to the real-world impact of those decisions. So, to me, that is why we have the split in the business community, with some companies saying this is a great idea, and other companies saying, with some irony, over our dead body, because they may be very much dealing with a dead body here.

All right. Does that argue that we should not have Federal legislation? No. The progress in the States, causing this level of litigation to level out and begin to turn down, is not even throughout the country. We need a national standard. Ohio has led the way. Ohio has bills that are causing the litigation to begin to dry up. We are see-

ing the pattern of venue shopping dry up. But we still do not have any action out of California or New York. And, if I may, I remember when the Governor of Utah was once asked: What is the greatest economic development agency you have in Utah? And he said: The California State Legislature.

I think we can wait a long time before the California State Legislature can be depended upon to deal with this issue. So we do need a national bill.

But the one thing everybody on either one of these charts wants is certainty.

Let's go back to the first chart and the example I was talking about with respect to U.S. Gypsum or USG. Within the last week or two, USG announced they were setting up a reserve for their asbestos liabilities. They said: We are setting up the reserve with \$900 million in cash and \$3 billion in contingent notes. Their stock went up 15 percent the next day because their investors said there is a degree of certainty.

Now, if you take that \$3.9 billion figure they determined was the amount of their liability and you compare it to what the consultants said their liability was—\$4 billion—you are very much in the ballpark with roughly the same figure. Now, the interesting thing about the contingent notes they said they would sign for the \$3 billion is the contingency. The contingency was whether this bill passes. If this bill does not pass, they will then be on the hook for the \$3 billion in contingent notes. If the bill does pass, they are out with only the \$900 million. As we see, they are only required to pay, under the trust fund, \$797 million. So as to the \$900 million, they may even get a refund from that if this bill passes.

That demonstrates the value of certainty. They came up with certainty, one way or the other, and their stock went up 15 percent. We can give people certainty with the right kind of Federal bill that does not have the problems that this trust fund has.

So what do I search for in a bill? Well, the first one should be obvious from the presentation I have made: a restructuring of the liabilities in the trust fund. And if the trust fund were to go away, that would not bother me either, if we could have an understanding of how we could take the experience in the States and make it work on the Federal level.

Back to Judge Jack and her rulings and the actions of the various States, we discovered there really are only a few things that need to be done to tame this monster.

The first one is to stop the venue shopping. Well, if we pass a Federal bill, we can do that. The Judiciary Committee has worked hard in that direction, and I commend them for it.

No. 2, building on what Judge Jack discovered, we can have the right kind of medical certification. All she did was force these people to prove they were injured and the claims went away. I am not satisfied the medical certification in this bill is strong enough. I

would prefer to take the kind of medical certification we have at the State level, particularly Ohio, and say if we can write that into the Federal bill, then we are on our way toward realizing Judge Jack's goal in eliminating those who are not medically certified.

The third thing we can do is adopt the position that many of the State courts have adopted, which simply says: You can file your claim if you are not sick because you think you might be, but we are going to put that claim in an inactive docket, or a deferral registry—pick whichever term of art you prefer—and it will sit there unacted upon until you can come in and prove you are sick.

If we can do those three things—stop the venue shopping, get a legitimate medical certification, and set up inactive dockets—at the Federal level, the State experience says we can solve this problem. Whether there is a role in all of that for the trust fund, I am not sure.

I am enormously respectful of the senior Senator from Pennsylvania. He is a close, personal friend and has been the entire time I have been in the Senate. I commend him and the members of the Judiciary Committee for their efforts in working on this bill. But I do have a sense that in their focus on the disaster this has been throughout our history they have crafted a solution that, like the generals in the Army, may be the solution to the last war. They may have been fighting the last war instead of addressing what has currently happened.

So I understand the Senator from Texas has an amendment, which I intend to support. I understand the Senator from Arizona, Mr. KYL, has a provision that presumably will affect this difference between people on the two lists. I am interested in that. I am not sure it is the solution, but I want to move in this direction. I think we need a bill. I want to support a bill. As the bill currently stands, I think it is in need of the kinds of changes I have outlined.

Mr. DURBIN. Mr. President, will the Senator yield for a question?

Mr. BENNETT. I am happy to yield.

Mr. DURBIN. I would like to commend the Senator from Utah. He and I come from different parts of the political spectrum, and his life experience in business and otherwise is quite different from my own life experience. But I will tell you that I agree completely with your analysis. I think you have carefully looked at the impact of this pending bill on real-life companies, real-world companies, and there are clearly winners—and big winners—and losers—and big losers—in the course of creating this trust fund.

Without assigning any motive as to why some companies do so well and others do so poorly, I think what you have suggested as an alternative is the sensible middle ground. And the sensible middle ground, which I think will soon be offered by the Senator from

Texas, is to look at successful efforts in States that have changed the whole environment on asbestos litigation.

I am looking to this amendment. I want to read it carefully before making any commitment on my part, but this seems to me to be the right move to make, to capitalize on the State efforts before we create a trust fund.

I would like to ask the Senator if he has any knowledge or personal experience with the creation of other trust funds in the past in an effort to solve problems like black lung, and even in the trust funds that were created by companies like Johns Manville, and whether the initial estimates of cost turned out to be accurate in the long run.

Mr. BENNETT. I thank the Senator for his kind words. We will continue to be on opposite sides of the spectrum, but we will continue to be good friends.

In response to his specific question: Yes, the GAO has done a study of Federal trust funds and has found that as a general rule, the creation of a trust fund creates roughly twice as many claims as was anticipated at the time of their creation. This doesn't automatically mean twice as much money. In some cases, it means substantially more than twice as much money. And in one case, it means the amount of money stayed the same because the amount proclaimed was less than projected.

The one thing we can draw from that experience is what I said at the beginning of my remarks. Virtually everything we are saying about this is a guess. Everything we are assuming is based on an extrapolation based on other assumptions. We cannot, with any certainty, say that the trust fund will be sufficient or that it will not be sufficient. The one thing that we can say with certainty is, this is how much you will have to pay if the trust fund is created. That, as I say, is the reason for the split in the business community. As people have done the numbers, some say: I am better off in the tort system. Others say: I will pay anything to get out of the tort system.

The trust fund needs to be manipulated, if we are going to keep the trust fund, to make sure that there is a greater degree of fairness on the part of those who are contributing to it.

This is taxation with a vengeance on the part of the Federal Government for many of these companies. And some companies are saying: We are willing to pay that tax rate. Others are saying: Under no circumstances.

It will be very interesting if a conversation is held with those companies fighting for the bill and the proposition is made, if you really want the bill, will you increase the amount of your contribution to the trust fund so that the amount for some of these other companies will go down? That will be an interesting conversation. I understand some people are thinking about having it. I would like to be present when it is had, to see where we go with this.

Mr. DURBIN. I thank the Senator.

Mr. BENNETT. I yield the floor.

The PRESIDING OFFICER. The minority leader.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. ENSIGN). Without objection, it is so ordered.

The Senator from Texas.

AMENDMENT NO. 2748 TO AMENDMENT NO. 2746

Mr. CORNYN. I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Texas [Mr. CORNYN], for himself, Mr. COBURN, Mr. GRAHAM, Mr. THUNE, Mr. ENSIGN, Mr. INHOFE, Mr. MARTINEZ, Mr. CRAPO, Mr. BENNETT, Mr. SMITH, Mr. CRAIG, Mr. SUNUNU, Mr. DEMINT, Mr. THOMAS, and Mr. BUNNING, proposes an amendment numbered 2748 to amendment No. 2746.

Mr. CORNYN. I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in today's RECORD under "Text of Amendments.")

Mr. REID. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. CORNYN. Mr. President, I rise to join my colleagues in a call for asbestos reform. No other issue more readily highlights the toll that excessive litigation has placed on our society and, even more poignantly, on the lives of those who are dying with asbestos-related disease who are left with inadequate legal recourse and compensation by virtue of the massive waive of litigation, primarily by those who are not sick and who suffer no impairment as a result of their exposure to asbestos. Make no mistake about it: Today we are not just talking about liability reform, we are talking about scandal reform.

The legislation before us represents a genuine effort—I dare say, a Herculean effort—by the chairman of the Judiciary Committee and the ranking member and others who have worked together with them to try to bring us to where we are today; that is, with a good-faith proposal to address this complex problem. No one has worked harder or driven the members of the Judiciary Committee harder than our chairman, Senator SPECTER. He has tried hard to reach consensus among so many disparate parties and on so many different complicated issues.

The question before us is whether a national trust fund of the magnitude contemplated is the appropriate method to ensure victims will be compensated fairly and efficiently and that the trust fund can reasonably expect to remain solvent and viable.

After countless hours of reviewing and studying the options and hours of working with my colleagues to achieve reform, I unfortunately conclude that in its current form and with its current significant weaknesses, it is not. Rather, I believe the likelihood is far greater that the trust fund will sooner, rather than later, prove unsustainable and return us to the same broken tort system, then leaving thousands of Americans in the wake of a failed Government program, wondering where to go and why they must now go back to court. This simply cannot be the outcome.

I offer an alternative solution, a simple solution that has been tested in States around the country and a solution that would target the key causes of the asbestos liability crisis. I am pleased to offer this amendment on behalf of 14 cosponsors: Senators COBURN, GRAHAM, THUNE, ENSIGN, INHOFE, MARTINEZ, CRAPO, BENNETT, SMITH, CRAIG, SUNUNU, DEMINT, THOMAS, and BUNNING. We are working closely with our colleagues on the Democratic side who are looking for an alternative solution. I do believe, before the close of business today, we will have bipartisan sponsorship of this amendment.

We are looking for a solution that provides a simple but effective approach and one that establishes a national floor with respect to the medical criteria required to bring a claim into court, one which tolls the statute of limitation to ensure that victims get their day in court and virtually eliminates the likelihood of fraud in the medical screening industry, which has proven to be a corrupt cottage industry.

In short, that is basically what this amendment would do. It is about 50 pages, not 400 pages. It requires no complicated administrative scheme, no complex funding formulas that require a Ph.D. in economics to understand. There are no complex constitutional questions, no litigation that will arise over the constitutionality of the proposal, and no real cost to the American taxpayer or, for that matter, to the businesses that would otherwise have to contribute to this \$140 billion trust fund. There is no question about favoring one constituency differently than another constituency. Most importantly, I am confident that our solution is a system more likely to ensure that those individuals who are truly sick from exposure to asbestos will receive fair and efficient adjudication of their claims against those who were actually responsible for their injuries.

This proposal is embraced by such a diverse group as the American Bar Association that studied it. You can imagine getting lawyers to agree, with

their divergent interests, on what solution to this problem would likely work best and be the least disruptive to our civil justice system. They believe this is it. Indeed, our legislation would target directly the well-documented causes of the asbestos liability scandal plaguing our civil justice system.

The oft-quoted RAND Corporation, in its research, has discovered:

Almost all the growth in the asbestos case-load can be attributed to the growth in the number of nonmalignant claims which includes claims from people with little or no functional impairment.

In other words, these are people who are not sick. Those are the main claimants today under the asbestos liability system. Their research reveals that up to 90 percent of the plaintiffs filing claims have no physical impairment, but they have clogged our courts and delayed justice for those who are sick with asbestos disease. These claims brought by unimpaired plaintiffs often are generated through mass screenings and supported by questionable medical evidence, backed by doctors who do not claim to have a doctor-patient relationship but who will screen thousands of x-rays and who, not surprisingly, more often than not, overwhelmingly find some evidence of asbestos-related disease. When those same x-rays are given a second opinion by someone without a vested interest in finding asbestos-related disease, only a minute fraction actually are confirmed. So this is a cottage industry of fraudulent claims which has further contributed to the broken system we have today.

Under the status quo, forum shopping is rampant. For example, between 1998 and 2000, five States captured 66 percent of the filings; 66 percent of the asbestos lawsuits were filed in just five States because of rampant forum shopping. They were the States of Texas—my State—Mississippi, New York, Ohio, and West Virginia. It is not surprising that each of these States has now enacted or is seriously considering enacting asbestos liability reform at the State level. The good news is, as the Senator from Utah, Mr. BENNETT, pointed out, these State reforms appear to be working. They are working because they rightfully focus on the causes. So, too, should a national solution. Doctors and medical providers take the Hippocratic oath which says: First, do no harm. We in the Congress, particularly in the Senate, have a Hippocratic responsibility to, first, do no harm in the legislation we pass.

Notwithstanding the Herculean efforts undertaken by the chairman and the Judiciary Committee, I believe we cannot honestly take that oath and represent to the American people that we have done no harm in the proposal currently before us. We need an alternative which we have offered with this amendment.

The past several years have witnessed encouraging signs from States known to have been havens of the worst of the asbestos litigation abuses.

As I mentioned, States such as Texas, Mississippi, Ohio, Florida, and Georgia are taking action. During the time that we have debated in the Nation's Capitol what to do, the States have acted.

Some States have created special dockets for unimpaired claimants, allowing only those who are sick to proceed to trial. It makes sense. The modest venue reforms and limits on consolidation have been adopted, and at least 4 States, including, last year, Texas, have enacted objective medical criteria.

The Texas bill, in the context of asbestos-related claims, allows claimants who are actually impaired to pursue their claims in the judicial system and merely defers the claims of those who are exposed but not impaired. It does this by establishing medical criteria that a claimant must meet to demonstrate some impairment before proceeding with the lawsuit. The good news for these individuals who are not impaired and have been exposed, and for the system generally, is the vast majority of them never will get sick.

Under the perverse limitations required by the statute of limitations that require you to file a lawsuit or risk being forever barred under the current system, they must file now, thus contributing to the huge clog of our court system and the bankruptcies that have racked up seemingly one after another. These State efforts are, in fact, working.

While it is difficult to assess the nationwide impact in the short time they have been implemented, anecdotal evidence indicates there has been a real impact. For example, one Texas tort reform observer, in 2006, said this:

We are still waiting on more definitive figures, but rough estimate at this point—filings of new claimants in Texas have dropped in excess of 50 percent since the State bill passed in July. Based on the terms of the act, the time has just run for claimants to file medicals to avoid the [multi district litigation in Federal Court]. The effect will be that at least 75 percent of pending claims will be dismissed or abated. Thousands of claims from unimpaired claimants have been rendered dormant and will not proceed.

Perhaps the most important point is the ones that justifiably should proceed because they have real manifestations of asbestos-related disease will have priority, will have their day in court, and will not be left with pennies on the dollar, which many are today because of the bankruptcies that have been created by this flood of litigation.

One example of the claims history of a company in Texas—we will call it "company A" because we don't want to necessarily point out or talk about a particular company, but company A, between 1980 and 1996, had 134,000 new claims. In 1987, they had 25,000. You can see the rest of the numbers. The height of their claims experience was in 2001, when they had 56,000 claims. In 2005, after this legislation passed in Texas imposing strict medical criteria, creating a dormant docket for those who

were exposed but not impaired, while letting those who are sick go to court, only 13,272 claimants came forward. There has been a 77-percent decline in new filings over the last 5 years. This is due largely to the legislation and fair enforcement of the law in States such as Florida, Mississippi, Ohio, Texas, Georgia, and Illinois.

