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AN ANALYSIS OF THE FINANCIAL  
IMPACT OF S. 852: THE FAIRNESS IN ASBESTOS  
INJURY RESOLUTION ACT OF 2005

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## INTRODUCTION

Nearly thirty years ago, the first of a series of bills to remove asbestos litigation from the tort system by creating an industry-funded mechanism to administratively pay asbestos claims was introduced into Congress.<sup>1</sup> The need for a legislative resolution for asbestos litigation has long been manifest.<sup>2</sup> After many unsuccessful efforts to resolve the asbestos litigation crisis, the Senate is poised to take up consideration of Senate Bill 852 (S. 852),<sup>3</sup> the Fairness in Asbestos Injury Resolution Act of 2005. This essay is a preliminary effort to present some context for discussion of S. 852 and to estimate the costs that may be incurred for resolution of personal injury asbestos claims if S. 852 is enacted.

To date, over 850,000 individual claimants have filed suit against over 8,400 manufacturers, distributors, installers, and sellers of asbestos-containing products distributed across most United States industries, as well as against owners of buildings and plants in which asbestos is present, claiming injury from exposure to asbestos, resulting in over seventy bankruptcies.<sup>4</sup> Since each plaintiff sues approximately sixty to seventy different defendants and bankruptcy trusts, the total number of claims probably exceeds 50,000,000.<sup>5</sup>

While nonmalignant claim filings substantially declined in 2004 and continue to decline in 2005 from previous record levels,<sup>6</sup> the latest estimates are that 1,000,000 new claimants will emerge over the next forty-five years.<sup>7</sup>

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<sup>1</sup> See *infra* note 40 and accompanying text.

<sup>2</sup> See *infra* notes 36-39 and accompanying text.

<sup>3</sup> See Albert B. Crenshaw, *Analysis Says Asbestos Plans Might Work*, WASH. POST, Aug. 27, 2005, at D03.

<sup>4</sup> Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 834-35 (2005). Most knowledgeable observers anticipate additional bankruptcy filings depending on whether proposed federal legislation (S. 852) is enacted and, if it is, what it provides with regard to mandatory payments to the Trust Fund.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Letter from Robert A. Falise, Chairman & Managing Trustee of the Manville Personal Injury Settlement Trust, to the Hon. Jack B. Weinstein and the Hon. Burton R. Lifland (July 29, 2005) (accompanying the Trust's financial statements and Report for the quarter ended June 30, 2005 and describing actuarial analysis of future claim filings done by Tillinghast-Towers, Perrin, Foster, & Crosby, Inc.). The Tillinghast projections assume that, although very few screenings to generate nonmalignant claims have taken place in 2004 and 2005, lawyers will resume sponsoring such screenings in future years, though not to the same degree as they have in the past. See Trevar Withers, Remarks at the Tillinghast-Towers Perrin Asbestos Conference (Sept. 29, 2005). The validity of this assumption depends on the dollar values that emerging bankruptcy trusts will assign to nonmalignant asymptomatic claims and the outcome of the grand jury investigation that the U.S. Attorney's Office for the Southern District of New York is currently conducting. See *infra* note 163.

Historically, approximately ten percent of asbestos claims have alleged malignancies, including mesothelioma, lung cancer, and “other cancers” (laryngeal, pharyngeal, esophageal, stomach, and colorectal cancers).<sup>8</sup> While mesothelioma claim values have increased significantly in recent years, the number of future malignant claims is fairly predictable and is based on epidemiological data.<sup>9</sup> Predictions of the number of future lung cancer and “other cancer” claims to be attributed to asbestos exposure are more problematic. Deaths attributed to lung cancer exceed 150,000 annually;<sup>10</sup> “other cancers” account for additional thousands of deaths annually. However, asbestos exposure is a substantial contributing factor in only a small fraction of these cancers. While issues of causation thus abound, historical tort system data can serve as a basis for projections. No comparable epidemiological or tort system data exists, however, as a basis for predicting the number of nonmalignant claims. Since the large majority of these claims purport to allege a “legal” injury that is not recognized by medical science as a disease or injury, medical science and epidemiology cannot inform predictions of the numbers of such claims. Nor does historical tort system experience provide reliable data because these claims are primarily a function of the development of an entrepreneurial model in which the profitability of the litigation determines the number of claims. Profitability is a function of the cost of claim generation, which includes the costs of mass screenings and the production of medical evidence, mostly by a score of regularly-selected B-readers and litigation doctors, versus the income such claim filings generate in the form of settlements and, on rare occasions, verdicts. Under the prevailing entrepreneurial model, both the existence of actual injury and proof of substantial product exposure are often essentially irrelevant. As a federal judge has noted, a “diagnosis” is “money in the bank” irrespective of its validity.<sup>11</sup> The decrease in nonmalignant claim filings that began in 2004 is largely accounted for by a decrease in the profitability of entrepreneurially-generated nonmalignant claims.

A number of factors account for the significant impetus behind current consideration of legislative proposals that range from limiting compensation available in the tort system to plaintiffs whose injuries meet specified medical criteria to the creation of an administrative alternative to asbestos litigation. These factors include: the number of

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<sup>8</sup> STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 75 (2005), available at [http://www.rand.org/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf) [hereinafter RAND REPORT].

<sup>9</sup> *Id.* at 141-45.

<sup>10</sup> U.S. Dep’t of Health & Human Serv., Ctrs. for Disease Control & Prevention, Lung Cancer Statistics, <http://www.cdc.gov/cancer/lung/statistics.htm> (last visited Sept. 20, 2005).

<sup>11</sup> *In re Silica Prods. Liab. Litig.*, No. MDL 1553, 2005 WL 1593936, at \*53 (S.D. Tex. June 30, 2005).

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asbestos lawsuits; the almost \$80 billion in costs already imposed on defendants and their insurers; the even larger sum projected for future costs; the 500,000 jobs lost or not created because of the litigation; the further financial consequences of the litigation's impact on capital markets; and concern for the integrity of the civil justice system as most recently voiced by a federal judge presiding over the silica multi-district litigation (MDL) proceeding, who found that B-readers, diagnosing doctors, screening companies, and lawyers had engaged in a scheme to manufacture diagnoses for money.<sup>12</sup>

S. 852, which is now before the Senate, is the product of extended and extensive negotiation between a number of stakeholders, including, *inter alia*, businesses, insurers, labor unions, and lawyers.<sup>13</sup> The bill proposes the creation of a \$140 billion trust funded by businesses and insurers to pay claims that meet the medical criteria the bill sets out (the "Trust Fund"). In this essay, I examine the financial costs, in addition to the \$140 billion to be paid into the Trust Fund, which may be incurred to resolve current and future personal injury claims based upon asbestos exposure.

In attempting to quantify the costs that "fixing" the asbestos litigation crisis may generate and, in particular, those costs additional to the Trust Fund, I am not advocating adoption or rejection of S. 852 or any other legislative "fix" of the massive civil justice system failure that I describe below. Moreover, though I consider the costs that may be incurred in addition to the cost of the Trust Fund S. 852 will create if enacted, I am not expressing any view as to the likelihood of the bill's passage.

Repair of this failure is underway in a number of states.<sup>14</sup> It is clear, however, given the evidence of specious claiming that I summarize below and the conclusions drawn by U.S. District Court Judge Janis Jack in presiding over the silica MDL proceeding (which equate to a finding of massive fraud),<sup>15</sup> that more needs to be done to curb the abuses of entrepreneurial claiming as well as the negative effects of asbestos litigation on capital markets and job creation.

There are substantial benefits to be realized by adopting legislation to create an administrative mechanism in place of the tort system for resolution of asbestos claims. First, an administrative mechanism can provide for substantially uniform compensation to similarly situated claimants, which would be more equitable and expedient than the lottery-like nature of asbestos litigation in the current

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<sup>12</sup> See *infra* notes 149-150 and accompanying text.

<sup>13</sup> See Crenshaw, *supra* note 3.

<sup>14</sup> See, e.g., OHIO REV. CODE ANN. §§ 2307.91-.98 (West 2005); GA. CODE ANN. §§ 51-41-1 to 51-14-10 (West 2005).

<sup>15</sup> See *infra* Section V.C.5.

tort system.<sup>16</sup> An administrative mechanism would provide the added benefit that those with injuries which merit substantial compensation such as mesothelioma will not be adversely affected by the insolvency of particular defendants as currently can occur in the tort system.<sup>17</sup>

Second, adopting appropriate “medical/exposure criteria” could limit eligibility for compensation to only those claimants with actual injuries substantially caused by asbestos exposure. Appropriate medical criteria could eliminate or severely limit compensation to the hundreds of thousands of mostly unimpaired claimants—claimants that are recruited by entrepreneurial screening programs and whose claims are supported by entrepreneurially-generated medical evidence and testimony—who have not suffered an injury recognized as such by medical science but who have received billions of dollars in settlements and judgments in the tort system. Moreover, appropriate standards for the administration of pulmonary function tests could eliminate tens of thousands of lung impairment claims that are based on improper test administrations.

Third, by adopting appropriate limitations on lawyers’ fees—S. 852, for example, limits plaintiff lawyers’ fees to 5 percent<sup>18</sup>—legislation could significantly reduce the intolerably high transaction costs associated with asbestos litigation in the tort system. Currently, claimants realize less than forty-two cents of each dollar paid out by defendants and their insurers.<sup>19</sup> Most of the remainder goes to pay plaintiffs’ and defendants’ lawyers.<sup>20</sup> In 2003, a consulting actuary for Tillinghast testified that, of the \$130 billion it estimated in 2001 would be required for future asbestos claims, approximately \$41 billion (31.5%) would go to plaintiffs’ attorneys<sup>21</sup> and \$28 billion (21.5%) would go to defense costs, leaving \$61 billion (47%) of the \$130 billion in projected future costs for claimants.<sup>22</sup> Substantially eliminating these

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<sup>16</sup> See Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1852 (1992).

<sup>17</sup> Individuals whose asbestos exposure occurred while they served in the military during World War II could realize a particular benefit. See *The Fairness in Asbestos Injury Resolution Act: Hearing on S. 852 Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Hershel W. Gober, National Legislative Director, The Military Order of the Purple Heart).

<sup>18</sup> S. 852, 109th Cong. § 104(e) (2005).

<sup>19</sup> RAND REPORT, *supra* note 8, at 104-05.

<sup>20</sup> *Id.* at 87-106.

<sup>21</sup> Plaintiffs’ lawyers charge contingency fees in asbestos litigation ranging from 25% to 50%. It appears that a plurality of contingency fees charged is 40%. See Brickman, *supra* note 4, at 841-42. These contingency fees, as well as expenses charged to claimants, frequently violate ethical rules limiting fees and expenses to “reasonable amounts.” *Id.* at 840-43. However, asbestos litigation appears to be exempt from the application of ethical rules. *Id.* at 837-39.

<sup>22</sup> *Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Resolution Act of 2003: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Jennifer

transactional tort system costs could result in additional payments to claimants in the range of \$60 billion.

Fourth, legislation that would liquidate the costs of future asbestos-related liability at an appropriate level could provide a substantial benefit to the economy. Substituting a final and visible outcome for the vagaries of the tort system would enable capital markets to accurately assess the costs to individual businesses and insurers, which could reduce the cost of capital for these business and insurers, leading to increased productivity and investment.<sup>23</sup>

To set the stage for my analysis of the costs that may be incurred for resolution of personal injury asbestos claims if S. 852 is enacted, I first present a brief history of asbestos litigation, including the development of an entrepreneurial model of claim generation, followed by a brief summary of legislative efforts to deal with the asbestos litigation crisis. I then briefly summarize S. 852's legislative history and current content. Finally, I consider the costs contributors to the Trust Fund may additionally have to bear to resolve personal injury asbestos claims.

## I. A BRIEF HISTORY OF ASBESTOS LITIGATION

Extensive exposure to asbestos, which was considered a magic mineral for more than a millennium because of its unique resistance to heat and a "strategic and critical mineral" essential to the war effort during World War II, has resulted in more than 100,000 deaths from cancer and asbestosis, a scarring of lung tissue.<sup>24</sup> Beginning in the 1960s, published research showed alarming rates of mesothelioma, a virulent cancer of the lining of the lung, among asbestos miners and

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L. Biggs, FCAS, MAAA, Consulting Actuary, Tillinghast-Towers Perrin).

<sup>23</sup> For discussion of the costs to society of asbestos litigation and, in particular, asbestos bankruptcies, see Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 37 n.10 (2003-04); Press Release, NERA Economic Consulting, Proposed Asbestos Trust Fund Legislation Would Save At Least \$71 Billion; Boost US Competitiveness (Apr. 26, 2005) (describing the results of its study, commissioned by the National Association of Manufacturers' Asbestos Alliance, in which it estimated that asbestos litigation had cost \$343 billion to date, stated that "[t]he productivity of the US manufacturing sector would be improved by eliminating the uncertainty and inefficiency of asbestos litigation," and projected that "the stock market valuation of reform to defendant companies [from adoption of S. 852] is between \$60 and \$137 billion").

<sup>24</sup> RAND REPORT, *supra* note 8, at 16. RAND indicates that 81,790 mesothelioma deaths occurred through 2004, and that it anticipates an additional 50,770 through 2029; in addition, 179,870 lung cancer deaths and 50,720 "other cancer" deaths occurred through 2004. The lung cancer totals are controversial because while asbestos exposure significantly increases the risk to smokers of contracting lung cancer, proof of causation is often problematic. Medical evidence controverts, in varying degree, claims that asbestos exposure causes "other cancers."

asbestosis among insulation workers.<sup>25</sup> The growing awareness of the risks and the corporate misdeeds led to a spate of lawsuits. In 1973, the litigation underwent a significant change when the Fifth Circuit Court of Appeals allowed workers injured by asbestos exposure, in addition to filing workers' compensation claims against their employers, to file product liability lawsuits against manufacturers of the products used by industrial and construction workers.<sup>26</sup>

In 1982, the Johns Manville Corporation, then the nation's principal asbestos miner and fabricator of material containing asbestos, filed for bankruptcy in the face of about 16,000 pending claims.<sup>27</sup> This turned out to be only the tip of the iceberg, however. Under the impetus of judicial decisions that greatly expanded the amount of insurance assets that would be available to claimants, the litigation mushroomed. Moreover, while initially most asbestos litigation involved seriously injured claimants, by the mid-to-late 1980s, most of the lawsuits were being filed on behalf of claimants with little or no injury or proof of substantial exposure to products sold by the companies they were suing. My study of this litigation has led me to identify an entrepreneurial model of nonmalignant claim generation that began to emerge in the mid-to-late 1980's to replace the traditional medical model of tort litigation in which a wrongfully injured person sees a doctor to treat his or her illness or injury and then seeks out a lawyer. Under the entrepreneurial model,<sup>28</sup> lawyers recruit plaintiffs, who are usually unaware of any injury and lack any symptoms or lung impairment, and send them to a small number of doctors chosen because they reliably produce diagnoses of and X-ray readings consistent with asbestos-related injury.

