# Assessing the Economic Impact of Proposed Asbestos Legislation:

## A Reconsideration of the Evidence

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## I. Introduction[1]

Asbestos litigation in the United States has spun out of control. As documented in White (2004), a number of factors combined to create the legal equivalent to a "perfect storm."[2] Asbestos companies engaged in identifiable misconduct in the past, making punitive damages in asbestos suits likely and plausibly appropriate. Early plaintiffs won large judgments against asbestos companies, encouraging defendant companies to settle cases out of court; and as the early settlements became well known, the number of plaintiffs expanded rapidly. Without trials, many claims of damage have never been assessed by juries.

This cycle of litigation has continued even as many of the original defendants have run out of money, because many states have "joint and several liability" provisions which hold companies further down the supply chain responsible when other defendants closer to the injuries are unable to pay. By 2001, 6,000 companies faced asbestos litigation.

Given these conditions, the Supreme Court recently suggested the need for a legislative solution. This year, Senator Arlen Specter introduced The Fairness in Asbestos Injury Resolution Act (FAIR, S. 852), which would establish a $140 billion trust fund to pay claims and resolve related asbestos legal issues. In April, an economic consulting firm, NERA, issued an analysis of this proposal which purported to identify massive economic benefits that would follow its enactment.[3] We have analyzed the NERA study and found that its conclusions are not sound or reliable. First, the analytic methods used by NERA to identify the specific damages arising from asbestos litigation are deeply flawed in both theory and application. Second, the NERA study *assumes* that the legislation would fix all of the asbestos-related issues affecting the economy, while our analysis of the bill found that this assumption is highly questionable.

The next section analyzes the economic methodology and calculations used in the NERA study. The following section examines the likely legal consequences of the Senate bill. The final section concludes.

## II. An Economic Evaluation of the NERA Study.

The NERA study makes several claims about the purported high levels of various costs associated with the current asbestos litigation and the purported large benefits associated with adopting a trust fund approach for remaining cases. There is no question that asbestos litigation imposes costs on U.S. businesses. However, close analysis

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[1] This analysis was supported by funding from the Coalition for Asbestos Reform.

[2] White, Michelle, "Asbestos and the Future of Mass Torts,' NBER working paper 10308, February 2004.

[3] Dr. Denise Martin, Dr. Faten Sabry, Paul Hinton, Dr. Ron Miller, and Dr. Stephanie Plancich, "Costs of Asbestos Litigation and Benefits of Reform," NERA, April 25, 2005. (Link: http://www.nera.com/Publication.asp?p_ID=2459)

establishes that NERA's estimates are fundamentally incorrect and can not be used as a guide to gauge the potential benefits of specific legislation.

The NERA study makes four principal claims:

- The current asbestos litigation process has provided claimants $39 billion in compensation while costing the economy some $343 billion.
- In the future, this process will provide claimants an additional $73 billion in compensation and cost the economy $96 billion in administrative and bankruptcy-related costs, plus at least $50 billion per-year in costs arising from reduced productivity associated with the litigation process.
- The proposed trust fund would make $140 billion available to claimants and for medical monitoring, while reducing the NERA-projected $96 billion costs for administrative and bankruptcy-related costs by $85 billion and eliminating the NERA-projected costs from lower productivity.
- Approval of the proposed trust fund would increase the market capitalization of the defendant companies by $60 billion to $137 billion.

If these projections were even approximately accurate, they could provide powerful arguments both against allowing the current litigation process to continue and for enacting the proposed trust fund. However, the NERA study's claims are seriously biased and unreliable. An economic case for the proposed trust fund remains unproven.

The NERA results cannot be tested directly, because the study does not provide either the data on which it relied to calculate its estimates or detailed descriptions of the methodologies used. As a scientific matter, the NERA estimates are merely asserted and not demonstrated. However, the descriptions of the approaches used by NERA to construct its estimates reveal fundamental problems that positively vitiate the claims.

