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Asbestos Litigation: Prospects for Legislative Resolution

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Summary

A large volume of litigation has been occasioned by occupational exposure to asbestos, which may ultimately result in payments of \$200 billion or more and has already bankrupted numerous companies. This litigation “explosion” has led to a number of innovations in legal process, but some of the settlements that seemed most promising were overturned by the Supreme Court, with the Court suggesting that the situation “calls for national legislation.”

Bills in the 108th Congress deal with asbestos in various ways. H.R. 1586 (Cannon), H.R. 1737 (Dooley) and S. 413 (Nickles) would conserve the resources of defendant corporations — many of which have been bankrupted by asbestos cases — so that funds could be applied first to workers who are already sick. This would be done by postponing the cases of those who show early symptoms of asbestos disease but are not yet impaired.

There are also bills — H.R. 1114 (Kirk) and S. 2290 (Hatch) — that would try to resolve the question of asbestos litigation comprehensively. S. 2290 (a somewhat revised substitute for S. 1125) has received the most attention and been reported out by the Senate Judiciary Committee. However, most observers do not see the committee’s passage as a consensus, so that further compromises would be needed for full Senate passage. The House has not acted on any of these asbestos bills.

S. 2290 would spell out uniform criteria for diagnosing and classifying asbestos diseases in 10 categories, each with a specified level of compensation, ranging from \$20,000 to \$1 million. It would establish a fund through which all claims are paid, financed by assessments on defendant companies and their insurers. Each of the largest firms subject to assessment would be responsible for paying up to \$25 million per year for 27 years. The assessments (including those of insurers) could eventually total \$108 billion, with provisions in the measure for perhaps \$30 billion more if needed.

The most-debated points of S. 2290 include the adequacy of the funding scheme, the levels of compensation, medical criteria (especially as regards smoking history), and transition issues.

This report discusses such issues thematically, and will be updated to reflect major legislative actions. A section-by-section analysis of S. 2290 may be found in CRS Report RS21815, *Fairness in Asbestos Injury Resolution Act of 2004*.

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Asbestos Litigation: Prospects for Legislative Resolution

Asbestos has been widely used as an insulation material, friction product (e.g., in brakes and clutches) and textile reinforcement, due to its unique combination of strength, flexibility and resistance to heat and corrosion. Over the years, scientific studies have increasingly implicated the material as a cause of debilitating, fatal lung diseases. Protective standards have been adopted and progressively tightened, but human exposures continue to occur through ongoing use and from legacy buildings and equipment.¹ Moreover, cases of asbestosis, lung cancer and other diseases will be emerging for years to come because they occur after a long latency.

Although most cases of asbestos-related disease have occurred from occupational exposure, few of the affected workers have been able to obtain medical and financial assistance from their employers under state workers compensation law. However, many have successfully sued the manufacturers of asbestos under claims of products liability, to such an extent that many large firms have been forced into bankruptcy. This litigation “explosion” has led to calls for legislation that would expedite the settlement process through administrative alternatives.

This report describes how the asbestos litigation process has evolved, and then discusses some legislative “fixes” that have been tried or proposed. Finally, we discuss more extensively S. 2290, the bill receiving the most attention in the 108th Congress. The discussion is thematic, highlighting the sub-issues remaining most in dispute. For a section-by-section explanation of S. 2290, see CRS Report RS21815, *Fairness in Asbestos Injury Resolution Act of 2004*, by Henry Cohen.

Scope of Litigation

It is estimated that at least 600 thousand people have brought asbestos-related personal injury suits so far, and the number of new claims each year appears to be still increasing. Typically, each plaintiff sues dozens of defendants, so the total volume of litigation is quite substantial. The total amount spent on asbestos litigation

¹ The Environmental Protection Agency issued a regulation in 1986 that would have banned virtually all major uses, but most of the rule was overturned by the Fifth Circuit Court of Appeals (*Corrosion-Proof Fittings*, 947 F.2d 1201). S. 1115 (Murray) has been introduced in the 108th Congress for a ban on asbestos products (with a procedure for EPA to allow exceptions). One of the bills for resolving litigation, S. 2290 (Hatch), would also include a ban on future usage. Current regulatory standards are described in CRS Report RS21042, *Asbestos: Federal Regulation of Uses*, by Edward Rappaport.