The elements of this entrepreneurial model<sup>29</sup> include:

(1) a massive client recruitment effort over the past fifteen to twenty years to "screen" over 750,000, and perhaps as many as 1,000,000, former industrial and construction workers, which generated at least ninety percent of all the claims of nonmalignant injury filed during that period, even though most of those so recruited have no medically cognizable asbestos-related injury and cannot demonstrate any statistically significant increased likelihood of contracting an asbestos-related disease in the future when compared to other similarly

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<sup>25</sup> I. J. Selikoff, J. Churg & E. C. Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS OF THE N.Y. ACAD. OF SCI. 139 (1965), cited in RAND REPORT, *supra* note 8, at 12.

<sup>26</sup> *Borel v. Fibreboard Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

<sup>27</sup> *See In re Johns-Manville Corp.*, 26 B.R. 420, 422 (1983).

<sup>28</sup> For further discussion of the entrepreneurial model of claim generation, see Brickman, *supra* note 23.

<sup>29</sup> The following discussion of the entrepreneurial model is mostly based upon Brickman, *id.*

situated workers;

(2) the manufacture of specious medical evidence, including: (a) evidence generated by the entrepreneurial screening enterprises and doctors that the plaintiffs' lawyers select, who produce "diagnoses" which are not a product of good faith medical judgment but rather a function of the millions of dollars in income they receive for these services each year, and (b) pulmonary function tests, which screening companies often administer in violation of standards established by the American Thoracic Society, and which therefore often result in findings of impairment where none would be found but for the improper test administration;<sup>30</sup>

(3) the use of entrepreneurial witness preparation techniques, frequently resulting in testimony that follows scripts prepared by lawyers, which scripts are often replete with misstatements regarding:

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<sup>30</sup> An analysis of the financial incentives that underpin the entrepreneurial model offers an explanation for the actions of plaintiff lawyer-selected B-readers and diagnosing doctors as well as screening enterprises that administer pulmonary function tests. Each of these three critical participants in the entrepreneurial model is selling a service. However, the service is not simply reading an X-ray film or administering a battery of pulmonary function tests (PFTs); it is "collecting evidence for future asbestos litigation." Motion for Case Mgmt. Order Concerning Mass Litig. Screenings at 6, *In re Asbestos Prods. Liab. Litig.* (No. VI), 2 MDL 875 (E.D. Pa. 2001) (quoting Brief of Appellants at 19, *In re Asbestos Prods. Liab. Litig.*, 225 F.3d 648 (3d Cir. 2000) (Nos. 98-1166, 98-1165)) (describing in detail, including references to depositions and exhibits, the operation of Most Health Services, Inc., a screening company). Millions of dollars are paid annually to B-readers and screening enterprises that perform these services and get the "right" results in interpreting X-rays and CT (CAT) scans and administering PFT's. As U.S. District Court Judge Janis Jack, presiding over the silica MDL, observed, "in the business of mass screenings [for silicosis and asbestosis], a diagnosis, whether accurate or not, is money in the bank." *In re Silica Prods. Liab. Litig.*, No. MDL 1553, 2005 WL 1593936, at \*53 (S.D. Tex. June 30, 2005). I have previously concluded that service providers that fail to provide consistently high percentages of 1/0 readings or "diagnoses" of asbestosis, or consistently high percentages of findings of lung impairment, risk losing their place in the entrepreneurial process to other, more "efficient" providers that provide more favorable results. Judge Jack reached the same conclusion, stating that "[w]hile a B-reader/diagnosing doctor is essential to the screening process, the doctor is fungible, and if the screening company or law firm was unhappy with one doctor's rate of positive reads and/or diagnoses, then future business will go to another, more compliant doctor." *Id.* at \*53. In some cases, both B-readers—specifically certified pulmonary X-ray readers—and screening enterprises are paid more for positive outcomes than for negative ones. See Brickman, *supra* note 23, at 90-94. Moreover, some B-readers who read X-rays as "consistent with asbestosis" are hired to write the medical report, which relies on and incorporates the B-reading and, in most cases, constitutes the medical evidence introduced in support of the claim. B-readers may charge two to four times for the medical report what they charge for a B-reading alone. Thus, a B-reader who reads a film as positive may earn a much larger fee than he or she would if he or she had read the film as negative. The empirical evidence I have gathered to support my assertion about higher payments for positive outcomes is supplemented by Judge Jack's findings. She notes, for example, that the Campbell Cherry law firm paid N&M, a screening enterprise, \$750 for screening a litigant as positive for silicosis but zero if the finding was negative. Under that arrangement, N&M had a strong financial interest in the outcome of the screenings it conducted. This incentive may account for N&M's success in apparently screening only those who would be "diagnosed" as having silicosis and, in the process, generating approximately \$3,192,000 in income from just that one law firm for producing 4,256 plaintiffs. *In re Silica Prods.*, 2005 WL 1593936, at \*27-31; see also Brickman, *supra* note 23, at 74-75.

(a) the identification and relative quantities of asbestos-containing products with which claimants came in contact at work sites (in order to shift product “ID” from certain manufacturers that have declared bankruptcy to others that are solvent),<sup>31</sup> (b) the information printed on the containers in which the products were sold, and (c) their own physical impairments;

(4) the filing of massive numbers of claims in about twenty jurisdictions selected in part for their propensity (a) to fashion what I have called “special asbestos law”—a distortion of civil tort rules in order to accommodate many claimants’ inability to fulfill the usual evidentiary requirements for establishing proximate cause; and (b) to further accommodate mass claim filings by using aggregations and other procedural devices that, although purportedly intended to ease the burden on state court systems, have actually and perversely generated vastly increased claim filings;

(5) the resort to settlement strategies (including “inventory” settlements and settlements of future claims according to a “matrix” of claim values), which defendants were compelled to pursue because the mass filings deprived them of any realistic opportunity to investigate the claims,<sup>32</sup> a substantial number of which lacked merit and credible

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<sup>31</sup> The fungability of product identification testimony by claimants and their witnesses is a function of entrepreneurial witness preparation techniques. When former main targets of the litigation enter bankruptcy and the value of claims against that entity decline precipitously, claimants’ testimony as to which products they were exposed to and the relative quantities of those products appears to change so as to downplay the quantities of the bankrupted companies’ products and instead “ID” theretofore unidentified products of other, still solvent companies. These periodic changes in testimony appear to result from witness coaching and further appear to have the purpose of maintaining the cash flow that is the objective of the entrepreneurial model. Indeed, claimants continue to “discover” products they have not previously identified as causally related to the claimed disease, and to “ID” those products in new lawsuits they bring five, ten, or even twenty years after having filed initial sets of claims against several score of other defendants. The ability to add virtually any manufacturer, seller, distributor, or installer of asbestos-containing products as a defendant whenever doing so is financially beneficial, seemingly irrespective of any actual and substantial exposure to the company’s products, is a central feature of the entrepreneurial asbestos litigation model. Judge Jack commented on this phenomenon in the silica MDL, observing that:

In many cases, the number of Defendants [named by Plaintiffs represented by one law firm] bear no apparent relationship to the number of Plaintiffs [represented by that firm]. Instead, the number of Defendants (and the identity of the Defendants) seem to be contingent on the identity of the Plaintiffs’ law firms rather than the identity of the Plaintiffs. For instance, O’Quinn, Laminack & Pirtle is Plaintiffs’ counsel in 18 MDL cases, 16 of which are brought against the same 73 Defendants, despite the fact that the Plaintiffs in those 16 cases range in number from 9 to 410. Likewise, Campbell, Cherry, Harrison, Davis & Dove is Plaintiffs’ counsel in two MDL cases, one with 247 Plaintiffs and one with 4,280 Plaintiffs but both against the same 134 Defendants.

*In re Silica Prods* 2005 WL 1593936, at \*17 n.15.

<sup>32</sup> As noted by Judge Jack in the silica MDL proceeding, the entrepreneurial claim generation strategy seeks

to inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system. This is apparently done in hopes of extracting mass nuisance-value

evidence of injury or exposure to defendants' products;<sup>33</sup> these attempts to tame litigation costs not only failed, but actually provided cash flow to underwrite the cost of additional screenings; and

(6) the inexorable result of bankruptcy filings by more than seventy companies to date because of asbestos-related liabilities, though the advent of bankruptcy has not resolved the problem of overwhelming numbers of meritless claims; instead, an analogous set of problems surfaces when claimants present these claims for payment under criteria determined by leading plaintiff lawyers and set out in the Trust Distribution Procedures of trusts created in the aftermath of these bankruptcies.<sup>34</sup>

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settlements because the Defendants and the judicial system are financially incapable of examining the merits of each individual claim in the usual manner.

*Id.* at \*95.

<sup>33</sup> It has been widely acknowledged that these sorts of settlement strategies have resulted in defendants paying substantial sums to claimants without valid claims. For example, Judge John Fullam, presiding over the Owens Corning bankruptcy, issued a memorandum and order stating that it is "reasonably well known" that Owens Corning's history of dealing with asbestosis claims "has included payments to large numbers of claimants who actually sustained little or no harm from their exposure to Owens Corning's products." *In re Owens Corning*, Nos. 00-3837 to -3854, slip op. at 1-2 (Bankr. D. Del. Nov. 22, 2004). Because of economic considerations, defendants usually performed little or no investigation into the merits of the thousands of inventory and future claims they settled. Former Attorney General of the United States Griffin Bell has stated:

Many [asbestos] defendants are reluctant to demand X-rays and conduct such audits for fear that plaintiff lawyers will target the company, refuse to settle any claims, and try their most serious cancer cases in plaintiff friendly jurisdictions. While serious cases are relatively few in number compared to cases filed by the unimpaired, the risk of even a handful of multimillion dollar verdicts often dissuades defendants from a high profile, contentious fight that could bankrupt the company in the short term. One business analyst has observed, "[I]n a sense, the plaintiffs' attorneys have the asbestos defendants held hostage." Defendants often conclude that rather than question this X-ray evidence, it is cheaper to treat the claims as administrative costs, regardless of merit, than to litigate. This strategy has failed for a number of defendants in the long run, as an endless supply of nonsick claimants have replenished the plaintiff lawyers' client base, leaving bankruptcy as the only realistic option for those companies.

Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6 BRIEFLY . . . PERSP. ON LEGIS., REG., AND LITIG. (NAT'L LEGAL CTR. FOR THE PUB. INTEREST, D.C.), June 2002, at 16.

<sup>34</sup> Beginning with the bankruptcy of Johns-Manville, trusts have been created to which current and future asbestos claims are channeled. In 1994, Congress amended the Bankruptcy Code to formalize this process. 11 U.S.C. § 524(g)-(h). However, in practice, plaintiff lawyers, who exercise effective control over the creation of asbestos bankruptcy trusts, largely dictate the trusts' structures and procedures. See *Administration of Large Business Bankruptcy Reorganizations: Has Competition for Big Cases Corrupted the Bankruptcy System?: Hearing Before the Subcomm. on Commercial And Administrative Law of the H. Comm. on the Judiciary*, 108th Cong. 19-20 (2004) (written statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law); Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154. As a consequence, trusts have not been structured to effectively distinguish between valid claims by plaintiffs who are actually sick as a result of exposure to debtors' products and the hundreds of thousands of invalid claims brought by unimpaired, asymptomatic claimants or claimants lacking significant exposure to debtors' products. Instead, the trusts have been structured to favor the interests of the lawyers controlling the trusts' creation by, for

It is thus beyond cavil that the quantum of specious claiming in asbestos litigation constitutes a massive civil justice system failure.

## II. THE JUDICIAL PLEA FOR A LEGISLATIVE SOLUTION

As the stream of litigation became a river and then a flood, the claim filings overwhelmed courts. In September 1990, United States Supreme Court Chief Justice William H. Rehnquist appointed an Ad Hoc Committee on Asbestos Litigation to “address . . . the massive and complex issues involved with asbestos litigation,” and to “consider all necessary administrative steps that may be taken under existing law . . . [as well as] legislative remedies or amendments to the federal rules of practice and procedures.”<sup>35</sup> In March 1991, the Committee issued a report, which the Judicial Conference of the United States subsequently adopted, recommending that Congress enact

a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes, with the objectives of achieving timely appropriate compensation of present and future asbestos victims and of maximizing the prospects for the economic survival and viability of the defendants.<sup>36</sup>

The Committee concluded that the volume of asbestos litigation had reached “critical dimensions . . . [and] is becoming a disaster of major proportions . . . which the courts are ill-equipped to meet effectively.”<sup>37</sup> It went on to state that “[t]he ultimate solution should be legislation recognizing the national proportions of the problem . . . and creating a national asbestos dispute resolution scheme . . . .”<sup>38</sup>

Ironically, at the time of the Judicial Conference report, the consequences of entrepreneurial claim generation and the other features of the entrepreneurial model had only begun to be realized. Even so, Congress so far has declined to enact legislation to deal with what the Supreme Court has referred to as “the elephantine mass of asbestos cases . . . [that] defies customary judicial administration and calls for national legislation.”<sup>39</sup> The Ad Hoc Committee’s dire predictions as to

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example, paying their claims earlier and at higher levels than claims that arise later in the process without regard to merit or causation. This has resulted in the rapid depletion of trust assets.

<sup>35</sup> JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE AD HOC COMMITTEE 1 (1991) [hereinafter AD HOC REPORT].

<sup>36</sup> *Id.* at 27.

<sup>37</sup> *Id.* at 2. The Judicial Panel on Multidistrict Litigation has reached similar conclusions. *See, e.g., In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991).

<sup>38</sup> AD HOC REPORT, *supra* note 35, at 2.

<sup>39</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). The Court stated these words in the process of setting aside a \$1.5 billion settlement of asbestos litigation and essentially declaring that the class action mechanism set out in Rule 23 of the Federal Rules of Civil Procedure could not be used to fashion a global settlement of asbestos litigation. *See also Norfolk & Western Ry.*

what would occur in the absence of a legislative resolution not only came to fruition, but in fact came to be greatly exceeded.

### III. LEGISLATIVE EFFORTS TO FIX THE ASBESTOS LITIGATION CRISIS

Legislative efforts to establish an administrative alternative to asbestos litigation date back to 1977, when Representative Millicent Fenwick (R-N.J.) introduced the first asbestos-specific compensation bill, which proposed the creation of a fund to pay compensation for asbestos-related disease.<sup>40</sup> A variety of proposals since then have ranged from: (1) a tort reform approach including such measures as strengthening venue requirements and eliminating spurious joinders to preclude widespread forum shopping, capping or otherwise limiting punitive damages, limiting joint and several liability, removing the windfall element from the application of the successor liability doctrine, restricting judicial resort to mass aggregations and other procedural devices that have had the effect of coercing settlement of nonmeritorious claims; to (2) the promulgation of “medical/exposure criteria” that claimants would have to meet in order to pursue an asbestos-related claim in the tort system; to (3) the creation of a fund to provide compensation to those injured by exposure to asbestos (as defined in the legislation creating the fund) in lieu of resort to the tort system. The oft-repeated intent of many of the legislative proposals has been to provide fairness and efficiency for claimants, relief for overburdened courts, financial certainty for the businesses funding any trust fund, and economic stability for companies pressed to the brink of bankruptcy by present and future asbestos exposure claims.