Company B, in Mississippi, has experienced a 90-percent decrease in claims since their legislation was enacted. The point is, some might say why don't we leave this up to the States? Unfortunately, we have seen claims migrate to States that don't have similar reform legislation, thus mandating, in my opinion, a national solution. That is what this amendment proposes.

Company C reports a significant decrease in new litigation filings since September 1, 2005. This is in Texas. The mix of the claims is important because there have been zero, none, malignancy cases, and 10 mesothelioma claims—the most pernicious cancers that are caused by asbestos exposure. In terms of the other types of claims, they have dropped precipitously. So 34 new filings in 5 months, all malignancy cases, which can be adjudicated in court based upon their respective merits.

We will go through a couple more here. Company D, in 2003, experienced 32,444 filings. In 2004, that number dropped to 5,000—from 32,000 to 5,000, roughly. In 2005, it dropped to 2,415, with 6,791 dismissals.

As we can see, there have been significant declines in the number of claims, making way for people who truly are sick to have their day in court, while those who have been exposed but are unimpaired and not sick can preserve their claims for a later date, if and when they happen to get sick.

The national solution we have crafted is designed to ensure that those who truly are sick get their day in court, as I said. It establishes specific medical criteria to be used to distinguish claims between people who are physically impaired due to exposure to asbestos and the claims of people who are not experiencing any physical problems. This legislation will prioritize the claims of the truly sick through the use of reasonable, objective medical criteria. It requires physical impairment. It requires supporting documentation to verify that the claimant can demonstrate impairment based on reasonable and objective medical criteria. It requires that the diagnosing physician actually have a doctor-patient relationship with the claimant, avoiding the millions in this cottage industry doing fraudulent screenings, which has generated problems for the current system. It allows the claimant who acquires a nonmalignant condition to pursue a separate recovery if the person later develops an asbestos-related cancer.

I could go on, but I think it is clear from not only the simplicity of this approach, and due to the fact that it has

broadly been embraced among organizations such as the ABA, which has both defense lawyers and plaintiff's lawyers and represents the legal profession generally, it is their considered judgment that this represents a reasonable and, in fact, a better solution to our current problem. It observes the "Hippocratic oath" that I submit should apply to legislation as much as it should to the practice of medicine, that it does no harm to the current system. In fact, it is narrowly focused on the causes of the problems that confront our system today.

The Federal trust fund may well be a fine solution to the current problem but only if structured appropriately and only if we can reasonably expect that it will proceed.

I am sorry to say that S. 852, as drafted, cannot, in my opinion, succeed. It would create an unsustainable Federal entitlement, with costs that would likely far exceed the \$140 billion price tag presently contemplated. Enacting this legislation without significant modification would undermine recent State reforms and would create at least as many problems as it would solve.

I sincerely believe this alternative amendment my colleagues and I have offered today is the best hope we have of accomplishing the goal that I believe all of us operating in good faith share, and that is ensuring prompt payment for victims and allowing those exposed but not sick to have their day in court if and when they do become sick.

I invite all of my colleagues to join the 14 of us who are cosponsors to this amendment. I predict by the close of business today we will have a bipartisan amendment. We are continuing to reach out to our colleagues in the Senate, and I know this is a complex issue and many on the Judiciary Committee have spent years trying to get us to where we are today. Frankly, I applaud their efforts, as I have the leadership of our chairman. I believe, and the cosponsors of this amendment believe, this is the best approach; that is, to pass this amendment and send it to the House of Representatives so we can provide a simple and effective solution to the current asbestos scandal.

AMENDMENT NO. 2749 TO AMENDMENT NO. 2748

Mr. CORNYN. Mr. President, before I conclude, I send a second-degree amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Texas [Mr. CORNYN], for himself, Mr. COBURN, Mr. GRAHAM, Mr. ENSIGN, Mr. CRAPO, Mr. INHOFE, Mr. MARTINEZ, Mr. DEMINT, Mr. THUNE, Mr. BENNETT, Mr. SMITH, Mr. CRAIG, Mr. BUNNING, Mr. THOMAS, and Mr. SUNUNU, proposes an amendment numbered 2749 to Amendment No. 2748.

Mr. CORNYN. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in today's RECORD under "Text of Amendments.")

Mr. DURBIN. Will the Senator yield for a question?

Mr. CORNYN. Yes.

Mr. DURBIN. Mr. President, I thank the Senator for bringing this important amendment to debate. I will ask him a question or two about his amendment.

I think the Senator is on the right track in noting that several States have made significant progress in dealing with the asbestos litigation. In some States, there has been an agreement between what are usually warring and opposing parties as to how the system can be improved. I wish to ask the Senator from Texas whether the approach he has suggested to the Senate today would preempt existing State laws and standards in this area?

Mr. CORNYN. I thank the Senator for his question. It is an important one. Our intention would not be to preempt local State laws but, rather, to create a national forum, in a way that would provide uniformity and would avoid the migration of claims from those States that have reform to those that do not, thus continuing the status quo.

Mr. DURBIN. One of the more controversial parts of the amendment relates to joint and several liability, which those of us who have practiced law know a little more about than those who have not. If a State already has joint and several liability in these cases, would your amendment preempt that State's joint and several liability standard?

Mr. CORNYN. Mr. President, I appreciate the question. This amendment calls for several liability, not joint liability. The Senator raises a good question and, frankly, one I want to make sure I do a little research on and confer with him, perhaps, so I can give him a more definitive answer.

Mr. DURBIN. Mr. President, I thank the Senator for allowing me to ask a question. I thank him also for offering the amendment. It is a valuable part of the debate. Parenthetically, I concur completely with the Senator from Texas in the fact that many States are doing very positive things to deal with this issue, and I think it would be wise for us to look to their leadership in some of these areas. Secondly, I think he feels as I do, that the underlying trust fund has some fundamental flaws.

I yield the floor.

Mr. CORNYN. Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire is recognized.

Mr. GREGG. Mr. President, I wish to speak a little bit about the status of the points of order that have been discussed, at least in the media, relative to this bill, that arise from the Budget Act.

There are four potential issues here. One, we have not seen the final language, so many of these have not been resolved as to their applicability.

Talking about the one which has received a significant amount of attention, there is a reserve fund that was created in the last budget, the purpose of which was to allow this bill to come forward. The reserve fund has a series of conditions attached to it, and the effect of the reserve fund is that it sets up the ability of the budget chairman to release dollars—in this case an allocation—if those conditions have been met.

As Budget chairman, I find myself in what would be called a position of a referee or a fair arbiter on this issue. I have views on this bill. I don't happen to support the bill. Those views are not relevant to the decision I need to make as chairman of the Budget Committee relative to releasing a reserve fund.

The key issue on the reserve fund is whether at some point in the future taxpayers will become obligated for the claims which would be made under this asbestos claims bill.

How do I come to a conclusion as to whether taxpayers would be obligated in my role as a fair arbiter or referee? Basically, I turn to our professional, nonpartisan, fair whistle caller, sort of like the referee on the football field on an instant replay going up to the guys in the stands who just viewed the play and get their opinion. That group is the CBO, the Congressional Budget Office. They take a look at the bill, and they score whether the bill is fully paid for. If it is not fully paid for, then it is arguable, of course, the taxpayers may end up picking up some of the bill in the outyears, which would undermine the purposes of the reserve fund.

The initial response from CBO, which was sent to the chairman of the committee, Chairman SPECTER, essentially said they don't know. They estimate the potential income to the fund is about \$140 billion. That is the number talked about around here. The potential administrative cost of the fund is about \$10 billion, but they are not sure whether the claims will exceed \$130 billion. If they exceed \$130 billion, theoretically taxpayers might become liable; if not, the taxpayers would not become liable. So they essentially said they don't know. Since they are dealing with outyear numbers, it is, to some degree, guesswork.

We have not seen the final product, but the final product was delivered to CBO last night. They are now rescoring it. I don't know what they are going to say. They may come back and say, yes, it is clearly outside the revenues and, therefore, taxpayers may end up with it. They may come back and say, no, clearly it is not the final version. Or, again, they might say they really can't tell.

Again, as referee, I have to look at this information and make a decision. My inclination is that if there is no clear one-way-or-the-other call from CBO, that it either, A, is under, in which case clearly we would release, or B, it is over, in which case we clearly would not release. If they are, rather,

of the opinion this is too far out and too difficult to call and are dealing in a range of \$10 billion, which they were in their first letter, then it would probably be unfair—to stop this bill on that point of order—to the bill, to the manager, and to the people who believe they have a right to get a fair hearing on this bill. But that final decision has not been made.

There are three other points of order, however, that lie whether or not this point of order is made ripe. Those three other points of order are still potentially there. There has been representation that these points of order are technical. They are not. At least one of them certainly is not because it was put in place to address the issue of one Congress binding later Congresses to major programmatic activity.

We will address those as we go down the road. However, I did want to update people generally on where this specific point of order relative to the reserve fund lies because there has been a lot of representation in the press, as occasionally happens, that has been a little bit off target.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I had hoped to engage in a short colloquy with the Senator from Texas on his amendment, but I had to leave the floor for a moment or two. I want to make a couple of very brief points—and I will elaborate on them more extensively later—and that is the medical criteria bill does not do anything for the employees of companies which have gone bankrupt. There are some 77 of those, and more imminently, so that we have a large group of people suffering from mesothelioma and other deadly, serious diseases who will not be compensated.

Then we have the veterans who have had exposure to asbestos in a variety of ways, a lot through Government work, where they do not have anybody to sue. So a medical criteria bill will not help them.

Then we have basic consideration of the medical criteria bill that does not really take these cases out of the court system. It does not stop the suits from being filed. It does not stop the extensive discovery process, the depositions, the interrogatories, the medical examinations. When we deal with the question as to injury, it is subject to contest and subject to litigation. So the medical criteria bill is a diversion—I wouldn't call it a poison pill because I don't want to engage in any inflammatory language, but it does not do what the trust fund does, and that is provide a remedy for compensation for thousands of very seriously ill people.

While I am on the Senate floor, I want to take up one other point briefly while the Senator from Illinois is on the floor. He has made an argument—an extensive argument—about knowing who is going to put up the money.

When I pointed out yesterday that the lists were available to him to know

who is putting up the money, that his staff, in fact, had looked at them, he then shifted his ground from not knowing who was putting up the money to the specious argument that they were secret from the public in general and that there is some effort to conceal something which, of course, is not the case.

Then on a mutation, he moves from that to a contention that these people who had to be subpoenaed have written the bill because somehow they have provided some information as to how much money is going to be put up, which goes into the bill.

I don't think I require any extensive reply to that. I think of my sister Shirley in Elizabeth, NJ, who likes the Senator from Illinois, as I do—sometimes—pointed out to me that she could see through those arguments. But not making the materials available beyond the Senator and the staff—and I can see they ought to be able to copy them—I will stand by that—so that Senator DURBIN doesn't have to look at them, his staff can look at them, copy them, and show them to Senator DURBIN, all within the range of confidentiality. But that doesn't mean there is some secret being kept from the American people, not as long as DICK DURBIN knows what they are; he will protect the American people. Frankly, so will ARLEN SPECTER protect the American people. But it doesn't mean these sinister forces have written the bill because the bill was written by the committee. Senator DURBIN is on the committee. He helped write the bill. He made amendments. I think some were even adopted. I won't swear to that. I know one was and then it was changed when we finally understood what it was. We adopted one in about 4 minutes one day—right?—and then we had to change it when we found out what it really was. We do that from time to time.

I have taken a look at the issue of confidentiality because I reserved that yesterday during the discussion. I find there are a couple of provisions that are very problematic. One is section 1905 of title 18 of the United States Code which makes it an offense—and I am not sure what, with the abbreviated version I have here, the penalties are, but it prohibits any officer or employee of the United States to divulge information—I will have this printed in the RECORD—“which information concerns or relates to trade secrets, processes, operations, style of work, or apparatus,” et cetera.

It is hard to interpret it without doing some more research, but I think it may well cover this.

There is also a Senate rule, rule XXIX(5), which relates to prohibition against any Senator, officer, or employee of the Senate disclosing secret or confidential business proceedings of the Senate. It does not appear on its face to conclusively cover these kinds of records, but it may. It may be part of the records of the Senate. But I

think there is more than a colorable prohibition against disclosure on confidentiality. At least at this time, I wouldn't rule it out completely. I would like to have maximum disclosure, frankly, if it can be done consistent with the law and consistent with the rules of the Senate and consistent with fairness to the companies which provided the information.

Mr. President, I ask unanimous consent that this document entitled "FAIR Act Transparency," which includes the references to which I just alluded, be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. DURBIN. Mr. President, will the Senator yield for a question?

Mr. SPECTER. I do.

Mr. DURBIN. Mr. President, is the Senator prepared today to tell us who prepared this list, the entity he had to subpoena to get the information about how the trust fund will be funded?

Mr. SPECTER. I am prepared to have the Senator told because I don't have it at my fingertips. But I am prepared to have that information given to the Senator from Illinois. Yes.

I yield the floor.

EXHIBIT 1

FAIR ACT TRANSPARENCY

Funding is guaranteed. The \$140 billion in defendant participant contributions to the Fund under the FAIR Act are guaranteed by the manufacturers and industry.

Certification. The fund cannot be deemed operational until the Fund Administrator publishes a list of defendant participants and their required payments in the Federal Register.

Senator Durbin's assertions that outside groups wrote the FAIR Act is flat wrong. S. 852 creates an allocation formula whereby contributions are based directly on a manufacturers "prior asbestos expenditure" in the tort system. This was a FORMULA created and drafted by SENATORS. Our Congressional subpoena was directed at the corporations to identify, by computing their "prior asbestos expenditure" what tiers of the funding formula they would fall into.

Process. I have met with many Senators individually including, at different times, Senator Cornyn (4/12/05) and Senator Feinstein (5/10/05) on the issue of transparency. The Judiciary Committee issued three subpoenas in an effort to learn more about the companies likely to pay into the Fund created by the FAIR Act. The subpoenas were dispatched between September 30 and December 1 to groups representing companies on both sides of this bill.

These transparency efforts led to the creation of a spreadsheet with the names and anticipated tier assignments of companies. The staff came up with their estimates based upon publicly available information included in SEC filings and data gathered through hundreds of phone calls. In light of this information, Judiciary Staff held at least two transparency briefings, the first of which occurred on October 7, 2005.

All Senators and their staff can view a list compiled now. This list is confidential because it includes confidential information from businesses.

Confidentiality. In issuing the subpoenas and making telephone calls, my office informed companies that the information ob-

tained would be held confidential pursuant to Rule XXIX of the Standing Rules of the Senate and under 18 U.S.C. 1905. Rule XXIX (5) of the Standing Rules provides:

"[a]ny Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees, and offices of the Senate, shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt."