(awards and expenses) has been on the order of \$54 billion, most of this expenditure being financed by defendant companies and their insurers. The total ultimate bill may be on the order of \$200 billion.² The amounts awarded in individual cases are difficult to estimate, as most are resolved confidentially by settlements. Among cases that have gone to trial and succeeded,³ the average award has been about \$1.8 million. Negotiated settlements tend to be considerably less, however. Minus the legal expenses of both plaintiffs and defendants, about 43% of total spending has been reaching the claimants as their net recovery.

The resulting liabilities have forced some 60 companies into bankruptcy in the last 20 years, 22 of them since January 1, 2000. Among the most prominent of these firms are Armstrong World Industries, Babcock & Wilcox, Federal Mogul, Johns-Manville, Owens-Corning, U.S. Gypsum and W. R. Grace. Bankruptcy is not a desirable outcome for either the defendant firms or the claimants. Claims can be put on hold for five years or more, and in some cases the trusts established to take care of victims have been able to pay only 5% to 10% of what was expected. A subsidiary question is the extent to which defendants can rely on their insurance companies to cover their liabilities, an issue that is occasioning substantial litigation of its own.⁴

Procedural Improvisation

The unprecedented scale of litigation has induced courts and the parties to develop new structures for resolution of cases. Whereas, at first, defendants vigorously contested such issues as whether a worker was “injured,” whether the cause was asbestos exposure, and which manufacturer’s asbestos was the particular asbestos at fault, by the 1980s new court procedures and decisions were establishing clearer bases for liability. Some judges encouraged consolidation of cases, for example, by selecting a few individual cases to go to trial as representative of the whole. Defendants found that their best opportunity was to negotiate settlements through attorneys representing thousands of claims at a time, with the amounts for each individual to be determined by schedules of factors such as disease type. By the 1990s, the leading law firms representing claimants had standing agreements with the major defendants for settling claims (though that system has since lost much of its viability).

The bankruptcy courts have been a notable forum for resolving cases *en masse*, beginning with the pathbreaking Manville Trust.⁵ In 1988, after six years under court

² Quantitative data cited here are from Stephen Carroll et al., *Asbestos Litigation Costs and Compensation, An Interim Report* (Santa Monica, CA: RAND Institute for Civil Justice, 2002), p. 99. Available at [<http://www.rand.org/publications/DB/DB397>]. (Hereafter cited as *RAND report*.)

³ About two-thirds of plaintiffs going to trial win and receive awards.

⁴ Randy Maniloff, “Asbestos: Insurance Coverage Issues on a Changing Landscape,” *Mealey’s Litigation Report: Insurance*, July 9, 2002.

⁵ Daniel Gross, “Recovery Lessons from an Industrial Phoenix,” *New York Times*, Apr. 29, (continued...)

supervision, Johns-Manville Corp. emerged from bankruptcy 50% owned by a trust charged with compensating current and future asbestos liability claimants. Administrative procedures were developed to streamline claims handling. The trust's operating expenditures are only 5% of benefits paid, and lawyers representing claimants cannot charge more than 25%. Thus, claimants receive 70% of what the trust pays out. Unfortunately, though, the amounts paid are quite low, since the assets of the trust have only been adequate to pay 5% to 10% of full value. The system became a model for other, solvent companies. Congress also codified the process for a bankrupt firm to resolve its liability for all pending *and future* claims via such trusts.⁶ In short, some observers believe that through such innovations "asbestos litigation was transformed in fact — although not in form — into a quasi-administrative regime."⁷

Most recently, some corporations, including Halliburton, Honeywell and the European-based manufacturer ABB, have presented plans by which claims are to be resolved by the bankruptcies of their subsidiaries rather than the parent corporation, which would then be able to carry on freed of asbestos liabilities. This would make use of the 1994 bankruptcy law amendment, but leave the parent corporation solvent and still in control of its operations (unlike the Manville model, which put control of the whole corporation under the trust).⁸

