Backgrounder

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Fixing the Asbestos Mess: The Senate's Reform Needs Reforming

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Asbestos. It is the basis for the longest-running mass tort litigation in U.S. history, as well as the most expensive. Since the late 1960s, some 850,000 claimants have sued for asbestos-related injuries. The litigation has cost some $70 billion and 60,000 jobs, but little has gone to the truly injured. Lawyers and litigation costs have consumed almost 60 percent of resources expended, and much of the rest has gone to claimants without real impairments. Yet the lawsuits are still coming, with up to $200 billion in additional claims on the horizon.

This week, the Senate will take up legislation aimed at closing this longest of long-running litigation dramas. The Fairness in Asbestos Injury Resolution (FAIR) Act of 2005 (S. 852), sponsored by Senator Arlen Specter (R–PA), is intended to take asbestos litigation out of the courts and place it in the hands of the executive branch.

The concept of replacing sprawling and unfair lawsuits with a simplified compensation system administered by the U.S. Department of Labor is appealing on the basis of efficiency. However, if done poorly, it may also set a dangerous precedent and serve as a blueprint for turning other judicial issues into entitlements. Moreover, the system outlined by S. 852 is flawed, allowing claims by individuals who were not wrongly injured by asbestos to dissipate the resources available, threatening the viability of the compensation system that it establishes.

Talking Points

- The current asbestos litigation reform bill (S. 852) has a number of flaws. Specifically, it would (1) establish weak eligibility and evidentiary standards for establishing exposure and injury; (2) allow compensation for conditions that may be unrelated to asbestos; (3) require automatic payment of claims after 180 days regardless of merit; (4) allow compensation to those exposed to naturally occurring asbestos; and (5) give special treatment to claimants in specific communities.
- The proposed transformation of asbestos tort claims into entitlement claims would set a potentially dangerous precedent for other, less exceptional legal claims.
- Lawmakers should focus on establishing rules that would target aid only to those who are truly wronged.

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The History of Asbestos Litigation

Asbestos was long considered a "magic mineral" because of its ability to resist heat. It was used for nearly 1,000 years in countless ways—in home and office insulation, lining for automobile brakes, and even flame-retardant hulls for ships.[1] Yet prolonged exposure to asbestos dust fibers has long been known to cause asbestosis, a disease of the lungs. In the 1960s, asbestos was also linked to cancer, including mesothelioma, a cancer of the lung lining.

The first injury-related lawsuits against asbestos manufacturers were brought in the late 1960s. These lawsuits accelerated in 1973 when the courts applied strict liability rules to asbestos, meaning that manufacturers could be found liable without a showing of negligence.[2] As the number of cases mounted, the courts began to chip away at liability rules by lowering requirements to prove proximate cause for injuries and by aggregating cases.

One could have predicted that weak evidentiary standards for cause and negligible limits on liability would create a cottage industry of lawsuit abuse. By the mid-1980s, asbestos manufacturing had virtually ceased, but manufacturing asbestos lawsuits had become big business.

As described by Lester Brickman of the Benjamin Cardozo School of Law, trial lawyers actively recruited plaintiffs who were usually unaware of any injury and had no symptoms and sent them to carefully chosen doctors who could be counted on to diagnose x-ray readings as asbestos-related.[3] One million individuals may have been screened during the past 20 years for asbestos injuries as part of these recruitment efforts. Moreover, plaintiffs' attorneys soon learned which jurisdictions would be most favorable toward asbestos claims and gravitated to those jurisdictions. "[B]y the mid-to-late 1980s, most of the lawsuits being filed were on behalf of claimants with little or no injury or proof of substantial exposure to products sold by the companies they were suing."[4]

The results have been devastating. In all, over 850,000 individuals have filed lawsuits against nearly 8,400 firms.[5] As early as 1982, Johns-Manville, the largest asbestos manufacturer, was forced to declare bankruptcy due to the flood of lawsuits against it. Johns-Manville has been followed by some 70 other firms, many of which were only tangentially related to asbestos.[6] The impact on the economy has been substantial, highlighted by the loss of an estimated 60,000 jobs.[7] Ironically, the judicial chaos has ultimately hurt legitimate claimants as resources have gone to pay lawyers and bogus claims.

