

# CRS Report for Congress

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## S. 852: The Fairness in Asbestos Injury Resolution Act of 2005

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### Summary

This report provides an overview of S. 852, the Fairness in Asbestos Injury Resolution (FAIR) Act of 2005. The bill would largely remove asbestos claims from the courts in favor of the no-fault administrative process set out in the bill. The bill would establish the Office of Asbestos Disease Compensation to award damages to asbestos claimants from the Asbestos Injury Claims Resolution Fund. Companies that have previously been sued for asbestos-related injuries — and insurers of such companies — would be required to make contributions totaling roughly \$140 billion to this Fund.

Claims of asbestos-related injury<sup>1</sup> have flooded the courts since the 1970s, but litigation has proven to be an inadequate means to resolving all the claims. The Supreme Court has twice struck down attempted global asbestos settlements,<sup>2</sup> in both instances inviting Congress to craft a legislative solution.<sup>3</sup> In an attempt to resolve this problem, Senator Arlen Specter introduced S. 852, the Fairness in Asbestos Injury Resolution (FAIR) Act. The bill was reported out of the Senate Judiciary Committee on June 16.

**The Claims Process.** The bill would establish within the Department of Labor the Office of Asbestos Disease Compensation, which would award damages to claimants

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<sup>1</sup> Asbestos exposure can cause a variety of serious health conditions, from asbestosis (build-up of scar-like tissue in the lungs, inhibiting breathing) to mesothelioma (cancer of the membrane surrounding the lungs).

<sup>2</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). In both of these cases, the Court held that the settlements did not satisfy Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal courts. For background information on the history of asbestos litigation, see CRS Report RL32286, *Asbestos Litigation: Prospects for Legislative Resolution*, by Edward Rappaport.

<sup>3</sup> See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. at 628-629.

on a no-fault basis according to their respective levels of injury and asbestos exposure.<sup>4</sup> The Office would be headed by an Administrator, who would be appointed by the President — with the advice and consent of the Senate — to a five-year term and report directly to the Assistant Secretary of Labor for the Employment Standards Administration.<sup>5</sup> The Office would pay awards from the privately funded Asbestos Injury Claims Resolution Fund<sup>6</sup> (“the Fund”), discussed in greater detail below. New asbestos claims — and most pending ones — could no longer be pursued in federal or state court.<sup>7</sup>

Upon enactment of S. 852, all pending asbestos claims (other than some individual actions at the evidentiary stage and actions with final verdicts, judgments, or orders) would be stayed. If, after nine months, the administrative process outlined in the bill is not up and running so that it can review and pay “exigent health claims” — i.e., claims by those suffering from mesothelioma or having a life expectancy of less than one year, or claims by relatives of those who died from asbestos-related conditions after enactment of the bill — at a reasonable rate, then those claims could be maintained in the same courts in which the claims were pending when the act was enacted.<sup>8</sup> The comparable time period for all other asbestos claims (with the exception of the least serious claims) would be two years.<sup>9</sup>

Any individual who suffers from an asbestos-related disease or condition meeting the medical criteria listed in the bill (or, in the case of death or incompetence, that person’s personal representative) could bring a claim under the administrative process outlined in the bill. An initial claim would have to be filed no later than five years after the claimant receives a medical diagnosis and medical test results that would make the claimant eligible for one of the bill’s disease levels.<sup>10</sup> For claimants who have asbestos claims pending in court, the statute of limitations would be five years from enactment of the bill.<sup>11</sup>

The Administrator would establish a claimant assistance program to, among other things, provide to claimants information and legal assistance.<sup>12</sup> Attorneys representing claimants under the draft bill could charge their clients no more than five percent of the

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<sup>4</sup> S. 852, § 101.

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

<sup>6</sup> *Id.* at § 221.

<sup>7</sup> *Id.* at § 403(e).

<sup>8</sup> *Id.* at § 106(f)(2)(B). The bill would also outline a process under which the parties to an exigent health claim suit could execute a settlement before moving the claim to the administrative process. *Id.* at § 106(f)(2)(A).