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Co. v. Ayers, 538 U.S. 135 (2003).

<sup>40</sup> For discussion of congressional proposals to reform asbestos litigation, see Mary S. Lyman & Letitia Chambers, *Asbestos Litigation: A History of Congressional Consideration 1977 to 2000*, 3-3 MEALEY'S ASB. BANKR. REP. 24 (2003); see also Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891, 1891 n.1 (1992). In 1991, I drafted a proposed administrative alternative to asbestos litigation at the request of the Administrative Conference of the United States and organized a colloquy to consider the proposal. See Marshall Breger, Chairman, Admin. Conference of the U.S., Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims 4 (Oct. 31, 1991) (transcript on file with the Cardozo Law Review). To participate in the colloquy, I invited U.S. District Court Judge Jack Weinstein; Deborah Hensler of RAND's Civil Justice Institute; Ronald Motley, a plaintiffs' lawyer; Andrew Berry, a defense lawyer; Howard Samuel of the AFL-CIO; and Judge G. Mervin Bober, Associate Chief Administrative Law Judge of the U.S. Department of Labor. The proposal, which was also discussed at hearings before a subcommittee of the House Judiciary Committee, would create an industry-financed trust fund to pay asbestos claims that meet certain medical criteria according to a matrix of claim values. See *Effects of Asbestos Injury on Federal and State Courts: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 102nd Cong. (1991) (statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law).

IV. S. 852: THE FAIRNESS IN ASBESTOS INJURY RESOLUTION (FAIR)  
ACT OF 2005

A. *Legislative History*

After numerous hearings and unsuccessful proposals in Congress over more than two decades, the Senate Judiciary Committee undertook the present effort to reform asbestos litigation with hearings beginning in 2002. On May 22, 2003, Senator Orrin G. Hatch, then Chairman of the Committee, introduced Senate Bill 1125 (S. 1125), the FAIR Act of 2003, co-sponsored by five Republicans and two Democrats.

In lieu of tort reform or a “medical/exposure criteria” approach, S. 1125 adopted the trust fund approach to resolving the asbestos litigation crisis and incorporated “medical/exposure criteria” elements. Under S. 1125, a no-fault administrative process would replace civil lawsuits and would compensate individuals injured by asbestos according to a schedule of values. S. 1125 provided an exclusive, administrative forum for all future asbestos personal injury claims, including those claims pending in bankruptcy court or before bankruptcy trusts.<sup>41</sup> If enacted, according to commentators, S. 1125 would “bring to an end asbestos litigation, as we know it.”<sup>42</sup> After hearings, input from experts and stakeholders, and four mark-up sessions that resulted in the adoption of numerous amendments, the Committee reported out S. 1125 on July 10, 2003 by a party-line vote of ten in favor, eight opposed, and one abstention. The version of S. 1125 that passed the Committee established a \$108 billion Asbestos Injury Claims Resolution Fund (the “Fund”), which consisted of payments of \$52 billion from defendants and \$52 billion from insurers, with the remaining \$4 billion to be paid from bankruptcy asbestos trusts. The proposed \$108 billion Fund was more than double the \$45 billion fund the bill provided when it was first introduced.<sup>43</sup> In addition, in the event the Fund was later found to be unable to pay all claims, S. 1125 provided for contingent funding that could range from \$31 billion to \$45 billion, to be paid by insurers and defendant participants.<sup>44</sup>

Following the Committee’s action, key stakeholders objected to various provisions of the bill.<sup>45</sup> To address their concerns, Senator

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<sup>41</sup> See Patrick M. Hanlon, *Asbestos Legislation: Federal and State* (Oct. 26, 2003) (unpublished manuscript, on file with the Cardozo Law Review); Linda Martin Barber & Mary Lyman, *The Fairness in Asbestos Reform Act—What Will It Do, Where Is It Now?*, 19-5 MEALEY’S LITIG. REP. ASB. 28 (2004).

<sup>42</sup> Barber & Lyman, *supra* note 41, at 28.

<sup>43</sup> *Id.*

<sup>44</sup> Hanlon, *supra* note 41, at 12.

<sup>45</sup> The groups that have actively represented stakeholders in the legislative process include the National Association of Manufacturers (NAM), the Asbestos Study Group (ASM), which

Arlen Specter invited representatives of defendant companies, insurers and reinsurers, and labor and trial lawyers to meet. At Senator Specter's request, Senior Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit served as overseer/mediator of the group. Later that fall, Senate Majority Leader Bill Frist held a series of meetings with affected parties and, on October 15, 2003, announced that insurers and defendant companies had reached an agreement concerning the amount of their financial contributions to the trust fund established by the bill. Senator Frist acknowledged, however, that many details remained to be worked out.<sup>46</sup> Stakeholders and a bipartisan group of senators continued to work on financial and structural issues through the Fall of 2003 but did not reach a consensus, and Congress adjourned for the year without a floor vote.

On April 7, 2004, Senator Hatch introduced Senate Bill 2290 (S. 2290), the FAIR Act of 2004. In its summary of the changes from S. 1125 as reported, the Committee reiterated the objective that the FAIR Act "must preempt and supersede all asbestos claims filed in the current tort system."<sup>47</sup> Among the changes made were an increase in claim values, a "more streamlined" administrative structure, and a new funding proposal to make funds available within months of the bill's enactment.<sup>48</sup> Under this revised version of the Act, defendants would be required to pay annual aggregate payments of \$2.5 billion for twenty-three years or until a total of \$57.5 billion was reached. If the Fund could not meet its financial obligations, the Fund's Administrator could seek an additional amount, up to \$10 billion, from defendants. The bill also required insurers to pay \$46.025 billion over a twenty-seven-year period.

Majority Leader Frist's efforts to bring up S. 2290 for a floor vote floundered when the Senate failed to invoke cloture in the face of objections. At Senator Specter's request, Judge Becker reconvened the stakeholder meetings. Various stakeholders then met with Judge Becker thirty-six times between August 2003 and January 2005 in an

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represents many of the major asbestos defendants, the American Insurance Association (AIA), the Property and Casualty Insurers Association of America (PCI), the Reinsurers Association of America (RAA), and Equitas, the entity that holds reserves and handles pre-1993 claims for certain Lloyds of London syndicates.

<sup>46</sup> The agreement reportedly called for a base fund of \$114 billion, into which insurers would pay \$46.025 billion and defendants would pay \$57.5 billion. Barber & Lyman, *supra* note 41. In addition, defendants would pay \$10 billion to a contingency fund, with a possible additional \$10 billion payment later if needed to secure the fund. *Id.*

<sup>47</sup> STAFF OF S. COMM. ON THE JUDICIARY, 108TH CONG., S. 2290, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2004 HATCH/FRIST/MILLER BILL, SUMMARY OF CHANGES FROM S. 1125 AS REPORTED 1 (Comm. Print 2004), reprinted in 150 CONG. REC. S4107 (2004).

<sup>48</sup> *Id.* at 6.

effort to grapple with the unresolved issues concerning the bill.<sup>49</sup>

After the 109th Congress convened, in January 2005, Senator Specter, now Chairman of the Judiciary Committee, held two hearings on new drafts of the bill. On April 19, 2005, he introduced S. 852, the FAIR Act of 2005, with bipartisan sponsorship. Further hearings were held in April 2005, followed by six Committee markup sessions in April and May, with numerous amendments considered and many accepted. On May 26, 2005, the Committee approved S. 852 by a thirteen-to-five vote, with three Democrats and all Republicans voting in favor. This latest iteration of the FAIR Act contemplates a \$140 billion Trust Fund. In this essay, I will analyze the costs that may be incurred in the effort to resolve personal injury asbestos claims by enacting S. 852 that are in addition to the projected \$140 billion Trust Fund S. 852 proposes.

### B. S. 852: A Summary<sup>50</sup>

Like its predecessor FAIR bills, S. 852, the FAIR Act of 2005, would take asbestos claims out of the courts and substitute a no-fault<sup>51</sup> administrative claims-handling system administered by a newly created Office of Asbestos Disease Compensation (OADC), to be housed within the U.S. Department of Labor and funded through a national trust fund.<sup>52</sup> The OADC would resolve claims within a limited time frame and would issue a written proposed decision of the OADC

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<sup>49</sup> S. REP. NO. 109-97, at 5-6 (2005).

<sup>50</sup> S. 852 is undoubtedly one of the most complex pieces of legislation ever attempted. Many of its provisions are the product of intensive negotiations among the stakeholders and have been substantially revised over the past two years. As with any complex piece of legislation that has undergone substantial redrafting, a number of the resulting provisions are opaque and subject to differing interpretations.

For a more complete summary of S. 852's provisions, see Patrick M. Hanlon, *Asbestos Litigation: The Fair Act Two Years On*, 1 PRATT'S J. OF BANKR. L. 207 (2005). A unique feature of S. 852, which I do not discuss, is the provision that specifically applies to claimants from Libby, Montana. These special-purpose provisions provide that asbestos exposure is presumed for those who have resided in or around Libby for twelve months. Moreover, there is no requirement of impairment from restrictive disease. The net effect is to allow those claimants to receive a minimum of \$400,000 in compensation for smoking-related diseases. *See id.* at 215-18. Studies mandated by the bill could extend the "Libby" provision to twenty-eight other locations. Though this outcome is unlikely, the potential costs of a finding that other locations qualify for "Libby" coverage are so substantial that they could lead the Trust Fund to an early sunset.

I also do not discuss the provision allowing people exposed to naturally-occurring asbestos to file an "exceptional medical claim," S. 852, 109th Cong. § 121(g)(10) (2005); *infra* note 56, and the adjustment for claimants who have claims under the Federal Employers' Liability Act (FELA), which governs claims by workers in the railroad industry, S. 852 § 131(b)(4). *See* Hanlon, *supra*, at 219.

<sup>51</sup> As in any no-fault compensation program, a number of claimants who would not have a claim against defendants in the tort system are nonetheless eligible to receive an award from the Trust Fund.

<sup>52</sup> S. 852 § 101.

Administrator within ninety days of the filing of a complete claim.<sup>53</sup> S. 852 also calls for an accelerated review process and a payment procedure under which payment of claims would begin upon the OADC's final decision and would be completed within four years at the latest.<sup>54</sup> Special expedited procedures are established for claimants with mesothelioma and others with less than a year to live and their survivors.<sup>55</sup> Asbestos disease claimants' eligibility for compensation would be based upon standardized medical criteria. As set out in section 121 of S. 852, to be awarded compensation under the bill, a claimant would have to satisfy the enumerated medical and exposure requirements for one of nine disease levels,<sup>56</sup> each of which has a specified award:<sup>57</sup>

Level I (Asbestosis/Pleural Disease A), award of medical monitoring only;<sup>58</sup>

Level II (Mixed Disease with Impairment), \$25,000 award;<sup>59</sup>

Level III (Asbestosis/Pleural Disease B), \$100,000 award;<sup>60</sup>

Level IV (Severe Asbestosis), \$400,000 award;<sup>61</sup>

Level V (Disabling Asbestosis), \$850,000 award;<sup>62</sup>

Level VI (Other Cancers, such as colon, larynx, pharynx, or stomach, if exposure to asbestos was a substantial contributing factor), \$200,000 award;<sup>63</sup>

Level VII (Lung Cancer with Pleural Disease), awards of \$300,000 to smokers, \$725,000 to ex-smokers, and \$800,000 to nonsmokers;<sup>64</sup>

Level VIII (Lung Cancer with Asbestosis), awards of \$600,000 to

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<sup>53</sup> *Id.* § 114(b).

<sup>54</sup> *Id.* §§ 114(d), 133(a)(1).

<sup>55</sup> *Id.* § 106(c).

<sup>56</sup> The bill allows limited exceptions for certain "exceptional medical claims" with eligibility based upon comparable medical evidence to be reviewed by a Physicians' Panel.

<sup>57</sup> S. 852 § 131(b)(1). All award values are offset for prior settlements and verdicts, *id.* § 134(a), but not for workers' compensation benefits, *id.* § 134(b)(1). *See also* discussion *infra* Section V.C.3. S. 852 precludes railroad workers, who otherwise would be eligible to make asbestos-based FELA claims against railroads, from bringing such claims, but also provides those workers with an upward adjustment in award values to 110% of the average settlement value for the relevant disease category. *Id.* §§ 403, 131(b)(4).

<sup>58</sup> S. 852 §§ 121(d)(1), 131(b)(1).

<sup>59</sup> *Id.* §§ 121(d)(2), 131(b)(1).

<sup>60</sup> *Id.* §§ 121(d)(3), 131(b)(1).

<sup>61</sup> *Id.* §§ 121(d)(4), 131(b)(1).

<sup>62</sup> *Id.* §§ 121(d)(5), 131(b)(1).

<sup>63</sup> *Id.* §§ 121(d)(6), 131(b)(1). Although medical literature casts serious doubt on whether asbestos exposure causes any of the "other" cancers, these claims do succeed in the tort system though defendants often prevail in jury trials. For these reasons, the bill provides that a panel of physicians must decide all claims in this category. In addition, the bill mandates an accelerated study of asbestos causation of these cancers by the Institute of Medicine, which conclusions the panels are required to follow. *Id.* §§ 121(d)(6), (e), 131(b)(1).

<sup>64</sup> *Id.* §§ 121(d)(7), 131(b)(1).

smokers, \$975,000 to former smokers, and \$1,100,000 to nonsmokers;<sup>65</sup> and

Level IX (Mesothelioma), \$1,100,000 award.<sup>66</sup>

Levels I to V are nonmalignant conditions; Levels VI to IX are malignant conditions. Level I claimants are those who have had some asbestos exposure and have been diagnosed with an asbestos-related condition (pleural plaques, pleural thickening, or a 1/0 X-ray reading on the ILO scale, which litigation doctors in asbestos litigation testify is “consistent with asbestosis,” though this is not, in and of itself, a diagnosis) but cannot demonstrate any impairment of pulmonary function.<sup>67</sup> Since these claimants have no asbestos-related disease, the bill provides no compensation for them. They are entitled, however, to “medical monitoring” costs, i.e., reasonable costs of triennial medical testing.<sup>68</sup> Levels III, IV, and V require a chest X-ray showing asbestosis or asbestos-related pleural changes, and pulmonary function tests indicating restrictive lung impairment.<sup>69</sup>

Payment of all awards would be accomplished through the Asbestos Injury Claims Resolution Fund,<sup>70</sup> a \$140 billion repository created entirely with private funding. Mandatory contributions would consist of: total payments not to exceed \$90 billion over the life of the fund<sup>71</sup> (with a minimum annual aggregate payment of \$3 billion)<sup>72</sup> from defendant companies and \$46.025 billion from insurers,<sup>73</sup> less any

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<sup>65</sup> *Id.* §§ 121(d)(8), 131(b)(1).

<sup>66</sup> *Id.* §§ 121(d)(9), 131(b)(1).

<sup>67</sup> *Id.* § 121(d)(1).

