

Asbestos Reform White Paper
Senate Budget Committee Democratic Staff
February 2006

Executive Summary

This White Paper analyzes the financial risks of S. 852, the Fairness in Asbestos Injury Resolution Act. Specifically, it assesses the likelihood that the federal trust fund established by S. 852 will become insolvent and what that failure could mean for taxpayers. There are a number of relevant factors for policymakers to consider in assessing S. 852. These factors include the benefits that a federal trust fund potentially could provide both to claimants by streamlining the claims process and to defendant companies and insurers by limiting the risks that they and their employees face from further asbestos litigation. Another factor, however, should be the risk to taxpayers of trust fund insolvency.

A Senate Budget Committee (SBC) Democratic staff analysis finds that the risk of trust fund failure is significant. While CBO's August analysis of the trust fund found that it could remain solvent under certain circumstances, the SBC staff analysis found that little, if any, margin for error exists. Making even minor adjustments to CBO's analysis revealed the likelihood of trust fund insolvency. The analysis suggests that the value of claims is likely to exceed the value of compulsory contributions from defendant companies and insurers by at least \$20 billion. Likely administrative expenses add close to another \$5 billion to that shortfall.

Those costs alone, however, understate the full amount of the shortfall. The mismatch in timing for the trust fund between the filing of claims and the receipt of compulsory contributions from defendant companies and insurers means that taxpayers will likely be called upon to finance a significant amount of the fund's debt service. That subsidy can be avoided only if Congress allows the trust fund to terminate under the provisions of S. 852, an unlikely event.

Including interest costs, SBC staff estimates the shortfall at approximately \$150 billion over the trust fund's expected lifetime of almost 50 years. On a present-value basis, a more accurate measure that expresses the amount of lifetime underfunding in today's dollars, the shortfall is approximately \$50 billion. That figure represents the amount of liability of defendant companies and insurers that taxpayers could be called upon to subsidize under S. 852.

Under a more pessimistic scenario that assumes an even higher number of cancer claims, claims expenses exceed contributions by more than \$60 billion. With debt service and administrative expenses, the total shortfall increases to close to \$300 billion in nominal terms, or more than \$85 billion in net present value terms.

Asbestos Litigation and S. 852

Overview of Asbestos Issue

Claims arising from asbestos-related injuries have flooded the tort system over the last several decades. It is estimated that around 850,000 individuals have filed claims against more than 8,400 businesses that have either manufactured or sold asbestos-containing products or owned a building or plant that contributed to asbestos exposure. Costs from such suits are estimated to approach \$80 billion and have resulted in numerous bankruptcies and lost jobs.¹ Future claims look to push total costs above \$200 billion. Congress has attempted for several years now to address this problem. S. 852, the Fairness in Asbestos Injury Resolution Act of 2005, which the Judiciary Committee reported on June 16, 2005, represents the latest effort.

Overview of S. 852

Federalization of Asbestos Compensation. S. 852 attempts to reform the current system of asbestos compensation by federalizing the responsibility. It removes cases from the tort system, processing them instead through the Department of Labor on a no-fault basis. In doing so, it creates a new – albeit, capped – entitlement for claimants. That is, if the claimant satisfies the bill’s medical criteria and filing deadlines – and assuming that the new Asbestos Injury Claims Resolution Trust Fund contains sufficient resources to pay the claim – the individual, or his or her family in the case of death, is entitled to compensation from the federal government.

Payments to Claimants. S. 852 compensates claimants according to nine levels of medical impairment – five for non-malignant diseases, such as asbestosis, and four for malignant diseases, such as mesothelioma. Eight of the nine levels result in cash awards, with the first level providing for medical monitoring only. For example, claimants with mesothelioma qualify for a level IX award of \$1.1 million, while claimants with mixed disease with impairment qualify for a level II award of \$25,000. For levels VII and VIII lung cancer claims, payments vary depending on whether the claimant is a smoker, ex-smoker, or non-smoker. Award levels are adjusted annually for inflation starting in 2007.

