



November 23, 2005

The Honorable Arlen Specter  
Chairman  
Senate Committee on the Judiciary  
United States Senate  
711 Hart Senate Office Building  
Washington, D.C. 20510-3802

Dear Mr. Chairman:

Thank you for your November 15 response to my October 28 letter on behalf of the Coalition for Asbestos Reform (C.A.R.). In it, I stated that many companies are unaware of the financial impact that S.852, if enacted, would have on their financial situation. I made clear the position of the C.A.R. that in most cases the financial and insurance data necessary for a company to accurately predict its Tier and Sub-Tier is simply impossible.

In your response, you state that my letter "appears to contradict" Carol Morgan's April 26, 2005 Judiciary Committee testimony on behalf of C.A.R. Ms. Morgan is President of National Service Industries, which is a member of C.A.R.

Ms. Morgan's testimony was entirely accurate and entirely consistent with C.A.R.'s position as stated in my October 28 letter. Your November 15 letter quotes only part of an answer by Ms. Morgan to a question from Senator Sessions. Her relevant statements – in full – were as follows:

- "And as Senator Feinstein pointed out earlier, we're not really sure exactly what the source of funds is for the business contribution. We haven't seen that data, and that needs to be scrutinized very carefully." Tr. 66.
- "But as far as knowing what tiers we're in, we really don't know exactly where we'll end up in terms of the sub-tiers until we have more information." Tr. 75.
- "But I do know that there are a lot of defendants who are being represented by insurance companies in their asbestos litigation, and really probably are not aware of the impact of this bill. They have just been able to have all of their claims covered by insurance." Tr. 90.

"Now, once we know more about the exact source of funds for that \$90 billion, which is not certain right now – that's still a mystery, what companies, what their shares are, and, most importantly, whether they have the ability to pay. We don't have that information yet." Tr. 92.

"We can estimate. We can guess, and based on that we know what our personal situations are, and there are a number of us, as I mentioned before, who would simply not be able to make the payments without our insurance assets." Tr. 92-93.

Members of C.A.R. know what their "personal situations are," but that does not mean that they know precisely what Tier or Sub-Tier they are in. As Ms. Morgan stated, they can only estimate or guess. While several members of C.A.R. know that they are in Tier II by virtue of the fact that their historical asbestos expenditures exceed \$75 million (such as Foster Wheeler, Hopeman Bros., Oblebay Norton, A.W. Chesterton and National Service Industries), they can only guess what Sub-Tier they are in since revenue thresholds have not been published. Other members of C.A.R. know generally about their prior asbestos experience but lack specific information from company or insurance records to determine their assigned Tier, and therefore, these companies resort to guessing about the applicable Tier, in addition to the Sub-Tier.

Thus, in her testimony, Ms. Morgan repeatedly emphasized the points I made in my October 28 letter: all of the information necessary to determine a company's Tier and Sub-Tier accurately is not available; companies must therefore rely on guesswork; and some companies will be adversely impacted and will not have enough money to make the required payments under S.852 if it is enacted. In the Coalition's view, these are critical problems with S.852 that have not yet been addressed.

We have particular concern about small and mid-sized companies which fall into the lower Tiers and whose circumstances may make it impossible for them to provide the information required by the bill. Specifically, S.852 requires companies in Tiers III-VI to calculate exactly what has been paid either by, or on behalf of, the company in total asbestos expenditures through the end of 2002. Due to the significant limitations on gathering accurate information, particularly information that is two or three decades old, we believe it will be extremely difficult and in some cases impossible for companies whose expenditures fall between \$1 million and \$75 million to accurately determine their total asbestos expenditures required by S.852.


Many companies in this category are not in possession of complete historic cost data accumulated from their first asbestos expenditure and will have to rely on their insurance carriers for this data. But because defense costs are not normally considered a part of the insured company's primary limits, carriers often aggregate these costs rather than assigning them to individual policy holders. Finally, the fact that some of the required data predates computers creates yet another barrier: retrieving it from archived paper records, which may or may not exist. The solvency of S.852's trust fund relies on the assumption that companies have access to and can accurately calculate the above information.

As noted above, the problem for individual defendant participants is further compounded by the Sub-Tier allocation structure. Only the very large and very small can reasonably estimate the Sub-Tier in which they will be placed. Others will only be able to guess. Since the difference between the top and bottom contribution rates range from \$330 million (TIERS II, III); \$99 million (TIER IV); \$24 million (TIER V) and \$12 million (TIER VI), this ambiguity creates a major problem for these firms. Clearly this rate differential is material for many, if not most, companies particularly those which are fully insured.

For the foregoing reasons, except for the C.A.R. members which know their prior asbestos expenditures to be \$75 million or more, as discussed above, we are unable to provide the information you request.

We support the goal of finding an acceptable and functional solution to the nation's asbestos litigation crisis. In that regard, it is our strong hope that we can continue the dialogue between us. As it stands, however, the members of C.A.R. reiterate their strong opposition to the enactment of S.852 in its current form.

Sincerely,



Thomas R. O'Brien  
Chairman  
Coalition for Asbestos Reform