Similarly, Section 1905 of Title 18 of the United States Code provides:

Whoever, being an officer or employee of the United States . . . divulges, discloses, or makes known in any manner . . . any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

In light of the foregoing, the Senate Judiciary Committee reiterates what we have said from the beginning of this exercise: we are prepared to share the spreadsheet with any Senator or designated member of their staff. The staff may even make a copy of the spreadsheet so long as they sign an acknowledgement form indicating they understand the information is to remain confidential pursuant to Rule XXIX and 18 U.S.C. 1905.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, I thank the Senator from Pennsylvania, and I say with genuineness that I respect him more often than not. I go beyond "sometimes" which he said of me, and say I respect him more often than not. I respect his great work on this issue. This is not easy.

What the Senator is trying to do is nothing short of revolutionary. He wants to close down the court system of America for hundreds of thousands of individuals who otherwise would go to court, to a judge or a jury, and ask for fair compensation for their injuries.

The Senator from Pennsylvania has decided that system is wrong or inadequate or broken and has suggested that we are going to do away with the court system in America for these victims and create a brand new system.

That is a daunting task. I am not sure, given the 2 or 3 years that the Senator has put into it, that I could even come up with a suggestion that I would have confidence would work.

This is what we know about the trust fund and the system we are being asked to vote for in the Senate.

First, the cost of this is being estimated over a period of 50 years. Over 50 years, what are we likely to pay to those Americans who have been injured and died from asbestos exposure? If you will follow some of the best prophets and predictors in Washington, you will

find them woefully inadequate to predict what is going to happen next year, let alone in 50 years.

So I have challenged the Senator from Pennsylvania and those in his corner, including my friend, the Senator from Vermont, Mr. LEAHY, to tell me where you came up with the figure of \$140 billion. The response we have been given is: Why, that is what Senators have been talking about for a long time, \$140 billion.

I think that falls short of the kind of certitude that we should have before we close down the court system of America to hundreds of thousands of injured people and their families.

The second question I asked yesterday, which we again explored today, is: Who is going to pay for this? Who is going to provide the \$140 billion, if it is not the taxpayers, to pay the people who were injured?

I am afraid today the Senator from Pennsylvania continues along the same line of reasoning. Someone—an undisclosed company—which he has promised he will now tell me, some undisclosed private entity decided which businesses in America would pay into this trust fund and how much they would pay. A curious thing: I don't know who contacted this private group to create this information. It is certainly essential to this concept of a trust fund. But the group that created the information was so loathe to share it with the Congress which is considering this bill that the chairman of the committee had to subpoena the information from the company that created it for his bill which we are now considering.

It is a strange process. On the one side, the chairman of the committee would rely on this private company to determine who will pay into the trust fund and how much they will pay, and then having relied on them to write this bill to close down our court system for millions of Americans exposed to asbestos, he couldn't get the information from them unless he sent them a subpoena demanding it under his power of the Judiciary Committee. At some moment in time, they produced it. Then when it came in, this information, essential to know whether this trust fund will work, it turns out it was marked "committee confidential."

I have been around the Senate for a few years. I was on the Intelligence Committee. I know when things are marked classified and top secret and confidential, it is clear that they are secret. They are not to be shared with the public. But what is it about this bill and who is going to pay into it that is so classified and so confidential and so secret that the American people have no right to know? That is the question I asked yesterday. Because if we are going to say to millions of Americans and their families: Give up your day in court, what has been your constitutional and legal right for the 200-plus years America has been in existence; give it up, trust us, we will

create a trust fund that is going to be more fair and more generous, shouldn't we share with the American people the basic information that was used to create this alternative to a day in court?

No. The chairman comes before us today and tells us he thinks it is illegal, it may be illegal, it may even violate Senate rules to share this information.

I struggle with it because I think this gets to the heart of the matter. If we cannot justify the cost of this trust fund over 50 years, if we cannot say to the American people: "Here is how it will be paid for," then I am afraid we are asking too much. We are asking them to walk away from their American-given right for redress in our courts for a trust fund that cannot be explained, a trust fund that was created by some private company that did not even want to share the information that led to its creation. That is not a confidence builder.

Despite my admiration for the chairman of the committee—and it is truly something I would say on this floor without reservation. He is a man I respect very much, in a variety of ways, for his service in the Senate. Despite that, this bill should not be passed. This bill, which will literally change the system of justice in America, should not be passed on such a flimsy foundation.

A moment ago, the Senator from New Hampshire, the chairman of the Budget Committee, came to the floor and made an interesting statement. He said he will rely on the Congressional Budget Office to determine whether this trust fund will work. But if the Congressional Budget Office comes back and says: We don't know, we can't tell you—maybe it will and maybe it will not—I think I heard the Senator from New Hampshire say that is good enough. If they say it will not work, OK. But if they are not sure, that is good enough.

Is it good enough? Is it good enough for the millions of Americans who are counting on us not to take away their rights as American citizens to go to court when a wage earner and his or her family have been exposed to asbestos, unwillingly, unknowingly exposed and now cannot breathe and has a limited amount of time left on this Earth and believes that the company that sold the asbestos product should be held responsible and accountable—is it good enough for us to say: No, we are not going to let you go to court any longer?

Is it fair for us to say to the housewife who—and this is a real case; I am not making this up—who literally had a husband who worked in the asbestos industry, brought home his work clothes, piled them up in the laundry room, and before she stuck them in the washer she shook his clothes, not knowing that she was breathing in asbestos fibers, and she contracted mesothelioma, the deadly lung disease from asbestos, simply by being exposed that

much—is it wrong for us to say she should not hold a company such as W.R. Grace and Company responsible for the fact that for more than 70 years they refused to disclose the danger of this asbestos fiber to their workers and people who used their products?

I know how I feel about it. All we are asking is that that family have a chance to argue their point of view in a court and let a jury of that woman's neighbors and peers decide what is fair and what is just. That is what is at issue here; to close the courthouse door to her and her family and say, no, you can no longer go before the courts of America, the courts of your State, you have to go to a trust fund, a trust fund that may get around to considering your claim, may end up paying your claim—all of these possibilities.

I am also troubled by the fact that when you take a hard look at this trust fund of \$140 billion over 50 years, you realize what is going to happen as soon as this bill passes. Should it pass, there will be a rush of people filing under the trust fund, asbestos victims. Why? Because the instant this bill is signed into law, anyone who has a claim pending in American courts is stopped. They cannot move forward. They cannot take their case any further. If they are not arguing their case in trial before a jury or a judge, they are finished; closed down and stopped. They could have the trial scheduled that they have been working for years to start next week, and they are finished the day this bill is signed.

What will they do—all that work, all that preparation, gathering all the medical records? They will start over. Sick people, dying people in America will start over, filing the paperwork for the new system. We expect a lot of them, if this bill passes, to rush in and say: Pay us, for goodness sakes. We have been working at this for years. Why wouldn't they do that?

As they do, they will swamp the system. This trust fund is not designed to collect all this money from all these corporations and insurance companies in a hurry. It collects it over a 30-year period of time. So at the outset, if the trust fund is going to actually pay the victims, they have to borrow money to do it.

We have had some calculations that if they borrow the money to pay the claims in a timely fashion, more than a third of the \$140 billion trust fund will be spent on interest payments for borrowed money—more than a third: \$52 billion will be spent over the life of this trust fund.

When the Senator from Pennsylvania addressed this issue the other day, he was brutally frank and candid. What would we do if we ran out of money? What would happen if \$140 billion did not compensate all the asbestos victims we know are out there? I have to say over the course of the history of asbestos that we have underestimated the potential claimants time and time again. What happens if \$140 billion does

not work? The Senator from Pennsylvania came to the floor and said: We will adjust the payments to the victims; the medical criteria for eligibility. In layman's language, we will cut the victims' compensation.

When the Senator comes to the floor and suggests that an alternative from the Senator from Texas will leave some people in the lurch, it may not be as inclusive as the underlying bill, I hope he will recall his own words on the floor when he said if \$140 billion is not enough, those same victims will be shortchanged and will receive less.

I am going to close at this moment and say, as I said at the outset, the Senator from Pennsylvania accepted a Herculean assignment to try to replace the court system in America. If you are going to do that for hundreds of thousands and maybe millions of Americans, it is a task that many Senators would never accept. I salute him for trying. But I say in all honesty that, as we stand here today, this will not work. This trust fund will fail.

It will not be the first time a legislative effort will fail. Many of our efforts do. We try our best, but we are human. Men and women try to create laws that will make America better. Sometimes they do and sometimes they don't. The Medicare prescription drug plan, Part D, is a good indication of something that doesn't work. It was passed 2 years ago by this Senate and the House, was signed by the President—2 years to get ready to get 40 million Medicare recipients into prescription drug coverage, which we all support, and we created a system which has been nothing short of a disaster, an unsalvageable fiasco. So our best efforts will leave some poor senior citizens without the drugs they need and many others completely confused and perplexed by this bureaucratic mess we created called the Medicare prescription drug plan, Part D.

I think we will learn our lesson quickly, and I hope we change that law. But think about this law. What if we get this law wrong? What if we say to thousands of American families with someone deathly ill in their home: You are finished in court. Walk away from all of your efforts for compensation. Trust us that we will create a new system that will be as just and even more fair than the court system in America.

If we are wrong on that one, if we make a mistake on that one, the human suffering and misery that will result goes far beyond what we have seen on the Medicare prescription drug plan, Part D.

I don't think it is worth the risk. I think we ought to look at this in more modest terms and honest terms and realize that a trust fund whose total amount we cannot justify, from sources that are still on a secret list that cannot be seen by the American public, is not the best way to go.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, when the Senator from Illinois talks about doing it in an honest way—we have done that. We have been honest.

When he talks about, if we make a mistake, there will be a lot of human suffering, there is a lot of human suffering right now. It would be hard to structure a substitute system which would have more human suffering than you have now. We are looking at a system which is totally debilitating and decimating, with the courts clogged and with thousands of people suffering from deadly diseases and not being compensated.

When the Senator from Illinois makes a reference to saluting me for trying, I appreciate salutes of any kind, but I am looking to the possibility of a salute for succeeding. I don't know how this debate is going to turn out or what is going to happen in the final vote. But I do know that for more than 3 decades, nobody has been able to bring a bill to the floor and nobody has been able to move past a determined effort by the minority to block this bill with a filibuster.

When that effort failed late in the afternoon on Tuesday, they wanted to withdraw the motion, and we defeated it very soundly.

The Senator from Illinois says I have undertaken a Herculean assignment. It is a Herculean problem. I wish Hercules was around to handle it. I would be glad to defer to Hercules were he here.

When the Senator from Illinois refers to cutting payments, that does not happen unless the Congress agrees. When the administrator evaluates the trust fund and finds that there may be insufficient funds to pay the claims, the administrator then reports to a committee of 20, selected by the leaders of the House and Senate, and then they make a recommendation to the Congress.

So it isn't a cut without having congressional action. As wise as we may think we are today, there will be Senators here into the indefinite future; we hope forever. They will have the wisdom, they will make a judgment, and they will have the determination as to what payments are going to be made. So it is not an automatic or easy cut in payments.

Bear in mind that the basic remedy is to go back to the tort system, to go back to court. So the claimants are no worse off under the tort system than they are today, if no plan is adopted.

The Senator from Illinois has repeatedly challenged the establishment of the trust fund of \$140 billion. Yesterday, he referenced a letter which he sent to me to which he has not gotten an answer. I checked about the letter and I checked about what we did about the questions raised in the letter, and the answer was we had a briefing 2 days later. We answered the questions, not by written letter but by a more detailed statement from a briefing.

When the Senator talks about the \$140 billion which was established, all

the information was available in that briefing, and still is to the Senator from Illinois about projections based upon experience with asbestos.

When we talk about the Bates White report, that has been thoroughly refuted. They took into account people such as manicurists and taxi drivers who did not have an occupational exposure to asbestos.

The Congressional Budget Office came up with an analysis of Bates White, and left the Bates White report in ruins. We had a detailed hearing on that as we have had every time an issue has arisen.

The Congressional Budget Office then issued a supplemental report showing that Bates White was wrong and their initial figures were correct. On page 8 of the report submitted by the Congressional Budget Office, dated August 25, 2005, they have a chart where it supplements their analysis that there could be costs in the range of \$120 billion to \$150 billion, and then they come to a net conclusion of the projection at \$132 billion. These are projections; they are not guesses; they are not speculations; but they are not mathematics, either. They are based upon the best information available and they are judgment calls.

In the letter from the Congressional Budget Office dated December 19, they included this statement after analyzing a great number of factors:

The final outcome cannot be predicted with great certainty.

I don't know what can be predicted with great certainty. I know for many years I was a district attorney prosecuting criminal cases and handled first-degree murder cases. The death penalty is imposed in America if it is proved beyond a reasonable doubt. But on a level of great certainty, that is not an attainable level, and I would say almost in any field of human endeavor. I don't want to be too expansive in that assertion, but great certainty is not something you come by in the ordinary affairs of men and government.

Mr. DURBIN. Mr. President, will the Senator yield for a question?

Mr. SPECTER. Yes.

Mr. DURBIN. Through the Chair, I wish to ask the Senator if he would agree with the following: If we can't say beyond a reasonable doubt or great certainty, if we reach the point where \$140 billion is inadequate, and it cannot compensate as we called for in this bill, is it not true at that point there are only three options? One option is to go back to the businesses that contributed to the trust fund and ask for more; the second is for the Government to assume the liability; and the third is to reduce the payments to the victims as called for in the existing legislation.

Is there another option I am missing?

Mr. SPECTER. Mr. President, the answer to the first question is no. The answer to the second question is yes. OK?

Mr. DURBIN. Would the senator be kind enough to give me a few more words? I know he has a lot.

Mr. SPECTER. I do not know if it is possible for this Senator to give a few words. I will try.

The answer is no, those are not the only options. The answer is yes, there is another option. The "yes" answer is to go back to the tort system. Senator BIDEN offered that amendment in July of 2003. I am on it because it seemed to me that claimants should not bear the risk of the failure of the trust fund, and in this bill you go back to the tort system. So the claimants are no worse off than they are now.

Mr. President, these letters may be part of the RECORD, but I want to be sure they are.

I ask unanimous consent that the letters from the Congressional Budget Office, dated August 25, 2005 and December 19, 2005, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 25, 2005.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 852, the Fairness in Asbestos Injury Resolution Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mike Waters (for federal costs), Barbara Edwards (for revenues), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

S. 852—Fairness in Asbestos Injury Resolution Act of 2005

Summary: S. 852 would establish the Asbestos Injury Claims Resolution Fund (the Asbestos Fund) to provide compensation to individuals whose health has been impaired by exposure to asbestos. Under the bill, the Administrator of a new Office of Asbestos Injury Claims Resolution (the Office) within the Department of Labor would administer the Asbestos Fund and manage the collection of federal assessments on certain companies that have made expenditures for asbestos injury litigation prior to enactment of this legislation. A separate Asbestos Insurers Commission would allocate other payment obligations among insurers with asbestos-related obligations in the United States. The Asbestos Fund also would absorb all private asbestos trust funds already existing at enactment. Under the bill, individuals affected by exposure to asbestos could no longer pursue awards for damages in any federal or state court and would submit claims to the Administrator, who would then evaluate such claims and award compensation according to criteria and amounts specified in the legislation.