Finally, many had expected eventually to come to a final resolution of most cases by "global" settlements. However, the two prominent asbestos settlements that were fully litigated up to the Supreme Court were overturned there.⁹ The key features of the *Georgine* settlement were (a) definitive criteria for proving exposure and illness, in a simplified and expedited process, (b) standardized compensation for actual illness only, (c) preservation of the right to compensation later if disease (or worsened disease) occurs later, (d) a cap on attorney fees, and (e) a limited right to opt out and rely on one's ordinary right to sue. These settlements were rejected for not meeting the requirements for establishing class actions under Federal Rule of Civil Procedure 23. *Georgine* was found wanting because various subgroups of claimants (and potential claimants) were in widely varying circumstances, so that common elements did not predominate among their cases. Also, adequate representation was not broadly enough assured, especially for those who might become aware of their injury only in the future. These defects were not adequately overcome by the agreement's provision allowing potential plaintiffs to opt out. The *Ortiz* class was established under a different subsection of Rule 23 that did not require meeting such criteria, but the Court said it had not been demonstrated

⁵ (...continued)

2001, Business Section, p. 4.

⁶ Section 111 of the Bankruptcy Reform Act of 1994 (P.L. 103-394).

⁷ *RAND report*, p. 26.

⁸ Susan Warren and Alexei Barrionuevo, "Halliburton to Settle Asbestos Claims," *Wall Street Journal* (Dec. 19, 2002), pp. A3, A6.

⁹ *Amchem Products v. Windsor*, 521 U.S. 591 (1997) [also known as the *Georgine* case] and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999).

convincingly enough that the settlement qualified for this alternate rule subsection (assets of defendants insufficient to meet liabilities).

What was notable about these cases is that members of the Supreme Court expressed discomfort with having to reject settlements with some merit for not meeting the detailed requirements of federal court procedure (which, of course, has its own merits). As stated by Justice Ginsburg in the *Georgine* case, “Rule 23, which must be ... applied with the interests of absent class members in close view, cannot carry the large load ... heaped upon it.” More pointedly, Justice Souter in *Ortiz* commented that “this litigation defies customary judicial administration and calls for national legislation.”

Thus, each of several hoped-for routes toward resolution — bankruptcy court, class actions, or consolidation of individual cases in one court (which is possible for federal court cases) has run into significant impediments in recent years. At the same time, a schism may be emerging between claimants who are critically ill and others who may be less sick (or show abnormal x-rays without apparent illness) but who sue immediately, either because of legal deadlines (“statutes of limitations”) or because they fear that funds may not be available later. Some prominent attorneys representing those with cancer have shown interest in solutions that would postpone suits by those who are not yet impaired, conserving currently available resources.¹⁰

Policy Alternatives

Status Quo

Despite warnings that the asbestos problem is reaching “crisis” proportions, it could be argued that the current legal regime has distinct advantages and should be allowed to proceed as it is, or with minor improvements. The current system is providing substantial assistance to large numbers of victims, most of whom do not have to pay lawyers’ fees unless and until compensation is received. From a public policy perspective, the fact that defendant companies are the ones financing the benefits may be considered broadly beneficial. That is, companies in all industries are being put on notice that allowing harm to occur to employees and the public can be fatal to their own financial well-being.

On the other side of the ledger, the current system is not likely to have adequate resources to fully compensate all claimants. A substantial portion of the resources that are available is used to run the system rather than directly benefit claimants. It is also disorganized, with no oversight to assure that compensation is allocated primarily to those with the most compelling cases.

¹⁰ Greg Hitt, “Asbestos Makers, Litigants: Uneasy Allies,” *Wall Street Journal* (May 28, 2002), p. A4.

