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The Honorable John Cornyn
SH-517 Hart Senate Office Building
Washington, DC 20510

Dear Senator Cornyn:

Thank you for affording me the opportunity last week to explain my concerns, and those of my clients, regarding the pending Fairness in Asbestos Injury Resolution Act ("FAIR Act"). As you suggested, I am summarizing my analysis in this brief letter, and enclosing a somewhat more detailed explanation of the constitutional problems posed by the bill.

The trusts that my firm represents were created by courts, pursuant to § 524(g) of the Bankruptcy Code, solely to resolve the claims of victims of asbestos exposure. Section 402(j) of the current draft of the FAIR Act would require the surrender of substantially all the assets of those judicially-created asbestos trusts to a national fund. This national fund would then be used to pay some claimants to whom the trusts have no obligation, but would be unavailable to pay some claimants to whom the trusts do have obligations. In addition, even for those claimants who would be entitled to compensation under the national fund, this compensation would often be less than that which they are entitled to receive under the existing trusts, or would be provided to them on a wholly different timetable. In short, the FAIR Act would take resources belonging to victims of asbestos exposure and alter, often in material ways, their rights to recover for their injuries.

In the event the bill is not modified – by allowing asbestos trusts to opt out of its coverage – the trustees whom we represent would seem to have no choice but to bring a lawsuit challenging these provisions as unconstitutional. First, such an action would assert that the FAIR Act violates the Takings Clause of the Fifth Amendment by extinguishing the vested property rights of the trusts' beneficiaries without providing just compensation. Second, the FAIR Act violates separation-of-powers principles by tampering with final judgments of the judicial branch. Third, the Act violates equal protection principles by specifically excluding bankruptcy-related recoveries from the Act's general protection of recoveries arising out of prior settlements and final judgments – thus irrationally distinguishing between (a) individuals who secured a

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recovery for their asbestos claims through a typical settlement or civil action and (b) individuals who secured a recovery through a bankruptcy-related settlement or final judgment. Finally, the FAIR Act violates the Due Process rights of the trusts and their beneficiaries by stripping the trusts of the financial resources necessary to assert a legal challenge to the Act.

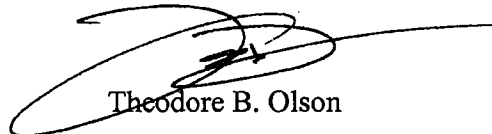
At least as important as the constitutional infirmities of the bill are the profoundly harmful public policies that these provisions would enact: confiscating private property, upsetting final court decrees, disturbing settled expectations, undoing years of conscientious work by courts and litigants, and doing damage and causing emotional distress to sick and deserving claimants.

Needless to say, if this challenge is successful, the assets of the trusts will be unavailable to the national fund. The current draft of the FAIR Act provides for other stakeholders to indemnify the national fund in the event that such litigation is successful, but the practical shortcomings of that provision are serious. The guarantee is capped at \$4 billion even though the assets of all existing asbestos trusts currently exceed \$7.6 billion. Moreover, the loss of the trusts' assets would create major cash flow problems for the national fund because, while the trusts are required to hand over their assets to the national fund within six months, the guarantors are allowed to make their payments over five years. If the national fund is unable to return the assets taken from the asbestos trusts, the United States Treasury will be required to provide the just compensation required by the Takings Clause. Many Senators are understandably adamantly opposed to using taxpayer dollars to fund the FAIR Act, but this is precisely what could happen if the constitutional challenge were to be successful.

My firm's clients take no position on the provisions of the FAIR Act that do not affect them, but as fiduciaries they would have no choice but to challenge the provisions of the Act that would deprive their beneficiaries of their constitutionally-protected rights. This is especially true in light of the tremendous investment represented by these trusts. Not only are they the product of years of effort on the part of the bankruptcy courts and the stakeholders, but they also represent the settled expectations of numerous victims of asbestos exposure who have surrendered their legal claims solely in return for the establishment and maintenance of these trusts.

I hope that you and your colleagues will feel free to contact me if you would like me to elaborate on any of the issues raised in this letter.

Very truly yours,



Theodore B. Olson

TBO/ejs
Enclosure(s)

CONSTITUTIONAL DEFECTS OF THE FAIR ACT

Pursuant to § 524(g) of the Bankruptcy Code, various asbestos trusts have been created over the past decade for the sole purpose of resolving the claims of victims of asbestos exposure. Sections 202(f)(2) and 402(j) of the current draft of the FAIR Act would require the transfer of substantially all the assets of the trusts to a national fund within six months of enactment. The draft further provides that the beneficiaries' rights to the trusts' corpuses would be "superseded and preempted as of the date of enactment." § 402(j)(2)(E).