<sup>68</sup> *Id.* § 131(b)(1). While the cost of this provision is insubstantial in relation to the cost of the Trust Fund, it should be noted that providing “medical monitoring” costs serves a political purpose but has no medical justification. Most asbestos-related conditions, including mesothelioma and asbestosis, are untreatable. Screening for lung cancer may have some health-related value but this is unrealized under S. 852. Providing for medical monitoring costs therefore does not advance any health-related interest. Moreover, there is no scientifically credible evidence that those diagnosed with pleural plaques have any greater likelihood of contracting an asbestos-related disease than co-workers similarly exposed who have not developed pleural plaques. See Brickman, *supra* note 23, at 52-53.

<sup>69</sup> *Id.* § 121(d)(3)-(5). This issue of whether a lung impairment is found to be “restrictive,” i.e., characterized by a reduction in lung capacity due to asbestos exposure, or “obstructive,” i.e., characterized by an obstruction of the air passageways in the lungs mostly due to smoking, or a combination of both, will have significant impact on the aggregate amounts to be paid for these claims. Levels III, IV, and V are distinguished by the degree of lung impairment, ranging from minimal to moderate to severe.

<sup>70</sup> *Id.* § 221.

<sup>71</sup> *Id.* § 202(a)(2).

<sup>72</sup> *Id.* § 204(h).

<sup>73</sup> *Id.* § 212(a)(2). Unlike the defendants who have an allocation system, albeit a complex one, no allocation system exists for insurers. Instead, the bill provides for an “Asbestos Insurers Commission” to adopt allocation principles and apply them to all insurers with \$1 million or more in liabilities. *Id.* § 212(c). The complexities of this process are discussed in Hanlon, *supra* note 50, at 227-30.

bankruptcy trust credits under section 222(d),<sup>74</sup> with the remainder to be paid from asbestos bankruptcy trust funds.<sup>75</sup>

The bill would require each “defendant participant” to make scheduled payments based upon its placement in a complicated system of tiers and sub-tiers.<sup>76</sup> To provide assets for the Trust Fund’s formation, insurers’ payments would be front-loaded; \$20.625 billion of their total payment obligation would be due within the first five years, with up to fifty percent of the first year’s payment required within ninety days of the bill’s enactment.<sup>77</sup>

The assets of bankruptcy trusts confirmed after July 31, 2004 are also to be transferred into the Trust Fund, but all such assets would be credited against the payments due from the defendants and insurers.<sup>78</sup>

The Trust Fund Administrator would be authorized to impose a *pro rata* surcharge on all participants “to ensure the liquidity of the Fund” if the transfer of assets from other bankruptcy trusts is held up in litigation or for other reasons and if borrowing is insufficient to insure the Trust Fund’s ability to meet its obligations without risking termination.<sup>79</sup> As a further “fail-safe” against shortfalls in the Trust Fund, the Administrator would be authorized to borrow from both commercial lenders and the Federal Financing Bank. Defendant and insurer participants would be obligated to repay amounts that the Administrator borrows.<sup>80</sup>

In the event the Trust Fund becomes over-funded in relationship to the claims being asserted, funding “holiday” and “step-down” provisions allow for reduced payments into the Trust Fund. Ten years after enactment, the defendant and insurer contributors may be entitled to a “holiday” for all or a portion of that year’s annual contribution.<sup>81</sup> Rigid requirements must be fulfilled and the Administrator may revoke

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<sup>74</sup> The bankruptcy trust credits referred to in section 222 are applied against both defendants’ and insurers’ shares. S. 852 § 222(d)(1). To the extent such credits are applied, they will reduce the overall size of the Trust Fund. However, credits are granted solely for assets the Trust Fund receives from bankruptcy trusts that were confirmed and “substantially consummated” after July 31, 2004. *Id.* To date, there has been only one such confirmation: Mid-Valley (DII Industries and Kellogg Brown & Root—subsidiaries of Halliburton). This trust has been funded with approximately \$2.4 billion in cash and 59.5 million shares of Halliburton stock, as well as by financing and a letter of credit. The total value of the trust’s assets approximates \$5 billion. See Russell Gold, *Halliburton Finalizes Settlement for \$5.1 Billion Over Asbestos*, WALL ST. J., Jan. 4, 2005, at A3.

<sup>75</sup> S. 852 § 402(a)(2).

<sup>76</sup> *Id.* § 204(i); see also Hanlon, *supra* note 50, at 220-23. A series of complex provisions in S. 852 deals with “inequity adjustments” in such instances. S. 852 § 204(d)(3), (m), 203(g)(3).

<sup>77</sup> *Id.* § 212(a)(3)(C), (e)(1). Front-loading imposes an additional cost because of the time value of money.

<sup>78</sup> *Id.* § 222(d)(2)(A)-(B).

<sup>79</sup> *Id.* § 222(c)(1)(A)-(B).

<sup>80</sup> *Id.* § 221(b)(4).

<sup>81</sup> *Id.* §§ 205(b), 212(a)(3)(F).

any holiday. Defendants are also entitled to a “step-down” whereby at the end of the tenth, fifteenth, twentieth, and twenty-fifth years of the Trust Fund, their annual contribution is reduced by ten percent.<sup>82</sup> The Administrator can nullify any such step down if he or she determines that it would jeopardize the Trust Fund’s ability to meet its obligations.

The assets of asbestos bankruptcy trusts confirmed *before* July 31, 2004, which were estimated to be approximately \$4 billion,<sup>83</sup> are to be transferred into the Trust Fund and are considered to be part of the \$140 billion cost.<sup>84</sup> The Administrator of the OACD would manage the Trust Fund and would be authorized to borrow for the Trust Fund and to invest Trust Fund assets.<sup>85</sup> The Administrator must submit an Annual Report to Congress on the condition of the Trust Fund and may bring about the termination of the Trust Fund and the sunseting of the Act if he/she determines that the Trust Fund will have insufficient resources to pay claims and meet its other obligations.<sup>86</sup>

#### V. ADOPTION OF S. 852: HOW MUCH WILL THE PROPOSED “FIX” COST DEFENDANTS AND INSURERS?

If S. 852 is enacted, it will impose costs on businesses and insurers in the form of required payments into the Trust Fund. In addition to these payments, however, businesses and insurers may incur a variety of other substantial costs to resolve pending and future asbestos-related personal injury claims. In this section, I consider both the costs imposed by S. 852 and the additional costs that may be incurred for such resolution. In some cases, these additional costs are a function of provisions in S. 852; some of these costs, however, already exist in the tort system, and would have to be resolved irrespective of whether Congress enacts S. 852.

The magnitude of future asbestos-related tort system costs, however, is a subject of renewed intense scrutiny because of issues of legitimacy and the effect of structural changes in the tort system. I have previously concluded that a substantial number of nonmalignant claims generated by mass screenings are specious.<sup>87</sup> U.S District Court Judge John P. Fullam, who presided over the Owens Corning bankruptcy,

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<sup>82</sup> *Id.* § 205(a).

<sup>83</sup> S. REP. NO. 109-97, at 26 (2005).

<sup>84</sup> *Id.* The value and number of the trust confirmed before July 31, 2004 likely increased since S. 1125 and S. 2290, the predecessors to S. 852, were first considered; however, the trustees of certain of these pre-July 31, 2004 trusts have threatened to challenge the constitutionality of the Act, thereby leaving the actual amount to be realized from these trusts uncertain.

<sup>85</sup> S. 852 § 101(c).

<sup>86</sup> *Id.* § 405.

<sup>87</sup> See Brickman, *supra* note 23.

acknowledged a number of the concerns I expressed about large numbers of these claims lacking validity.<sup>88</sup> U.S. District Judge Janis Jack has found that lawyers, B-readers, diagnosing doctors and screening companies—who have accounted for tens of thousands of asbestos-related claims—had engaged in a scheme to manufacture diagnoses of silicosis for money.<sup>89</sup> And a year and a half long investigation of both asbestos and silica claim generation is underway in the U.S. Attorney's Office for the Southern District of New York.<sup>90</sup> Finally, extensive tort reform efforts in the form of judicial rulings on procedural and substantive issues and the enactment of state legislation are causing dramatic declines in nonmalignant claim filings.<sup>91</sup>

#### A. *Costs Within the Trust Fund*

The amount of money required to fund the Trust Fund to ensure payment of present and future claims has been the subject of debate since S. 1125 was first proposed. In the more than two years since the FAIR Act of 2003 was presented, the proposed Trust Fund has been increased from \$45 billion, to \$108 billion in S. 1125, to \$124 billion in S. 2290, to \$140 billion in S. 852. The Judiciary Committee Report on the FAIR Act of 2005, submitted by its Chairman, Senator Arlen Specter, concludes that the sum of \$140 billion “is based on sound statistical data and economic models, and is more than adequate to compensate all victims of asbestos-related disease.”<sup>92</sup> But for a small fraction, all of the \$140 billion for the Trust Fund is raised from defendant and insurer participants

This brief history describes the absolute and contingent amounts that S. 852 would require defendant and insurer participants to pay into the Trust Fund. As the debate over the number and cost of future claims continues while S. 852 is under consideration, there appears to be a

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<sup>88</sup> *Owens Corning v. Credit Suisse First Boston*, No. 04-00905, slip op. (D. Del. Mar. 31, 2005); see also *In re Owens Corning*, Nos. 00-3837 to -3854, slip op. at 1-2 (Bankr. D. Del. Nov. 22, 2004) (indicating “it will . . . be necessary to structure a program of payments which . . . recognizes only legitimate claims,” especially in view of the fact that Owens Corning had made “payments to large numbers of claimants who actually sustained little or no harm from their exposure to Owens Corning’s products”).

<sup>89</sup> See *supra* note 11; *infra* text accompanying notes 149-150.

<sup>90</sup> See Jonathan D. Glater, *Asbestos Fund Bars 9 Doctors*, N.Y. TIMES, Sept. 15, 2005, at C1; Jonathan D. Glater, *Lawyers Challenged On Asbestos*, N.Y. TIMES, July 20, 2005, at C1.

<sup>91</sup> See *supra* note 14; *infra* note 93.

<sup>92</sup> S. REP. NO. 109-97, at 86 (2005). In their June 22, 2005 letter to Senate colleagues, Senators Arlen Specter and Patrick Leahy, ranking minority member, commented “Majority Leader [William] Frist and then-Democratic Leader [Tom] Daschle agreed that the Fund should be set at \$140 billion, which has been generally accepted as sufficient to ensure adequate payment to victims and is now embodied in S. 852.” Letter from Senator Arlen Specter & Senator Patrick Leahy to U.S. S. Comm. on the Judiciary (June 22, 2005), cited in S. REP. NO. 109-97.

general acceptance of the \$140 billion size of the Trust Fund.<sup>93</sup>

<sup>93</sup> While plaintiffs' counsel, labor unions, defendants, and insurers have disputed this figure, saying it is either too high or too low, the Senate Judiciary Committee has treated \$140 billion as the correct amount, so I will use that figure as the basis for this discussion. One business publication has noted that while the Congressional Budget Office (CBO) estimates that the Trust Fund may pay out less than \$140 billion, the CBO adds as a caveat that the Trust Fund might end up paying out \$150 billion over its estimated fifty-year lifetime. *Asbestos Trust Fund Analysis Shows Need For Change*, BUSINESS INSURANCE, Sept. 5, 2005. The publication goes on to state:

The CBO notes that while the trust is likely to be funded at the proposed \$140 billion level, nobody can predict with any accuracy the value of legitimate claims presented to it. CBO estimates they could range anywhere from \$120 billion to \$150 billion over 50 years. Given the difficulty of projecting financial performance of anything for five years, let alone a half-century, we feel that those numbers must be taken with a ton of salt.

*Id.* Even though it appears the issue of the Trust Fund's size has been resolved, analyses sponsored by interested parties contend that S. 852 is significantly under-funded. Bates White, LLC, an economic consulting firm, prepared an analysis of S. 852 and concluded that the bill would create entitlements in pending and future claimants to approximately \$300 billion, leaving S. 852's \$140 billion Trust Fund with a \$160 billion shortfall. *See* BATES WHITE, LLC, ANALYSIS OF S. 852, FAIRNESS IN ASBESTOS INJURY RESOLUTION (FAIR) ACT 5 (2005). The firm identifies two categories of claimants that it says pose the greatest threat to the Trust Fund's financial viability: "lung and other cancer" claimants, and dormant claimants who can recover the difference between amounts previously collected in the tort system and the award levels specified in S. 852. *Id.* The firm argues that S. 852 creates much higher entitlements for "lung and other cancer" claimants than is projected by the CBO because, in their view, far more "lung and other cancer" claimants can demonstrate pleural changes (and thus become eligible for levels VI and VII compensation) than the CBO projects. They also argue that the number of claimants thus eligible for compensation will far exceed the number that are able to obtain compensation in the tort system. *Id.* at 11. This is so, they state, because pleural changes—indications of abnormalities in the thin lining of the lung that may be associated with asbestos exposure and that are asymptomatic—are far more prevalent among the relevant population than the drafters of S. 852 contemplated. *Id.* at 11-17. For a discussion of pleural changes, see Brickman, *supra* note 23, at 51-54.

On the other hand, there may be reason to conclude that the Trust Fund is over-funded. While so noting, I do not address in this essay the issue of whether the Trust Fund's size is appropriate.

In its most recent Cost Estimate of S. 852, dated August 25, 2005, the CBO discusses the number of pending and future claims as part of its calculation of how much funding the Trust Fund will require. It concludes that future malignant claims will number 78,000 and will receive \$74 billion from the Trust Fund. Future nonmalignant claims are projected to number 1,184,000 and to receive \$32 billion. (The remaining \$25 billion is for pending claims.) The report states:

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.

CONG. BUDGET OFFICE, COST ESTIMATE: S. 852 FAIRNESS IN ASBESTOS INJURY RESOLUTION

Accordingly, for purposes of this analysis, I will use \$140 billion as the cost of the Trust Fund. As discussed below, however, that sum exceeds projected costs by \$7 billion—a sum that was thought to be required to

ACT OF 2005, at 9 [hereinafter 2005 CBO REPORT]. The CBO's analysis, however, fails to take into account a substantial decline in nonmalignant asbestos claiming that began in the second half of 2003. In 2003, new claim filings against the Manville Trust totaled approximately 101,200, a record for any year. In 2004, however, the number of new claimants dropped to 14,600—a decrease of approximately 85%. The ratio of nonmalignant to malignant claims declined from 9:1 in 2003 to 3:1 in 2004. From January 1 through June 30, 2005, 11,200 new claims were filed with the Manville Trust versus 7,400 in the first half of 2004. Letter from Robert A. Falise, *supra* note 7. If the same filing rate prevails for the remainder of 2005, the Manville Trust will receive 22,400 new claims in 2005 versus 14,600 in 2004, an increase but still a 77.8% decline when compared to 2003. Of the 9,355 new claims filed through May 31, 2005 (for which data is available), 2,358 were malignancies and 6,200 were nonmalignants (with 737 classified as "other"). For that five month period in 2005, the ratio of new nonmalignant to malignant claims had fallen to 2.65:1 versus 3:1 in 2004 and 9:1 in 2003.