Financing. To finance awards and other expenses, S. 852 establishes the Asbestos Injury Claims Resolution Fund, a federal trust fund, to be overseen by a Presidentially appointed Administrator. The fund will receive compulsory contributions – \$90 billion from defendant companies that have spent more than \$1 million on asbestos injury litigation, \$46 billion from insurance companies that have made more than \$1 million in asbestos-related payments, and approximately \$7.5 billion in assets from existing private trust funds established to settle asbestos claims. Defendant companies and insurers can offset a portion of their contributions by claiming bankruptcy trust credits of about \$4 billion. Thus, the bill is designed to collect a maximum of about \$140 billion. In addition, the Administrator can invest unused assets, which could earn additional proceeds.

¹ Brickman, Lester. “An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005.” *Cardoza Law Review*. Vol. 27:2, pp. ii-iv.

Borrowing Authority. S. 852 provides for roughly constant contributions from defendant companies and insurers over a 30-year period. CBO estimates the fund will face more than half of all claims expenses within the first 10 years; other analysts place this amount even higher. Because of the mismatch in timing between contributions into and payments from the fund, S. 852 authorizes the administrator to borrow funds. That borrowing is capped and cannot exceed the sum of the fund's existing assets plus the amount of contributions expected to be collected over the subsequent 10 years. The fund must repay borrowed amounts with interest.

Termination of the Trust Fund. The bill requires the Administrator to terminate operations if it is determined that the trust fund has insufficient resources to continue paying claims. Remaining claimants would be forced back into the courts. Such a scenario assumes that future Congresses would allow the trust fund to fail. That scenario seems unrealistic. Defendant companies and insurers will have paid billions, if not tens of billions of dollars, into the trust fund, only to face the prospect of paying unknown billions more in the courts. Claimants with valid claims, believing they are entitled to the same federal compensation received by other claimants with identical medical conditions, will instead be turned away and forced to start anew in the courts. All of this would happen with a new federal bureaucracy already up and running and in the midst of receiving medical files and processing claims.

Federal Liability. S. 852 states that “nothing in this act shall be construed to create any obligation of funding from the United States Government...or obligate the United States Government to pay any award or part of an award, if amounts in the fund are inadequate.” As alluded to by CBO in its August estimate (p. 18), some risk remains that the Administrator could borrow beyond the fund's ability to repay Treasury. For instance, the Administrator could borrow against future collections up to the authorized limit. S. 852 requires companies to pay off any borrowing by the fund, even amounts remaining after fund termination. Even so, some portion of the future collections could fail to materialize once companies recognize the fund will terminate and that they will be forced again to litigate claims in the courts.

Analysis of CBO Estimate

On August 25, 2005, CBO released its estimate for S. 852. Some proponents of S. 852 have mischaracterized CBO's conclusions, citing its estimate as proof that the trust fund will have adequate resources to cover all obligations. Such a presentation is incorrect both because it significantly distorts CBO's conclusions and because CBO's estimate likely understates the amount of obligations. That is, there are a number of items either not included or understated within CBO's estimated range. All but one of these items would worsen the trust fund's performance.

What CBO's Cost Estimate Actually Says

CBO does not assert that the trust fund will have sufficient resources to meet all obligations over the next 50 years. CBO instead found the following:

- First, S. 852 will *worsen* projected budget deficits by about \$6.5 billion (excluding associated debt service costs) over the 2006-2015 period. That is, within the one time period that CBO can estimate with some confidence, it finds the fund's payments for claims and administrative expenses will exceed its revenues by \$6.5 billion.
- Second, the administrator will have to *borrow* from Treasury in the early years of the fund's operations to avoid terminating the fund prematurely. CBO alludes to the possibility that the administrator could borrow beyond the fund's ability to repay Treasury.
- Third, while uncertain because of the estimated 50-year life of the fund, the fund's resources may in fact be *insufficient* to cover the cost of claims that CBO could estimate. CBO makes clear that its range of \$120 billion to \$150 billion includes neither the cost of *all* claims nor the cost of any debt-service and administrative expenses. Thus, the risk of insolvency is even greater than simply comparing the above range to the \$140 billion in desired collections, a point CBO has emphasized in subsequent letters and testimony.