***Productivity-related costs:*** The NERA study estimates that asbestos litigation has already cost the American economy $343 billion; and that some $292 billion to $303 billion of those costs, or 85.1 percent to 88.3 percent, can be traced to "productivity losses" arising from the litigation's alleged effects on the cost of capital, foreign direct investment, restructuring opportunities, and use of management resources. The study argues that the litigation process creates uncertainties that raise the borrowing costs of the defendant corporations, reducing their capacity to invest and grow, deter foreign investment and consume management time and other resources that could be used more productively.

First, the NERA study provides no data or other evidence for its assumption that these effects actually occurred in these cases or, if they did, any evidence of their dimensions. Furthermore, the study's basic argument that these user costs effects, whatever their dimensions, would produce large costs for the American economy is incorrect. Any uncertainties surrounding the asbestos litigation do not affect either the overall supply of capital available for U.S. investment, domestic or foreign, or the overall demand for it. Therefore, the alleged effects on capital costs and investment rates would be almost entirely distributional: Any increases in borrowing costs for defendants associated with “uncertainties” about their future would be offset by corresponding decreases in borrowing costs for other firms. There is no economic basis to expect that these effects would have any significant *net* costs for the U.S. economy. Third, to the extent that litigation has historically raised the costs of asbestos production, and asbestos creates negative externalities, there may be positive offsetting effects from higher user costs in affected industries. The reason there has been so much asbestos-related litigation is that asbestos was clearly a harmful substance. Reducing harmful activity, either through litigation or taxes targeted to those producing the harm, necessarily has benefits associated with it that the NERA study either ignored or assumed to not exist.

Furthermore, the methodology used in the NERA study to estimate the purported productivity losses among defendant industries is technically biased or otherwise flawed. The study’s authors acknowledge that they could not directly observe or measure any of these effects, and consequently adopted an indirect methodology. The study used the incidence of asbestos-related bankruptcies to identify industries “heavily affected” by the litigation, constructed a subset of industries that were both “heavily affected” and “subject to international competition,” measured the difference in productivity gains by this subset and the rest of the economy, and compared that difference to differences in productivity gains among corresponding industries in 10 other developed countries over the period 1987-2000. The study claims to have found that the productivity gains of sectors which it identified as “heavily affected” by the litigation and subject to international competition, relative to the rest of the U.S. economy, were 0.5 percent less per-year than gains by corresponding sectors in other countries relative to the rest of their economies.

First, the sample selection used in the study fatally biased the results. The use of bankruptcy as a screen essentially produces the results, since low productivity and low productivity growth will inevitably be associated with bankruptcy whether or not asbestos is involved. In addition, the decision to exclude service industries from the subset affected by the litigation and include them in industries used for comparison further biases the results. Over this particular period, many U.S. service sectors achieved strong productivity gains, compared to both some other U.S. sectors and their foreign counterparts, reflecting their early adoption and efficient use of information technologies. The NERA analysis implicitly attributes these differences to the impact of asbestos litigation alone, rather than to technological innovation and the myriad other factors known to affect productivity.

The decision to focus exclusively on selected manufacturing sectors to identify litigation-related productivity costs, and measure them relative mainly to their European counterparts, biased the results even further. Over this period, many European countries used industrial policies to specifically support productivity-enhancing investments by their manufacturing companies. The European Commission reports that in the mid-1990s, its member states spent a total of 35 billion euros/year on subsidies to manufacturing industries, with significant variations among them. These policies may well have created short-term productivity benefits for many of the industries, which the study compared to those in the U.S. “heavily affected” by the litigation. This introduced additional distortions into the results, which the study again attributes to the impact of the litigation.