<sup>9</sup> *Id.* at § 106(f)(3)(A).

<sup>10</sup> *Id.* at § 113(b)(2). The statute of limitations would not apply to the progression of nonmalignant diseases once the initial claim has been filed, but any claim regarding a malignant condition would have to satisfy the five-year statute of limitations. *Id.* at § 113(b)(3).

<sup>11</sup> *Id.* at § 113(b)(4).

<sup>12</sup> *Id.* at § 104. In addition, the Administrator would be required to establish a program for the medical screening and education of those with high risks of asbestos-related injuries. *Id.* at § 225.

final award.<sup>13</sup> The Administrator would be required to submit annual reports to Congress on the claims process and recommend changes if awards exceed or fall below predicted levels.<sup>14</sup>

*Awards.* In order to receive compensation, a claimant would have to show, by a preponderance of the evidence, that the claimant suffers from an eligible disease or condition.<sup>15</sup> In addition, claimants would be required to demonstrate a minimum exposure to asbestos.<sup>16</sup> Claimants would be compensated according to the tiered compensation scheme outlined in the bill. This scheme would set medical criteria and awards for nine levels of asbestos-related injury, with awards ranging from medical monitoring for claimants in Level I (asbestos-related non-malignant disease and five years occupational exposure to asbestos) to \$1.1 million for claimants in Level IX (mesothelioma).<sup>17</sup> The bill would also allow claimants suffering from asbestos-related injuries that cannot fit into one of the nine levels to seek compensation for their “exceptional medical claims.”<sup>18</sup>

One of the more controversial aspects of the effort to reach a legislative solution to the asbestos problem has been the question of smoking. Levels VII and VIII of the tiered compensation scheme both deal with lung cancer, and some have expressed concern that smoking may have contributed to many of these claimants’ conditions.<sup>19</sup> As a result, the awards in Levels VII and VIII are pegged to each claimant’s smoking history, in that non-smokers would get higher awards than ex-smokers, who would get higher awards than smokers.<sup>20</sup>

<sup>13</sup> *Id.* at § 104(e)(1).

<sup>14</sup> *Id.* at § 405(c).

<sup>15</sup> *Id.* at § 111. A claimant suffers from an eligible disease and condition where the claimant can satisfy the medical criteria in the bill. *Id.* at § 3(7).

<sup>16</sup> *Id.* at § 121(c). Exempted from this requirement would be those who worked or lived near Libby, Montana, the former site of a vermiculite mining operation that exposed many of the townspeople to high levels of tremolite asbestos. *Id.* at § 121(c)(4). The ore mined in Libby was usually sent to plants around the country to be processed, and it now appears that some of these communities – like Libby – may be suffering from high rates of asbestos-related cancers and conditions. The Specter bill would allow the Administrator, following the results of a study, to treat residents of these “Libby sister” communities like residents of Libby under the bill. *Id.* at § 121(f)(9).

<sup>17</sup> *Id.* at § 131(b)(1). Beginning in January, 2007, the award amounts would be adjusted annually to account for cost of living increases. *Id.* at § 131(b)(6).

<sup>18</sup> *Id.* at § 121(g).

<sup>19</sup> See, e.g., T.R. Goldman, *Firefight: The Art of the Asbestos Deal*, Legal Times, April 19, 2005.

<sup>20</sup> According to the bill, a “non-smoker” is someone who has never smoked or has smoked fewer than 100 cigarettes (or the equivalent of other tobacco products) in his or her lifetime, while an “ex-smoker” is someone who has not smoked in the twelve years preceding diagnosis of lung cancer. S. 852, § 131(b)(2). Under the bill, a claimant in levels VI-VIII asserting that he is a non- or ex-smoker would be required to submit to testing of his serum cotinine level, a useful indicator of smoking history. *Id.* at § 115(c)(3)(B).

