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S. 852: The Fairness in Asbestos Injury Resolution Act of 2005

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Summary

This report provides an overview of S. 852, the Fairness in Asbestos Injury Resolution (FAIR) Act of 2005. The bill would largely remove asbestos claims from the courts in favor of the administrative process set out in the bill. The bill would establish the Office of Asbestos Disease Compensation to award damages to asbestos claimants on a no-fault basis from the Asbestos Injury Claims Resolution Fund. Companies that have previously been sued for asbestos-related injuries — and insurers of such companies — would be required to make contributions totaling roughly \$140 billion to this Fund.

Claims of asbestos-related injury¹ have flooded the courts since the 1970s, but litigation has proven to be an inadequate means to resolving all the claims. The Supreme Court has twice struck down attempted global asbestos settlements,² in both instances inviting Congress to craft a legislative solution.³ In response, various bills have been introduced in past Congresses that would have removed asbestos claims from the tort system in favor of an administrative claims resolution process,⁴ although none has passed. On April 19, 2005, Senator Arlen Specter introduced S. 852, a bill building on earlier efforts.

¹ Asbestos exposure can cause a variety of serious health conditions, from asbestosis (build-up of scar-like tissue in the lungs, inhibiting breathing) to mesothelioma (cancer of the membrane surrounding the lungs).

² *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). In both of these cases, the Court held that the settlements did not satisfy Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal courts. For background information on the history of asbestos litigation, see CRS Report RL32286, *Asbestos Litigation: Prospects for Legislative Resolution*, by Edward Rappaport.

³ See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. at 628-629.

⁴ See, e.g., S. 2290 (108th Cong.). For a summary of that bill, see CRS Report RS21815, *Fairness in Asbestos Injury Resolution Act of 2004 (S. 2290, 108th Congress)*, by Henry Cohen.

The Claims Process

The bill would establish within the Department of Labor the Office of Asbestos Disease Compensation, which would award damages to claimants on a no-fault basis according to their respective levels of injury and asbestos exposure.⁵ The Office would be headed by an Administrator, who would be appointed by the President — with the advice and consent of the Senate — to a five-year term and report directly to the Assistant Secretary of Labor for the Employment Standards Administration.⁶ The Office would pay awards from the privately funded Asbestos Injury Claims Resolution Fund⁷ (“the Fund”), discussed in greater detail below. New asbestos claims — and most pending ones — could no longer be pursued in federal or state court.⁸

Upon enactment of S. 852, all pending asbestos claims (other than some individual actions at the evidentiary stage and actions with final verdicts, judgments, or orders) would be stayed. If, after nine months, the administrative process outlined in the bill is not up and running so that it can review and pay “exigent health claims” — i.e., claims by those suffering from mesothelioma or having a life expectancy of less than one year — at a reasonable rate, then those claims could be maintained in the same courts in which the claims were pending when the Act was passed.⁹ The comparable time period for all other asbestos claims (with the exception of the least serious claims) would be two years.¹⁰ Claimants who decide to return to court in these situations would have the option to remain in court even if the Fund were to become operational later.¹¹

Any individual who suffers from an asbestos-related disease or condition meeting the medical criteria listed in the bill (or, in the case of death or incompetence, that person’s personal representative) could bring a claim under the administrative process outlined in the bill. A claim would have to be filed no later than five years after the claimant receives a medical diagnosis of an eligible disease or condition, or discovers facts that would lead a reasonable person to seek a diagnosis.¹² For claimants who have asbestos claims pending in court, the statute of limitations would be five years from enactment of the bill.¹³

⁵ S. 852, § 101.

⁶ *Id.*

⁷ *Id.* at § 221.

⁸ *Id.* at § 403(e).

⁹ *Id.* at § 106(f)(2)(B). The bill would also outline a process under which the parties to an exigent health claim suit could execute a settlement before moving the claim to the administrative process. *Id.* at § 106(f)(2)(A).

¹⁰ *Id.* at § 106(f)(3)(A).

¹¹ *Id.* at § 106(f)(3)(E)(ii).

¹² *Id.* at § 113(b). The statute of limitations would not apply to “the progression of nonmalignant diseases once the initial claim has been filed.” *Id.* at § 113(b)(2).

¹³ *Id.* at § 113(b)(3).

The Administrator would establish a claimant assistance program to, among other things, provide to claimants information and legal assistance.¹⁴ Attorneys representing claimants under the draft bill could charge their clients no more than five percent of the final award for filing the initial claim, or twenty percent for claims under “administrative appellate review.”¹⁵

Awards. In order to receive compensation, a claimant would have to show, by a preponderance of the evidence, that the claimant suffers from an eligible disease or condition.¹⁶ In addition, claimants would be required to demonstrate a minimum exposure to asbestos.¹⁷ Claimants would be compensated according to the tiered compensation scheme outlined in the bill. This scheme sets awards for nine levels of asbestos-related injury, with awards ranging from medical monitoring for claimants in Level I (asbestosis-related non-malignant disease and five years occupational exposure to asbestos) to \$1.1 million for claimants in Level IX (mesothelioma).¹⁸ The bill would also allow claimants suffering from asbestos-related injuries that cannot fit into one of the nine levels to seek compensation for their “exceptional medical claims.”¹⁹

One of the more controversial aspects of the effort to reach a legislative solution to the asbestos problem has been the question of smoking. Levels VII and VIII of the tiered compensation scheme both deal with lung cancer, and some have expressed concern that smoking may have contributed to many of these claimants’ conditions.²⁰ As a result, the awards in Levels VII and VIII are pegged to each claimant’s smoking history, in that non-smokers would get higher awards than ex-smokers, who would get higher awards than smokers.²¹

¹⁴ *Id.* at § 104. In addition, the Administrator would be required to establish a program for the medical screening and education of those with high risks of asbestos-related injuries. *Id.* at § 225.