Changes in Tort Law

Some observers see asbestos litigation as part and parcel of broader problems with personal injury litigation that justify more general “tort reform,” especially in cases with thousands of plaintiffs. Many specific measures have been suggested, such as caps on punitive damages, limitations on joint and several liability, and more narrowly specifying the court(s) in which each plaintiff can bring his/her case. These are discussed more fully elsewhere.¹¹

A tort innovation peculiar to asbestos is the “pleural registry.” In a number of states, this device enables one to make a tentative filing when one learns of one’s injury (often upon diagnosis of *pleural plaques*),¹² and thus meet the legal deadline even though no (or minor) impairment has yet occurred. Trial of the claim is delayed until serious symptoms occur. This procedure can postpone many cases — many of which will never progress to debilitating disease — and allow immediate resources to be concentrated on those with the most serious immediate problems. Similar provisions are included in the bills now pending in the Congress.

Proving “Physical Impairment”

Several current bills — H.R. 1586 (Cannon), H.R. 1737 (Dooley), and S. 413 (Nickles) — build on the pleural registry concept by requiring that, before they can proceed further with an asbestos suit, plaintiffs must make a *prima facie* case that they have a *physical impairment* and that exposure to asbestos has been a substantial contributing factor. Until such time as impairment can be established, statutes of limitations and other time limits would be held in abeyance. If a non-malignant case is established, claims for cancer must be put aside until that disease becomes evident (a *two disease rule*). If a state court does not apply such principles, the bills would authorize removal of cases to federal court. There are also restrictions on venue (i.e., which courts have jurisdiction) and on consolidation of cases.¹³

The bills differ in particulars, but each specifies exactly how physical impairment and causation are to be established. Factors to be considered include employment and smoking history, x-ray evidence of abnormalities such as pleural thickening or opacities, pathological evidence of lung scarring, and impaired breathing shown by measures such as forced vital capacity. The bills provide a presumption that the presence of cancer, or particular kinds of cancer, entails physical impairment. (Whether the disease was caused by asbestos may still have to be

¹¹ See CRS Issue Brief IB97056, *Products Liability: A Legal Overview*, by Henry Cohen.

¹² Pleural plaques resemble calluses. They are patches of tough sinewy tissue which form on the inside of the chest wall and show up in chest x-rays. They are generally thought of as an indicator of asbestos exposure rather than a disease.

¹³ H.R. 1586 also has provisions to: limit non-economic damages, prohibit punitive damages, allocate responsibility according to proportional liability (including liability of the claimant), require disclosure of other sources of compensation, and require proof of specific types of negligence in the case of sellers of asbestos products other than manufacturers.

proven.) The bills also specify qualifications for those professionals who render diagnoses.

Administrative System

Two bills in the 108th Congress (H.R. 1114 and S. 2290) would in effect establish administrative systems to settle claims along the lines of the *Georgine* settlement. Their intent is to circumvent the seemingly insurmountable requirements of the Federal Rules of Civil Procedure — while assuring a reasonable measure of justice for all parties.

Like the other bills just discussed, H.R. 1114 (Kirk) would require all claimants to first establish that they have an eligible asbestos-related medical condition; failing that, their right to future action would be preserved until such time as impairment occurs. Unlike the other bills, the determination of impairment and causation would be made administratively rather than judicially, through medical review panels appointed by a new agency in the Justice Department, the Office of Asbestos Compensation (OAC).

The OAC would perform a number of functions beyond determining medical eligibility, most importantly taking a direct part in litigation and settlement. First (upon issuing a claimant a certificate of medical eligibility), the OAC, acting through a Trustee, would receive offers of settlement from both sides. The Trustee would also make offers of its own to claimants. If a claimant accepts the Trustee's offer, the Trustee would assume the claim and pursue it against the defendants. Claimants could accept or reject any offers they wish, and for any cases not settled, either pursue a regular lawsuit or an administrative proceeding under the auspices of the OAC. A federal fund would be established for the purpose of facilitating the Trustee's assumption of claims, with the intention of the fund breaking even financially in the long run.