Other trusts have experienced declines in the range of 25-35%. For example, Celotex Trust claims declined 25% from 2003 to 2004 and the ratio of nonmalignant to malignant claims declined from 9:1 to 6.5:1. See CELOTEX ASBESTOS SETTLEMENT TRUST, INTERIM CLAIMS REPORT (2005). The H.K. Porter Asbestos Trust reported an estimated 32% decline in new claim filings for 2004 as compared to 2003. The Eagle-Picher Trust reported that the ratio of nonmalignant to malignant claims for new filings in 2004 had fallen to approximately 5.8:1, down from 9:1 in each of the preceding three years. Annual Report and Account of Ruth R. McMullen, et al., As Tr. of The Eagle-Picher Indus. Pers. Injury Settlement Trust, For the Year Ended Dec. 31, 2004, at 6-7, *In re* Eagle-Picher Indus., Inc., No. 1-91-0010 (Bankr. S.D. Ohio Apr. 21, 2005). Moreover, due to the decrease in claims filings and presumably because of an expectation that claim filings will decrease going forward, the Eagle-Picher Trust raised the percentage of claim values to be paid from 15.5% to 19.8%. *Id.* at 10. The Trust reported that the leading plaintiffs' estimation expert had "performed an independent analysis and advised that the recommendation [to do so] was reasonable." *Id.* Also concurring were the plaintiff lawyers on the Trust Advisory Committee. *Id.* In essence, all interested parties concurred in the expectation of a significant decline in future claims so as to justify raising the pay-out percentage. Many of the leading defendants in the tort system have reported in their 2004 10K's that they experienced declines averaging over 50% in new claim filings in 2004 compared to 2003, and declines averaging 59% in 2004 compared to 2001.

At a recent Mealey's conference on asbestos litigation, Joe Rice, a leading plaintiffs' attorney, in responding to discussion of whether the Manville Trust experience represented a "permanent decrease," stated: "I think it is a permanent decrease." Joe Rice, Remarks at Mealey's National Asbestos Litigation Conference (Sept. 20 2004) (participating in a panel discussion of "Recent Trends In Asbestos Claims Filings"). Mr. Rice attributed the decline to a number of factors, including the Manville Trust adopting more stringent medical criteria and exposure requirements and bankruptcy courts adopting or considering adopting "trust distribution procedures" (TDP's) with new medical and occupational exposure criteria, which will have the effect of eliminating substantial numbers of claims that claimants otherwise could have filed. (TDP's prescribe the requisite medical and exposure criteria for filing claims with trusts created in bankruptcy proceeding to pay claimants.) In addition, several of the recently adopted and currently proposed TDP's include "collars" that will further limit the amount of the trusts' assets available to pay most nonmalignant claims. All of these factors combined are reducing the tort system value most nonmalignant claims can realize. In the entrepreneurial claim generation process, decreased profitability of nonmalignant claims for plaintiffs' lawyers results in fewer claims generated.

Even so, the CBO's failure to take into account this decline in nonmalignant claiming is unlikely to appreciably affect the total dollar value of nonmalignant claims since, as the CBO further estimates, 85% of future nonmalignant claimants will be eligible only for a maximum of \$1,000 in medical monitoring costs.

pay the claims of certain lung cancer claimants that were ultimately excluded from compensation under S. 852—though that sum has to be discounted for the reasons set forth.<sup>94</sup>

After discussing the financial effects of omitting this claim category, I then consider the financial costs of S. 852 that are not included in the \$140 billion Trust Fund figure, which should be added to that sum to gain a more accurate understanding of the cost of “fixing” asbestos litigation by adopting S. 852.

### B. *The Former “Level VII” Claimants*

Both S. 1125 and S. 2290 included a category, “Malignant Level VII,” which applied to claimants with a primary lung cancer who could produce evidence of substantial occupational exposure to asbestos and medical documentation establishing asbestos exposure as “a contributing factor” to the lung cancer (the “Former Level VII’s”).<sup>95</sup> Former Level VII’s were not required, however, to show that the asbestos exposure was “a substantial factor” in causing the lung cancer or, as many leading doctors believe is required to show that a smoker’s lung cancer was caused by asbestos exposure, the existence of an underlying asbestos-related condition such as asbestosis or pleural plaques. Since over 150,000 lung cancers manifest annually,<sup>96</sup> this provision generated considerable controversy because it threatened to make the FAIR Act into a smokers’ relief bill. Ultimately, as explained by Senators Specter and Leahy, the Former Level VII’s category was deleted from S. 852:

Some members raised concerns about compensating the so-called “exposure only” Level VII lung cancers, fearing that this disease category would create a “smokers” compensation fund. Without sufficient markers to show a stronger causal connection between asbestos exposure and lung cancer, *this disease category could have required \$7 billion from the Fund*. After serious consideration, we removed this disease category from the bill.<sup>97</sup>

Senators Specter and Leahy have thus valued the savings from the deletion of the Former Level VII claims at \$7 billion. However, no

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<sup>94</sup> The actual value of this deletion must be offset by the increased values for cancer claims. *See infra* note 98.

<sup>95</sup> S. 1125 § 121(d)(7); S. 2290 § 121(d)(7). The “contributing factor” standard requires a considerably lower level of proof than the “substantial factor” test. *See, e.g., McCloskey v. Workers’ Comp. Appeal Bd.*, 460 A.2d 237 (Pa. 1983).

<sup>96</sup> U.S. Dep’t of Health & Human Serv., Cntrs. for Disease Control & Prevention, Lung Cancer Statistics, <http://www.cdc.gov/cancer/lung/statistics.htm> (last visited Sept. 20, 2005).

<sup>97</sup> Letter from Senator Arlen Specter & Senator Patrick Leahy, *supra* note 92, at 4 (emphasis added).

corresponding reduction was made in the aggregate amount of the Trust Fund. Therefore, in effect, the cost of the Trust Fund was increased by up to \$7 billion though a certain portion of the \$7 billion was used to increase cancer claims values.<sup>98</sup>

### C. *Costs Outside the Trust Fund*

S. 852, as currently drafted, contains language preempting any federal or state law insofar as it may relate to an asbestos claim.<sup>99</sup> It also, however, allows clear exceptions and “carve-outs” that, by themselves, will have a financial impact in addition to the \$140 billion cost of the Trust Fund. Consequently, any evaluation of the cost of “fixing” asbestos litigation by enacting S. 852 may not be limited to the \$140 billion funding obligations *within* the Trust Fund since, as discussed below, S. 852 contemplates the payment of significant costs in addition to the \$140 billion Trust Fund.<sup>100</sup> In this essay, I examine five of these exceptions and carve outs, and their related financial impact:

1. asbestos claims handled and paid over the past thirty months since S. 1125 was first discussed;
2. “exigent” claimants who qualify for special treatment under S. 852;
3. subrogation and workers’ compensation claims;

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<sup>98</sup> The “price” for eliminating the Former Level VII category was an increase in the claim values for most cancer categories and the allowance of the routine use of CT (CAT) scans to establish claims for lung cancer with asbestosis (Level VIII). S. 852 § 1212(d)(8). CT scans are more sensitive than chest X-rays and so can detect more instances of asbestos-related conditions. In addition, no established medical criteria exists for evaluating whether a CT scan indicates the presence of asbestosis, whereas the International Labour Organization (ILO) has adopted a significantly developed protocol for classifying chest X-rays. Accordingly, there is a weaker basis for challenging a positive CT scan reading than a positive X-ray reading. Thus, this provision allowing CT scans to be used will likely result in claimants filing more Level VII claims. For an explanation of the ILO classification of chest X-rays, see Brickman, *supra* note 23, at 47-48. For consideration of the possible impact of funding “holiday” and “step-down” provisions, see *supra* text accompanying notes 81-82.

<sup>99</sup> Sec. 403(a), “Effect on Federal and State Law,” states, “The provisions of the Act shall supersede any Federal or State law insofar as such law may relate to any asbestos claim, including any claim described under subsection (e)(2).” S. 852 § 403(a). An “asbestos claim” is a defined term under S. 852, which limits its application to injuries suffered by a person as the result of asbestos exposures; as such, it explicitly excludes, among other claims, “claims alleging damage or injury to tangible property.” *Id.* § 3(3)(B)(i).

<sup>100</sup> A number of other potentially significant costs of resolving asbestos claims exist, which I do not discuss in this essay. For example, the costs associated with property damage caused by asbestos (such as claims seeking as a remedy the costs of removing asbestos from buildings) are excluded from coverage under S. 852, S. 852 § 3(3)(B)(i), and represent an additional and potentially significant cost outside the Trust Fund that certain trust participants must bear.

4. pending lawsuits where evidence has commenced, lawsuits where a final judgment has been entered, and certain settlements; and
5. silica/mixed dust claims.

1. Claims Paid During the Legislative Process

Additional costs of resolving personal injury asbestos litigation beyond the Trust Fund include payments made by defendants and insurers pursuant to judgments or settlements that were entered in the tort system during the more than two-year period in which Congress has been actively considering different iterations of the FAIR Act.<sup>101</sup> In a letter to United States Senators dated June 27, 2005, a group of insurers, which described itself as holding over two-thirds of the net asbestos reserves as of December 2004 and as having paid nearly two-thirds of all asbestos claims, calculated that \$9 billion had been paid in the thirty months since the Trust Fund was first proposed.<sup>102</sup> Nonetheless, legislators have not elected to reduce proportionately the size of the Trust Fund to account for that \$9 billion. For those insurers and defendants that paid the \$9 billion, their share of the amount to be paid into the Trust Fund has been effectively increased by \$9 billion plus any additional monies they must pay out in settlements and judgments until such time as Congress actually passes S. 852. Accordingly, even though this expense (or possibly a larger amount) would have been incurred in the tort system even if Congress had not been considering a proposal for a legislative “fix,” it is appropriate to add the \$9 billion-plus figure to the accounting of the cost of legislatively resolving personal injury asbestos litigation.

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<sup>101</sup> When the FAIR Act was initially proposed, it was assumed Congress would pass the bill in 2003 and payments to claimants outside a Trust Fund would stop. As such, 2002 data was used in establishing the size of the Trust Fund under S. 1125. The Trust Fund amount was not adjusted downwards to reflect that claims continued to be paid while the FAIR Act was being considered.

<sup>102</sup> Letter from Acuity, Allstate, Am. Int'l Group, Am. Re, The Chubb Corp., Erie Ins. Group, EMC Ins. Co., Gen. Re, The Hartford, Liberty Mutual, Nationwide, One Beacon, Royal Sun Alliance, Safeco Corp., Swiss Reinsurance Am. Corp., Winterthur N. Am. and Zurich to author (June 28, 2005) (on file with author). For purposes of this analysis, I am accepting this amount as accurate.

## 2. "Exigent Claimants"

In order to address asbestos claims pending in the tort system while the Trust Fund administrative framework is being set up, the drafters authorized "exigent claimants" to seek payment both before and after S. 852 is enacted.<sup>103</sup> Living claimants with mesothelioma or with a life expectancy of less than one year (or the spouse or child of such a claimant if the claimant died since his or her claim was filed with the Trust Fund) are authorized to file "exigent health claims" under S. 852.<sup>104</sup> S. 852 provides that, if the Administrator fails to pay a claim that he or she has determined or certified as exigent, the claimant may seek a payment directly from a defendant identified as "an appropriate defendant in a civil action seeking damages for the asbestos claim of the claimant."<sup>105</sup> If the claimant and a defendant or defendants ultimately achieve an agreement, payment must be made within a prescribed time frame. While the bill caps any such award at no greater than one-hundred-fifty percent of the Trust Fund award value, if the claim is not settled, the claimant may pursue the claim in the tort system where no caps on the award or on attorney's fees exist.<sup>106</sup>

Under S. 852, settlement payments made by a defendant for exigent claimants are deducted from that defendant's required annual contributions to the Trust Fund:

Any defendant whose settlement offer is accepted may recover the cost of such settlement by deducting from the defendant's next and subsequent contributions to the Fund the full amount of the payment made by such defendant to the exigent health claimant, unless the Administrator finds, on the basis of clear and convincing evidence, that the defendant's offer is not in good faith.<sup>107</sup>

Nonetheless, here too, the drafters apparently have elected not to provide for any corresponding reduction in the \$140 billion Trust Fund total. While section 106(f) of the bill addresses the "exigent" claimant payment protocol, it does not provide that payments to exigent claimants will be deducted from, or offset against, the collective obligation.<sup>108</sup> Thus, although payments to exigent claimants count

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<sup>103</sup> S. 852 § 106(f)(2)(A)(i).

<sup>104</sup> Under section 106(c)(3), the Trust Fund Administrator may, in final regulations, designate additional categories of "exigent claimants" which can further expand the costs associated with such claims.

<sup>105</sup> S. 852 § 106(f)(2)(A)(iii)(IV).

<sup>106</sup> The exigent claim provisions are inordinately complex if not unfathomable; my analysis in this essay barely touches on most of the complexities.

<sup>107</sup> S. 852 § 106(f)(2)(A)(xii)(I). The section further provides that if there are not enough future payments to allow the defendant to recover its costs, it is entitled to reimbursement.

<sup>108</sup> Section 106(f) does contain language that "[a]ny such payment [to a claimant] shall be considered a payment to the [Trust] Fund for purposes of section 404(e)(1) and in response to the payment obligations imposed on defendant and insurer participants in Title II," but the intent

against particular defendants' allocated shares, they do not appear to decrease the collective obligation of defendants, insurers, and bankruptcy trusts to pay in a total of \$140 billion. Thus, as S. 852 currently reads, when one defendant/contributor offsets its next payment into the Trust Fund by the amount it paid to an exigent claimant, the other defendants and insurers paying into the Trust Fund will have to make up the amount of that offset. Accordingly, exigent payments may constitute a cost to defendants and insurers in addition to the cost of the \$140 billion Trust Fund.<sup>109</sup>

To quantify the value of the exigent claimant exception, I have adopted the projections that the Congressional Budget Office (the CBO) provided on November 7, 2003 at the request of J. Dennis Hastert, the Speaker of the House, when S. 1125 was under consideration. For its report, the CBO was asked to provide a forecast for pending and future malignant and nonmalignant claims by disease level and by year. The CBO based its estimate for pending claims on research Navigant Consulting had conducted for use by the Senate Judiciary Committee and various stakeholders during discussions of the Trust Fund.<sup>110</sup> From these projections, I conclude that the financial impact of the exigent claims exception ranges from \$7.7 billion to \$11.0 billion.<sup>111</sup>

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behind this is unclear, particularly given the reference to insurers, who are not otherwise addressed elsewhere in section 106(f). *Id.* § 106(f)(2)(A)(xii)(I).

<sup>109</sup> It is theoretically possible that the collective obligation to pay in \$140 billion will be reduced by exigent payments under the funding "holiday" and "step-down" provisions. *See supra* text accompanying notes 81-82. Moreover, the language I am interpreting is opaque and a construction different from the one I offer can be generated if one approaches the task with the view that exigent payments should not only offset participants' payments but also count toward the annual payment target and ultimately the \$140 billion total payment. The interpretation I present is buttressed by the fact that, while it would be a simple drafting task to provide that exigent payments count towards the \$140 billion total, the bill, as currently drafted, does not explicitly so provide.