CBO estimates that net receipts and expenditures of the Asbestos Fund would increase projected budget deficits over the 2006-2015 period by about \$6.5 billion (excluding debt service costs).

We expect that sums paid into the fund would be treated in the budget as federal revenues and that amounts expended to pay claims and administer the fund would be considered new federal direct spending. During periods when surplus amounts would be collected by the fund, CBO assumes that

most of its assets would be invested in non-governmental securities. The net cash flows associated with such investments would also be direct spending.

Over the 2006–2015 period, we estimate that payments to eligible claimants, start-up costs, investment transactions, and administrative expenses would total nearly \$70 billion. Over the same 10-year period, we estimate that the fund would collect about \$63 billion from firms and insurance companies with past asbestos liability and certain private asbestos trust funds.

Consequently, we expect the Administrator of the fund would need to exercise the borrowing authority authorized under the bill to meet the fund’s obligations during this period. Assuming enactment of S. 852 by the end of calendar year 2005, CBO estimates that almost \$8 billion would be borrowed during the first 10 years.

To evaluate the long-term financial viability of the fund, CBO projected cash flows over the life of the fund—assumed to be about 50 years—using a variety of assumptions about the number, type, and timing of future claims likely to be submitted to the fund, and alternative assumptions about future inflation and interest rates. The legislation is designed to produce collections totaling about \$140 billion over the first 30 years. CBO expects that the value of valid claims likely to be submitted to the fund over the next 50 years could be between \$120 billion and \$150 billion, not including possible financing (debt-service) costs and administrative expenses. The maximum actual revenues collected under the bill would be around \$140 billion, but could be significantly less. Consequently, the fund may have sufficient resources to pay all asbestos claims over the next 50 years, but depending on claim rates, borrowing, and other factors, its resources may be insufficient to pay all such claims.

A more precise forecast of the fund’s performance over the next five decades is not possible because there is little basis for predicting the volume of claims, the number that would be approved, or the pace of such approvals. Epidemiological studies of the incidence of future asbestos-related disease and the claims approval experience of pri-

vate trust funds set up by bankrupt firms can be used to indicate the range of experience of the federal asbestos trust fund might face, but those sources cannot reliably indicate the financial status of the fund over such a long time period.

CBO estimates that the fund would face more than half of all anticipated claims expenses in its first 10 years, while it would receive roughly constant collections from insurers and defendant firms over its first 30 years. This conclusion is consistent with other forecasts that we have reviewed. Because expenses would exceed revenues in many of the early years of the fund’s operations, the Administrator would need to borrow funds to make up the shortfall. The interest cost of this borrowing would add significantly to the long-term costs faced by the fund and contributes to the possibility that the fund might become insolvent. Under the provisions of section 405, the fund would have to stop accepting new claims (a process known as “sunset”) if its current and future resources become inadequate to fulfill all existing and anticipated obligations, including its debt obligations.

Pursuant to section 407 of H. Con. Res. 95 (the Concurrent Resolution on the Budget, Fiscal Year 2006), CBO estimates that enacting S. 852 would cause an increase in direct spending greater than \$5 billion in at least one 10-year period from 2016 to 2055.

S. 852 contains two intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the cost of complying with those mandates would be insignificant and well below the threshold established in that act (\$62 million in 2005, adjusted annually for inflation).

S. 852 would impose new private-sector mandates, as defined in UMRA, on certain individuals filing claims for compensation for injuries caused by exposure to asbestos; certain companies with prior expenditures related to asbestos personal injury claims; certain insurance companies; trusts established to provide compensation for asbestos claims; health insurers; and persons involved in manufacturing, processing, or selling certain products containing asbestos. Based on

information from academic, industry, government, and other sources, CBO concludes that the aggregate direct cost to the private sector of complying with all of the mandates in the bill would well exceed the annual threshold established by UMRA (\$123 million in 2005, adjusted annually for inflation).

Estimated Cost to the Federal Government: The estimated budgetary impact of S. 852 over the 2006–2015 period is shown in Table 1. The effects of this legislation fall within budget functions 600 (income security) and 900 (interest). CBO estimates that the bill would have little net effect on the budget over the first five years but would add about \$6.5 billion to deficits from 2011 through 2015. (The longterm budgetary impact of the bill is discussed in the section following the “BASIS OF ESTIMATE” section.)

Basis of Estimate: For this estimate, CBO assumes that S. 852 will be enacted by the end of calendar year 2005. Based on information from the Department of Labor, we expect that the Asbestos Fund could become fully operational during fiscal year 2007 and that certain pending exigent asbestos claims would be paid by the fund in 2006.

CBO expects that the fund’s assessments on firms and insurers would be treated in the budget as revenues and that payments to satisfy claims would be considered direct federal spending. In addition, because the Administrator would be authorized to invest the fund’s balances, certain cash flows associated with investments in nongovernmental financial instruments also would be reflected in the budget. Specifically, under the Administration’s current procedures for budget presentation, government funds invested in nongovernmental financial instruments are recorded as expenses (outlays), and the redemption of such investments is recorded as a receipt (negative outlay). Under the bill, any noncash assets received from 4 existing private asbestos bankruptcy trust funds (such as the Manville Trust) would have no budgetary impact until they were liquidated by the Administrator. At that point, both the assets and any gains or dividends on those assets would be recorded on the budget as revenues.

TABLE 1.—ESTIMATED BUDGETARY IMPACT OF S. 852

	By fiscal year, in billions of dollars									
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
CHANGES IN DIRECT SPENDING										
Claims and Administrative Expenditures of the Asbestos Fund:										
Estimated Budget Authority	8.7	21.9	11.1	5.3	5.3	5.3	5.0	4.9	4.7	4.6
Estimated Outlays	8.7	5.6	8.4	9.5	10.8	6.7	5.2	5.1	5.0	4.8
Investment Transactions of the Asbestos Fund:										
Estimated Budget Authority	0	1.1	0	0	-1.0	-0.2	0	0	0	0
Estimated Outlays	0	1.1	0	0	-1.0	-0.2	0	0	0	0
Total Direct Spending:										
Estimated Budget Authority	8.7	23.0	11.1	5.3	4.3	5.1	5.0	4.9	4.7	4.6
Estimated Outlays	8.7	6.7	8.4	9.5	9.8	6.5	5.2	5.1	5.0	4.8
CHANGES IN REVENUES										
Collected from Defendant Firms	2.9	2.9	2.9	2.9	2.9	2.9	2.9	2.9	2.9	2.9
Collected from Insurer Participants	1.3	4.1	5.0	5.0	5.0	1.1	1.1	1.1	1.1	1.1
Collected from Bankruptcy Trusts ¹	4.5	0	0.4	1.6	1.6	0	0	0	0	0
Total Estimated Revenues	8.7	7.0	8.4	9.5	9.6	4.0	4.0	4.0	4.0	4.0
CHANGES IN THE DEFICIT										
Estimated Net Increase or Decrease (-) in the Deficit from Changes in Revenues and Direct Spending	0	-0.3	0	0	0.3	2.5	1.2	1.1	0.9	0.8

¹ CBO estimates the total value of cash and financial assets of the asbestos bankruptcy trust funds would be \$7.5 billion in 2006 and \$8.1 billion when liquidated. The federal budget would record the cash value of those trust assets when they are liquidated by the Administrator to pay claims. CBO estimates that assets of asbestos bankruptcy trust funds would not be fully liquidated until 2010.

Note: Numbers in the table may not add up to totals because of rounding.

To estimate the cost of processing claims, CBO reviewed prior government experience with similar compensation funds and operations of privately run asbestos funds. We also discussed the potential costs of administering the fund with the Department of Labor. To estimate the number and types of claims the Asbestos Fund would receive and when they would be received, CBO reviewed a number of projections of asbestos injury claims that were prepared for different pur-

poses by several private groups and individuals, including those developed by the Asbestos Study Group, Navigant Consulting, the National Association of Manufacturers, and Legal Analysis Systems during consideration of this bill and of similar legislation considered by the 108th Congress. In addition, we studied the history of claims paid and projections of those anticipated to be paid by the Manville Trust and considered the inaccuracy of past projections of future asbestos in-

jury claims. Finally, to determine whether the Asbestos Fund could be expected to collect the amount of assessments from defendant companies and insurance companies that are anticipated in the legislation, CBO examined financial information for some of the public companies that would likely be contributors to the fund and the reserves held by insurance companies for asbestos claims.

Direct spending: To estimate the amount and timing of new direct spending under S.

852, CBO considered the cost of administering the Asbestos Fund and the length of time it would take following enactment for the fund to be fully operational and processing claims. We projected the number of claims that would be submitted to the fund over the 2006-2015 period, including those claims that have been filed or will be filed in federal or state courts or with existing trusts but not settled by the time the bill is enacted (these claims are known as pending claims). To estimate the cost of paying valid claims submitted to the fund, we considered the number of claims likely to be submitted by persons with malignant and nonmalignant medical conditions due to asbestos exposure. We also estimated the net disbursements and receipts associated with the fund's investment activity. Finally, we considered the borrowing that might be required in each year in order for the fund to pay claims.

Administration and Start-up of the Asbestos Fund. Based on the cost of operating existing government compensation funds, the operation of privately run asbestos trusts, and information from the Department of Labor, CBO estimates that administration of the Asbestos Fund would require a staff of over 700 employees for the 2006-2015 period, costing a total of nearly \$1 billion over 10 years. Such administrative costs would be paid from the Asbestos Fund and would not require further appropriation action. For this estimate, CBO expects that the Office would start accepting claims in 2006, shortly after enactment. During the first three years of operation, CBO estimates that the Office would receive around 185,000 claims per year, but that this number would fall to an average of around 60,000 for the next seven years, once all currently pending claims are resolved by the fund.

Individuals seeking compensation from the Asbestos Fund would need to file a claim with the Office within the time specified by the legislation (five years from the date of enactment for pending claims or five years from the date of diagnosis for future claims). The Administrator would then have 90 days to present a proposed decision concerning the appropriate award according to the medical criteria and awards values specified in the legislation. If the claimant chooses to accept the award, the Administrator would issue a final decision, and the Asbestos Fund would pay the claimant over the next one to four years. A claimant could appeal a decision by the Administrator within 90 days of its issuance by requesting either a hearing or a review of the written record. In those

cases, a decision on the appeal would be required within either 180 days or 90 days, respectively.

Under the bill, any claim pending on the date of enactment would be stayed, unless it were already before a court. Of the stayed claims, exigent claims (defined by S. 852 as those claims brought by a living claimant with either mesothelioma or less than one year to live, or by the spouse or child of a claimant who died after either filing of his or her claim or enactment of the bill) would receive the earliest attention by the Administrator. Within 60 days of receipt, the Administrator would be required to either approve or disapprove such a claim as exigent. The bill would require the Administrator to pay exigent claims within one year for cases of mesothelioma, and in no more than two years for all other exigent claims.

CBO expects that the fund would not be fully operational until at least a year following enactment of the legislation. Even after appointing an Administrator and Insurers Commission, this start-up period would be needed to promulgate detailed operating rules and procedures and to recruit, hire, and train personnel to process claims and manage the fund's operations. (The Energy Employees Occupational Illness Compensation Program—a similar federal fund serving a much smaller population—took slightly more than a year to become fully operational.) During this start-up period, the Administrator and the Insurers Commission would also need to collect financial information from thousands of firms and insurers that have made prior expenditures for asbestos injury claims to set appropriate assessment rates for those insurers and firms.

Payments to Claimants. To estimate the cost of paying compensation claims under the bill, CBO reviewed projections of asbestos injury claims that were presented to the Senate Committee on the Judiciary during its consideration of S. 852 and for similar legislation considered by the 108th Congress. Such projections were based on a combination of epidemiological data, projections of disease incidence for the affected population, historical experience of bankruptcy trusts, and projections of the number of injured that would apply for compensation given the bill's medical criteria and compensation award values.

S. 852 defines nine levels of medical impairment that persons exposed to asbestos have suffered and specifies a dollar amount of compensation that the fund would pay to individuals who demonstrate both adequate exposure to asbestos and specified medical con-

ditions. Over time, those award values would be adjusted for inflation. For the lung cancer levels, the bill stipulates different awards, depending on whether a claimant, currently or in the past, does or does not smoke tobacco. (For example, claimants having lung cancer with asbestosis would qualify for compensation under level VIII; awards at this level would range from \$600,000 to \$1.1 million, depending on the claimant's history of tobacco use.)

To estimate the cost to the fund of compensating claimants, CBO considered four categories—future claims that would be made by individuals with malignant conditions, future claims that would be made by those with nonmalignant conditions, and claims pending on the date of enactment of the bill for both malignant and nonmalignant conditions. As detailed below, CBO used information from available projections and studies to estimate the number of claims in each category that would qualify for compensation under the medical conditions specified in the bill. Individuals who are eligible for an award would receive payments from the fund over a one- to four-year period. For this estimate, we assumed that payments for nonexigent claims would be spread equally over a four-year period. We assume that claims pending for mesothelioma at the time the bill is enacted would represent the exigent claims and would be paid in 2006.

Table 2 summarizes the number of claims and total award value for those claims that CBO projects for each category of claims under the legislation.

Pending claims. Individuals who have an outstanding claim with any firm filed in a court on the date of enactment of S. 852 would have five years to submit a claim for compensation from the fund. CBO estimates that, over the first five years that the fund is operational, more than 320,000 pending claims would receive an award from the fund.

There is no comprehensive information regarding the numbers and types of asbestos injury claims that individuals have filed in federal and state courts or with existing trusts under current law. Nor is there reliable information on the numbers and award values of such claims that are settled each year. In 2003, Navigant Consulting prepared an estimate of the number and type of asbestos injury claims then pending in federal and state courts. That information was collected to inform the consideration of legislation similar to S. 852 in the 108th Congress.

TABLE 2.—SUMMARY OF ESTIMATED ASBESTOS CLAIMS AND AWARD VALUES

	Initial 10-year period		Life of fund	
	Number of claims	Award Value of claims (in billions of dollars)	Number of claims	Award Value of claims (in billions of dollars)
Pending Claims for:				
Malignant Conditions	21,000	14	21,000	14
Nonmalignant Conditions	301,000	11	301,000	11
Total Pending Claims	322,000	25	322,000	25
Future Claims for:				
Malignant Conditions	42,000	34	78,000	74
Nonmalignant Conditions	620,000	16	1,184,000	32
Total Future Claims	662,000	51	1,262,000	106
Total for All Claims	984,000	76	1,585,000	132

For this estimate, CBO used the information collected by Navigant in 2003 and adjusted the data to reflect developments since then. Using projections about the number of claims expected to be filed in 2004 and 2005 and assumptions about the pace of settlements for asbestos injury cases, we concluded that the number of pending cases in

2006 is likely to be larger than estimated in 2003—about 7 percent larger.