S. 2290 — Points of Debate

S. 2290 (Hatch), the Fairness in Asbestos Injury Resolution Act, will be discussed at further length here, as it has been the focus of considerable attention in the Senate. It is a somewhat revised substitute for S. 1125, a bill that emerged out of negotiations encouraged by the Senate Judiciary Committee among groups representing all parties. Most observers do not expect the House to act on the asbestos issue until the Senate passes a bill. (For further explanation of the bill's detailed provisions, see CRS Report RS21815, *Fairness in Asbestos Injury Resolution Act of 2003*, by Henry Cohen.)

S. 2290 would simplify the resolution of cases, not only, like the other bills, by specifying medical eligibility criteria, but also by establishing a schedule of benefits, a specific amount payable for each diagnostic category ranging from \$20 thousand to \$1 million (the latter for mesothelioma and some lung cancer cases). It would establish a fund through which all claims are paid, financed by assessments on defendant companies and their insurers. Each of the largest firms subject to

assessment would be responsible for paying up to \$25 million per year for 23 years. The assessments (including those of insurers) could total as much as \$108 billion. In addition, Subsections 204(k) to (m) would authorize up to \$10 billion more, if needed, via a contingent call to a “guaranteed payment account.” The federal government is expressly excluded from any payment obligation.

Among the asbestos bills in the 108th Congress, S. 1125 has received the most attention. The Senate Judiciary Committee, along with representatives of all of the involved interests, put considerable effort into finding a consensus. While consensus was not achieved, significant concessions were made on all sides and S. 1125 was reported by a vote of 10-9 on July 30, 2003. S. 2290 is a substitute bill reflecting some further negotiations, including mediation by Edward Becker, former chief judge of the Third Circuit Court of Appeals.¹⁴ The most contentious points still remaining primarily fall under the headings of funding adequacy, acceptability of the compensation schedule, basis for the diagnostic categories, and transitional issues. In what follows, this report describes how the bill would handle such matters and what objections have been raised. All of these points, among others, are addressed in the report of the committee.¹⁵

Funding Adequacy

A number of unknowns mean the bill’s stated funding capacity of \$114 billion, a substantial sum by any measure, may yet not suffice to pay all scheduled benefits. The Congressional Budget Office has estimated ultimate total costs of \$123 billion.¹⁶ One of the central points of debate in committee was whether to establish an overall funding figure first or establish the benefit schedule first, the question being framed in terms of who deserved “certainty.” On one side, it was argued that workers deserved certainty of payment because they would be giving up their right to sue and because previous bankruptcy resolution trusts had been inadequate. On the other side, business advocates argued that certainty for them (regarding the extent of their liability) was essential, it being the only reason they would consider giving up their right to defend themselves against what they see as tenuous claims in many cases.

The bill as reported features a fixed schedule of benefits, while the adequacy of funding is addressed through a number of various contingency measures (e.g., the guaranteed payment account). The revenue side of the equation thus becomes a bit complicated. It should be recognized that the “headline” figure of \$114 billion is a goal or estimate rather than a fixed mandate. Actual assessments on defendant companies will be determined by their assignment into tiers and sub-tiers, these defined by the companies’ historical asbestos payments and recent (2002) sales

¹⁴ See statement by Sen. Specter, *Congressional Record*, daily edition, vol 150 (Mar. 23, 2004), pp. S2987-S2988.

¹⁵ U.S. Congress, Senate Committee on the Judiciary, *The Fairness in Asbestos Injury Resolution Act of 2003*, 108th Cong. 1st sess., S.Rept. 108-118 (Washington: GPO, 2003), 227 p. (hereafter cited as “Committee report”).

¹⁶ Letters from CBO Director Douglas Holtz-Eakin to Sen. Hatch, Mar. 24, and Sen. Nickles, Apr. 8, 2004.

revenue. Annual assessments (for 23 years) will range from \$25 million (a company with historical asbestos payments greater than \$75 million and falling within the top quintile of these companies by revenue) to the smallest assessment, \$100 thousand (a company with asbestos payments of \$1 - 5 million and revenues in the smallest third of these companies). This scheme is intended to raise \$57.5 billion from defendant companies over 23 years. The bill also requires \$46 billion from the insurance industry, but leaves the allocation among companies to a special commission (Subtitle II B).¹⁷

The possibility of temporary shortfalls in the early years will be dealt with below under “Transition Issues.”