<sup>110</sup> CONG. BUDGET OFFICE, COST ESTIMATE: S. 1125 FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003.

<sup>111</sup> The largest category of "exigent" claims is mesothelioma claimants, who are awarded \$1,100,000 under S. 852. S. 852 § 131(b)(1). The CBO's base-line estimate of pending mesothelioma claims totaled 7,040. Multiplying 7,040 (the projected number of pending mesothelioma claimants) by the Trust Fund award value for mesothelioma claimants (\$1.1 million) yields \$7.7 billion. To this calculation should be added lung cancer claimants who could and probably will qualify as "exigents." Under S. 852, lung cancer claimants with asbestosis can be awarded between \$600,000 and \$1.1 million depending upon their smoking history; lung cancer claimants with "pleural disease" can be awarded between \$200,000 and \$800,000 depending upon their smoking history. The CBO projected approximately 2,522 pending claims of lung cancer with asbestosis and 3,837 claims of lung cancer with "pleural disease." Using a weighted average Trust Fund award value of \$700,000 for a lung cancer claimant with asbestosis and \$410,000 for a lung cancer claimant with pleural disease, the cost for both categories of lung cancer claimants approximates \$3.3 billion. (I multiplied \$700,000 by 2,522, which equals \$1.765 billion, and \$410,000 by 3,837, which equals \$1.5 billion, and then totaled both numbers.)

Ignoring other possible categories of "exigent" claims, the financial impact of the exigent claimant exception ranges from \$7.7 billion to \$11.0 billion, depending on whether one looks solely at mesothelioma claimants or also includes lung cancer claimants. Moreover, this range

### 3. Subrogation and Workers' Compensation Claims

The bill broadly frames its description of the claims that are to be channeled into the Trust Fund. It defines "asbestos claim" to mean:

Any claim, premised on any theory, allegation, or cause of action for damages or other relief presented in a civil action or bankruptcy proceeding, directly, indirectly, or derivatively arising out of, based on, or related to, in whole or part, the health effects of exposure to asbestos, including loss of consortium, wrongful death, and any derivative claim made by, or on behalf of, any exposed person or any representative, spouse, parent, child, or other relative of any exposed person.<sup>112</sup>

While this language is expansive, the bill explicitly excepts from the Trust Fund claims for benefits under workers' compensation laws and veterans' benefits programs.<sup>113</sup> As a matter of public policy, the drafters have also determined that workers' compensation benefits may not be set off as collateral sources from payments made by the Trust Fund to workers injured by exposure to asbestos.<sup>114</sup> Also, any workers' compensation claim or claim under a life or health insurance policy filed by a claimant, who has also filed a claim with the Trust Fund, must be handled without regard to any recovery the claimant receives from the Trust Fund.<sup>115</sup>

These provisions will require self-insured employers and insurers to make these payments in addition to their Trust Fund obligations. Moreover, none of these costs, which insurers and self-insuring defendants will incur outside of the Trust Fund, may be recouped because S. 852 precludes subrogation.<sup>116</sup> Because injured workers may receive an award from the Trust Fund in addition to workers' compensation (or like) benefits without any corresponding set-off

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does not take into account other claimants who may qualify as "exigents." But that variable is offset by the fact that I included all pending mesothelioma and lung cancer claimants in my projection. On August 25, 2005, the CBO released its report regarding the cost estimate of S. 852. 2005 CBO REPORT, *supra* note 93. In forecasting the number of pending cases as of 2006—the year the CBO assumed as the date of enactment—the CBO concluded that it should increase the projections it relied upon in 2003 by 7%. *Id.* I have not made that adjustment. If I did, the costs associated with the "exigent claimants" would increase by approximately \$0.5 billion.

<sup>112</sup> S. 852 § 3(3).

<sup>113</sup> *Id.* § 3(3)(B)(ii). In addition to property damage claims (discussed *supra* at notes 99-100), the Act also excludes claims under health, disability, and life insurance policies or plans, claims under collective bargaining agreements, and claims arising out of medical malpractice. *Id.* § 3(3)(B)(iii)-(v).

<sup>114</sup> "In no case shall statutory benefits under workers' compensation laws, special adjustments made under section 131(b)(3), occupational or total disability benefits under the Railroad Retirement Act (45 U.S.C. 201 et seq.) . . . and veterans' benefits programs be deemed as collateral source compensation for purposes of this section." *Id.* § 134(b)(1).

<sup>115</sup> *Id.* § 135(b).

<sup>116</sup> By extinguishing any lien, section 135 precludes subrogation.

against the payor's Trust Fund obligation,<sup>117</sup> the numbers of workers' compensation claims filed by those alleging asbestos-related injury sustained in the course of employment may be expected to increase. Accordingly, these increased costs that may be incurred for resolution of personal injury asbestos litigation in addition to the Trust Fund should be accounted for.

The National Council on Compensation Insurance, Inc. (the NCCI)<sup>118</sup> has analyzed the potential cost impact of the workers' compensation provisions of the Act.<sup>119</sup> The NCCI contends that once the disincentive to filing asbestos claims in the workers' compensation system (i.e., subrogation) has been removed, the number of such claims will increase greatly, with tens of thousands of additional claims each year flooding the state workers' compensation system. Although it notes that estimating the costs of section 135 of the Act is challenging and uncertain, the NCCI projects substantial additional costs to the workers' compensation system. Using the CBO estimate of the expected number of claims to the Trust Fund over its life, assuming that five to ten percent of these claims are accepted and compromised as workers' compensation claims, and applying countrywide costs-per-claim statistics and annual inflation factors, the NCCI concludes that the Act's ultimate cost impact to the state workers' compensation systems will be \$39 to \$88 billion.<sup>120</sup>

I have not attempted to independently assess the workers' compensation claim costs that the NCCI has analyzed; doing so would require a state-by-state analysis of workers' compensation programs<sup>121</sup> and a close examination of the NCCI's methodology and analysis.

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<sup>117</sup> "The payment of an award to an asbestos claimant under section 106 or 133 shall not affect any claim of an asbestos claimant against—(1) an insurance carrier with respect to insurance; or (2) against any person or governmental entity with respect to worker's compensation, healthcare, or disability." S. 852 § 135(b).

<sup>118</sup> As described on its website, NCCI, which has operated since 1922 as a not-for-profit organization, "is the oldest and largest provider of workers compensation and employee injury data and statistics in the nation." It regularly analyzes workers' compensation system cost trends and determines the overall financial impact of proposals and enacted legislation that affect the workers' compensation system. National Council on Compensation Insurance, Inc., <http://www.ncci.com> (last visited Sept. 26, 2005).

<sup>119</sup> NAT'L COUNCIL ON COMP. INS., INC., ANALYSIS OF S.852 FAIRNESS IN ASBESTOS INJURY RESOLUTION (FAIR) ACT OF 2005 (on file with author).

<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.*, WIS. STAT. ANN. § 102.12 (West 2005) (requiring claimants to notify employers within thirty days after the date of injury or the date "the employee knew or ought to have known the nature of his or her disability and its relation to the employment" and, regardless of notice, barring claims not filed within two years of such date unless "the employer knew or should have known, within the 2-year period, that the employee had sustained the injury on which the claim is based"); 77 PA. CONS. STAT. ANN. § 602 (West 2005) (barring claims not filed within two years); UTAH CODE ANN. § 34A-3-109 (West 2005) (barring claims not filed within six years, or in which the employee does not meet his or her burden of proof within twelve years, from the date the employee's cause of action arose).

Nonetheless, a case has been made that these costs could be significant. Therefore, they should be added to the calculus of the costs that may be incurred for resolution of personal injury asbestos litigation, in addition to the cost of the Trust Fund, if S. 852 is enacted.

4. Pending Lawsuits Where Evidence Has Commenced,  
Lawsuits Where a Final Judgment Has Been  
Entered and Certain Settlements

a. Pending Law Suits

Prior versions of the FAIR Act grappled with the question of how to treat cases already pending in the tort system at the time Congress passes the bill. S. 1125 provided that the Act would preempt *all* pending court actions asserting asbestos claims, with a limited exception for cases where a judgment was entered that was no longer subject to appeal.<sup>122</sup> Amendments offered by Senator Diane Feinstein, concerned with delay during the start-up period, would have preserved all cases in the tort system until the Administrator certified that the Fund was operational. S. 2290 returned to the original concept of S. 1125, excepting only cases with final judgments that were no longer appealable. S. 852, however, creates a broader exemption for on-going lawsuits: if the presentation of evidence has commenced, the case is not preempted. If, however, the jury has begun to deliberate, S. 852, as currently drafted, provides that the claim *is* preempted.<sup>123</sup> Obviously, this latter outcome is inconsistent with the preemption provision and is

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<sup>122</sup> This exception was sound because once a plaintiff had a final, non-appealable judgment, a vested property right arose which, if disturbed by the legislation, would raise a legitimate constitutional challenge.

<sup>123</sup> As set forth in section 403(d)(2)(A)(iii)(I), S. 852 excepts from its reach any individual jury trial in federal or state court, which “is before the jury after its impaneling and commencement of presentation of evidence, but before its deliberations.” Section 403(d)(2)(A)(iii)(II) includes an essentially parallel provision for cases where the judge serves as the trier of fact. Section 403(d)(2)(A)(iii)(III) extends the exemption to apply to any claim where “a verdict or final order, or final judgment has been entered by a trial court.” The previous versions of the FAIR Act limited the exemption to a final, non-appealable judgment. By allowing cases with final judgments to be paid outside the Trust Fund, S. 852 eliminates the “no longer subject to appeal” standard that created vested property rights under S. 1125 and S. 2290. A trial court judgment, standing alone, does not create such property rights. *In re U.S. Atmospheric Testing Litig. v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). “No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit . . . . This is true after suit has been filed and continues to be true until a final unreviewable judgment is obtained.” *Id.* (citing *Hammond v. United States*, 786 F.2d 8, 12 (1986)). It also bears noting that, even without a “rush to the courthouse” before passage of the Act, claimants who are able to secure trials and begin introducing evidence before the date Congress enacts the bill will be allowed to continue their claims within the very tort system that the Trust Fund is designed to replace.

probably an artifact of the extensive redrafting process.

Quantifying the cost for pending cases where the presentation of evidence has commenced requires a series of increasingly problematic estimations. As of the date Congress enacts S. 852, the number of trials that fall within this exception will be fixed. The actual cost of this exception will take much longer to ascertain. I am informed that asbestos trials average five to eight days in duration, though some go much longer. It may easily take six months or more for all the trials in this category across the country to conclude.

Calculating the cost of all trials in which the presentation of evidence is underway when Congress passes S. 852 requires, first, a determination of how many trials will fit within the exception. The trials must be divided between those in which plaintiffs prevail and those that will result in defense outcomes. Then, of those trials in which plaintiffs prevail, the percentage likely to go to verdict and the percentage likely to settle prior to verdict must be estimated. For both plaintiffs' verdicts and pre-verdict settlements, the calculations must take into account the nature of the claims, by disease, and the average verdict or settlement value of each such claim. Looking at the likely dollar average for each verdict or settlement by disease, the total dollar range of all settlements and verdicts might then be projected. The penultimate step in this analysis would be to factor in defense costs, since they too would be paid by the participants outside the Trust Fund. Defense costs would vary depending upon the number of defendants and whether the claims were resolved via settlement prior to verdict or not until after the trial concluded. Finally, this figure must be offset by deducting a value assigned to those non-preempted trials that result in defendants' verdicts.

The foregoing analysis reveals that calculating the cost of the pending trials exception to preemption under S. 852 is inordinately complex. While I am therefore not going to attempt to quantify these costs, it appears likely that this factor could result in participants incurring substantial tort system costs outside of the Trust Fund, particularly if these trials take a long time to resolve.

#### b. Settlements

In addition to pending lawsuits, the treatment of settlements that were finalized prior to the enactment of S. 852 has been a subject of intense discussion through the various iterations of the FAIR Act. The first version sought to except only those settlements that were definitively concluded. S. 1125 preserved from its reach, and thereby required payments *outside* the Trust Fund for, those settlements already

approved by a court and having the status of a final judgment. Proposed amendments would have excepted settlements and verdicts predating the Act.<sup>124</sup> S. 2290 attempted to define finality as the completion of all acts called for in settlement agreements. That version would have invalidated any settlements with any future performance remaining, including unpaid payments, and channeled the asbestos claims into the Trust Fund.

S. 852 takes a much larger step toward excepting settlements from the Trust Fund, with the result that if the bill passes, there will be claims paid—and therefore costs incurred—outside the Trust Fund. While, on the one hand, S. 852 provides that any agreement concerning an asbestos claim and requiring future performance shall be superseded by the Act,<sup>125</sup> it also creates an exception for certain settlements.<sup>126</sup> Specifically, a settlement agreement that

is written, binding and legally enforceable,

predates enactment,

is made between a defendant or insurer and a specific named plaintiff (or plaintiff's relatives or legal representative), and

contains an express obligation by the defendant or insurer to make specified future payments

is outside of S. 852, so long as “all conditions” to payment are fulfilled within thirty days after enactment.<sup>127</sup> Where plaintiffs can claim that they have entered into or are covered by settlement agreements, plaintiffs’ lawyers will have a substantial incentive to argue that “all conditions” have been met so that payment will be made outside the Trust Fund. This is so because S. 852 caps contingency fees at five percent,<sup>128</sup> whereas in the tort system, attorney’s fees generally are not capped and many if not most approximate forty percent of a claimant’s gross award.<sup>129</sup> Plaintiffs’ counsel’s interests are obviously better served by having claims paid under the guise of a pre-Act settlement than by having them resolved under the Act. It is unclear whether the Administrator will have either the tools or the incentive to examine in detail whether settlement payments claimed to be due are excepted from S. 852. While here too, it is difficult to estimate the magnitude of this

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<sup>124</sup> Hanlon, *supra* note 41, at 20.

<sup>125</sup> S. 852 § 403(c)(1)-(2).

<sup>126</sup> *Id.* § 403(c)(3).

<sup>127</sup> *Id.* As an exception to the exception, this provision does not apply to settlements where the defendant is in bankruptcy. *Id.* § 202(f). Thus, the bill would not preserve settlements under Owens Corning’s National Settlement Program, even if they meet the conditions of section 403(c)(3), because the company filed for bankruptcy.

<sup>128</sup> *Id.* § 104(e).