For this estimate, CBO did not take into account the number of claims that are still technically pending with at least one company but have been inactive for several years. If the claimants' lawyers actively seek out those individuals to file a claim against the fund, the number of claimants

seeking compensation from the fund in the first four years could be significantly higher. An award from the Asbestos Fund for such individuals would be reduced by the value of any other awards received for a given claim. CBO estimates that the average award from the fund over the 2006-2015 period for pending malignant claims would be about \$650,000 and

that awards for such claims would total \$14 billion. We estimate that awards for pending nonmalignant claims would average around \$38,000; total awards for those claims would be \$11 billion over the next 10 years.

Future claims for malignant conditions. CBO examined several projections of malignancies associated with asbestos exposure. While all of those projections included claimants with asbestos exposure and lung cancer but with no evidence of pleural disease or asbestosis, such claimants would receive no compensation under S. 852. CBO assumes that the total number of claims for malignant conditions that would be compensated by the fund would be near the average of the various projections we examined (excluding those lung cancer claimants who would not be eligible for compensation). Adjusting for the time that has elapsed since the performance of the studies that we examined, those studies varied from 65,000 to 100,000 claims for malignant diseases that would be compensated by the Asbestos Fund. This estimate assumes that there would be about 78,000 such claimants. We distributed those cases across the categories of malignant diseases specified in the bill based on the various projections and on the historical distributions of such claims received by the Manville Trust. On this basis, CBO estimates that the average award for malignant conditions over the next 10 years would be \$800,000 and that the total value of awards for such conditions over that period would reach \$34 billion.

Future claims for nonmalignant conditions. The different projections available to CBO of the number of nonmalignant cases and their distribution among the categories specified in the bill vary greatly. CBO expects that the ratio of nonmalignant claims to malignancies under the bill would be similar to the historical ratio of claims compensated by existing bankruptcy trusts. For example, since 1995, the Manville Trust has received an average of eight claims for nonmalignant conditions for every claim for a malignant condition. Based on those historical data and because nonmalignant claimants could receive larger awards under S. 852 than those provided by existing trust funds, CBO estimates that during the first 10 years after enactment, the fund would compensate, on average, 10 new claims for nonmalignant conditions for every new malignancy (including claimants exposed to asbestos with lung cancer who would not be eligible for compensation under the bill). CBO expects that this ratio would decrease over time because of reductions in the use of and exposure to asbestos. (Other analysts have estimated the ratio of claims for nonmalignant conditions to malignancies to be as low as 7:1 or as high as 17:1.) In total, CBO anticipates about 1.2 million future claims for nonmalignant conditions.

CBO estimates that around 85 percent of claims for nonmalignant conditions filed with the Asbestos Fund would be eligible for medical monitoring reimbursement (level I) from the fund. Such reimbursement, roughly \$1,000, is the lowest rate of payment specified for nonmalignant conditions. This claims estimate is based on available research involving a sample of the exposed population with nonmalignant conditions and the history of claims filed with the Manville Trust. To evaluate the history of such claims, CBO reviewed the trust's estimate of how claims received under its 1995 trust distribution process (TDP) would have been compensated under the 2002 TDP. (The later TDP contains categories for nonmalignant conditions more similar to those under S. 852.) Overall, CBO estimates that, over the next 10 years, the average payment for nonmalignant conditions would be about \$26,000 and total awards

for such conditions would amount to \$16 billion.

Investments of the Asbestos Fund. Section 222 would authorize the Administrator to invest amounts in the fund to ensure that there are sufficient sums to make payments to claimants. That section appears to imply that the fund's Administrator could invest surplus amounts in private securities. For this estimate, CBO assumes that the managers of the fund would keep 20 percent of the investments in Treasury securities and 80 percent in non-Treasury securities. The current budgetary treatment of federal investments in non-Treasury instruments is specified in the Office of Management and Budget's (OMB's) Circular A-11, which states that the purchases of such securities should be displayed as outlays and the sales of such securities and returns, such as dividends and interest payments, should be treated as offsetting receipts or collections.

CBO estimates that investing 80 percent of fund balances in private securities would result in net receipts of \$200 million over the 2006-2015 period. The fund would make net investments in 2007, when its collections would exceed its expenditures. In subsequent years when expenditures would exceed collections, the difference would be made up by drawing down assets from the fund, starting with any assets received from other asbestos trust funds. Liquidated assets and earnings from private trust funds would be considered revenue in the federal budget, while the value of assets privately invested by the Administrator would be recorded as offsetting receipts upon liquidation.

For this estimate, CBO used its projections of the return on Treasury securities to predict investment earnings of the fund for both private securities and government securities. Although private securities may well yield higher gains over the long term, such investments carry much greater risk than government securities. The difference between projected returns on private securities and government bonds can be seen as the cost investors must be paid to bear the additional risk of holding private securities instead of government bonds. Thus, adjusted for the additional cost of risk associated with private securities, the net expected returns on private securities are the same as those on government securities.

Revenues. Receipts to the fund would come from three sources: defendant companies that have spent more than \$1 million on asbestos injury litigation, insurance companies that have made more than \$1 million in such payments, and existing private trust funds formed to settle asbestos claims. Over the life of the fund, defendant companies would be expected to contribute \$90 billion, less any credits granted for the establishment of private bankruptcy trust funds set up after July 31, 2004 (known as bankruptcy trust credits); insurance companies would be called upon to contribute just over \$46 billion, less bankruptcy trust credits. CBO is aware of one bankruptcy trust that would be eligible for such credits—the Halliburton Bankruptcy Trust. CBO estimates that the bankruptcy trust credits of defendant companies would total \$2.4 billion over the 30-year period, or \$80 million per year, with the credits being apportioned to all defendant companies based on their share of the total amounts of payments for the year. Insurers would have an estimated \$1.5 billion in bankruptcy trust credits; those credits would go to the insurers who paid into trusts set up after July 31, 2004. All assets of existing asbestos trusts (about \$7.5 billion) would be transferred to the fund.

Defendant companies. Section 202 would specify \$90 billion, less any bankruptcy trust credits under section 222, as the amount to

be collected from defendant companies. The minimum aggregate annual payment would be \$3 billion, less any bankruptcy credits. CBO estimates that annual payments would total \$2.9 billion over 30 years. For the purpose of determining each firm's contribution, each one is assigned to a tier based on its prior asbestos expenditures and whether it is in bankruptcy proceedings.

The actual amounts paid by firms might differ from that implied by their tier assignments because the bill would allow certain exemptions for small businesses and modifications of assessments, based on financial distress or inequity or based on whether a firm meets the criteria for being classified as a distributor. The bill also would allow the Administrator to increase the amount that defendants would pay if the total payments fall short of the minimum aggregate annual payment amount.

The defendants' contributions could decline over the 30-year period for two reasons. First, if more defendant companies exist and make payments than CBO estimates, the payments in the earlier years would exceed the minimum required payment. Because the aggregate payments cannot exceed \$90 billion less bankruptcy credits (or a net of \$87.6 billion), any excess amounts paid in earlier years would reduce the amounts needed to be paid in the future years. Second, the required total payments could decline in later years if the Administrator determines that full payment is not required, and each company's assessment would decline proportionately.

The amount the fund would collect from defendant companies depends on a number of unknown factors:

The number of subject companies and the tiers into which they would fall;

Which of those companies would be subject to exemption or modification of their contributions and whether some affiliated entities would elect to be treated separately or jointly;

The size and nature of the assets of firms in liquidation;

The number and characteristics of subject firms that may go into bankruptcy during the assessment period; and

How much funding is needed to satisfy claims and other expenses of the fund.

Some sources have indicated that as many as 8,400 firms may have paid sufficient prior asbestos claims to be covered by the legislation. CBO could not verify this figure. Based on information that CBO could obtain about firms that have incurred asbestos litigation expenses, we estimate that about 1,700 defendant firms would be required to make contributions to the fund under the bill. It was possible to determine the likely tiers for about 500 of those firms. The remaining firms were assigned equally to the two lowest tiers, based on the assumption that firms with unknown tier assignments were those with lower asbestos claims payments. No reduction in the number of firms was made for those exempt due to size. Similarly, CBO made no upward adjustment to account for defendant firms not identified.

Tier I firms are firms that have filed for bankruptcy. Revenues for tier I firms expected to emerge from bankruptcy were obtained, where possible, from public sources. No reliable information could be obtained about the possible contributions of tier I firms that are likely to liquidate. Firms that securities analysts expect to earn revenues in 2006 were assumed to make the required payments, and no reduction in contribution was made for firms that would receive hardship or inequity adjustments in their contributions or for consolidated payments made by affiliated groups.

Insurers. Section 212 would specify just over \$46 billion, less any bankruptcy trust

credits, as the amount to be collected from insurers over a 28-year period. In the case of insurers, no allocation or formula for payments is specified in the legislation, although the legislation does specify how much in aggregate would be collected for each of the 28 years. The bill would create an Asbestos Insurers Commission to determine an allocation among the insurance companies. The bankruptcy trust credit would represent a dollar-for-dollar reduction in the amount of liability an insurer would pay under the bill for any contributions to bankruptcy trusts established after July 31, 2004. CBO estimates that the value of the bankruptcy trust credits would be \$1.5 billion. Either the allocation determined by the Asbestos Insurers Commission or one agreed upon by the subject companies would determine how much each insurer would pay of the \$46 billion total.

S. 852 would direct insurers to contribute an aggregate initial payment of no more than 50 percent of the first year's required \$2.7 billion within 90 days after enactment. The bill would authorize the Administrator to calculate the initial payment obligations of insurers and handle other matters related to the collection of the funds. However, the initial payment amounts would not be considered final until the Insurers Commission has been formed, promulgated its allocation methodology, and issued its final determination of liability of the insurers. Based on the procedural steps specified in the bill, CBO expects that such determination would be made in fiscal year 2007.

The participating insurers would pay interest on any difference between their ultimate liability and the amount of the interim payment. Any insurers who paid more than their ultimate liability would receive interest on the excess amount. The bill specifies that the interest rate on any overpayments or underpayments would be the same rate. CBO estimates that the fund would be able to collect the initial payment from insurers by the end of fiscal year 2006 and that the demands on the fund for payments would prompt the Administrator to seek to collect the maximum allowed for the initial payment—50 percent of the first year obligation. CBO further assumes that the remaining 50 percent of the first year's payment would be collected in the second year with the associated interest and the second year's contribution.

Existing asbestos trust funds. Based on publicly available information, CBO determined that the existing private trust funds set up to compensate claimants currently contain about \$7.5 billion in assets. Under the bill, those assets would be transferred to the new Asbestos Fund in the first year following enactment. Until that transfer occurs, we assume that claims paid by these funds would roughly equal investment income. The assets of existing trusts are invested in a variety of financial instruments, and only the cash and U.S. obligations in these trusts would be recorded in the federal budget as revenues of the government when transferred. The private securities in the trusts (together with any earnings) would be recorded as revenues only when converted to cash or U.S. obligations.

Based on the financial reports of the Manville Trust, CBO estimates that 56 percent of transferred trust assets (about \$4.5 billion) would be recorded as revenues in 2006. For this estimate, we assume that the remainder of the assets would only be sold as needed to finance spending in later years. The proceeds of those sales would be recorded as revenues to the fund at that time.

Offsets and guaranteed payment surcharge. The bill would allow firms and insurers to reduce their individual assessments by the value of any asbestos claims paid after the

enactment date of S. 852 and before 2007, when CBO expects the fund's full operations would start. It also would authorize certain payments by subject companies to guarantee collection of the mandated amounts. For the purpose of this estimate, CBO assumes that these provisions would have no net effect on annual payments by firms and insurers.

Offsets for exigent claims paid during start-up of the Fund. In the interim between enactment of S. 852 and the time when the fund would begin full operations, defendants and insurers may settle or face judgments on exigent asbestos claims that the fund is unable to process or pay. Firms and insurers could use those settlement amounts as a dollar-for-dollar offset against their assessments, reducing the payments required to be made to the fund.

Guaranteed payment surcharge and guaranteed payment account. The Administrator of the fund could impose on each defendant participant a surcharge to offset any shortfalls in the annual aggregate payment amounts. If the payments by defendant participants exceed the minimum aggregate annual payment of \$3 billion, less bankruptcy trust credits, the excess amount, up to \$300 million, would be set aside in the guaranteed payment account as a form of self-insurance by the fund, with any excess funds being carried forward to the next year. For this estimate, CBO assumed that the Administrator would assess a surcharge on all firms when necessary. If the funds in the guaranteed payment account are insufficient to ensure that the minimum annual payment is raised in any year, the Administrator of the fund would be able to levy a guaranteed payment surcharge on the defendant participants on a pro rata basis.

Secondary effects on other revenue sources. The payments made by defendants and insurers and the sums received by claimants could affect taxable income under the federal corporate and individual income tax systems. This cost estimate includes no effects of those transactions on federal income taxes paid by claimants or businesses. Those secondary effects are likely to be insignificant in any event.

Payments made into the fund would be tax-deductible and would thus reduce the corporate income tax liability of participating firms. But in the absence of this legislation, firms would have to pay asbestos damages set in the courts, which would also be tax-deductible. It is impossible to say with any confidence whether the amounts that would be paid out by defendant firms and insurers under this legislation would be higher or lower than what they would expend in its absence through the tort system. The best assumption under the circumstances is that the bill would have no significant effect on corporate taxable income or on the government's receipts from corporate income taxes.

Similarly, the tax treatment of payments received by claimants would be unchanged from what it is now—effectively excluded from taxable income and therefore having no effect on taxes paid by individuals. There might be some reduction in income tax receipts if a significantly larger proportion of payments goes to claimants rather than to their attorneys, who would pay tax on the income. But this would depend on whether more claimants think they can navigate the new system set up under the legislation without legal assistance than is the case under the existing one—a circumstance that cannot be known. CBO expects that any change in the allocation of awards between attorneys and claimants would be too small to significantly affect income tax receipts.

Budgetary impact of the Asbestos Fund after 2015: To assess the long-term financial

viability of the Asbestos Fund, CBO considered several possible projections of the fund's cash flows beyond the normal 10-year estimate of the legislation's budgetary impact. When estimating such cash flows, the provisions of section 405 are critical. That section of the bill would sunset the fund's operations by directing the Administrator to reject new claims if the fund's resources (including borrowing authority) prove inadequate to pay additional obligations. Under S. 852, claimants could seek compensation in federal courts if the fund were to sunset. In determining whether or not to sunset, the Administrator would consider the unpaid costs of any approved claims and previous borrowing against future revenues. Section 405 also would require the Administrator to return remaining assets to certain non-governmental trust funds—but only in the event of a sunset.

CBO estimates that total receipts to the Asbestos Trust Fund over its lifetime would amount to about \$140 billion, including a small amount of interest earnings on its balances. We estimate that the fund would be presented with valid claims worth between \$120 billion and \$150 billion in addition to any financing (debt-service) costs and administrative expenses. Under the legislation, receipts to the fund would be fairly evenly distributed over its first 30 years. However, even if receipts exceed claims, CBO estimates that more than half of the fund's expenditures for claims would be paid in the first 10 years of its life. Such an imbalance between when the fund's anticipated claims payments would be made and when receipts would be collected would require the Administrator to borrow to pay claims. Under the bill, the borrowed amounts (including interest costs) would have to be repaid from the fund's own budgetary resources.