What CBO's Cost Estimate Does Not Say

The summary on page 2 has contributed to the confusion over CBO's estimate:

The legislation is designed to produce collections totaling about \$140 billion over the first 30 years. CBO expects that the value of valid claims likely to be submitted to the fund over the next 50 years could be between \$120 billion and \$150 billion, not including possible financing (debt-service) costs and administrative expenses.

The preceding two sentences have been presented as evidence that CBO believes the trust fund will most likely contain adequate resources to cover obligations. However, CBO never intended the two sentences to be read as a conclusion. Further, read properly, the two sentences actually reflect the considerable uncertainty surrounding the fund's long-term viability.

CBO Does Not Estimate Revenues Will Equal \$140 Billion. First, CBO carefully states that the legislation is *designed* to produce collections totaling \$140 billion. It is not asserting that the trust fund *will* collect \$140 billion, only stating the bill's intended target. Elsewhere in the estimate, CBO casts significant doubt on the \$140 billion – including uncertainty as to (1) what individual defendant companies will pay into the fund (which is unclear under S. 852), (2) future bankruptcies and other economic factors over the 30-year period defendant companies are required to contribute to the fund, and (3) the potential difficulty in instituting the bill's fall-back, surcharge mechanism. The surcharge is designed to ensure that annual payments from defendant companies equal roughly \$3 billion. However, employing the surcharge could create further pressure on defendant companies, rising to a level that is unsustainable and resulting in even more bankruptcies. Consequently, CBO states within the same paragraph cited above:

The maximum actual revenues collected under the bill would be around \$140 billion, but could be *significantly* less. [emphasis added]

The Range Only Covers Claims. Second, CBO makes clear that the \$120 billion to \$150 billion range is an estimate of possible claims expenses *only* and not a comprehensive analysis that also

includes financing and administrative expenses. Since CBO states unequivocally that the administrator will be forced to borrow (at least in the initial years), there clearly will be financing expenses not included within the \$120 billion to \$150 billion range. Likewise, there will be additional administrative expenses on top of that range.

The Range is Not Comprehensive of All Claims Expenses. Third, CBO qualifies its range by referring to it as “likely” claims that “could be” submitted over the next 50 years. Both as part of the original estimate and in subsequent letters and testimony, CBO makes clear that the range of claims expenses is not comprehensive – that is, it does not include the effect of a number of known and, in all but one instance, potentially costly variables that CBO was unable to estimate. These variables include: (1) dormant claims that will be revived once a new funding source becomes available, (2) exceptional medical claims (i.e., the granting of awards to asbestos victims whose conditions do not align with one of the nine categories in the bill), (3) other geographical areas that potentially could receive the same special status provided to residents of Libby, Montana, (4) the claims of family members of workers exposed to asbestos, (5) allowing CT scans to serve as documentation of pleural abnormalities, and (6) the possibility that medical studies required by S. 852 could preclude certain cancer claims. Only the final item, which affects just 1 percent of claims under CBO’s analysis, would decrease the cost of claims. The rest would *increase* the cost of claims, perhaps substantially.

So, when read properly, the two sentences cited above fall *far* short of stamping CBO’s imprimatur on the solvency of the S. 852 trust fund. Any doubt of that fact was removed by CBO’s December 19th letter to Senate Judiciary Chairman Arlen Specter, which states:

The proposed trust fund might or might not have adequate resources to pay all valid claims. There is a *significant* likelihood that the fund’s revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. [emphasis added]

Confirming the softness of the \$120 billion to \$150 billion range, the December 19th letter states:

CBO projects that the proposed fund would be presented with valid claims worth between \$120 billion and \$150 billion, *excluding* certain potential costs or savings that CBO *could not estimate*; total costs *would be higher* because the fund must also cover administrative expenses and any financing costs. [emphasis added]

Based on CBO’s Analysis, S. 852 Should Face At Least One Budget Point of Order

Senator Gregg has told reporters that S. 852 could face up to four budget points of order. Most significantly, the fund could face points of order for exceeding Judiciary’s allocation and for violating the Senate’s long-term spending point of order.