<sup>129</sup> RAND has estimated plaintiff attorney fees at approximately 34%. RAND REPORT, *supra* note 8, at 102. My own estimate is higher. See Brickman, *supra* note 4, at 841-43.

cost, it nonetheless constitutes a cost additional to the \$140 billion cost of the Trust Fund.

c. Offset for Prior Awards

S. 852 requires a claimant to disclose any payment he or she has received for an asbestos claim in any prior action or claim, including settlement or judgment.<sup>130</sup> Any previous payments to a claimant either under the Act or prior to the Act offset amounts to be paid under the Trust Fund. If prior payments have exceeded the amount S. 852 sets forth for that disease category, no payment from the Trust Fund is allowed. However, in order for the Trust Fund Administrator to offset any prior award payment from a Trust Fund award, the Administrator must be informed of such payment. While anyone who willfully falsifies a claim by failing to disclose prior settlement proceeds received is subject to criminal penalties,<sup>131</sup> the lesson of asbestos litigation is that where substantial sums are at stake, financial incentives tend to predominate over adherence to rules.<sup>132</sup> The concern that claimants who have already received multiple settlements will nonetheless receive payment again under S. 852 is heightened by the fact that the only databases that would effectively allow the Trust Fund Administrator to identify undisclosed pre-Act settlement payments to a claimant are those maintained by plaintiffs' law firms,<sup>133</sup> and that S. 852 contains no

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<sup>130</sup> S. 852 § 113(c)(7).

<sup>131</sup> *Id.* § 401(a).

<sup>132</sup> For example, ethical rules regulating lawyers' conduct have rarely been applied to asbestos litigation. See Brickman, *supra* note 4, at 837-39. In addition, there is at least circumstantial evidence that attorneys have submitted claims to asbestos bankruptcy trusts that include conflicting product exposure assertions. See Brickman, *supra* note 23, at 74-76 n.120. Judge Jack, in her Order in the Silica MDL, notes more hard evidence of the use of inconsistent work histories and false exposure claims. She discusses two medical reports provided by Dr. Ray Harron for the same individual. On one date, Dr. Harron "diagnosed" the litigant with silicosis, and on another date, with asbestosis. *In re Silica Prods. Liab. Lit.*, No. MDL 1553, 2005 WL 1593936, at \*30 (S.D. Tex. June 30, 2005). In the asbestos report, the litigant's work history states that he worked for the U.S. Army as a laborer from 1957 to 1994, during which time he was exposed to asbestos. In the silicosis report, the work history states only that he worked for the Ingalls Corporation as a painter from 1965 to 1968, where he was exposed to silica. *Id.* At least one of these work history claims is obviously a misstatement.

<sup>133</sup> Except for the relatively rare occasions when trials go to verdict and judgment and require complex allocations of responsibility amongst settling and nonsettling defendants, defendants are generally unaware of how much a claimant or his representative has already received in settlement proceeds. Thus, in the tort system, a claimant may already have already received twenty or thirty settlements (or more) at the time that a demand is made on a particular defendant. The aggregate amount the claimant receives may be multiples of the reasonable aggregate value of the claim in the tort system. While plaintiff lawyers, of course, are aware of the aggregate amount of settlement proceeds their clients have received to that point, defendants generally are not only unaware of that amount but also unable to find out. Attempts to discover this information in depositions often fail and, in any event, necessitate incurring the cost of taking

provision giving the Administrator authority to access those databases. A possible alternative database might be constructed by assembling the databases maintained by hundreds of defendants. However, even if confidentiality issues could be overcome, many of these databases are incompatible, limiting the ability to combine them to produce aggregate data. The inability to independently and accurately determine the prior amounts paid to claimants in the tort system is likely to result in unwarranted Trust Fund payments to these claimants. While the magnitude of such excess payments cannot readily be estimated, these excess payments may be considered a cost of resolving personal injury asbestos litigation in addition to the Trust Fund cost set out in S. 852.

## 5. Silica

A danger exists that the civil justice debacle occasioned by entrepreneurially-generated asbestos claims will be replicated with respect to silica claims. Because of the unprecedented level of discovery permitted by Judge Jack in the silica MDL,<sup>134</sup> the silica story has emerged as an even more clearly defined indictment of entrepreneurial claiming than is asbestos litigation.

While occupational exposure to silicosis has had tragic consequences, strict government regulations enacted over the past fifty years have sharply reduced permissible exposures to silica. As a consequence, deaths attributable to silicosis have declined steadily from 1,157 deaths in 1968 to 187 deaths in 1999. Consistent with this decline, only a handful of silicosis cases have presented at leading medical institutions in recent years.<sup>135</sup> However, beginning in late 2002, an “epidemic” of silicosis claim filings took place, mostly in state courts in Mississippi despite the fact that Mississippi’s silicosis mortality rate ranks forty-third out of the fifty states.<sup>136</sup> Fortunately for American workers, the locus of this “phantom epidemic”<sup>137</sup> was not in

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plaintiffs’ depositions.

<sup>134</sup> See *infra* notes 142-144 and accompanying text.

<sup>135</sup> From 1950 to 1979, for example, Massachusetts General Hospital reported only 15 cases of silicosis and coal workers’ pneumoconiosis. Theresa C. McLoud et al., *Chronic Diffuse Infiltrative Lung Disease*, 5(2) CLINICS IN CHEST MED. 329, 339 (1984). From 1980 to 1987, the Mayo Clinic found only ten to twenty-five cases of silicosis per year from the approximately 250,000 patients it sees annually. RICHARD A. DEREMEE, CLINICAL PROFILES OF DIFFUSE INTERSTITIAL PULMONARY DISEASE 46 (1990). Between the two periods of 1969 to 1981 and 1982 to 2001, the death rate for silicosis had dropped 70%. M.D. Attfield et al., *Changing Patterns of Pneumoconiosis Mortality, United States, 1968-2000*, 53(28) MORBIDITY & MORTALITY WEEKLY REP., July 23, 2004, at 627-32, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5328a1.htm>.

<sup>136</sup> *In re Silica Prods.*, 2005 WL 1593936, at \*4.

<sup>137</sup> *Id.* at \*6.

workplaces but rather only in state courtrooms.

The beginning of the legal “epidemic” of silicosis filings coincides with two developments that created the perception that the end game had begun with regard to nonmalignant, entrepreneurially-generated asbestos claims: (1) the onset of Congressional consideration of S. 1125 in 2002-2003 that would have limited payment to only those asbestos claimants that could show actual injury,<sup>138</sup> and (2) the adoption by a number of key states of tort reform legislation directly aimed at curbing the asbestos litigation abuses this essay describes as an integral part of the entrepreneurial model.<sup>139</sup> As a consequence of these developments, some screening entities and plaintiff lawyers shifted their focus from screening for asbestosis to screening for silicosis.

Approximately 10,000 of the approximately 35,000 silicosis claims recently filed, mostly in Mississippi and Texas state courts, were centralized into an MDL proceeding presided over by U.S. District Court Judge Janis Jack, which began on September 4, 2003.<sup>140</sup> Of these 10,000 claims, twelve doctors accounted for over 9,000 of the diagnoses. In October 2004, defendants deposed one of these doctors, Dr. George Martindale, who had diagnosed 3,617 of the plaintiffs as having silicosis. Dr. Martindale recanted all of his diagnoses, testifying that he did not even know the criteria for making a diagnosis of silicosis.<sup>141</sup> In reaction to this extraordinary event, Judge Jack observed that “it’s clear this Martindale business is fraudulent,”<sup>142</sup> and issued the unprecedented order that every physician who had diagnosed silicosis in any of the plaintiffs had to be available to testify at a *Daubert*<sup>143</sup> hearing; moreover, Judge Jack provided that defendants could depose B-readers, diagnosing doctors, and screening enterprise principals in open court under her direct supervision, thus precluding such witnesses from refusing to answer questions for unsustainable reasons and turn over subpoenaed documents as often occurs in asbestos litigation depositions.<sup>144</sup>

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<sup>138</sup> See *Hearings on Asbestos: Mixed Dust and FELA Issues Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2005) (written Statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law) (quoting Heath Mason, the co-owner of N&M, Inc., who testified that the reason his company changed from asbestos to silica screening is because of the “Hatch Bill”).

<sup>139</sup> *Id.* at \*45 (“[M]ost of the [silicosis] cases were filed just prior to the effective dates of a series of recent legislative ‘tort reform’ measures in Mississippi.”).

<sup>140</sup> See *In re Silica Prods.*, 2005 WL 1593936, at \*6.

<sup>141</sup> *Id.* at \*11.

<sup>142</sup> Transcript of Dec. 17, 2004 Status Conference at 36, *In re Silica Prods.*, 2005 WL 1593936.

<sup>143</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>144</sup> Prior to the “*Daubert*” hearing, two more depositions took place: Drs. Glynn Hilbrun and Kevin Cooper. Both doctors also recanted the medical diagnoses of silicosis they had signed, stating that they had not diagnosed *any* of the plaintiffs with silicosis. See *In re Silica Prods.*, 2005 WL 1593936, at \*17.

A study done by the defendants in the silicosis MDL showed that sixty percent of the claimants had previously filed asbestos claims with the Manville Trust.<sup>145</sup> From the testimony presented, retreading these asbestosis claims as silicosis claims appears to have been a quite simple process: B-readers reread the X-rays, previously read as consistent with 1/0 asbestosis, as consistent with 1/0 silicosis (even though silicosis and asbestosis manifest differently on X-rays). Judge Jack euphemistically referred to this as “the opportunistic transformations of asbestosis reads into silicosis reads . . . .”<sup>146</sup> Often, these new readings were performed by the same B-readers who originally read the X-rays as 1/0 asbestosis. In rereading the same X-rays as “consistent with silicosis,” these B-readers do not mention their prior reading of the X-rays as indicating lung conditions “consistent with asbestosis.” Moreover, in current screenings, B-readers commonly read an X-ray, fill out one ILO form as 1/0 asbestosis, and at the same time fill out a second ILO form as 1/0 silicosis.

In retreading asbestosis claims, plaintiffs’ counsel were asserting that their claimants had *both* asbestosis and silicosis. At the U.S. Senate Judiciary Committee hearing at which I testified, medical experts on lung diseases testified that, while it was theoretically possible for someone to have both asbestosis and silicosis, it would be a “clinical rarity.”<sup>147</sup> Indeed several doctors testified that in their clinical experience, they had never seen a case where someone presented with both asbestosis and silicosis. Yet appearing before Judge Jack were thousands of plaintiffs claiming to have both asbestosis and silicosis. This is undoubtedly also true for the tens of thousands of silicosis claims that were not part of the MDL.

In response to the incredible testimony being presented in her presence, Judge Jack observed on several occasions that it appeared that fraudulent diagnoses had been produced. On one occasion, she declared from the bench that it was “a reasonable assumption” that the testimony of one B-reader raised “great red flags of fraud.”<sup>148</sup>

Indeed, defendants in the MDL proceeding presented overwhelming evidence that, in Judge Jack’s words, the silicosis “epidemic” “is largely the result of misdiagnosis,”<sup>149</sup> and that “the lawyers, doctors and screening companies were all willing participants”

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<sup>145</sup> *Hearings on Asbestos: Mixed Dust and FELA Issues Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (written Statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law); see also Jonathan D. Glater, *Companies Get Weapon in Injury Suits*, N.Y. TIMES, Feb. 2, 2005, at C1.

<sup>146</sup> *In re Silica Prods.*, 2005 WL 1593936, at \*54.

<sup>147</sup> *Id.* at \*23.

<sup>148</sup> Transcript of Feb. 17, 2005 Daubert Hearing at 23, *In re Silica Prods.*, 2005 WL 1593936.

<sup>149</sup> *In re Silica Prods.*, 2005 WL 1593936, at \*143.

in a “scheme” to “manufacture[] [diagnoses] for money.”<sup>150</sup>

Despite the overwhelming nature of the inculpatory evidence produced in the course of the silica MDL proceeding, it is critically important to note that the only reason this information has ever seen the light of day is that Judge Jack did what no judge had ever previously done with regard to claims generated by mass screenings: she permitted extensive discovery of screening enterprise principals and B-readers. Based upon my study of asbestos litigation, it appears quite likely that permitting the same level of discovery in asbestos litigation would elicit similar inculpatory information regarding similarly supported nonmalignant asbestos claims generated by mass screenings—claims that have resulted in *billions* of dollars in settlements.<sup>151</sup>

Mass screenings by the same screening enterprises using the same B-readers and diagnosing doctors have been the hallmark of asbestos litigation for almost twenty years. Thus, the silica MDL proceeding’s importance extends well beyond silicosis litigation. As Judge Jack observed, the “evidence of the unreliability of the B-reads performed for this MDL is matched by evidence of the unreliability of B-reads in asbestos litigation.”<sup>152</sup> Journalists have also noted the relevance of the silica MDL proceeding to nonmalignant asbestos litigation.<sup>153</sup>

While Judge Jack has corroborated many of the conclusions I have reached in the course of my study of asbestos litigation,<sup>154</sup> it is

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<sup>150</sup> *Id.* at \*150.

<sup>151</sup> But for Judge Jack’s rulings, the 10,000 claims that were consolidated before her for pre-trial purposes may have generated tens of millions of dollars in settlements, even though those claims were mostly if not entirely based on “diagnoses manufactured for money.” As one newspaper has reported:

In April 2004, a member of the plaintiffs’ team wrote lawyers for the 250-plus defendant companies that the 10,000-person lawsuit could be settled for an average of \$100,000 per plaintiff, or a total of about \$1 billion . . . [and] that if they didn’t settle, they’d spend more than \$1.5 billion taking deposition testimony from plaintiffs, doctors and others and covering costs incurred during preparation of an eventual trial or trials. And that sum didn’t include the damages that the plaintiffs’ lawyers expected to win at trial.

Eddie Curran, *Judge Torches’ Silicosis Testing*, MOBILE REG., July 31, 2005, at 1A. Moreover, there is no assurance, despite Judge Jack’s findings, that these silica claims will be appropriately dealt with by Mississippi state courts.

<sup>152</sup> *In re Silica Prods.*, 2005 WL 1593936, at \*54.

<sup>153</sup> See, e.g., Jonathan D. Glater, *Civil Suits Over Silica in Texas Became a Criminal Matter in New York*, N.Y. TIMES, May 18, 2005, at C5 (stating that the testimony in the MDL proceeding “may have cast doubt on claims, many of them already paid, that were filed in the past over asbestos-related disease”); Roger Parloff, *Diagnosing For Dollars*, FORTUNE, June 13, 2005, at 97-98. Roger Parloff writes:

The real importance of . . . [the silica MDL] proceedings, however, is not what they reveal about possible fraud in silica litigation but what they suggest about a possible fraud of vastly greater dimensions. It’s one that may have been afflicting asbestos litigation for almost 20 years, resulting in billions of dollars of payments to claimants who weren’t sick and to the attorneys who represented them.

*Id.*

<sup>154</sup> See Brickman, *supra* note 23.

important to note that her scathing indictment of entrepreneurial claim generation was largely advisory in nature and that there is no national moratorium on filing bogus silica claims. Because she determined that most of the state cases had been improperly removed to federal court and she therefore lacked federal subject-matter jurisdiction, she remanded the great majority of the cases to state court. It is now up to state court judges to determine whether they will allow the tens of thousands of bogus claims to proceed and whether a plaintiffs' lawyer's demand for a \$1 billion settlement<sup>155</sup> will have to be met. A state MDL proceeding currently underway in Houston, Texas does not auger well for the civil justice system's ability to reject massive numbers of specious claims.<sup>156</sup>

S. 852's treatment of silica claims does not resolve the issue of claimants filing massive numbers of bogus silica claims in state courts. In particular, in the context of silica litigation, creating a mechanism to serve as the exclusive remedy for resolving asbestos claims presents two distinct problems.