Depending upon the precise timing and value of claims presented to the fund as well as the exact revenue collected, investment returns, and interest rates, the fund might or might not have adequate resources to pay all valid claims. For example, if the value of valid claims totaled \$130 billion, interest costs on the fund's borrowing might amount to \$10 billion, and interest earned on investments could approach \$2 billion, while administrative costs would add another \$1 billion to \$2 billion. If the value of such claims were significantly more than \$130 billion, the fund's revenues might be inadequate to pay all claims.

Because of the uncertainty and sensitivity of the variables that affect the fund's balances, any long-term projection over five decades must be viewed with considerable caution. Operating the Asbestos Fund would be an entirely new governmental task, and CBO and other analysts have little basis for judging how the Administrator would implement the legislation. The discretion available to the Administrator and insurance commission with respect to the allocation of costs, provision of adjustments, and levying of surcharges makes the flows into and out of the fund hard to predict with much reliability. Furthermore, the projections that have been made in recent decades of the number of asbestos claims likely to be filed were, in hindsight, much too low, suggesting that there might be a significant risk of underestimating the number of future asbestos claims. In addition, receipts to the Asbestos Fund would depend on the continued viability of the firms required to pay into it, which is also uncertain.

The Asbestos Fund's operations are uncertain: Contributing to the uncertainty of the cost to resolve claims under the bill are some significant features of the claims process that would only be defined after enactment of the legislation. For instance, the bill

would require the Institute of Medicine of the National Academy of Sciences to conduct a study to examine the causal link between asbestos exposure and cancers other than lung cancer or mesothelioma. If that study were to determine no causal link between asbestos exposure and any of those cancers, the number of claims for such conditions (level VI under the bill) could decline significantly. The bill would also require the Agency for Toxic Substances and Disease Registry (ATSDR) to conduct a study to determine if any other contaminated sites pose dangers similar to those observed in Libby, Montana. Because claimants from Libby would receive higher minimum awards than other claimants and because the bill would mandate similar treatment for any sites so identified, the costs could rise depending upon which sites might be judged similar to Libby and on how many claimants would be affected. Also, this estimate does not take into account the impact of approving any exceptional medical claims, which are claims that do not fit into the defined criteria but which might still receive compensation depending upon the findings of specific panels of physicians. It is difficult to assess how many such claims might be filed and how liberally those panels might rule on the claims.

Past estimates of the number and value of Asbestos claims have been inaccurate: Forecasts of asbestos claims made over the past decade have failed to accurately predict the magnitude, scope, and evolution of asbestos claims. According to one witness that testified on similar legislation previously before the committee, "in every instance where companies or trusts have attempted to project future asbestos claims, they have always seriously underestimated." Most estimates of future claims rely on a combination of epidemiological information and statistical estimation techniques using historical data. Such models contain a number of potential sources of error in forecasting.

In 1988, experts estimated that the number of future claims against the Manville Trust would range from 50,000 to 200,000. By January of 1991, the trust had already received more than 171,000 claims. Through the summer of 2005, the Manville Trust had received 690,000 claims. The most recent claims forecast performed for the trust estimated that the trust may receive up to 1.4 million additional claims.

CBO's estimates of the number and distribution of claims that would be compensated by the Asbestos Fund under S. 852 are based on forecasts similar to those that have been prepared for the Manville Trust. Therefore, it is possible that the number of claims that would be compensated under S. 852 could deviate in significant respects from our estimates in terms of cost, timing, or both.

Revenue collections are uncertain: The revenue stream that would be generated by the legislation is highly uncertain. Although the aggregate amount of the levy on defendant firms and insurers is fixed over the first 30 years, a number of factors described earlier make it difficult to project the annual receipts with much reliability.

First, identifying the defendant participants and where they would fall in the different payment tiers is difficult, if not impossible, without legislation requiring the information to be disclosed. (Tier placement directly affects the amount a defendant company would pay into the fund.) Many of the prior asbestos settlements were made outside of the court system and, as such, are not public record. This lack of information means that the number of defendant companies in each tier and the resulting payments could be either higher or lower than the numbers used in preparing this estimate.

If the number of defendants is significantly higher than assumed in this estimate and if claims remain at or about the level estimated, the likelihood of insufficient funding available to settle claims would be reduced. At the end of the first 10 years, if excess monies existed, the Administrator could decrease the payments required by the defendants by up to 10 percent.

Similar stepdowns in payments could also occur after 15, 20, and 25 years should funding exceed claims levels sufficiently to warrant such a reduction.

To determine the impact of a significantly higher number of defendant companies making payments, CBO estimated the revenues and the resulting effects on cash flow if there were an additional 650 companies in each of the two lowest tiers. This scenario would result in approximately 3,000 defendant companies paying into the fund and, assuming that the number of claims projected by CBO is correct, the fund would be able to pay all claims projected by CBO and there would be no early sunset due to lack of funds to pay claims.

Conversely, significantly fewer defendant participants who meet the criteria for payments under this bill would result in higher levies on the existing defendant participants to ensure the minimum aggregate annual payment of \$3 billion less bankruptcy trust credits. This continuing drain on firms' resources could lead to more bankruptcies and even higher levies on the remaining firms.

Thirty years is a long time-span for a business. Even under ordinary conditions, economic circumstances lead many firms to liquidate over time. Normal attrition will be exacerbated by the costs of dealing with asbestos liability—either under the current system of litigation or under the legislation itself. The legislation's provisions for adjustments based on inequity or financial distress might mitigate business bankruptcies, but at the cost of even greater uncertainty in the value of the fund's future revenue stream. The legislation also would allow the Administrator to impose a surcharge to guarantee payment of amounts that some firms would be unable to pay. The success of this surcharge depends, in turn, on estimating the attrition among firms.

The bill proposes no absolute deadlines concerning the establishment of the Asbestos Insurers Commission. Some of the tasks involved in promulgating a methodology and producing final billings to the insurers are well defined and have specific time frames, while time frames for other activities are not clearly specified. CBO expects that appointing and confirming the five members and establishing the final allocation methodology for participating insurers would take at least 12 months. If the process were to take longer, it could delay the payments from insurers and possibly necessitate more borrowing than CBO has projected.

Federal liability if the trust fund's resources are inadequate to pay claims: So long as the fund's Administrator does not borrow from the U.S. Treasury beyond the means of the fund to repay such borrowing, the government's general funds would not be used to pay claims. Furthermore, section 406 states that the legislation would not obligate the federal government to pay any part of an award under the bill if amounts in the Asbestos Fund are inadequate.

Estimated long-term direct spending effects: Pursuant to section 407 of H. Con. Res. 95 (the Concurrent Resolution on the Budget, Fiscal Year 2006), CBO estimates that enacting S. 852 would cause an increase in direct spending greater than \$5 billion in at least one 10-year period from 2016 to 2055.

Estimated impact on state, local, and tribal governments: S. 852 contains two inter-

governmental mandates as defined in UMRA. First, it would preempt state laws relating to asbestos claims and prevent state courts from ruling on those cases. Second, the bill would require state governments to comply with requests for information from the Asbestos Insurers Commission. CBO estimates that any cost associated with this mandate would be insignificant and well below the threshold established in that act (\$62 million in 2005, adjusted annually for inflation).

The bill would authorize \$15 million from the Asbestos Trust Fund for state, local, and tribal governments to monitor and remedy naturally occurring asbestos. Any related costs to those governments would be incurred voluntarily as a condition of receiving federal aid.

Estimated impact on the private sector: S. 852 would impose new private-sector mandates, as defined in UMRA, on:

Certain individuals filing claims for compensation for injuries caused by exposure to asbestos;

Certain companies with prior expenditures related to asbestos personal injury claims;

Certain insurance companies; Trusts established to provide compensation for asbestos claims;

Health insurers; and

Persons involved in manufacturing, processing, or selling certain products containing asbestos.

Based on information from academic, industry, government, and other sources, CBO concludes that the aggregate direct cost to the private sector of complying with all of the mandates in the bill would well exceed the annual threshold established in UMRA (\$123 million in 2005, adjusted annually for inflation) during the first five years those mandates would be in effect. CBO cannot determine the direction or magnitude of the net impact of the bill's mandates on claimants, defendant companies, or insurance companies over the long term.

Asbestos injury claims: The bill would prohibit an individual from bringing or maintaining a civil action alleging injury due to asbestos exposure. Currently, individuals can file asbestos injury claims against any number of defendants in state or federal court. Under S. 852, individuals would only be able to receive compensation for asbestos-related injury by filing a claim with the federal Asbestos Fund established by the bill. A claimant would be able to recover from the fund if that person could meet the bill's medical criteria, which are based on the severity of the asbestos-related disease. Claims pending as of the date of enactment would be stayed, except for certain pending civil actions.

Some individuals who would receive compensation under current law would not be qualified to receive compensation under the bill. Further, some individuals would receive more compensation for their asbestos injury claims under current law, while others would receive more if S. 852 is enacted. The direct cost of the mandate to claimants would be the difference between the total settlements and judgments that would be obtained under current law and the compensation that would be obtained by claimants under S. 852.

Based on information from academic, industry, and other sources, CBO assumes that claimants who would be deemed ineligible for compensation under the bill would be predominantly from the "unimpaired" category. Because comprehensive data relating to asbestos exposure, litigation, and compensation are not available, it is difficult to predict the number of claimants who would receive compensation and the amount of the settlements they would receive under current law. Unimpaired claimants historically receive multiple settlements of a few thousand dollars each from as many as half-a-

dozen defendants. According to several expert sources, settlements for unimpaired claimants may range in value from \$3,000 to \$50,000 per claimant. Also, according to several sources, a large proportion of claims currently pending could have their settlements precluded or delayed under the bill.

Further, experts predict that many individuals would probably receive less compensation in the first five years under S. 852 than under current law. Consequently, CBO expects that the direct cost to claimants of complying with this mandate could amount to hundreds of millions of dollars over the 2006–2010 period.

Assessments on defendant companies: Section 202 would impose a new mandate on defendant participant companies, defined in the bill as certain companies with prior expenditures related to asbestos personal injury claims. Such defendant companies would be required to pay an annual assessment to the Asbestos Fund totaling a minimum of \$3 billion in each of the first five years, less any bankruptcy trust credits. Defendant participants would be required to pay over the life of the fund a total of not more than \$90 billion, less any credits.

Section 204 would require the Administrator of the Asbestos Fund to impose a surcharge on each participant required to pay contributions into the fund to make up for any shortfalls in a given year due to nonpayment by some participants. The amount of surcharge to be paid would be determined by the Administrator. CBO expects that the Administrator would assess a surcharge on all firms sufficient to compensate for this loss and that the surcharge would be imposed differentially on defendant companies to reflect their different risks and to maintain their roughly equivalent contributions. However, CBO expects that there would be no surcharge on defendant companies during the first five years of the mandate.

The amount the fund would receive from defendant companies would depend on a number of factors, including the number of subject companies and the tiers into which they would fall. Based on data from industry and other sources, CBO estimates that the defendant companies would pay \$2.9 billion per year into the fund over the 2006–2010 period. According to industry and academic sources, defendant companies in aggregate currently pay asbestos litigation and settlement costs on an annual basis close to the amounts that would be required by the bill in the next five years. Thus, CBO estimates that the incremental costs, if any, for those companies to comply with those mandates would not be significant over the first five years the mandates would be in effect.

Assessments on insurance companies: Section 212 would impose a mandate on insurers with asbestos-related obligations. The bill would require those insurance companies to contribute to the fund, and specifies that their contribution would satisfy their contractual obligation with the defendant companies to compensate claimants for injuries caused by asbestos. The bill does not, however, specify any allocation or formula for such payments to the fund. The amount of the contribution to the fund for individual insurance participants would be determined by the Asbestos Insurers Commission established under the bill.

The aggregate contributions to the fund of all participating insurers would average \$2.7 billion in the first and second year and \$5 billion in years three through five. Participating insurers would be required to pay over the life of the fund a total of \$46 billion, less any bankruptcy trust credits. Based on information from industry sources, CBO estimates that insurers would pay a total of about \$20.4 billion into the fund during fiscal

years 2006 through 2010. According to industry information on asbestos liability costs, insurance companies in aggregate would have expected costs for asbestos claims under current law close to the amounts that would be required by the bill over the next five years. Thus, CBO estimates that the incremental costs for those insurance companies to comply with the mandates would not be significant over the 2006–2010 period.

Asbestos settlement trusts: Section 402 would require asbestos settlement trusts, established to provide compensation for asbestos claims, to transfer their assets to the Asbestos Fund no later than 90 days after the enactment of the bill. Such a requirement is an enforceable duty, and therefore, a mandate under UMRA. Based on information from the trusts and industry sources, CBO expects that such trusts would transfer approximately \$7.5 billion in assets to the fund in 2006. The cost to the trusts of the mandate for the trusts in that year would be the value of the assets net of amounts that the trusts would otherwise pay for compensation and administrative costs in that year.

Health insurance: Section 409 would impose a private-sector mandate by prohibiting health insurers that offer a health plan from denying, terminating, or altering coverage of any claimant or beneficiary on account of participation in a medical monitoring program under this bill or as a result of any information discovered as a result of such monitoring. This mandate would have no direct cost because such a medical monitoring program does not exist under current law.

Ban on products containing asbestos: Section 501 would prohibit persons from manufacturing, processing, or distributing in commerce certain products containing asbestos. The bill would require the Administrator of the Environmental Protection Agency, not later than two years after the enactment of the bill, to promulgate final regulations prohibiting commerce in such products (with some exceptions). In addition, the bill would require persons who possess a product for the purpose of commerce that is subject to the prohibition, not later than three years after the enactment of the bill, to dispose of that product by means that meet federal, state, and local requirements. A number of products and processes still use asbestos, including brake pads and linings, roofing materials, ceiling tiles, garden materials containing vermiculite, and cement products. According to industry and government sources, products are readily available to replace products containing asbestos, and the disposal of such asbestos products would not be difficult. Therefore, CBO expects that the direct cost of complying with this mandate would not be large.

Estimate prepared by: Federal Spending: Mike Waters and Kim Cawley. Federal Revenues: Barbara Edwards. Impact on State, Local, and Tribal Governments: Melissa Merrell. Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis. G. Thomas Woodward, Assistant Director for Tax Analysis.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 19, 2005.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As you requested, the Congressional Budget Office (CBO) has studied the report prepared by Bates White, LLC, concerning S. 852, the Fairness in Asbestos Injury Resolution Act of 2005. In particular, you asked CBO to evaluate the Bates White projection of the claims against the proposed asbestos trust fund from individuals with

lung and other cancers (identified in the legislation as disease levels VII and VI). In light of that evaluation, you also asked whether CBO would modify the conclusions reached in its August 25, 2005, cost estimate for S. 852.

CBO has discussed the Bates White report with its authors and officials of that firm. It has also met or spoken with a number of other experts with varying views on the asbestos legislation, including Judge Edward Becker, trial lawyers with extensive experience in asbestos litigation, and representatives of NERA Economic Consulting, the Asbestos Study Group, the AFL-CIO, and Legal Analysis Systems. As a result of that review and assessment process, CBO has reached the following conclusions:

The Bates White report contains no new information that would cause CBO to revise its cost estimate.