S. 852 Exceeds the Judiciary Committee’s Current Allocation. First, S. 852 exceeds the Judiciary Committee’s current allocation for direct spending under the 2006 budget resolution, both in the first year and over five years. As such, the bill, as reported, could be subject to a 60-vote point of order for violating section 302(f) of the Congressional Budget Act (exceeding the

Judiciary Committee's 302(a) allocation). S. 852 can avoid this point of order if Budget Committee Chairman Judd Gregg uses reserve fund authority provided to him under section 307 of the 2006 budget resolution (*Reserve Fund for Asbestos Injury Trust Fund*) to increase the Judiciary Committee's allocation by CBO's estimate of direct spending in 2006 and over the 2006-2010 period. Section 307 includes several conditions that must be met before releasing the reserve fund. For instance, Chairman Gregg must determine that S. 852 would be funded solely from nontaxpayer sources for the life of the fund and that it would not increase the deficit for the period of fiscal years 2006 through 2056. Given CBO's analysis and subsequent statements, it is unclear whether Chairman Gregg will find that S. 852 satisfies those two conditions.

S. 852 Violates the Senate's Long-Term Spending Point of Order. Even if Chairman Gregg were to release the reserve fund for asbestos compensation, S. 852 should still face another 60-vote point of order for violating section 407 of the 2006 budget resolution. Under section 407, a bill shall not be in order if it "would cause a net increase in direct spending in excess of \$5 billion in any of the four 10-year periods beginning in 2016 through 2055." CBO estimates that the bill would increase direct spending for claims alone by between \$120 billion and \$150 billion. As a result, in its August estimate, CBO states on page 2 that "enacting S. 852 would cause an increase in direct spending greater than \$5 billion in at least one 10-year period from 2016 to 2055." A reserve fund adjustment under section 307 would not remedy the long-term spending point of order.

SBC Staff Analysis Suggests that S. 852 Trust Fund Is Likely To Fail

Hypothetical "Break-Even" Scenario. In its August estimate, CBO outlines a hypothetical, break-even scenario for the S. 852 trust fund that assumes: (1) collections of \$140 billion, (2) claims awards of about \$130 billion, (3) interest costs on borrowing of about \$10 billion, (4) administrative expenses of up to \$2 billion, and (5) investment earnings of up to \$2 billion.

In November, CBO released a table presenting the number of claims, by year and type of claim, totaling just over \$130 billion. Using this data, SBC Democratic staff modeled an approximate version of CBO's hypothetical scenario. It is worth noting that, given CBO's analysis and subsequent letters, it is very unlikely the fund could out-perform this break-even scenario. First, the scenario assumes compulsory contributions will total the maximum of \$140 billion, even though CBO has stated that actual collections "could be significantly less." Second, \$130 billion in claims falls within the low end of a range that CBO admits is not comprehensive of all claims costs. The break-even scenario leaves virtually no margin for error.

Trust Fund Cannot Survive Modest Adjustments to Assumptions. CBO acknowledges that it cannot estimate the effect of some items and that considerable uncertainty surrounds the estimate of others. In almost every instance, a more accurate estimate would worsen the position of the trust fund. To better assess whether the asbestos trust fund is adequately funded, SBC staff made modest adjustments to a few of CBO's assumptions, including assuming that:

- Dormant claims will add less than 5 percent to the number of claims. CBO acknowledges that dormant claims will increase the number of filed claims but has not estimated an amount.
- Twenty-five percent of nonmalignant claims will receive a cash award, compared to CBO's estimate of 15 percent.
- Future cancer claims will total 90,000 rather than 78,000, an amount within CBO's estimated range of 65,000 to 100,000, and below recent estimates performed by the consulting firm, Tillinghast-Towers Perrin.
- Administrative costs will average about \$100 million a year.

Including interest payments on the fund's borrowing, these modest adjustments result in estimated obligations exceeding designed contributions by a total of \$150 billion in nominal terms (i.e., not adjusted for the effects of inflation), or about \$50 billion in present-value terms (a more accurate measure of the real amount of underfunding). If Congress does not intervene to prevent termination, cumulative borrowing would exceed the fund's cap within the second decade, and the fund would fail. Debt service contributes greatly to the trust fund's insolvency, underlining the severe mismatch between the timing of payments into the fund by defendant companies and insurers and payments from the fund to claimants.