More generally, the NERA methodology assumes that but for the asbestos litigation, the relationship between productivity gains in manufacturing and services would have been essentially the same in the U.S. and the 10 other developed nations. It is well-established that differences in productivity gains across countries are affected by many country-specific factors, such as labor-market rigidities, different rates of business formation and regulatory barriers to the adoption of new technologies, as well as different patterns of government subsidies. Moreover, these country-specific factors often affect service and manufacturing companies in different ways. Therefore, there is no reliable basis on which to claim that a difference in measured productivity between certain manufacturing sectors in the U.S. and other manufacturing and service industries can reasonably be attributed to the litigation, by simply comparing it to the difference in productivity gains between their counterpart sectors in other countries. Without such basis, all subsequent calculations are irrelevant.[4]

Finally, since most of any effects of the asbestos litigation on industry investment rates would be distributional, any costs in productivity for the defendant industries associated with higher capital costs (domestic and foreign) are offset by gains in productivity in other sectors whose capital costs would be indirectly reduced by the alleged capital-shunning of firms affected by the litigation. Any net productivity costs to the entire economy, therefore, would be much smaller than their estimates imply. Even if the NERA analysis were correct that the proposed trust fund would improve the productivity of the defendant firms by lowering their cost of capital, relative to the average cost – an assertion which is unproven -- the trust fund would slow the productivity gains of everyone else by raising their cost of capital relative to the average cost.

***Administrative costs:*** The NERA study further asserts that the proposed trust fund would eliminate $71 billion in NERA-estimated administrative costs associated with future litigation, including court costs and uncompensated time of court personnel spent on the litigation; defense costs including legal fees and the value of the time expended by the defendants and their staffs; and plaintiffs costs including their legal fees. This accounting is also fundamentally flawed.

First, the NERA study improperly characterizes expenditures on the administration of justice, including court costs and the uncompensated time of judicial

[4] The NERA study's calculations also suffer from technical problems. For example, the study estimates the productivity-related dollar losses allegedly associated with the litigation by multiplying the gap between the productivity differences in the U.S. and other countries, and the current dollar value-added in the trade-affected subset of "heavily affected" sectors. This calculation does not account for the cost of the productivity-enhancing investments which the study claims were precluded by the impact of the asbestos litigation, and therefore assumes that the litigation-affected sectors could have achieved higher productivity at *no* capital cost. Even if the selection of industries had not been biased and the analysis had accounted for all country-specific factors affecting productivity gains, the final estimate would be inaccurate.

personnel, as deadweight costs to the economy, when public finance typically approaches such expenditures at least in part as public investments which produce less crime, fraud and abuse in the future, as well as greater financial order and social stability. The study also counts as administrative costs the legal fees and value of the time expended by both the plaintiffs and the defendants. The plaintiffs' legal fees are normally a percentage of the total judgments, and those judgments are not an administrative cost but economic compensation for the costs arising from the original injuries. The "costs" or value of the underlying injuries are unaffected by whether litigation or a trust fund is used to compensate the injured parties. Similarly, the NERA study counts as an administrative cost the value of the time that the defendants spend preparing their cases (estimated by the study without providing any support for its accuracy), when the value of the defendants' time is more properly considered reflective of the cost they bear for the injuries which produced the litigation. The study, therefore, mischaracterizes all of the major elements which it counts as administrative costs, and those costs cannot be reasonably considered savings associated with ending the litigation.

Moreover, these purported administrative savings all assume that the proposed trust fund will end all asbestos-related litigation. As we will see in the next section, that assumption is incorrect. The congressional proposal would settle a substantial share of the cases, but litigation over the trust fund's decisions as well as litigation over cases not covered by the trust fund would continue. Even if the study's accounting of administrative costs were accepted, its calculation of $71 billion in future savings from a trust fund is unsupported by any analysis.

***Bankruptcy costs***: The NERA study further asserts that the proposed trust fund would save an estimated $13.7 billion in the future costs of "asbestos-related bankruptcies" (including direct costs of the process of declaring and managing the bankruptcy, job losses, and indirect costs of lost sales and profits). This estimate is also flawed both conceptually and technically.

The NERA study constructs this $13.7 billion estimate based on the relationship between the costs of past asbestos-related bankruptcies and the cost of overall past liabilities (including administrative costs; compensation paid to claimants; and court, processing and management time costs). Yet, the study offers no theoretical case or other evidence to support the assumption that a mathematical function posited between past bankruptcy costs and past "liability" costs will hold true for the relationship between future bankruptcy costs and future liability costs. In fact, on its face, this approach is likely to produce biased results: If weaker companies in any set go bankrupt faster than others, early bankruptcy costs will be greater, relative to liabilities, than later bankruptcy costs.