The Bates White report is not a cost estimate; its results are therefore not directly comparable with those of the CBO cost estimate. Bates White estimated the value of claims that could be eligible for compensation; CBO estimated the value of claims that would receive compensation. This distinction is important because many potential claimants would probably not file claims and not all of the claims filed would be approved.

Two elements of the Bates White analysis are particularly important, and contribute significantly to its estimate of potential costs. Bates White assumes that one eligibility requirement in the legislation (weighted work-years of occupational exposure) would not constrain potential claims; Bates White also estimates a prevalence of pleural abnormalities (an eligibility requirement for claimants with lung and other cancers) that is higher than other researchers believe is likely.

The Bates White report highlights some factors that pose potential risks to the financial viability of the asbestos trust fund that S. 852 would establish—including the possibility that the financial incentives created by the bill could lead to a substantial number of claimants with disease levels VII and VI. Those risks are real, but CBO believes that claims of the magnitude suggested by Bates White are unlikely to occur.

After further reviewing S. 852, studying the Bates White report, and consulting with a wide range of experts on asbestos legislation, CBO reaffirms the findings presented in its August cost estimate:

The proposed trust fund might or might not have adequate resources to pay all valid claims. There is a significant likelihood that the fund's revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. There is also some likelihood that the fund's revenues would be sufficient to meet those needs. The final outcome cannot be predicted with great certainty.

CBO projects that the proposed fund would be presented with valid claims worth between \$120 billion and \$150 billion, excluding certain potential costs or savings that CBO could not estimate; total costs would be higher because the fund must also cover administrative expenses and any financing costs. The revenues collected under the bill would be, at most, about \$140 billion, but could be significantly less. If the value of valid claims was significantly more than \$130 billion, the fund's revenues would probably be inadequate to pay all claims.

CBO could not estimate any costs or savings that might result from several features or consequences of the legislation. A number of those features could add to the cost of the legislation. In particular, CBO's estimate does not include potential claims by individuals with older, so-called dormant, asbestos

claims pending in the court system, who might seek additional compensation from the fund. It also does not encompass: possible claims by family members of workers who were exposed to asbestos; the costs of any exceptional medical claims that could be made under the bill; the potential costs for residents of other areas of the country who might be deemed eligible to receive the same special treatment given to the residents of Libby, Montana, under the legislation; and the impact on costs of allowing CT scans to serve as documentation of pleural abnormalities. On the other hand, CBO's estimate does not reflect the possibility that medical studies required by the legislation might preclude individuals with certain diseases from obtaining compensation from the fund.

A more detailed discussion of CBO's review of the Bates White report is enclosed. I hope this information is helpful to you.

If you wish further details on this analysis, we would be happy to provide them. The CBO staff contact is Mike Waters.

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

ANALYSIS OF POTENTIAL CLAIMS UNDER S. 852,
THE FAIRNESS IN ASBESTOS INJURY RESOLUTION
ACT OF 2005

As requested by Senators SPECTER, LEAHY, and FEINSTEIN, the Congressional Budget Office (CBO) has analyzed the report prepared by Bates White, LLC, concerning S. 852, the Fairness in Asbestos Injury Resolution Act of 2005, regarding the potential cost of claims against the asbestos trust fund that would be established by that act. In its cost estimate for that legislation, dated August 25, 2005, CBO estimated that the value of valid claims against the fund would total between \$120 billion and \$150 billion. The Bates White report, which was issued on September 19, 2005, suggested that the cost of claims could be much greater.

CBO has discussed the Bates White report with its authors and officials of that firm. It has also met or spoken with a number of other experts with varying views on the asbestos legislation, including Judge Edward Becker, trial lawyers with extensive experience in asbestos litigation, and representatives of NERA Economic Consulting, the Asbestos Study Group, the AFL-CIO, and Legal Analysis Systems. As a result of that review and assessment process, CBO has reached the following conclusions:

The Bates White report contains no new information that would cause CBO to revise its cost estimate.

The Bates White report is not a cost estimate; its results are therefore not directly comparable with those of CBO's cost estimate. Bates White estimated the value of claims that could be eligible for compensation; CBO estimated the value of claims that would receive compensation. This distinction is important because many potential claimants would probably not file claims and not all of the claims filed would be approved.

Two elements of the Bates White analysis are particularly important, and contribute significantly to its estimate of potential costs. Bates White assumes that one eligibility requirement in the legislation (weighted work-years of occupational exposure) would not constrain potential claims; Bates White also estimates a prevalence of pleural abnormalities (an eligibility requirement for claimants with lung and other cancers) that is higher than other researchers believe is likely.

The Bates White report highlights some factors that pose potential risks to the financial viability of the asbestos trust fund that S. 852 would establish—including the possibility that the financial incentives cre-

ated by the bill could lead to a substantial number of claimants with disease levels VII and VI. Those risks are real, but CBO believes that claims of the magnitude suggested by Bates White are unlikely to occur.

After a careful review of the Bates White report and further analysis of the legislation, CBO reaffirms the findings presented in its August cost estimate:

The proposed trust fund might or might not have adequate resources to pay all valid claims. There is a significant likelihood that the fund's revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. There is also some likelihood that the fund's revenues would be sufficient to meet those needs. The final outcome cannot be predicted with great certainty.

CBO projects that the proposed fund would be presented with valid claims worth between \$120 billion and \$150 billion, excluding certain potential costs or savings that CBO could not estimate; total costs would be higher because the fund must also cover administrative expenses and any financing costs. The revenues collected under the bill would be, at most, about \$140 billion, but could be significantly less. If the value of valid claims was significantly more than \$130 billion, the fund's revenues would probably be inadequate to pay all claims.

CBO could not estimate any costs or savings that might result from several features or consequences of the legislation. A number of those features could add to the cost of the legislation. In particular, CBO's estimate does not include potential claims by individuals with older, so-called dormant, asbestos claims pending in the court system, who might seek additional compensation from the fund. It also does not encompass: possible claims by family members of workers who were exposed to asbestos; the costs of any exceptional medical claims that could be made under the bill; the potential costs for residents of other areas of the country who might be deemed eligible to receive the same special treatment given to the residents of Libby, Montana, under the legislation; and the impact on costs of allowing CT scans to serve as documentation of pleural abnormalities. On the other hand, CBO's estimate does not reflect the possibility that medical studies required by the legislation might preclude individuals with certain diseases from obtaining compensation from the fund.

THE METHODOLOGY OF THE BATES WHITE
REPORT

The Bates White analysis of S. 852 is based on an epidemiological analysis of the population employed in industries with some potential exposure to asbestos. To estimate how many claims could be presented to the fund under S. 852 by individuals with both malignant conditions and asbestos exposure, Bates White first estimated the size of the population working in industries and positions in which asbestos exposure was probable. Using estimates of the lifetime incidence for individuals of developing lung and other cancers that could be compensated under S. 852, the authors estimated how many people could make such claims under the bill by further estimating how many of those individuals would develop pleural abnormalities. Evidence of such abnormalities is one of the qualifying requirements for compensation for disease levels VII and VI under S. 852.

For one of the cost scenarios in the Bates White analysis, the authors reported that they estimated that the value of claims from all individuals that could seek compensation from the fund would sum to \$300 billion over the next several decades. That figure does not include any costs or savings from most

of the same features of the bill, mentioned above, that CBO could not quantify. Bates White also presented an alternative estimate that includes some of those costs, bringing the total value of potential claims to nearly \$700 billion. Because the Bates White estimate of the value of claims that could be presented to the fund far exceeds the resources likely to be available to the fund, the authors concluded that the fund would have to be terminated without paying all valid claims.

The Bates White estimate includes a large number of potential claims against the asbestos trust fund from individuals suffering from lung and other cancers, many of which would not have been caused by exposure to asbestos. The report's authors believe that such claims are significantly under-represented in the experience to date in the tort system and existing asbestos trusts. Nevertheless, CBO remains convinced that the number of such claims that would be submitted to the trust fund and approved for payment under S. 852 would be far fewer than suggested by Bates White. In CBO's judgment, the historical experience of the Manville Trust and that trust's current projection of future claims against it are a more reliable basis for estimating the number of future valid claims that would be filed with the asbestos fund under S. 852.

COMPARING THE BATES WHITE REPORT ON S. 852
AND CBO'S COST ESTIMATE FOR THE BILL

The Bates White report and the CBO cost estimate cannot be directly compared because the estimates address different questions. CBO estimated the value of valid claims that would be presented to the fund's administrator. Bates White estimated the value of claims that could be presented to the administrator; its figures are not adjusted to indicate how many individuals actually would seek and receive compensation from the fund. If such adjustments were made, the Bates White cost analysis might be much more in line with other estimates of the likely cost for compensating claims for malignant conditions.

In attempting to answer different questions, the two analyses used different methodologies. CBO's estimate relies on the projections of claims from other analyses prepared with regard to S. 852 and similar legislation. Those projections are grounded, in part, on the historical experience of claims paid by the Manville Trust. That approach reflects the observation that the Manville Trust receives claims from nearly all of the individuals that have brought asbestos tort claims, and the expectation that it provides a reasonable model to use for projecting the number and types of future valid claims likely to be filed with the asbestos trust fund that would be established under S. 852—particularly claims for malignant conditions.

The Bates White analysis of S. 852 rejects the notion of using the experience of the Manville Trust to project the number of claims that could be made against the proposed fund, because the authors observe that not all individuals with malignant conditions that could make asbestos tort claims choose to do so. Bates White notes that engaging in tort litigation can be costly and burdensome, and that many individuals with potential asbestos tort claims choose not to make such claims. The authors expect that replacing the asbestos tort system with the administrative settlement process specified in S. 852 would encourage many of those individuals with malignant conditions and asbestos exposure to make claims against the federal asbestos fund. (Bates White also estimates fewer claims for nonmalignant conditions than CBO projects, but the financial

impact of that decrease is much smaller than the impact of its much larger estimate of the number of claims for malignant conditions.)

EVALUATION OF THE BATES WHITE APPROACH

During the Senate Judiciary Committee's November hearing on S. 852, several witnesses voiced concerns about the Bates White estimate of the number of individuals with lung and other cancers that could make claims for compensation under S. 852. CBO has discussed many of these issues with Bates White and others who have studied the legislation, and shares some of those concerns. They include:

Bates White may have overestimated the incidence of pleural abnormalities. Pleural abnormalities are one of the conditions that claimants with lung or other cancers must exhibit under S. 852 to qualify for compensation. Although there is broad agreement about the incidence of lung and other cancers in the asbestos exposed population, there does not appear to be a consensus about the extent of pleural abnormalities within that population. The Bates White report cites several studies as the basis for its estimate that about 10 percent of its exposed population of 27 million people could be expected to have pleural abnormalities. Among the more heavily exposed population of about 9 million, however, Bates White estimated that the incidence of abnormalities would be higher—around 24 percent.

NERA presented CBO with an evaluation of the studies cited by Bates White for its estimate of the incidence of pleural abnormalities. NERA concluded that the report overstated the incidence of pleural abnormalities by at least half. The incidence among the asbestos-exposed population appears to be in dispute because the sample population used in some studies that have measured it may not be representative of the population in question. In addition, some of the studies measured the incidence of pleural abnormalities based on their presence in only one lung, whereas eligibility under the bill would require the presence of such abnormalities in both lungs. CBO has not attempted to independently estimate the incidence of pleural abnormalities in the exposed population, but a proportion that differed significantly from that estimated by Bates White would change the results of that study substantially.

The Bates White study does not explicitly account for the work-years of occupational exposure specified by the bill. Under S. 852, claimants with lung or other cancers would be required to demonstrate that they experienced asbestos exposure for a specific number of years, weighted by the intensity of exposure and when it occurred. By not accounting for the bill's weighted work-year exposure criteria, Bates White has overestimated the number of individuals that could file a successful claim under S. 852. CBO believes that a significant percentage of potential claimants might be unable to demonstrate a sufficient number of work years of exposure to asbestos to qualify for compensation under the bill.

Meeting the bill's required weighted work-years of occupational exposure to asbestos is one of the key qualifying criteria—along with exhibiting pleural abnormalities—for an award under the legislation. The Bates White study did not directly account for this requirement. The authors told CBO that most individuals in the exposed population typically had long careers in the same occupation or industry and that the presence of pleural abnormalities was likely to indicate sufficient years of asbestos exposure to meet the bill's criteria.

However, pleural abnormalities can occur in individuals with fewer years of exposure than are required to qualify for disease levels

VII and VI under the bill. Consequently, applying the work-year criteria could eliminate a significant number of claimants who might otherwise qualify.

The Bates White report attempts to estimate the number of individuals that could make successful claims under S. 852, but does not attempt to estimate how many individuals would seek to do so. There is general agreement that individuals exposed to asbestos that have developed mesothelioma and asbestosis have a high propensity (probably well above 70 percent) to file tort claims and apply to the Manville Trust for compensation. There appears to be much less agreement on the propensity of individuals that have been exposed to asbestos and have developed lung or other cancers to take such actions. That is, in part, because there is no consensus on how many individuals with lung or other cancers could demonstrate that asbestos exposure was a substantial contributing factor to their disease (the basis for estimating a claiming rate). Many researchers agree that claiming rates for such individuals today are much lower—certainly less than half, perhaps much less—than for people with mesothelioma or asbestosis. Applying a claiming rate of much less than 100 percent for the Bates White estimates of level VII and VI claims would substantially reduce the costs presented in the Bates White analysis.

Bates White estimates a much larger population exposed to asbestos than most other analyses. Bates White reported that its estimate considered a working population of about 27 million that was exposed to asbestos, a much larger number than many other studies have assumed. However, the authors noted that about 9 million of those people, who had medium-to-heavy exposure to asbestos, accounted for about 90 percent (\$270 billion) of the potential claims. An asbestos-exposed population of around 9 million is similar to the estimates of other researchers, and CBO does not consider the size of the exposed population to be a significant issue with the report.

How the key participants in the process—the fund's administrator, claimants, and attorneys or others who assist claimants—behave would have a significant impact on the number of successful claims filed with the proposed asbestos trust fund. The authors of the Bates White report have suggested that the behavior of claimants and attorneys under S. 852 would differ greatly from their behavior under the current system. They expect that under the no-fault administrative process outlined in the legislation, many more claimants with asbestos exposure and lung or other cancers would pursue claims than have done so or filed with the Manville Trust. They anticipate this outcome because they expect that the cost of seeking an administrative claim from the fund would be much less than pursuing litigation, and that the rewards for claimants would be much greater than those obtained from the Manville Trust (though perhaps not as large as awards obtained in some tort settlements).

CBO reaches a different conclusion—that the system specified in S. 852 bears sufficient similarity to the operations of the Manville Trust that the latter's experience is a sound basis for projecting the number of most types of claims under the bill. CBO's estimate of the number of future claims for malignant conditions expected under S. 852 is very similar to the most recent claims projection prepared for the Manville Trust.