The Administrator would be required to provide to the claimant a proposed decision within ninety days of the filing of the claim. If unsatisfied with the proposed decision, the claimant would be entitled to seek review by a “representative of the Administrator,” so long as the request is made within ninety days of the issuance of the proposed decision.<sup>21</sup> After a review, or if no review is requested within ninety days, the Administrator would issue a final decision.<sup>22</sup> A claimant would then have ninety days to seek judicial review of the final decision in the U.S. Court of Appeals for the circuit in which the claimant resides.<sup>23</sup>

Under the bill, a claimant would receive his or her award in structured payments over a three-to-four year period.<sup>24</sup> The amount of the award would have to be reduced by the amount of collateral source compensation and most prior awards made pursuant to the administrative scheme.<sup>25</sup> “Collateral source compensation,” however would include only compensation paid by defendants, insurers of defendants, and compensation trusts pursuant to judgments and settlements; it apparently would not include payments from disability insurance, health insurance, medicare/medicaid, etc.<sup>26</sup>

Another sticking point in the debate over previous asbestos bills has been the effect any legislative resolution would have on so-called “mixed dust” (i.e., silica and asbestos) claims. Some have expressed concern that, if these claims are not included in the legislation (and therefore removed from the courts), asbestos claimants could avoid the administrative process by re-filing their claims in court as mixed dust claims. S. 852 would remove silica claims from the courts to the bill’s administrative process unless those bringing such claims establish by a preponderance of the evidence that exposure to silica caused their impairments and that asbestos did not significantly contribute to their impairments, and submit specific supporting evidence (e.g., x-rays, history of asbestos exposure, etc.).<sup>27</sup>

**The Asbestos Injury Claims Resolution Fund.** The Fund would be paid for by contributions from defendants in asbestos suits – “defendant participants” – and their insurers – “insurer participants.” Defendant participants would be required to contribute, in the aggregate, no more than \$90 billion,<sup>28</sup> while insurer participants would be required to contribute no more than \$46.025 billion.<sup>29</sup> The Administrator would be authorized to

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<sup>21</sup> *Id.* at § 114(d)(1)(A).

<sup>22</sup> *Id.* at § 114(e).

<sup>23</sup> *Id.* at § 302.

<sup>24</sup> *Id.* at § 133. The bill provides for lump sum and accelerated payments for serious conditions.

<sup>25</sup> *Id.* at § 134.

<sup>26</sup> The bill also explicitly excludes from the definition of “collateral source compensation” those benefits received pursuant to workers’ and veterans’ compensation programs. *Id.* at § 134(b).

<sup>27</sup> *Id.* at § 403(b).

<sup>28</sup> *Id.* at § 202(a)(2).

<sup>29</sup> *Id.* at § 212(a)(2)(A). Defendant and insurer participants would receive credits against their contributions for monies received from bankruptcy trusts established after July 31, 2004.

borrow to enhance the Fund's liquidity,<sup>30</sup> to sue any participant for failure to pay any obligation imposed under the bill, and to monitor and take action against participant companies that attempt to transfer their assets through business transactions.<sup>31</sup>

Under the bill, if the Administrator determines that the Fund does not have sufficient resources, then the Fund would sunset<sup>32</sup> and claimants with unresolved claims could return to federal or state court.<sup>33</sup> From the date of termination onward, any asbestos or class action trust established to distribute funds pursuant to a final judgment or settlement would be required to adopt the bill's medical criteria.<sup>34</sup>

*Defendant Participants.* Defendant participants would be grouped into tiers and subtiers according to prior asbestos expenditures, except that one tier would be reserved for organizations that have filed for bankruptcy in the year preceding enactment of the bill. These tiers and subtiers would determine the exact amount of each defendant participant's required annual contribution to the Fund, ranging from \$27.5 million down to \$100,000.<sup>35</sup> A defendant participant would be able to petition the Administrator for adjustments of its obligations in cases of severe financial hardship or "demonstrated inequity," or when the defendant participant can demonstrate that meeting its obligations under the bill would render the company insolvent.<sup>36</sup> In addition, persons or businesses classified as "small business concerns" under section 3 of the Small Business Act would be exempt from these payment obligations.<sup>37</sup>