Compensation Adequacy

The diagnostic categories and their compensable amounts are shown in **Table 1**. At least three types of consideration have guided the development of these numbers: (a) the pattern of awards given by courts or agreed in settlements, (b) the severity of symptoms and prognosis for each category, and (c) the likelihood that asbestos is the principal cause of disease. For example, non-lung cancers (Level VI) are paid less than one-sixth of what is paid for mesothelioma (Level X). This is both because mesothelioma is one of the most lethal of cancers (usually resulting in death within 18 months) and because mesothelioma is almost always caused by asbestos.¹⁸ Values within Levels VII to IX are to be determined by the fund administrator within the ranges shown, by devising a “matrix” that takes into account the amount of asbestos exposure, age at diagnosis (higher awards for younger claimants), and smoking history (sect. 131(b)(3)). (Diagnosis categories are discussed in more detail in the next section.)

Some of those who voted against S. 1125 in committee advocated that award values should be higher, promoting instead a schedule known as the Leahy/Kennedy claims value amendment. That schedule would have increased benefits for the lower disease levels the most *in proportional terms* (e.g., nearly doubling the benefit for Level II and raising by about 50% the Level III benefit). Many of the higher levels would be raised by \$100,000 or so; some raises similar to these were incorporated in S. 2290. The biggest differences in dollar terms were the benefits for smokers in the cancer levels. (See Committee report, pp. 202-205.) But supporters of the bill as reported emphasize that each dollar of benefits under this scheme is worth more than under the court-operated tort system. Under the tort system about 40% of total spending is reaching plaintiffs, whereas the administrative system is intended to be more efficient than that.

¹⁷ Section 404 adjusts the obligations of insurers and reinsurers to each other and to defendant companies.

¹⁸ For general information about asbestos-related diseases, see [<http://www.nlm.nih.gov/medlineplus/asbestos.html>] and [http://www.health.nih.gov/result.asp?disease_id=54].

Table 1. Asbestos Disease Categories and Compensable Amounts

Level	Disease or Condition	Award Amount
I	Asbestosis — normal lung function	Medical monitoring only
II	Mixed disease (asbestosis + other) with impairment	\$20,000
III	Asbestosis — TLC ^a 60-80%	\$85,000
IV	Severe asbestosis — TLC 50-60%	\$400,000
V	Disabling asbestosis — TLC < 50%	\$850,000
VI	“Other” cancers (non-lung)	\$150,000
VII A	Lung cancer — smokers	\$25,000 - \$75,000
VII B	— former smokers	\$75,000 - \$225,000
VII C	— non-smokers	\$225,000 - \$600,000
VIII A	Lung cancer with pleural disease — smokers	\$150,000 - \$250,000
VIII B	— former smokers	\$400,000 - \$600,000
VIII C	— non-smokers	\$600,000 - \$1,000,000
IX A	Lung cancer with asbestosis — smokers	\$450,000 - \$550,000
IX B	— former smokers	\$650,000 - \$950,000
IX C	— non-smokers	\$800,000 - \$1,000,000
X	Mesothelioma	\$1,000,000

Source: S. 2290, sections 121(d), 131.

a. TLC means Total Lung Capacity. For full diagnostic descriptions, see bill, subsection 121(d).

Medical Criteria

Eligibility for benefits would require certain kinds of evidence, including documentation of occupational exposure to asbestos (preceding a minimum 10-year latency period), smoking history, physical examination, pulmonary function test, x-rays, and pathology report. With this evidence, administrators are to apply the criteria in Subsection 121(d) and determine the highest of the 10 disease levels to which each claimant belongs (if any). The goal is a non-adversarial system that is prompt, efficient, and as accurate as possible in a field where there are substantial scientific uncertainties. While in some respects the benefit of the doubt is given to claimants, on the other hand the system is meant to eliminate screening “mills” that

produce thousands of claims upon evidence that is fragmentary at best, if not fraudulent.¹⁹