A number of factors make that analogy appropriate. For example, whether pursuing an asbestos tort claim under current law or an administrative settlement under the legislation, a claimant would need to demonstrate that asbestos exposure was a substantial

contributing factor to his or her cancer. Thus, just as under the current system, claimants could not necessarily assume that the fund's administrator under S. 852 would approve all claims. This is particularly true for level VI claims, which would be individually evaluated by a medical panel. The Manville Trust also requires applicants to demonstrate a specific number of work-years of exposure to asbestos to qualify for an award. The number of work-years needed to qualify for an award from the Manville Trust is generally less than would be required under S. 852, so in that respect, the experience of the Manville Trust could imply more claims than the federal fund might actually face. Also, CBO believes that claimants to the proposed federal asbestos fund would face costs and procedural burdens similar to those that applicants to the Manville Trust face.

Although the financial incentives for some claimants might be greater under the bill than under the current tort system, the financial incentives for attorneys to assist claimants would be weaker. Attorneys play a significant role in identifying claimants and pursuing their claims under the current system, and would probably do so under S. 852. Most claimants would probably need help preparing a claim under S. 852, and the bill would cap attorneys' fees at 5 percent of individual awards made by the fund. By contrast, under the current tort system, attorneys typically receive fees of up to 40 percent of the amount awarded. Because attorneys or others who might assist claimants would play such a key role in the claims process, the bill's cap on fees makes it less likely that the legislation would lead to a substantial influx of claims that are not represented in the current system.

Some of the attorneys whom CBO consulted suggested that asbestos tort claims have recently shifted away from relatively straightforward settlements, and that asbestos cases today involve a significant time commitment and large up-front costs to prepare for litigation, factors that may deter some individuals from pursuing claims. If so, the number of potential claimants to the fund proposed under S. 852 might be underrepresented in the current tort environment. But because asbestos litigation has been under way for many years, CBO believes that the long historical experience of the Manville Trust is the best available indicator of claimants' behavior under the bill, even if the current tort environment differs somewhat.

Mr. SPECTER. Mr. President, before yielding the floor, let me say what a constructive role Senator COBURN has played in the Judiciary Committee. Senator COBURN has been in this body since 2004. He had been in the House of Representatives. He has brought his expertise as a medical doctor and he has made great contributions.

We address some very tough medical procedures. I have said this to him privately, what a contribution he has made, and there is no reason I shouldn't say it publicly.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, I want to spend a few minutes talking about the bill.

There is one thing that is an absolute certainty: There are a ton of people in this country who have bad diseases from asbestos who aren't getting treatment and aren't getting cared for. That is what certainty is. You can bet on

that, that the problem is made worse because the trial bar is clogging the courts with cases of people who do not have diseases from asbestos, claiming they do. That is one of the reasons the courts want reform.

Having been on the Judiciary Committee during the process of this and voting this bill out of committee, even though I have significant reservations about this bill. Let me talk a couple of minutes about that.

It doesn't matter to me what the Congressional Budget Office says because their track record in estimating everything from the cost of Medicare to the benefits in capital gains taxes is usually 180 degrees off what actually happens. Having CBO's estimate about what is going to happen with this trust fund I don't think lends any credence or undermines it one way or the other. Because I think they do not know, and I don't think anybody can know.

There is a second problem in this bill; that is, the problem we face today is this bill will allow people who do not have injury from asbestos to receive hundreds of thousands of dollars for an asbestos claim when they do not have it. That deals with the medical criteria. It will allow smokers who have some exposure to asbestos who develop lung cancer—smoking is the No. 1 cause of lung cancer—who have no evidence of significant disease caused by asbestos causing their lung cancer to be compensated for a disease that they themselves were responsible for by smoking tobacco products.

The intended purpose of the FAIR Act is to compensate those who are truly sick from asbestos exposure, without destroying the companies and jobs and opportunities in the future. My worry with this bill is the defendants and the plaintiffs will end up back in the tort system in a very short period of time.

I am rising today to support Senator CORNYN's alternative, the Asbestos and Silica Claims Priorities Act. I am doing that because I think it addresses the real problem.

If you look at the abuse in the courts and if you look at what is wrong with this bill, it has to do with putting people in court who do not have disease from asbestos. The Cornyn Amendment has a very defined medical criteria which the courts will have to follow when making judgments about who is eligible to file a claim on this bill.

A major reason the FAIR Act won't have enough money—and the major reason people can attack the FAIR Act in terms of the amount of the trust fund—is because the medical criteria is going allow too many people to be in the process who do not have disease related to asbestos. There have not been significant changes in the medical criteria associated with this bill.

I tried to amend this in committee. I could not win. I have a significantly different level of knowledge on the committee than the rest of the members in terms of medical knowledge,

having continued to be a practicing physician, and I know it is going to be very difficult to explain all those medical issues to Members of this body to try to get them changed. That is why I think Senator CORNYN's approach is a better alternative.

We have to create a fair system in the courts for allowing those who are truly sick from asbestos exposure to seek compensation from those who are truly responsible, rather than creating another Federal bureaucracy that is likely to fail.

More than 73 companies have already gone bankrupt, and many others have suffered a great deal of financial difficulty, not because many sick people have sought compensation for their injuries but because smart trial lawyers have learned to game the system and file phony claims. These aren't faceless companies with unlimited resources. And the people who are truly injured are not faceless people who didn't contribute something good to the companies they worked for. The businesses, by and large, are ready and willing to right the past wrongs. The question is, Should they be paying when nobody is injured? With the medical criteria in this bill today, a third of the claims, in my estimation, will be paid to people—\$50 billion will be paid to people—who will file under the medical criteria, as written, who have no injury whatsoever from asbestos but yet these companies will be paying them for a perceived injury from asbestos.

Ninety percent of the claimants out there in the courts today who have filed claims that allege to have impairment from asbestos have no impairment. If you read the press stories about how the game has been played, how the B-Readers have falsely read, for payments from trial lawyer organizations, the chest x-rays, and the pulmonary function tests have been manipulated illegally to claim benefits from some of these companies, you can see we cannot have loose medical criteria and ever expect to have this trust fund survive.

The other thing to mention—it is not mentioned much—there is a background caseload in this country of mesothelioma, cancer of the lining of the lung, of about 800 people a year. If there had never been any asbestos, 800 people a year would develop mesothelioma.

At my age, and for most people somewhat younger who went to any public school where the ceiling tiles had asbestos components, we can qualify under this bill not because asbestos truly caused it. There is no causal effect in that low an exposure. There is no particle load count at all in terms of measuring exposure, which is what we know is important. A small amount of asbestos exposure is harmless, a large amount of asbestos exposure is terribly disease causing. When we don't look at load factors, we are going to have medical criteria that make people eligible who are truly not diseased from asbestos.

For example, there are 174,000 new cases each year in this country of lung cancer.

This is kind of a wordy chart. I don't think it is going to project well. But the important thing about that is they may have no true, actual asbestos exposure but could claim under this system asbestos exposure from environmental background exposure. Most of these people have lung cancer because they are smokers, and they are going to have lung impairment, and they are going to meet some of the requirements under the medical criteria but have no true asbestos exposure.

If you look at that, and take 10 percent of the cases based on lung cancers alone, you are talking \$5 billion a year. Just lung cancer alone times 30 years, at \$5 billion a year, is more than the trust fund has in it.

I will guarantee we will see an approach for compensation by anybody who has ever had any exposure or been around asbestos, and they will qualify to a certain extent more or less under this bill. What if it is 5 percent? You are still talking \$78 billion. The numbers are massive.

If you are going to have a trust fund, you are going to have to have adequate medical criteria that truly reward those people and compensate those people who are truly injured. If you have good medical criteria, the trust fund system will work. If you do not have good medical criteria, if you have very loose medical criteria, the trust fund will fail. We will not have solved the problem.

Either we have to get away from a trust fund program and design medical criteria the courts will use, or we have to keep a trust fund program and tighten up the medical criteria in this bill.

The bill as written today, I believe, will fail. It will fail because it will be overwhelmed with claims against this trust fund by people who do not have asbestos-related true disease.

I will give a couple of examples. Non-malignant level 2 under the fund allows individuals who have obstructive pulmonary disease—people with emphysema, people with chronic bronchitis—to receive compensation by the fund even when they do not have restrictive pulmonary diseases. That is what asbestos causes, a restrictive disease, not an obstructive disease. Under the criteria written in this bill, smokers who have had exposure to asbestos, who do not have a disease related to asbestos, will be compensated under this bill.

Consequently this fund allows a smoker—the No. 1 cause of obstructive airway disease, not asbestos, but smoking—asbestos causes restrictive lung disease—to receive compensation. That cannot work with the fund as we see it today.

This fund also will compensate people for cancers where there is no scientific evidence whatever that their cancers are caused by asbestos. For example, for colorectal cancer, there are 130,000 cases of colon cancer a year.

There are tons of scientific studies that show there is no connection between that and asbestos, but we have this in the bill. It is dependent on an IOM study, but it should not be in the bill. If new science sometime later shows some connection between colorectal cancer, stomach cancer, or esophageal, laryngeal, and pharyngeal cancer, we can put it back. We are putting it in, when there is no science whatsoever—and the small studies on laryngeal and pharyngeal cancer that show some connection were not modified for smoking and alcohol use, the No. 1 and No. 2 causes. So it is not good science.

Therefore, we have a large group. If you take lung cancers combined with all the other cancers and put them together and you say 10 percent of those who are coming through will try to go to the trust fund, you have \$267 billion that will blow this thing wide open.

This trust fund, with the medical criteria it has today, will not work. That is why having a bill that has specific medical criteria in it will work.

Let me be clear why I support the Cornyn substitute. The Cornyn substitute does not shut anyone out of the courts. If you think you have asbestos exposure, and you want to sue, you can. But you will have to meet the medical criteria for it to be related to asbestos or silicosis. There is no unreasonable requirement; there is just up-front medical criteria that must be met to have application and that requirement must apply.

It does not mean you cannot have your day in court. You can. You have to demonstrate your disease matches the medical criteria which are recognized medical criteria associated with asbestos disease.

The other thing that is good about this bill is if you have had asbestos exposure and have no disease now, this does not cut you off from the future. If you develop disease that is truly related to asbestos, you will be able to have your day in court years—30, 40 years—down the road if, in fact, you develop impairment related to asbestos within this medical criteria that the medical community and the scientific community recognize is accurate.

Under this substitute, as compared to the present bill, physicians will have to comply with strict scientifically sound requirements. There is no room for doctors and x-ray B readers to fudge the data under the Cornyn substitute. The substitute makes sense. The trust fund concept will work if we have good medical criteria. We do not, so it is not going to work.

The answer is to keep people in the court system but define the medical criteria where they can win when they truly have a disease that is caused by asbestos, and they lose when they do not have a disease caused by asbestos.

The science is not that hard. But we cannot take care of the trial lawyers and take care of all the executives who want this problem solved the way they want it. They want an answer now. The

answer is, use what this country has used in the past: the judgment of courts based on sound criteria that cannot be manipulated. Then we will get this problem solved and the people who are suffering today, who cannot get into court because of false claims—hundreds of thousands of them by people who do not have asbestos-related illness—the people who are injured will get compensated.

I thank Senator CORNYN for, first, his courage to offer a substitute. He is on the Judiciary Committee. We have a great chairman. He has done a lot of hard work on this. He has brought a bipartisan bill to the Senate. The bill will fail. It takes a great deal of courage on Senator CORNYN's part to offer a commonsense alternative to this. It is my hope that the many Members in this Senate will look at the trust fund with the medical criteria as set out today, and reject it as it is written. Either modify this bill or take the Cornyn substitute and put it in its stead.

This is an issue we will spend a lot of time on. I know people are considering points of order against the legislation. In fairness to the Senate and also the public, if that is going to happen, they ought to do it so we do not continue to spend time. Part of the process around here is to make things not happen so you can have a political advantage. If people are going to offer a point of order, they ought to offer it. Let's go on to the next thing on the agenda for the American people. If they are not going to offer it, let's have a real debate, file cloture, get a vote on this bill and move on.

I suggest the absence of a quorum.
The PRESIDING OFFICER (Mr. GRAHAM). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

POSTAL ACCOUNTABILITY AND ENHANCEMENT ACT

Mr. FRIST. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 164, S. 662.

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (S. 662) to reform the postal laws of the United States.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Homeland Security and Governmental Affairs, with an amendment.

(Strike the part shown in black brackets and insert the part shown in italic.)

S. 662

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

[(a) SHORT TITLE.—This Act may be cited as the "Postal Accountability and Enhancement Act".

[(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

[Sec. 1. Short title; table of contents.

[TITLE I—DEFINITIONS; POSTAL SERVICES

[Sec. 101. Definitions.

[Sec. 102. Postal services.

[TITLE II—MODERN RATE REGULATION

[Sec. 201. Provisions relating to market-dominant products.

[Sec. 202. Provisions relating to competitive products.

[Sec. 203. Provisions relating to experimental and new products.

[Sec. 204. Reporting requirements and related provisions.

[Sec. 205. Complaints; appellate review and enforcement.

[Sec. 206. Clerical amendment.

[TITLE III—MODERN SERVICE STANDARDS

[Sec. 301. Establishment of modern service standards.

[Sec. 302. Postal service plan.

[TITLE IV—PROVISIONS RELATING TO FAIR COMPETITION

[Sec. 401. Postal Service Competitive Products Fund.

[Sec. 402. Assumed Federal income tax on competitive products income.

[Sec. 403. Unfair competition prohibited.

[Sec. 404. Suits by and against the Postal Service.

[Sec. 405. International postal arrangements.

[TITLE V—GENERAL PROVISIONS

[Sec. 501. Qualification and term requirements for Governors.

[Sec. 502. Obligations.

[Sec. 503. Private carriage of letters.

[Sec. 504. Rulemaking authority.

[Sec. 505. Noninterference with collective bargaining agreements.

[Sec. 506. Bonus authority.

[TITLE VI—ENHANCED REGULATORY COMMISSION

[Sec. 601. Reorganization and modification of certain provisions relating to the Postal Regulatory Commission.

[Sec. 602. Authority for Postal Regulatory Commission to issue subpoenas.

[Sec. 603. Appropriations for the Postal Regulatory Commission.

[Sec. 604. Redesignation of the Postal Rate Commission.

[Sec. 605. Financial transparency.

[TITLE VII—EVALUATIONS

[Sec. 701. Assessments of ratemaking, classification, and other provisions.

[Sec. 702. Report on universal postal service and the postal monopoly.

[Sec. 703. Study on equal application of laws to competitive products.

[Sec. 704. Report on postal workplace safety and workplace-related injuries.

[Sec. 705. Study on recycled paper.

[TITLE VIII—POSTAL SERVICE RETIREMENT AND HEALTH BENEFITS FUNDING

[Sec. 801. Short title.

[Sec. 802. Civil Service Retirement System.

[Sec. 803. Health insurance.

[Sec. 804. Repeal of disposition of savings provision.

[Sec. 805. Effective dates.

[TITLE IX—COMPENSATION FOR WORK INJURIES

[Sec. 901. Temporary disability; continuation of pay.