The scenario illustrates how tenuous the fund's finances are – modest swings in the amount *and timing* of highly uncertain assumptions can bankrupt the fund. For instance, under the scenario above, claims increase over CBO's scenario by roughly 5 percent only. However, because dormant claims must be filed within five years of enactment, the mismatch between revenues and claims payments in the early years is exacerbated further.

Comparing CBO Hypothetical Scenario with SBC Staff Analysis

Assumptions	CBO	SBC Staff
Number of Claims	1.584 M	1.665 M
Claims Payments	~ \$130 B	~ \$160 B
Administrative Expenses	~\$2 B	~\$5 B
Net Financing Expenses*	~\$8 B	~\$125 B
Revenues	~\$140 B	~\$140 B
NPV cost -	~\$0	~\$50 B

*Assumes the fund is not terminated and that Congress authorizes the Administrator to continue borrowing beyond the fund's capacity to repay.

Further Discussion of Assumptions Made by SBC Staff

Dormant Claims. Dormant claims are claims still pending, but for which no source of funding exists from which to collect remaining amounts. Creating a new federal trust fund could give new life to these claims, as it would allow claimants, or their attorneys, to file already completed

records and analysis with the new trust fund. Dormant claims would have to be received within five years of enactment.

Dormant claims include both claims where an award was granted but no source of funding existed (perhaps because of a bankruptcy) and claims where only a partial payment was made. For instance, according to Mark Lederer, Chief Financial Officer of the Manville Trust, a private asbestos bankruptcy trust, the Manville Trust has twice had to slash the percentage of eligible claims payments it could pay, from 100 percent to 10 percent in 1990, and again from 10 percent to five percent in 2001. That is, because actual claims have far exceeded original estimates, the Manville Trust can pay just 5 cents on the dollar to claimants. The new S. 852 trust fund would provide those claimants with a new source of funds from which to recoup remaining amounts.

While great uncertainty exists as to the number of dormant claims, the amount could be substantial and, in any event, is certainly not *zero*. In its December letter to Senator Specter, CBO singled out dormant claims as a particular feature that could add to the cost of the legislation. If dormant claims increased the number of claims received by the trust fund in the first five years by just 10 percent, or less than five percent over the life of the fund, claims expenses would increase by \$5 billion to \$6 billion.

Nonmalignant Claims. In a September 1 response to questions from Budget Committee Ranking Member Kent Conrad, CBO acknowledged that there was “particular uncertainty” surrounding the estimate of the percent of nonmalignant claims that qualify for a cash award versus those that qualify for medical testing only. This split has huge ramifications for the solvency of the trust fund, both because CBO estimates the fund will receive almost 1.5 million eligible, nonmalignant claims and because the cost to the federal government is far greater for a tier II (\$25,000 in cash) or tier III (\$100,000) claim than it is for a tier I claim (medical testing, which is expected to cost the federal government roughly \$1,000). CBO assumes just 15 percent of eligible claimants will receive a cash award, while 85 percent will qualify for medical testing only, a split CBO claims is based on the experience of the Manville Trust. That assertion has been questioned by the Manville Trust. Other analysts place the percent of cash awards for nonmalignant awards under S. 852 at about 25 percent or higher.

The combination of a new federal trust fund that must expeditiously process over a million claims, including hundreds of thousands of up-front claims, as well as the dramatic difference in compensation for a level I claim versus a level II or III claim, argues strongly against the federal government performing better than the Manville Trust. A realistic range is that somewhere between 10 percent and 40 percent of nonmalignant claims will receive a cash award, or roughly 25 percent on average. Assuming the additional cash awards are divided evenly between tiers II and III, total claims expenses increase by \$12 billion to \$13 billion.