Moreover, the study appears to approach the bankruptcy issue in much the same way as it approached productivity-related losses, counting only the gross costs associated with defendant firms that could be bankrupted and not the net costs to the economy. In this regard, the study's estimate includes, as a cost, the value of the sales and profits forfeited by firms that go bankrupt, without taking account of the share of those sales and profits that other companies would capture by absorbing the customers and market shares of their bankrupt competitors.

Most fundamentally, the study counts all of its problematic estimate of $13.7 billion in future bankruptcy-related costs as a saving that would follow from enactment of the proposed trust fund, by assuming that "passage of legislation would prevent any additional asbestos-related bankruptcies." The study presents no theoretical case or other evidence for this assertion, most likely because it would be impossible to do so. The study concedes that widely cited projections of future costs of the liability system ($130 billion) are essentially the same as estimates of the costs of the trust fund ($140 billion). The notion that transforming an uncertain liability to a certain liability that is *larger* will significantly *reduce* bankruptcy is unusual, to say the least. While one might make the case that provisions for a massive redistribution of liability amongst firms, which transfers the large liabilities of a few firms to a diffuse set of other firms, might reduce bankruptcies, it also might not, since firms that already have such low productivity (according to the NERA study) presumably operate very close to the margin and could easily be pushed over the edge by the costs of participating in the trust fund.

By asserting that the trust fund would end asbestos-related bankruptcies, the NERA study posits that the burden of the administrative costs of defending themselves against future lawsuits is the only reason why firms would go bankrupt in the future. This assumption requires one to accept that firms which would be vulnerable to asbestos-related bankruptcies if the litigation process continues, but would by solvent and safe under a $73 billion-to-$140 billion trust fund system financed by those same firms.

***Stock Market gains:*** Lastly, the NERA study asserts that approval of the proposed trust fund would increase the market capitalization of the defendant companies by $60 billion to $137 billion. These estimates are also based on flawed methodologies that are inconsistent with normal professional practice in the "event study" literature.

The study's $60 billion estimate comes from attributing a claimed 6.1 percent difference in the share-price performance of 93 asbestos-case-affected companies, compared to the S&P 500, during a six-month starting in May 2003, when *one periodical* speculated that the likelihood of Congress enacting legislation settling the asbestos cases was 60 percent to 70 percent. The study offers *no* evidence to support its assertion that the periodical's speculation, *which proved to be incorrect*, was widely accepted by financial markets in the six months prior to its publication. Even if the report was both accurate and generally accepted by the markets in the prior six months, the NERA study does not attempt to isolate its effects from other factors which may have affected the stock prices of the 93 asbestos-related companies, by either comparing their average rise to indexes for their specific sectors or by performing "event studies" of the 93 companies, which would be the standard in the economics literature.

The $137 billion estimate comes from attributing a claimed 10.3 percent difference in the stock performance of each of the 93 companies and a paired firm with the same 2-digit SIC code not flagged by the NERA study's process of identifying asbestos liabilities, over the six month period preceding the publication of the incorrect speculation about coming congressional approval of a trust fund. This approach suffers from the same methodological weaknesses of the first estimate, plus additional problems. There is no attempt to evaluate other characteristics besides sharing a two-digit SIC code for selecting those companies for the non-asbestos index. Nor does the study present any evidence that might demonstrate that the differences in stock market performance between the 93 asbestos-affected companies and the NERA study's selection of 93 other companies was unique to the specific period of November 2002 to May 2003 by comparing it to differences during any other time period, such as the six months prior to November 2002 or the six months following May 2003. Nor do the study's authors attempt to justify the six month period they chose. Most well-conducted event studies of specific events use windows that are numbered in days, not months, to isolate the effects. Nor does the study provide any evidence that speculation concerning trust-fund legislation was a factor in analysts' reports or reports from other industry sources.