First, as already noted, plaintiffs' lawyers are retreading asbestos claims as silica claims. Second, a potential exists for bypassing the Trust Fund altogether by characterizing asbestos claims in the first instance as "silica" claims so that the plaintiffs can enter the tort system and thereby avoid the Trust Fund's limitations (especially for unimpaired claimants). Earlier drafts of S. 852 addressed the problem head-on, requiring a silica plaintiff to prove by a preponderance of the evidence, not only that he or she was functionally impaired, but that the impairment was caused by silica exposure and that asbestos exposure was not a significant contributing factor. If a plaintiff failed to make the required showing, the Act would preempt his or her silica claim.<sup>157</sup>

In its present form, S. 852 has diluted this silica provision, allowing both retreads and bypass silica claims. Thus, two ways now exist to avoid preemption of silica claims under section 403(b)(1). Under the first alternative, a claimant can bypass S. 852 by showing that his or her claim is a new claim, that he or she has not previously asserted a claim for an asbestos-related condition,<sup>158</sup> and that he or she is not eligible for "any monetary award under this Act."<sup>159</sup> Because the current version of S. 852 eliminates the earlier requirement that a silica plaintiff had the burden to prove that he or she had insufficient asbestos

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<sup>155</sup> See *supra* note 151.

<sup>156</sup> See Transcript of Status Conference, *In re Texas State Silica Prods. Liab. Litig.*, No. 2004-700000 (Dist. Ct. Harris County, Tex. June 27, 2005).

<sup>157</sup> See S. 852, 109th Cong. § 403(b) (discussion draft, Feb. 7, 2005).

<sup>158</sup> S. 852 does not contemplate the possibility of a new silica claimant obtaining a recovery in the tort system and then seeking compensation under S. 852. No provision would appear to preclude this possibility.

<sup>159</sup> S. 852 § 403(b)(1)(A)(i)(I) (2005).

exposure to be eligible for compensation under the Act, plaintiffs who qualify under Level I—essentially the entrepreneurially-generated “unimpaired” claimants—may, under this alternative, file silica claims in the tort system, provided they have not previously filed any asbestos-based claim (whether for workers’ compensation, in the tort system, or under the Trust Fund).<sup>160</sup> A claimant who qualifies for a Trust Fund award other than a Level I award, even one who has never filed an asbestos claim, cannot qualify under this exception from preemption.

The alternative proof required of a silica plaintiff under the second option applies only to those plaintiffs who have previously filed an asbestos claim and who allege that they have suffered a functional impairment (unlike Level I claimants, who do not so allege). These retreaded asbestos plaintiffs must show that silica exposure caused their impairment and that asbestos exposure was not “a substantial contributing factor” to that impairment.<sup>161</sup> The Act thus bars a retreaded unimpaired silica claimant from recovery. Although most silica claimants in the tort system have not heretofore claimed impairment, if S. 852 is enacted in its current form, that can be expected to change.<sup>162</sup> This creates a broad opening for the entrepreneurial asbestos claims mills to continue, albeit under the guise of “silica” claims. Indeed, meeting these current requirements in S. 852 appears to be quite simple. The same litigation doctors who “diagnosed” the existence of an asbestos-related disease to a degree of medical certainty in tens of thousands of claimants will simply add one word to their “diagnoses” and conclude to a degree of medical certainty that asbestos exposure was “*not* a substantial contributing factor” to any lung impairment claimed to be caused by silica exposure.<sup>163</sup> Thus, S. 852’s redrafted

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<sup>160</sup> S. 852 contains a possible ambiguity with respect to the effect of a Level I medical monitoring claim on the right to file a silica claim in the tort system. S. 852 allows a claimant to bypass the Trust Fund, *inter alia*, if the claimant is not eligible for a “monetary award under this Act.” *Id.* A payment to reimburse a claimant for the expense of periodic medical examinations beyond the costs covered by insurance may be seen as a reimbursement rather than a “monetary award” like the awards paid to Level II through VIII claimants. If that interpretation prevails, claimants eligible for Level I reimbursements would not be preempted under § 403(b)(1)(A)(i)(I) from bringing a silica claim in the tort system.

<sup>161</sup> S. 852 § 403(b)(1)(A)(i)(II). Section 403(b)(2)(B) sets forth the documentary requirement.

<sup>162</sup> Screening companies have a considerable history of misadministering pulmonary function tests to generate false findings of lung impairment in asbestos litigation. *See Brickman, supra* note 23, at 111-28.

<sup>163</sup> To those who express skepticism about the likelihood of such an occurrence, I cite the remarkable interchange between Judge Janis Jack and Richard Laminack of the law firm of O’Quinn, Laminack & Pirtle in the silica MDL. Laminack, whose firm represents approximately 100 mostly retreaded asbestosis claimants who now claim silicosis, apparently seeking both to separate his clients from the fraudulent diagnosing racket Judge Jack identified in her Order and to overcome damning medical evidence that the incidence of such dual disease is a “clinical rarity,” argues that he doubts that his clients “actually had asbestosis” and further doubts that “they had [valid] claims [of] asbestosis.” *Jack The Ripper*, WALL ST. J., Aug. 31, 2005, at A8. Ergo, he asserts that, although many of his clients previously obtained settlements of their

language will allow claimants to file retreaded asbestos claims as silica claims in the tort system, and that litigation will create substantial costs in addition to the \$140 billion to be paid into the Trust Fund.<sup>164</sup>

Ironically, the silica claims “epidemic” is a direct consequence of plaintiff lawyers’ attempts to avoid the consequences of S. 852 and its immediate predecessors by finding an alternative use for the very effective entrepreneurial claims generation process. As one plaintiff lawyer has observed, “why reinvent the wheel?”<sup>165</sup>

Predicting the number and cost of bogus silica claims is inherently uncertain. As noted, plaintiffs’ counsel sought \$1 billion to settle the 10,000 silica claims in the federal MDL proceeding.<sup>166</sup> Whether the cost of silica litigation is \$10 million or \$10 billion remains to be seen. What is reasonably clear, however, is that a best estimate of this cost should be included in toting up the effective cost of resolving asbestos litigation by adoption of S. 852.

#### D. *Certification and Sunset: The Beginning and the End of the Trust Fund*

##### 1. Certification of the Trust Fund

Once Congress enacts the FAIR Act of 2005, no claimant may maintain a pending asbestos claim unless it falls within the exceptions or carve-outs cited above.<sup>167</sup> While, on its face, S. 852 appears to stay the remaining claims, the stay is, in fact, dependent upon certain conditions. The Act charges the Trust Fund Administrator with certifying to Congress that the Trust Fund “is operational and paying all

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asbestos claims, they are, in fact, single-disease claimants because those asbestos claims were not legitimate. One powerful antidote to the recent “epidemic” of silica claims, *see supra* notes 136-137 and accompanying text, and to any mass “re-diagnosis” of asbestos claims, could be provided by the U.S. Attorney’s Office for the Southern District of New York, which has been bringing some of those involved in the silica “scheme” that Judge Jack identified before a federal grand jury. If that office issues indictments, entrepreneurial silica claim generation would probably largely cease, at least until the outcome of the indictments became clear. *See supra* note 7.

<sup>164</sup> Though the impetus to generate silica claims arises in part from the possible adoption by Congress of an administrative alternative to asbestos litigation, even if S. 852 is not adopted, silica claims would remain a tort system cost to be borne by defendants and their insurers. Nonetheless, I have chosen to consider the cost of these silica claims as additional to the \$140 billion Trust Fund because the silica provision previously included in the bill had largely precluded these claims. *See supra* note 157.

<sup>165</sup> *Hearings on Asbestos: Mixed Dust and FELA Issues Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (written Statement of Lester Brickman, Professor of Law, Benjamin N. Cardozo School of Law).

<sup>166</sup> *See supra* note 151.

<sup>167</sup> S. 852, 109th Cong. § 403(e)(1).

valid claims at a reasonable rate.”<sup>168</sup> If the Administrator cannot make this certification within nine months of enactment, the stay is lifted for “exigent” claims, notwithstanding the Act’s already built-in special expedited mechanism for paying exigent claimants.<sup>169</sup> For non-exigent claimants, the stay is lifted if the Administrator cannot make the certification within twenty-four months of enactment. If the Trust Fund is not certified, claimants are then permitted to bring their claims as civil lawsuits in the tort system.

For participants, the risk of failed certification is losing the sums they have already paid to the Trust Fund that may not be recouped. S. 852 does not address the disposition of amounts already contributed to the Trust Fund if certification does not occur; this omission raises the legitimate specter of participants incurring considerable costs pre-certification and then having to pay again in the tort system. Under S. 852’s funding mechanism, this burden falls squarely on the participants who are required to pay approximately \$6 billion in year one before the certification of exigent claims, and who are required to pay an additional \$6 billion in year two before the non-exigent claims have been certified. An early demise of the Trust Fund would therefore have a substantial negative financial impact on those paying into the Trust Fund.

## 2. Sunset

S. 852’s sunset provisions raise a similar and equally costly concern. The Act charges the Administrator with submitting an annual report to the Senate and House Judiciary Committees addressing the Trust Fund’s operation during the previous year. If, on the basis of the information in the report, the Administrator concludes that the Trust Fund may not be able to pay claims as they become due within the next five years, he or she must present reasonable alternatives for responding to the situation and recommend the best alternative for the claimants and public.<sup>170</sup> One alternative is terminating the Act.

S. 852 provides for the sunset of the Act 180 days after a determination by the Administrator that the Trust Fund will not have sufficient resources to pay all resolved claims while meeting its other financial obligations.<sup>171</sup> Although the stay of litigation is then lifted, the

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<sup>168</sup> *Id.* § 106(f)(3)(A). The Administrator cannot make such certification until sixty days after the defendants’ funding allocation information and the insurers’ required reserves information are each published in the Federal Register. *Id.* § 106(f)(3)(E).

<sup>169</sup> See discussion of exigent claimants *supra* Section V.C.2.

<sup>170</sup> S. 852 § 405(e)(1)(A).

<sup>171</sup> *Id.* § 405(f).

Act requires participants to continue making payments to the Trust Fund.<sup>172</sup> Claims already filed with the Trust Fund, but not resolved at the time of termination (so-called “sunset claims”), may be brought as civil actions in the tort system.

At least one commentator has raised the prospect that the plaintiffs’ trial bar might flood the Trust Fund with claims in one year to overwhelm it, thus seeking to use the sunset provision as a means to terminate the Act.<sup>173</sup> Changes made since S. 1125 have given the Trust Fund Administrator a longer financial view, more flexibility, and a range of options to address the Trust Fund’s financial distress; consequently, sunset is no longer automatic. Still, the possibility of sunset in any given year, with its concomitant costs in the tort system, when combined with sums the participants already will have paid into the Trust Fund, is yet another factor to be accounted for in determining the potential costs of resolving personal injury asbestos litigation that are additional to the payments into the Trust Fund.

The sunset provision has been problematic since it appeared in S. 1125. It challenges the principles of certainty and exclusivity that have been cited in support of the Act. For participants, the potential for sunset threatens loss of their considerable investment in the Trust Fund without the expected resolution of all asbestos claims. As Senators Kyl, Grassley, and Sessions stated, “[u]nder the sunset amendment, defendants and insurers could pay into the fund for five years, for a total of \$25 billion . . . , and then, in year six, if claims exceed funds, the whole system would be scrapped and everyone would be back where they started—but minus \$25 billion.”<sup>174</sup> While the sponsors of S. 852 argue that sunset “should not occur before there is an extensive and rigorous ‘program review,’”<sup>175</sup> its possibility merits identification as bearing upon the potential financial impact of resolving asbestos litigation by adopting S. 852.

#### CONCLUSION

While many of the asbestos-related costs in the tort system will be folded into the \$140 billion Trust Fund if S. 852 is enacted, defendants and insurers may incur some additional costs. As my analysis shows, the financial impact of S. 852 is not static; it has several significant

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<sup>172</sup> The Administrator may reduce participant payments if he or she concludes that the full amounts are not necessary for the Trust Fund to pay the claims that have been resolved as of termination. *Id.* § 405(f)(5).

<sup>173</sup> See Hanlon, *supra* note 41, at 19.

<sup>174</sup> S. REP. NO. 108-118, at 6 (2003).

<sup>175</sup> Letter from Senator Arlen Specter & Senator Patrick Leahy, *supra* note 92, at 5.

components, each of which must be quantified or, at a minimum, recognized, when toting up the costs that may be incurred for resolution of personal injury asbestos claims if Congress enacts S. 852. To recap, my analysis considered the following:

\$140 billion to fund the Trust Fund;

\$9 billion for claims paid during the thirty-month legislative process, plus additional sums for whatever additional time passes before S. 852 is enacted;

\$7.7-\$11.0 billion for “exigent” claimants; and

\$20-\$40 billion for newly filed workers’ compensation claims.<sup>176</sup>

Considering only the quantified costs, my analysis indicates that the costs that defendants and insurers may incur for resolution of personal injury asbestos claims, in addition to the \$140 billion to be paid into the Trust Fund, could range from approximately \$37 billion to \$60 billion. To this figure should be added the cost of four other exceptions that will impose costs outside the Trust Fund, which I have not quantified: (i) trial court verdicts; (ii) cases where the presentation of evidence has commenced; (iii) certain settlements; and (iv) silica claims. Each will add unspecified sums to the cost of resolving personal injury asbestos litigation.

The assumptions I have made in quantifying costs, and my reliance on reports and studies that I have not attempted to validate, may generate outcomes that are too high or too low. I have set out these costs and acknowledged my inability to quantify certain other costs, however, as an invitation to undertake a similar calculus to those seeking to meaningfully compare the costs of the tort and bankruptcy systems (which I have not attempted to quantify<sup>177</sup>) with the costs that may be incurred for resolution of personal injury asbestos claims if S. 852 is enacted.

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<sup>176</sup> As noted, NCCI has estimated that self-insured employers and insurers will experience additional costs of \$39 to \$88 billion if Congress enacts S. 852. *See supra* notes 118-120 and accompanying text. For purposes of this essay, I have arbitrarily discounted the NCCI estimate by approximately 50%. In doing so, I do not mean to express any view as to the soundness of NCCI’s estimates or its methodology. Moreover, as noted above, *see supra* text following note 120, I have not attempted to independently assess the cost effect of precluding recovery of workers’ compensation awards from the Trust Fund. S. 852 §§ 134(b)(1), 135(b).

<sup>177</sup> As noted, structural changes in the tort system, changes in the Manville Trust’s TDP as well as in TDP’s currently being adopted and considered for adoption (as compared to those of the older bankruptcy trusts) and Judge Jack’s determinations in the silica MDL have combined to significantly decrease the volume of nonmalignant claim filings. Perhaps the most significant impact of all, however, would be realized if the federal grand jury convened by the U.S. Attorney’s Office for the Southern District of New York, issues indictments of screening company employees and principals, doctors, and lawyers involved in the entrepreneurial generation of nonmalignant asbestos claims. *See supra* note 163.