Disputed Categories. Several of the disease categories have drawn criticism on the ground that they are not credibly linked to asbestos exposure. Among these are as follows:

- Simple asbestosis (Level I). It is agreed on all sides that claimants at Level I are not impaired (“ill”), hence do not receive cash compensation, only the right to monitoring. If illness on other levels is subsequently found, compensation can then be claimed. Some dispute the rationale for monitoring, arguing that being at Level I does not imply any higher probability of subsequent illness than for other workers who are not at Level I. On the other side it is argued that, as done with many toxic substances, all exposed workers should get screening regardless of whether they show symptoms.²⁰
- “Other cancers” (Level VI). There is dispute here on whether asbestos causes non-lung cancers (such as colorectal). Proponents of the provision note that the existing bankruptcy trusts compensate for non-lung cancers, but opponents claim that this is due to quirks of bankruptcy bargaining dynamics. The bill would award \$150,000 for such cases, but also mandate a study by the Institute of Medicine to be completed within two years.²¹
- Lung cancer without asbestosis (Levels VII and VIII). Some claim that when asbestos causes lung cancer, there is almost always evidence of clinical asbestosis.

The Tobacco Question. Beyond the foregoing disputes, however, the most contentious issue of all is the relevance of smoking history. The committee report states that “The Fund is not intended to be a compensation system for smokers, which would otherwise overwhelm the Fund leaving no money for asbestos victims.” Thus the compensation scheme discounts the awards to smokers in two ways. First, the three lung cancer levels (VII through IX) are distinguished by the degree of pathology or x-ray evidence linking the cancer to asbestos. Implicitly, Levels VII and VIII attribute a higher probability to other causes (e.g., tobacco or radon) where asbestos cannot be specifically linked. Second, levels are divided explicitly into sub-levels for smokers, former smokers²² and non-smokers, and the compensation matrix to be developed by the Administrator would differentiate awards within each sub-level according to smoking history.

¹⁹ On allegations of fraudulent testing, see Sen. Kyl’s statement, Committee report pp. 95-98.

²⁰ Compare Committee report pp. 98-99 and pp. 212-213.

²¹ Presumably the results of the study would not affect cases already decided.

²² Those who quit at least 12 years before diagnosis.

The resulting scheme has been criticized from both sides. On the one hand, as noted, some claim that asbestos is almost never the cause of cancer without also causing clinical asbestosis, so there should be no Levels VII or VIII. On the other hand, plaintiff advocates note that a high percentage of the blue collar workers most exposed to asbestos were indeed smokers, so that the widely publicized figure of up to \$1 million for lung cancer would be received by very few.

A key point of disagreement is whether there is *synergy* between tobacco and asbestos in causing cancer. Many believe that there is such a synergistic effect (i.e., when one is exposed to both asbestos and tobacco), the risk of lung cancer is enhanced greatly beyond the sum of the two factors independently. If this is so, then it could be argued that the awards to smokers should not be reduced very much vis-a-vis non-smokers. However, differing testimony on the matter was received by the committee and consensus not reached.²³

Diagnostic Quality Control. In addition to the foregoing disagreements about defining eligible medical categories, there is the issue of types of evidence to be deemed credible. In the existing tort law system, plaintiffs present evidence favorable to their case and defendants have an opportunity to challenge it. Since S. 2290 would replace tort law with a non-adversarial, administrative system, it explicitly defines what kinds of evidence are necessary and acceptable, and requires auditing of the results.

Subsection 121(b) sets general rules for expertise of those developing evidence. Thus, (a) x-ray interpretations must be done by “B-readers,” a certification overseen by the National Institute for Occupational Safety and Health; (b) pulmonary function testing for asbestos (Levels III to V) is to be done in accordance with the standards of the American Thoracic Society; and (c) diagnosis of malignancies (Levels VI through X) must be done by board-certified pathologists.²⁴

Section 115 provides for reviews and audits, including the empaneling of independent B-readers to spot check accuracy of submitted readings. The Administrator is also instructed to develop methods for evaluating medical evidence. Consequences may include disqualification of physicians or facilities if their evidence is found “not consistent with prevailing medical practices or the applicable requirements of this Act.” Finally, Section 401 provides criminal penalties for fraud or false statements.