The FAIR Act

The legislation being considered by the Senate (S. 852) would largely replace asbestos litigation with an administrative system run by the Department of Labor. Compensation would be paid from a new trust fund on a no-fault basis to claimants who meet specified eligibility criteria, which are

1. S. Rep. 109–097, *The Fairness in Asbestos Injury Resolution Act of 2005*, Committee on the Judiciary, U.S. Senate, 109th Cong., 1st Sess., June 30, 2005, p. 14.
2. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).
3. For instance, one doctor has accounted for over 50,000 asbestos claims over a six-year period. See Roger Parloff, "Diagnosing for Dollars," *CNN Money.com*, June 13, 2005, at *money.cnn.com/magazines/fortune/fortune_archive/2005/06/13/8262537* (February 3, 2006).
4. Lester Brickman, "An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005," *Cardozo Law Review*, Vol. 27, No. 2 (2005), p. 997, at *www.cardozolawreview.com/PastIssues/Brickman.Website.pdf* (February 3, 2006).
5. *Ibid.*, p. 992.
6. Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse, and J. Scott Ashwood, "Asbestos Litigation Costs, Compensation and Alternatives," Rand Institute for Civil Justice *Research Brief*, May 2005.
7. S. Rep. 109–097, p. 12.

divided into nine disease levels, from asbestosis without impairment to terminal cancer. Claimants in the lowest disease level would receive free medical monitoring of their condition, while those with terminal mesothelioma would receive $1.1 million.

The bill sets specific criteria—which vary by disease level—for a claim to be verified, such as an in-person physical exam and diagnosis by a board-certified pathologist. Attorney fees, which have been responsible for so much of the asbestos litigation costs, would be capped at 5 percent of awards.

Firms that have been sued for asbestos injuries, as well as insurers and bankruptcy trusts, would be assessed $140 billion in fees over the life of the program to finance the trust fund. Corporate contributions would be based on a number of factors, including prior defense costs and company revenue. Insurer assessments would be determined by a special commission.

Improvements Needed

Under the administrative system envisioned by S. 852, resolution of claims would be streamlined, reducing the enormous transaction costs that now eat up so much of the available funds. The established criteria would put some limits on who can make claims and under what circumstances. Perhaps most important, the bill reduces the uncertainty surrounding asbestos liability, allowing businesses to plan and invest without fear of a financially catastrophic lawsuit.

However, as currently written, S. 852 is flawed. Despite the criteria that it establishes, it does not ensure that only those individuals who are injured due to wrongful exposure to asbestos are compensated. Among the problems are:

- **Burden of proof of exposure.** Under the current bill, claimants would not qualify for benefits unless they were actually exposed to asbestos. The degree of exposure necessary to justify a claim would vary depending on occupation and other factors. However, Section 121 of the bill allows claimants to meet this requirement merely by filing an affidavit saying that they have been exposed. This opens the program to abuse. Instead, claimants should be required to provide some minimal evidence of asbestos exposure (such as pay stubs or affidavits from third parties).
- **Exceptional claims.** A key part of the bill is the establishment of specific medical criteria (i.e., specific evidence of injury) to be met before compensation is made. However, Section 121(g) would allow claimants who do not meet these criteria to file "exceptional claims," which are submitted to a panel of physicians. This sizeable loophole defeats the purpose of establishing clear standards, thereby undermining the trust fund.
- **Compensation for conditions not related to asbestos.** The bill's nine levels of compensation include payments for types of cancer that have not been clearly shown to be related to asbestos exposure. Compensation from the asbestos trust fund should be available only for injuries caused by asbestos.
- **Automatic payment of claims.** If the Department of Labor does not make a decision on a claim within 180 days, the claim is *automatically* paid per Section 114(c) of the legislation. This is intended to ensure that claims are resolved expeditiously. However, especially in light of the high volume of claims expected initially, the inevitable result would be payment of thousands of unmerited claims. It would be better to presume that a claim is *denied* if no explicit decision is made within the allotted time, followed by administrative and, if necessary, appellate court reviews.
- **Naturally occurring asbestos.** Section 121(g)(10) allows individuals exposed to naturally occurring asbestos to receive compensation if approved under the "exceptional claims" provision. However, the purpose of the bill should be to provide compensation for those who are wrongfully exposed to asbestos by others. There is no justification for using asbestos trust funds for injuries caused by nature itself that have nothing to do with the defendants paying into the fund.
- **Special treatment for specific communities.** The bill provides special treatment for residents