I. The FAIR Act Would Confiscate Private Property in Violation of the Takings Clause

The Act would violate the Takings Clause by expropriating the private property of the trusts and their beneficiaries "for public use, without just compensation." U.S. Const., amend. V. Specifically, by requiring existing asbestos trusts to transfer nearly all of their assets to a national fund and nullifying nearly all beneficiaries' rights to be compensated by the trusts for their asbestos-related injuries, it would take away rights that became vested in the trusts, their trustees, and their beneficiaries through the issuance of judicial confirmation orders in chapter 11 reorganization cases.

A. The Beneficiaries' Vested Property Interest in the Trust Assets

The process by which the trusts were established makes it clear that their beneficiaries possess a constitutionally-protected, or "vested," property interest in the right to receive compensation from the trusts. In brief, the beneficiaries' property interest arises by virtue of (a) the settlement of irrevocable trusts that created a fixed scheme of compensation for their asbestos-related injuries and (b) the final judicial decrees that approved and cemented these trusts and their terms. Under established precedent, the beneficiaries of a trust have a constitutionally-protected property interest in its corpus. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It is an equally well-established principle that final judicial decrees create vested property rights entitled to constitutional protection under the Takings Clause. *See McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by a judgment.")¹

To understand the nature of the beneficiaries' property interests, it is necessary to understand the process by which they came into existence. The trusts were established as the result of bankruptcy reorganization plans under which the reorganizing companies (or their affiliates or agents) funded the trusts in exchange for immunity from all current and future liability for asbestos-related claims. Under these plans, all individuals with present and future

¹ *See also Tonya K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("The 'vested rights' doctrine starts from the proposition that a judgment, like a deed, is (or identifies) a species of property [and that o]nce the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other.").

claims against the reorganizing companies exchanged their right to seek recovery for their injuries through the tort system in return for the right to be compensated from the trusts. As part of the bankruptcy process, the terms of these plans were negotiated by representatives of the claimants and then submitted to the claimant class for approval. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2004) (requiring the approval of 75% of voting claimants). Moreover, future claimants were represented by a court-appointed "futures' representative," whose principal responsibility was to protect the interests of the future claimants and ensure that the plan treated them on a par with similarly-situated current claimants. Finally, the trusts and their terms were embodied within reorganization plans approved and confirmed by final confirmation orders entered or affirmed by federal district courts in compliance with the provisions of § 524(g) of the Bankruptcy Code.²

In short, by approving these reorganization plans, the beneficiaries effectively converted what was merely a potential cause of action (and, thus, not a constitutionally-protected property interest) into a vested property right. Moreover, because these reorganization plans were effectuated by final chapter 11 confirmation orders, the terms of these plans bind all parties. Just as the *res judicata* effect of the confirmation orders forever bars the beneficiaries from asserting their legal claims against the reorganized entities, so also does it confer on them vested and enforceable property rights.³

² The courts have consistently held that chapter 11 confirmation orders, such as those that established the trusts, confer vested rights. *See, e.g., United States Trustee v. Craige (In re Salina Speedway, Inc.)*, 210 B.R. 851, 855 (10th Cir. B.A.P. 1997) ("Under section 1141 [of the Bankruptcy Code], a confirmed plan becomes a binding contract which creates vested substantive property rights and binds the debtor, any creditor, and any entity acquiring property under the plan."); *In re Burk Dev. Co.*, 205 B.R. 778, 796 (Bankr. M.D. La. 1997) (holding that "Section 1141 of the [Bankruptcy] Code ... establishes that an important effect of a confirmed Chapter 11 plan is the creation of a contract which creates *vested substantive property rights*") (emphasis in the original) (other emphasis omitted). If it were otherwise, chaos would ensue throughout the U.S. economy given that investors and the market rely on the finality of these orders to trade billions of dollars of debt and equity securities that have been issued or restructured through confirmed chapter 11 plans.