²³ Both sides were supported by expert witnesses. The committee majority in favor of the bill relied particularly on testimony of Dr. James Crapo of the University of Colorado. The dissenting minority claimed a “scientific consensus” for synergy as expressed by institutions such as the National Toxicology Program (Department of Health and Human Services) and the International Agency for Research on Cancer. Compare Committee report pp. 64-66 with pp. 200-202.

²⁴ According to the bill text, diagnoses of non-malignant conditions (Levels I through V) can be rendered by any physician. However, the Committee report (at p. 39) expresses the intent that “the documentation would be provided by an appropriately board-certified physician in occupational medicine or pulmonary medicine,” while recognizing that access to same “may not be feasible for all claimants due to geographical constraints.”

Transition Issues

Start-Up. S. 2290 would transfer all cases pending on the date of enactment, and all future cases, to the new system. By some estimates, as many as 300 thousand cases would be adopted at the outset, so that getting the system established and making what are supposed to be prompt decisions may be an administrative challenge. Concern has been expressed about claimants who may have their pending cases dismissed but must wait for the new system to begin. S. 1125 as passed by the committee included an amendment by Senator Feinstein that would delay termination of tort proceedings until the administrative system was up and running, but this was not included in S. 2290.

Status of Current Settlements. The bill (Subsection 403(d)) would in effect dismiss all claims that have not yet been finally adjudicated as of the date of enactment. Some questions have been raised about the consequences. First, the bill would terminate “inventory” or “matrix” agreements, which are open-ended, standing arrangements that pay specified amounts to claimants who qualify currently or in the future. One’s view on whether these should be terminated will probably correspond with one’s overall evaluation of the fairness of the proposed system vis-a-vis the current tort system. Furthermore, it is argued that some companies recently agreeing to settlements will pay much less under the bill’s terms, and may even be stalling on finalization of the settlements because of that prospect.²⁵ Again, one’s view of this will depend on one’s view of the overall scheme. As argued by the majority for passage, “The purported unfairness of preempting non-final settlement agreements ... [etc.] ... rests on the faulty premise that the existing system is somehow fair.”²⁶

Cash Flow Timing. As noted, a large number of cases may be expected at the outset. Beyond the administrative challenge, questions have been raised about whether the initial flow of funds will be adequate. Testimony was received indicating that it could take eight years to collect the funds that are needed for the initial claims (Committee report, p. 208-209). But the majority for passage pointed to several provisions intended to bolster initial funding: collection within six months of \$4 billion or more from liquidation of existing bankruptcy trusts, commencement of preliminary collections within six months (which may be before any cases are decided and payments made), and expedited judicial review, during which assessments would not be stayed. The fund would also have borrowing authority. (Section 221(b))

Three provisions of the bill specifically deal with the possibility of a fiscal “crunch.” First, there is a lockbox-type mechanism (Section 221(c)), whereby the administrator would establish separate accounts for each of the most serious diagnoses (Levels IV, V, IX and X) and reserve needed funds to them first. Implicitly, claimants in other levels would not be paid if sufficient funds are not available for the four protected levels. Second, as an “early warning” system, the

²⁵ Susan Warren, “Halliburton to Request Extension on Stay for Asbestos Obligations,” *Wall Street Journal* (July 21, 2003), p. A3; and “Halliburton Deal on Asbestos Suits could be at Risk,” *Wall Street Journal* (Aug. 13, 2003), p. C13.

²⁶ Compare Committee report pp. 69-71 with pp. 206-208.

Administrator is to include with each annual report a five year financial projection. If any shortfall is foreseen, he is to make recommendations for correction. Finally, if the Fund ever (after the first seven years) actually reaches a point of negative net worth, then the whole program would terminate 180 days after such determination is made. In that case, asbestos claims would revert to the tort liability system. However, they could be pursued only in federal court, not the state courts