Finally, while it is plausible that ending the financial uncertainty associated with the asbestos litigation could produce some positive market response, any such response should follow from whatever course produced that certainty, whether by creating a trust fund or concluding the litigation. Even if we set aside the NERA study's flawed evidence and reasoning in this area, the fact that the market looked positively upon the possibility of legislation does not necessarily imply that enacting the specific legislation currently at hand would have the same effect – unless, of course, the crafters of the legislation could miraculously craft a bill tailored exactly to market expectations.

Finally, any market response might also induce distributional changes. First, some firms presumably would be forced to pay into the trust fund an amount greater than their expected asbestos liability. These firms should see declines in their market value, while other firms might gain. But since the cost of the fund to defendant companies and their expected future costs from continued litigation are similar, it is impossible to justify large net stock market effects, unless the NERA authors also hope to disprove the proposition that markets function in an efficient manner. Moreover, the litigation does not affect overall demand for equities; and while its resolution – whether by the proposed trust fund or by the legal process – could shift some of that demand to companies no longer contending with asbestos-related suits, that shift would also reduce investor demand for other equities. Once again, the net result would be smaller than assumed.

**III. Legal Considerations**

As analyzed in the preceding section, the NERA study claims that the asbestos trust-fund legislation currently before the U.S. Senate (S.852) would substantially reduce the costs to the US economy associated with asbestos litigation in various ways. S. 852 would set up a fund administered by a new office in the Department of Labor that would award compensation on a no-fault basis to individuals who suffered serious health injuries through exposure to asbestos. The fund would be financed by those companies ("defendant-participants") and insurers who still have asbestos-related liability. Existing litigation would be stayed and attorneys fees associated with claims for compensation from the fund would be limited to 5 percent of awards.

By establishing a no-fault system of compensation, the study suggests that much of the deadweight costs of litigation—primarily lawyers' fees—would be avoided. In particular, the NERA authors estimate that the legislation will reduce administrative, legal and bankruptcy costs by $85 billion going forward, of which they estimate that $65 billion would be legal fees. They further estimate that legal fees incurred after the adoption of S. 852 would be no more than $2 billion.

In addition to the errors in economic reasoning noted in the preceding section, the NERA study's conclusions in this regard rest on two additional, highly-questionable assumptions: (i) There will be little or no litigation over the liabilities of the defendants and insurers required to contribute to the compensation fund established by the legislation; and (ii) the trust-fund structure outlined in the legislation would survive legal attacks that could delay or alter its implementation, or even cause its collapse.

**1. Determining liability to contribute to the compensation fund.**

S. 852 contemplates the creation of a compensation fund of up to $140 billion, consisting of $90 billion from various defendant-participants that would otherwise be subject to asbestos liability in the future, and $46 billion from insurers. Additional funds also may be available from bankruptcy trusts. These funds would be contributed over 30 years under a complicated scheme involving contributions from defendant-participants currently in bankruptcy and five additional liability groups—called "tiers" in the bill—that would have differential contribution requirements. Within the tiers, contribution levels would be fixed for "sub-tiers" based on firms' revenues. For example, those defendant-participants classified as tier II, the highest category of liability, would be those that had prior asbestos liability expenditures of $75 million or more. Within this group, contribution obligations would range from $16.5 million per-year up to $27.5 million per-year, based on the revenues of the defendant-participant in the most recent fiscal year prior to December 31, 2002. Those defendant-participants classified as tier III would be those that have had asbestos costs of less than $75 million, and the participants classified into tier III also would be distributed into sub-tiers based on their revenues. The same classification system would apply as well to tiers IV and V. The legislation specifies that a firm's placement in a tier and sub-tier would be permanent for the 30 year contribution period.

Since these fixed obligations would be paid over 30 years, the stakes associated with a defendant company's tier and sub-tier classification are quite high. For example, company A with $75 million in prior asbestos costs would be placed in tier II and subject to the highest contribution levels, while company B with $74 million in prior asbestos costs would be placed in tier III, where the contribution levels are lower. In tier III, a company, depending on its revenues, could face an annual contribution obligation of as little as $5.5 million or as much as $27.5 million —a difference of $22 million a year or $726 million over 30 years. That difference is certainly something worth litigating about.