³ In fact, section 524(g) of the Bankruptcy Code, which was invoked in each of the reorganization cases that created the trusts, ensures that both current and future claimants are bound and enjoy this vested property right. *Cf. County of Suffolk v. Long Island Lighting Co.*, 14 F. Supp. 2d 260 (E.D.N.Y. 1998), *rev'd on other grounds sub nom. County of Suffolk v. Alcorn*, 266 F.3d 131 (2d Cir. 2001) (holding that judicially-approved class action settlements bind future as well as past and present plaintiffs). The court noted:

Class actions are predicated on the notion that the interests of all class members are fully represented through the class representatives and through class counsel. It is as if each sues individually in a consolidated action. All party-members, including absent members and future members, are equally bound by the

[Footnote continued on next page]

B. The FAIR Act Would Take the Beneficiaries' Property Without Providing the Requisite "Just Compensation"

There is no real debate that the FAIR Act would expropriate the trusts' assets and extinguish the beneficiaries' rights to compensation from the assets. However, some proponents of the Act have urged that, because a national fund will be created to compensate certain asbestos victims, the beneficiaries have suffered no actual "taking" – or, at least, will receive "just compensation" through the national fund.

The facts, however, tell a different story. In reality, the vast majority of the trusts' beneficiaries who are entitled to compensation by the trusts – those who suffer from asbestos-related disease but who show no current signs of impairment – would receive little, or no, compensation from the national fund.⁴ And, even for those select beneficiaries who would qualify for payment by the national fund, most of them would receive proportionally less under the FAIR Act than they would have received from the trusts.

Moreover, experts have estimated that the national fund will be exhausted long before resolution of all of the claims that will be asserted against it – perhaps as early as within the first ten to twelve years of its existence. In fact, the sunset provisions of the Act, which permit a return to the tort system, contemplate the possibility that the national fund could be exhausted within a mere five years of enactment. And, unlike the trusts, the FAIR Act's national fund has no requirement that its funds be rationed and administered so that similarly-situated claimants – regardless of when they assert their claims – will be treated similarly.⁵ This means that, unless the national fund far outlives its expected lifespan, the Act effectively will be taking funds that the trusts would have paid to those beneficiaries who do not manifest diseases until, say, 2015 or 2020 and instead using them to pay claimants whose diseases arise earlier. This would be consistent with the net effect of the above-discussed provisions of the Act: to take vested

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strictures of the class action judgment. Since they are bound by the *res judicata* effect of the judgment to the same extent as the class representatives, each class member is entitled to the full legal benefits which flow to him, her, or it from the judgment.

Id. at 265-66 (internal citations omitted).

⁴ The sole compensation that the national fund would provide for such beneficiaries is a nominal "medical monitoring" reimbursement, which would reimburse claimants for the costs of "an examination by the claimant's physician, x-ray tests, and pulmonary function tests," but only once every three years and only to the extent such costs are not covered by health insurance. § 132(b).

⁵ The trusts accomplish this "similar treatment" by adjusting the payment percentage to ensure that the claims, which are allowed throughout the term of the trust according to the same criteria, are paid based on the available assets, rather than on a first come, first served basis.

property from the beneficiaries of the trusts (trusts that were funded solely for their benefit by the entities that were causally linked to their asbestos exposure) and to transfer it to a nation-wide class of victims whose illnesses by and large have no causal connection to the entities that funded these trusts.

II. The FAIR Act Would Tamper with Final Judgments in Violation of the Separation of Powers

We believe the FAIR Act is also susceptible to constitutional challenge on the grounds that it violates the separation of powers by effectively nullifying the final judgments of the federal district courts establishing the asbestos trusts. It is a venerable principle that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898) ("Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."). The Supreme Court has recently reaffirmed the principle, holding that once a judicial decision has become final, it cannot be reopened, nullified, or otherwise tampered with by the legislature. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

By divesting the trusts of their assets and thus dismantling their entire distribution scheme, the FAIR Act would effectively nullify the final court orders by which the trusts were established. In doing so, it would upset the settled expectations of the beneficiaries and other parties who have relied upon the finality of these orders. The time for appeal of these orders has expired, or any appeals of these orders have been resolved; and their reorganization plans have been substantially consummated (in some cases, years ago) – making them final and immune to modification. *See* 11 U.S.C. § 1127(b). For Congress now to reorder the scheme of rights and liabilities established by these final orders would clearly raise serious separation-of-powers issues (to say nothing of the practical problems that would attend such an attempt to unscramble the egg). *See Plaut*, 514 at 239 (noting that the "nub" of the separation-of-powers violation consisted of "the Legislature's nullifying prior, authoritative judicial action").