Future Cancer Claims. CBO states in its August estimate that it examined several projections of malignancies associated with asbestos exposure. Based on those studies, it calculated a range of 65,000 to 100,000 future (i.e., non-pending) cancer claims, selecting 78,000 as its point estimate. Other estimates place the number of such claims substantially higher. The Manville Trust recently hired Tillinghast-Towers Perrin to project future cancer claims. Tillinghast-Towers

Perrin calculated 14 different scenarios, with the lowest projection totaling around 104,000 and the average projection totaling around 133,000. In response to projections made by Bates-White, a consulting firm, CBO wrote in December to Senator Specter that “the financial incentives created by the bill could lead to a substantial number of claimants with disease levels VII and VI.” While CBO believes Bates-White overstates the magnitude of such costs, it has acknowledged that the “risks are real.”

An assumption of 90,000 cancer claims is conservative. It not only falls within CBO’s range of 65,000 to 100,000 claims, but represents just two-thirds of Tillinghast-Towers Perrin’s average projection of 133,000. The additional cancer claims would increase claims expenses by \$10 billion to \$11 billion. (This assumes the additional claims are evenly spread over the life of the fund.)

If cancer claims were to reach Tillinghast-Towers Perrin’s average projection of 133,000, claims expenses would increase by approximately another \$45 billion, raising total claims expenses for the fund above \$200 billion. Under this more pessimistic scenario, the total shortfall (including debt service) increases to close to \$300 billion in nominal dollars, or more than \$85 billion in net present value terms (up from approximately \$150 billion and \$50 billion, respectively, under the SBC scenario).

Administrative Expenses. CBO’s hypothetical scenario assumes administrative expenses of \$1 billion to \$2 billion, with almost \$1 billion of such costs occurring in the first 10 years. The experience of the Black Lung Program and the Energy Employees Occupational Illness Compensation Program (EEOICP) suggests that administrative costs will average at least \$100 million a year, or nearly \$5 billion.

For instance, according to GAO, in 2004, the Department of Labor reported expenses of \$89.5 million for part B of the EEOICP and \$55.8 million for the Black Lung Program. The Black Lung Program has existed since 1969, while the EEOICP finalized just 32,527 claims in 2004, fewer than the level of annual claims CBO estimates the trust fund will receive through the first 15 years of operation. Even as the number of claims begins to decline, inflation and other factors should maintain expenses at a relatively constant level over the close to five decades of operations.

Other Areas of Uncertainty. In addition to the four adjustments made above, CBO acknowledges several other areas that could result in costs or savings, but which it could not estimate – and which are not included in the SBC scenario. These areas include: (1) exceptional medical claims (i.e., the granting of awards to asbestos victims whose conditions do not align with one of the nine categories in the bill), (2) other geographical areas that potentially could receive the same special status provided to residents of Libby, Montana, (3) the claims of family members of workers exposed to asbestos, (4) allowing CT scans to serve as documentation of pleural abnormalities, and (5) the possibility that medical studies required by S. 852 could preclude certain (level VI) cancer claims.

Only item five, which affects just 1 percent of claims under CBO’s analysis, would decrease the

cost of claims. *Under both CBO's analysis and the SBC staff scenario, precluding all level VI cancer claims would reduce total claims expenses by less than \$5 billion.* The other four factors would *increase* claims expenses, perhaps substantially. In addition, the SBC scenario also does not adjust for a later date of enactment than was originally assumed by CBO (potentially increasing the number of up-front claims faced by the trust fund).

In addition, the SBC scenario leaves intact the assumption that revenues will total \$140 billion, even though significant doubts exist that the full amount will be collected. If, for instance, the fund was able only to collect \$130 billion, the fund's operations, including debt service, would exceed its revenues by about \$200 billion, or more than \$60 billion on a net present value basis.

Estimates Have Historically Understated Compensation Costs

If doubts remain that the actual costs of S. 852 will likely exceed the best guesses of CBO and other analysts, a review of the historical record of estimating such costs should lay such doubts to rest. Analysts have routinely and significantly understated the cost and number of claims for not just asbestos, but other injury compensation programs.

CBO Warns that Previous Estimates Have Understated Asbestos Claims. In its August estimate, CBO devoted a section to the unreliability of estimates of the number and value of asbestos claims (pp. 16-17). For instance, according to CBO, experts originally forecast in 1988 that the Manville Trust, the largest private asbestos bankruptcy trust, would receive between 50,000 and 200,000 claims over its lifetime. Through summer 2005, the Manville Trust had already received 690,000 claims. It is expected to receive up to another 1.4 million claims. As a consequence of the too-optimistic estimate, the Manville Trust can now pay just 5 cents on the dollar of eligible claims payments.