The aggregate annual payments to the Fund by defendant participants would have to be no less than \$3 billion for the first thirty years of the Fund.<sup>38</sup> The bill would provide for ten-percent reductions in this minimum amount following the tenth, fifteenth, twentieth, and twenty-fifth years after enactment, unless the Administrator finds that a reduction could endanger the Fund's ability to satisfy future obligations.<sup>39</sup> Further, beginning ten years after enactment, the Administrator would be empowered to suspend

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<sup>30</sup> *Id.* at § 221(b). Monies for repayment would be limited to amounts available in the Fund.

<sup>31</sup> *Id.* at § 223(j).

<sup>32</sup> *Id.* at § 405(f).

<sup>33</sup> *Id.* at § 405(g).

<sup>34</sup> *Id.* at § 405(f)(7).

<sup>35</sup> *Id.* at §§ 202, 203. The Administrator would be required to lower the contributions of those defendant participants who merely distributed (rather than manufactured) asbestos-containing products, although the total adjustments made to distributors contributions in a given year could not exceed \$50 million. *Id.* at § 204(m).

<sup>36</sup> *Id.* at § 204(d).

<sup>37</sup> S. 852, § 204(b).

<sup>38</sup> *Id.* at § 204(h)(1). The bill would also establish a guaranteed payment account that could be used for years in which the aggregate payments of defendant participants fall below the minimum \$3 billion. *Id.* at § 204(k).

<sup>39</sup> *Id.* at § 205(a).

all or part of the defendant participants' payments in a given year in which the Fund contains sufficient assets to satisfy that year's obligations.<sup>40</sup>

*Insurer Participants.* S. 852 would establish the Asbestos Insurers Commission — composed of five members appointed by the President with the advice and consent of the Senate — charged with instituting a methodology for determining the amount to be contributed to the Fund by each insurer participant.<sup>41</sup> Insurer participants would be able to appeal such determinations to the D.C. Circuit.<sup>42</sup> The aggregate annual payments to the Fund by insurer participants would be \$2.7 billion for the first two years, \$5.075 billion for years three through five, \$1.147 billion for years six through twenty-seven, and \$166 million for year twenty-eight. Beginning ten years after enactment, the Administrator would be empowered to suspend all or part of the insurer participants' payments in a given year in which the Fund contains sufficient assets to satisfy that year's obligations.<sup>43</sup>

**Prohibition on Asbestos-Containing Products.** The bill would require the Administrator to promulgate regulations prohibiting the manufacture, processing, or distribution in commerce of products containing asbestos.<sup>44</sup> The Administrator would be empowered to grant exemptions where doing so would not unreasonably risk injury to the public health or the environment and those seeking the exemptions have made good faith, unsuccessful efforts to find minerals to substitute for asbestos in their products.<sup>45</sup> The bill would specifically exempt from the prohibition: (1) asbestos-containing products necessary to the "critical functions" of the Defense Department or NASA; (2) asbestos diaphragms used in the manufacture of chlor-alkali and its derivatives; and (3) roofing cements, coatings, and mastics containing asbestos that is totally encapsulated by asphalt. The Administrator of the Environmental Protection Agency (EPA), however, would be required to review and possibly revoke this last exemption within eighteen months of enactment of the bill.<sup>46</sup>

Under S. 852, the EPA Administrator would be required to study the exposure risks associated with naturally occurring asbestos, and to develop management guidelines, model state regulations, testing protocols, etc., for naturally occurring asbestos.<sup>47</sup>

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<sup>40</sup> *Id.* at § 205(b).

<sup>41</sup> *Id.* at §§ 211, 212. Insurer participants would be able to petition the Commission for adjustments due to financial hardships. *Id.* at § 212(a)(3)(E).

<sup>42</sup> *Id.* at § 303.

<sup>43</sup> *Id.* at § 212(a)(3)(F).

<sup>44</sup> *Id.* at § 501(a).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at § 502.