III. The FAIR Act Would Violate Equal Protection Principles by Treating Bankruptcy-Related Recoveries Differently

Even as the FAIR Act retroactively abolishes the trusts and the beneficiaries' interests therein, it expressly *preserves* the prior recoveries of many other asbestos victims. The Act specifically provides that its provisions will not preempt or supersede any civil action in which a verdict, final order, or final judgment has been rendered (or in which the trial has reached the presentation of evidence stage), with the exception of filings in a bankruptcy court. It also protects from abrogation all previously entered written settlements, provided that all conditions precedent to payment have been fulfilled within 30 days of enactment. Again, however, it excludes bankruptcy-related agreements.

The Act's non-abrogation of prior final judgments and settlements is, standing alone, a fair and sensible idea. The fairness and equal protection problems arise when the Act excludes, without any compelling rationale, final judgments and settlements that were part of a bankruptcy proceeding. Under equal protection principles, legislation must provide similar treatment for

similarly-situated individuals, absent a legitimate state interest in doing otherwise. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 506-07 (1999). Here, there is no apparent justification for distinguishing between (a) individuals who secured a recovery for their asbestos claims through an individual settlement or an ordinary civil action and (b) individuals who secured a recovery through a bankruptcy-related settlement or final judgment. Although one *explanation* might be the ease with which the trusts' centralized assets could be confiscated, such a rationale is unlikely to qualify as a legitimate state interest.

IV. The FAIR Act Would Strip the Trusts of the Financial Means to Vindicate Their Constitutional Rights in Violation of Due Process

By confiscating all of the trusts' assets and thereby depriving the trusts of the means to redress this injury, the FAIR Act offends the Due Process Clause. The FAIR Act as presently drafted would require the trusts to transfer substantially all of their assets into the national fund within six months of enactment. It would also prevent any court from enjoining that transfer prior to final adjudication of any challenges to the Act. These provisions effectively strip the trusts of the financial ability to pursue any challenge to the Act and thereby protect their property interests. The Supreme Court has long recognized that basic principles of due process mandate that legislation may not be enforced when its practical effect would be "to preclude a resort to the courts . . . for the purpose of testing its validity." *Ex Parte Young*, 209 U.S. 123, 146 (1908). In addition, the Due Process Clause requires the availability of injunctive relief against a statutory scheme where such relief is necessary, as a practical matter, to the effective vindication of constitutional rights. *See Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920).

V. Conclusion

The preceding discussion in no way questions Congress's ability to create a national fund to compensate the victims of asbestos-related injuries. Given the challenges of funding the Act, it is understandable that Congress would look for creative solutions to the problem, but these solutions must also be constitutional. Expropriating the assets of existing trusts in order to provide start-up funding for a national fund takes property from some victims in order to compensate others. Such a solution not only is unfair, but is no solution at all: the current draft provides for other stakeholders to indemnify the national fund in the event that the transfer from the trusts is found to be unconstitutional, but the guarantee is capped at \$4 billion even though the assets of all existing asbestos trusts currently exceed \$7.6 billion. Moreover, the guarantors' obligation is spread over five years, whereas the transfer from the trusts is supposed to occur within six months of enactment.

The constitutional defects in the FAIR Act involve its means, not its ends. With that in mind, attached are two proposed amendments that would cure the constitutional defects addressed above. Specifically, the proposed amendments would allow existing funded asbestos settlement trusts to opt out of the Act's coverage, thus avoiding any question as to the constitutionality of the Act and, consistent with the intention of the Act, protecting the U.S. Treasury from being depleted.

PROPOSED AMENDMENTS

Revised Section 402(c) “Sec. 402. EFFECT ON OTHER LAWS AND EXISTING CLAIMS . . .

(b) Superseding Provisions. –

(1) In General. – Except as provided under paragraph (3) and *except with respect to persons not covered by the Act pursuant to Section 402(f)*, any agreement, understanding, or undertaking by any person or affiliated group with respect to the treatment of any asbestos claim that requires future performance by any party shall be superseded in its entirety by this Act.”

New Section 402(f) “Sec. 402. EFFECT ON OTHER LAWS AND EXISTING CLAIMS . . .

(f) *Exemption of Certain Existing Trusts.* –

(i) *In General.* Notwithstanding any other provision of this Act, if an election is made in accordance with subclause (ii), this Act shall not apply in any way to any partially or wholly funded trust (as defined in Section 201(8)) in existence pursuant to a plan of reorganization under chapter 11 of title 11, United States Code, that has been confirmed by a duly entered order or judgment of a court that is no longer subject to any appeal or judicial review on the date of enactment of this Act or to any person, the majority of whose voting shares are owned directly or indirectly by such trust.

(ii) *Election.* – A trust described in subclause (i) may elect not to be subject to the Act by providing written notice of such election to the Administrator within six months after enactment of the Act.”