GAO Finds Similar Failures With Existing Federal Compensation Programs. GAO came to a similar conclusion in its report, "Federal Compensation Programs: Perspectives on Four Programs" (GAO-06-230), in which it examined four existing federal programs designed to compensate individuals injured by exposure to harmful substances. The four programs are: (1) the Black Lung Program, (2) the Vaccine Injury Compensation Program, (3) the Radiation Exposure Compensation Program (RECP), and (4) the Energy Employees Occupational Illness Compensation Program (EEOICP). For the three programs for which it had sufficient data, GAO found that actual costs and claims far exceeded original estimates. For example, the Black Lung Program was originally estimated to cost about \$3 billion when it began in 1969. Through fiscal year 2004, actual benefits totaled more than \$41 billion – or almost 14 times the original estimate. Actual claims payments for the RECP has exceeded its original estimate by 60 percent. Even though the EEOICP benefits have not dramatically exceeded original estimates so far, GAO reports that the cost of such claims is expected to increase "substantially" because of recent changes that were not anticipated originally.

As with the value of claims, the number of claims have also far surpassed initial estimates. According to GAO, actual claims have exceeded estimates by about 85 percent (441,000) for the

Black Lung Program, 58 percent for the RECP, and almost 350 percent for the EEOICP.

Where is this All Headed?

What if the asbestos trust fund fails? Proponents argue that S. 852 contemplates this possibility, and provides for the termination of operations, returning asbestos claims to the courts. But is it that simple? What would insolvency really mean? Even though S. 852 states that general revenues cannot be used to cover any funding shortfall, the reality is that once created, it will be difficult for future Congresses to allow the trust fund to fail. It will also be difficult for companies and insurers to contribute additional amounts on top of the tens of billions already contributed or for some claimants to accept lower award levels than those received by other claimants in the same medical condition.

Defendant Companies and their Insurers. If the trust fund becomes insolvent, defendant companies and their insurers will have contributed tens of billions of dollars to the federal trust fund. They will have done so with an expectation that \$90 billion, in the case of defendant companies, and \$46 billion, in the case of insurers (both offset by bankruptcy trust credits), represents their maximum asbestos exposure. It is reasonable to expect both to oppose the prospect of returning to the courts to litigate an uncertain number of cases that carry with them an uncertain level of added exposure.

The two groups, which have battled one another at times over the size of their respective contributions, will have a common goal if the trust fund becomes insolvent. Further, given the difficulty in raising total contributions to \$136 billion, defendant companies and insurers will likely oppose with equal determination attempts to require additional contributions from them. Defendant companies and insurers can argue that they played by the rules, dutifully sending in their federally mandated contributions. If costs exceed initial projections, the higher costs can be blamed on federal mismanagement of the claims process and the fund.

Claimants. Claimants will have a similar interest in maintaining a federal trust fund that guarantees them the payment of generous award levels in a timely manner. S. 852 requires the Administrator to process claims and make payments (particularly for so-called “exigent” claims) in an expedited manner. Claimants will not want to trade the certainty of a federal payment in exchange for the uncertainty and added delay of court litigation. There will also be an issue of equity – that is, the federal government covering the cost of some claims but refusing to cover other, equally meritorious claims. And for individuals who believe they were promised an award level by the federal government, it won’t matter whether their payments ultimately are funded from defendant companies and insurers or from general revenue. Asbestos claimants, who often find themselves on the other side of the table from defendant companies and insurers (one wanting to maximize award levels and the other wanting to minimize contributions), are likely to oppose terminating the federal trust fund.

Taxpayers. If the trust fund becomes insolvent, and Congress feels pressured to neither force companies and insurers to contribute additional amounts nor claimants to accept lower awards,

then the only option short of returning the entire system back to the courts, is for Congress to provide general revenues to the fund (and/or forgive borrowing from the Treasury, which would have the same effect). This could entail taxpayers picking up tens of billions of dollars of liabilities or more.