The classification of defendant-participants into tiers would be made by the administrator of the program, based on information supplied by the defendant-participants. It is very difficult to imagine that the administrator would accept at face value the information supplied by the defendant-participants, or that the administrator's decisions as to tiers and sub-tiers for each company would go unchallenged. The key questions for these classification decisions will be the amount of each company's expenditures for asbestos liability prior to December 31, 2002, and its revenues under Generally Accepted Accounting Principles (GAAP). Revenues under GAAP, however, are subject to a high degree of variability and adjustment, even those already reported, and what a company may have already spent on asbestos liability is even more debatable. When the trust-fund administrator makes his or her determinations of these questions, it is highly likely that costly litigation will ensue.

Moreover, the administrator also would have the authority to reduce the obligations of particular defendant-participants based on financial hardship and gross inequity considerations. S. 852 does not specify what would happen if these exceptions, along with the bankruptcy of defendant-participants that already have fixed obligations to contribute, reduce the total amount in the fund below what would be necessary to compensate all its potential claimants. It could mean a restoration of litigation over compensation or new legislation that would increase the liability of the defendant-participants already in the contribution system. In either case, all defendant-participants would have a stake in how others are treated in the assignments to tiers and sub-tiers, and in the granting of exceptions for hardship and inequity—neither of which is well-defined in the legislation. Under these circumstances, any company would have legal standing to challenge the administrator's decisions regarding others, since those decisions could directly affect the costs that ultimately have to be paid by those that remain solvent over the fund's 30-year life. The costs of the litigation involved in sorting out all of these questions would likely far exceed the $2 billion estimate in the NERA study.

The implementation of S. 852 would likely result in massive litigation on other issues as well. For example, there is the question of establishing the contribution obligations of insurers, which would be done under a separate regime established by the legislation. The legislation does not establish any specific method for determining an insurer's liability. Instead, it specifies a maximum level of aggregate insurer liability—$46 billion—and authorizes a commission of full-time presidential appointees to establish the methodology by which the contribution obligations of each insurer would be determined. After a hearing and public comments, the commission would issue regulations that would specify the methodology.

The methodology to be developed by the commission is supposed to weigh a number of factors for determining an insurance company's obligation, but does not describe how the commission is supposed to weigh them. For example, the commission is supposed to consider, *inter alia*, historic premiums for asbestos exposure, recent loss experience, and the insurer's likely future liabilities under the tort system. Each of these elements could be used to argue for an increase or a decrease in an insurer's liability to the trust fund, but the legislation does not specify how the commission is supposed to treat them. Each of these criteria would be subject to a great deal of interpretation and dispute, depending on how the commission weighed it in its methodology. The legislation also stipulates that the commission may consider "any other factor the Commission may determine is relevant and appropriate." The absence of clear directions from Congress as to how the commission is to construct its methodology will lay the commission's actions open to charges that it has been arbitrary and capricious. One need only inspect the recent history of telecommunications regulation to understand how litigious this area will become. Individual insurers also will argue that they have been treated inappropriately based on the legislative language. Given the financial stakes involved, it is almost certain that whatever methodology is developed will be litigated for its differential effects on different insurers.

Finally, as with defendant-company contributions, the legislation authorizes the commission to grant individual insurers exceptions and adjustments based on financial hardship or inequity; while over the 30-year life of the trust fund some insurers will go bankrupt or be otherwise unable to contribute. Both factors suggest that some insurers could be required to make up shortfalls arising from such special dispensations or from bankruptcies. As with the defendant companies, an insurer would have standing to challenge exceptions provided to others, because the loss of any contributor could mean an increase down the road in its own contribution obligation. The almost certain result would be substantial and long term litigation.