in and near Libby, Montana, the site of a major asbestos-related mine. The bill sets a lower standard of proof for Libby residents and guarantees awards above what other claimants would receive for the same injuries. Such a carve-out based on where claimants live is fundamentally unfair and possibly unconstitutional. Libby residents who have been wrongfully injured by asbestos should be able to pursue their claims under the same rules that apply to others.

Among other problems, the additional costs due to these provisions are likely to strain the financial integrity of the asbestos trust fund. As a result, it is very likely that the fund will not prove to be financially viable. For instance, the Congressional Budget Office was able to give the proposal only a noncommittal assessment, concluding ambiguously that the fund "might or might not have adequate resources to pay all valid claims."[8]

More alarming is a recent study that concluded that the fund would go bankrupt within three years.[9] If that were to happen, under the terms of S. 852, asbestos claims would then go back to the courts, resuming the litigation wars. Alternatively, Congress would be tempted to fund the shortfall with taxpayer dollars or with even higher assessments on defendants. Each of these unattractive options would constitute a failure of this asbestos "solution."

To avoid this result, the reform plan must be reformed. At a minimum, it must ensure—through stricter eligibility and evidentiary standards—that only claimants who have been wrongfully harmed by asbestos exposure are compensated.

Even with such changes, however, the trust fund approach may be problematic. Any trust fund, in effect, transforms asbestos compensation into a federal entitlement. Once established, such entitlement systems tend to grow and expand beyond all projections. Perhaps worse, the transformation of these tort claims into entitlement claims sets a potentially dangerous precedent for other, less exceptional judicial issues.

A better alternative might be to reform the legal system itself, ensuring that reasonable rules of liability are imposed and followed. Several states, including Texas, have already adopted tort reforms.[10] In the House of Representatives, Representative Chris Cannon (R–UT) has offered a bill (H.R.1957) that would implement such reforms on a national basis.

Conclusion

The endless litigation over asbestos injuries is unprecedented in U.S. legal history—spanning decades, driving dozens of companies out of business, and destroying tens of thousands of jobs. It would be inaccurate to say that nobody wins, because many trial lawyers have clearly benefited from the flawed process.

Through countless decisions, the asbestos problem has been badly mishandled, with results that are not only inefficient, but also unjust. The challenge for policymakers is to reform the system in a way that solves today's problems without creating new ones.

Regrettably, the Senate bill as written may end up replacing one failed system with another. Lawmakers can still remedy the problem if they focus on rules that will aid those truly wronged *and nothing more*. If they can do this, asbestos litigation reform could establish a positive precedent rather than another—albeit different—type of failure.

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8. Congressional Budget Office, letter to Senator Arlen Specter, December 19, 2005, at *www.cbo.gov/ftpdocs/69xx/doc6989/12-19-AsbestosAct.pdf* (February 3, 2006).
9. Bates-White, LLC, "Analysis of S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act," September 2005, at *www.bateswhite.com/news/pdf/2005_Bates_FAIR_Act_Report.pdf* (February 3, 2006).
10. See "States Address Asbestos Issues as Congress Struggles," *Insurance Journal*, May 11, 2005, at *www.insurancejournal.com/news/national/2005/05/11/54904.htm* (February 3, 2006).