**2. The survival of the S. 852 structure.**

One of the keys to the structure that would be established under S.852 is a stay of all existing litigation and a substitution of the government-run no-fault trust fund for the current tort system of compensation. Because the new system would affect a process in which injured people are currently receiving compensation, it would have to be put in place promptly. The legislation, therefore, limits the period between enactment of the law and a fully-operational trust fund to two years. During this short period, the administrator of the fund and the members of commission would have to be named and confirmed by the Senate, their offices would have to be established and staffs would have to be hired, the administrator would have to establish the tiers and subtiers, and the commission would have to promulgate its methodology. The conceptual and practical problems associated with all of these tasks would be very time consuming. To the extent that either of these administrative bodies moves without adequate data and deliberation, its actions would be subject to legal challenges under the Administrative Procedure Act.

In addition, by the end of this same two-year period, the fund must have already collected sufficient contributions to justify the administrator's certification to Congress that the fund is operational. Otherwise, the entire system sunsets, and the prior litigation process is reinstated: "Notwithstanding any other provision of this Act, if no later than 24 months after the date of enactment of this Act, the Administrator cannot certify to Congress that the Fund is operational and paying all valid claims at a reasonable rate, any person…may pursue that claim in the Federal district court or State court located within

(i) the State of residence of the claimant; or (ii) the State in which the asbestos exposure occurred."

This very tight timetable itself could encourage litigation. The legislation, if enacted, would end most asbestos-damage litigation.. Under the strict, two-year time limit, anyone dissatisfied with its results under the new trust fund – including some claimants, attorneys and defendant companies – could have an incentive to delay its implementation. The same incentives would apply if the fund began operations but had insufficient resources to carry out its obligations.

As a result, an avalanche of litigation should be expected challenging the constitutionality and fairness of the law. Already, labor groups have charged that the legislation unfairly reduces the rights of workers, veterans groups have made the same charge on behalf of veterans, doctors and scientists have challenged the medical basis for the awards specified under the legislation, and insurers have claimed that the law would still leave them exposed to litigation. Whether any of these groups would have standing to challenge the law would only be determined after a great deal of litigation.

Those who clearly would have standing to sue include defendants-participants required to contribute to the fund but dissatisfied with their contribution share, and insurers with either a plausible case that they should not be included in the contribution regime at all or a view that they are treated unfairly under the methodology developed by the commission. Many of these litigants might well prefer to see the trust fund sunset due to delay than be subjected to greater contribution obligations than they believe they deserve. Even the legislation's requirement that the administrator certify that the fund is paying "all valid claims at a reasonable rate" will be subject to challenge, based on definitions of what constitutes a "valid claim" and a "reasonable rate."

Anticipating attempts to delay the trust fund's operations, the drafters of S.852 included provisions requiring that all legal challenges be brought in the federal courts of the District of Columbia, with expedited appeals to the Supreme Court if necessary. They also enjoined the courts to advance the cases on their dockets and expedite the proceedings. In a highly unusual provision, the legislation also prohibits courts from staying payments pending appeal. While the courts will try to comply fully with these provisions, many of these cases will require extensive discovery; and courts have always been reluctant to limit the discovery rights of litigants. Even if the provision barring stays pending appeal is upheld, the merits of the cases will still have to be decided and appealed. And if the cases involve contributions to which the fund was not entitled, those contributions will have to be returned, reducing its resources.

It is fair to assume that getting the fund up-and-running in two years will be a near impossible thing, if it is successful at all. If it fails, the costs of litigation will be even greater. Not only will all existing litigation be reinstated, but the two-year hiatus will require that everyone involved—judges, lawyers, defendants and plaintiffs, doctors and other expert witnesses—become familiar again with the issues in many tens of thousands of cases.

This is not a remote scenario; in fact, it may well be the most likely outcome. The NERA study is too optimistic in claiming that S. 852 would result in savings on litigation costs. Litigation will undoubtedly continue throughout the life of any trust fund, with parties seeking to reduce their liability or recover contributions they were forced to make.

## IV. Conclusions

The analysis presented here establishes that S. 852 would be very unlikely to deliver significant economic benefits, because it will induce a storm of new litigation with costs that may rival those of existing class action suits. Even if one were to assume that the bill would be effective, we have demonstrated that the estimates of the potential gains provided in the NERA study are highly biased and unreliable. In future work, we hope to explore the costs and benefits of various approaches to resolving the asbestos dilemma, including policies that would be far superior to S. 852.