¹⁵ *Id.* at § 104(e)(1).

¹⁶ *Id.* at § 111. A claimant suffers from an eligible disease and condition where the claimant can satisfy the medical criteria in the bill. *Id.* at § 3(7).

¹⁷ *Id.* at § 121(c).

¹⁸ *Id.* at § 131(b)(1). Beginning in January, 2007, the award amounts would be adjusted annually to account for cost of living increases. *Id.* at § 131(b)(6).

¹⁹ *Id.* at § 121(f).

²⁰ Under S. 852, all claims of lung cancer would have to be supported by additional physical indicia of asbestos exposure (e.g., pleural plaques, asbestosis). Previous versions of this legislation, however, had one level of compensation reserved for claims of lung cancer, without any other physical indication that asbestos caused the lung cancer. Some have strongly objected to the inclusion of these claims, in that isolating the cause of the lung cancer (i.e., smoking vs. asbestos) can be very difficult (*See, e.g.*, T.R. Goldman, *Firefight: The Art of the Asbestos Deal*, Legal Times, April 19, 2005). Consequently, no such level is included in S. 852.

²¹ According to the bill, a “non-smoker” is someone who has never smoked or has smoked fewer than 100 cigarettes (or the equivalent of other tobacco products) in his or her lifetime, while an “ex-smoker” is someone who has not smoked in the twelve years preceding diagnosis of lung cancer. S. 852, § 131(b)(2).

The Administrator would be required to provide to the claimant a proposed decision within ninety days of the filing of the claim. If unsatisfied with the proposed decision, the claimant would be entitled to seek review by a “representative of the Administrator,” so long as the request is made within ninety days of the issuance of the proposed decision.²² After a review, or if no review is requested within ninety days, the Administrator would issue a final decision.²³ A claimant would then have ninety days to seek judicial review of the final decision in the U.S. Court of Appeals for the circuit in which the claimant resides.²⁴

Under the bill, a claimant would receive his or her award in structured payments over a three-to-four year period.²⁵ The amount of the award would have to be reduced by the amount of collateral source compensation.²⁶ “Collateral source compensation,” however would include only compensation paid by defendants, insurers of defendants, and compensation trusts pursuant to judgments and settlements;²⁷ it apparently would not include payments from disability insurance, health insurance, medicare/medicaid, etc.²⁸

Another sticking point in the debate over previous asbestos bills has been the effect any legislative resolution would have on so-called “mixed dust” (i.e., silica and asbestos) claims. Some have expressed concern that, if these claims are not included in the legislation (and therefore removed from the courts), asbestos claimants could avoid the administrative process by re-filing their claims in court as mixed dust claims. S. 852 would remove silica claims from the courts to the bill’s administrative process unless those bringing such claims establish by a preponderance of the evidence that exposure to silica caused their impairments, and that asbestos did not significantly contribute to their impairments. In addition, silica claimants would be required to submit specific supporting evidence (e.g., x-rays, history of asbestos exposure, etc.).²⁹

The Asbestos Injury Claims Resolution Fund

The Fund would be paid for by contributions from “defendant participants” and “insurer participants.” Though these terms are not defined, they appear to refer to companies that have been sued for asbestos-related injuries and the insurers of those companies, respectively. Defendant participants would be required to contribute, in the aggregate, no more than \$90 billion,³⁰ while insurer participants would be required to

²² *Id.* at § 114(d)(1)(A).

²³ *Id.* at § 114(e).

²⁴ *Id.* at § 302.

²⁵ *Id.* at § 133.

²⁶ *Id.* at § 134.

²⁷ *Id.* at § (3)(6).

²⁸ The bill also explicitly excludes from the definition of “collateral source compensation” those benefits received pursuant to workers’ and veterans’ compensation programs. *Id.* at § 134(b).

²⁹ *Id.* at § 403(b).

³⁰ *Id.* at § 202(a)(2).

contribute no more than \$46.025 billion.³¹ The Administrator would be authorized to borrow to enhance the Fund's liquidity³² and to sue any participant for failure to pay any obligation imposed under the bill.³³

Under the bill, if the Administrator determines that the Fund does not have sufficient resources, then the Fund would sunset³⁴ and claimants with unresolved claims could return to federal or state court.³⁵ From the date of termination onward, any asbestos or class action trust established to distribute funds pursuant to a final judgment or settlement would be required to adopt the bill's medical criteria.³⁶

Defendant Participants. Defendant participants would be grouped into tiers and subtiers according to prior asbestos expenditures, except that one tier would be reserved for organizations that have filed for bankruptcy in the year preceding enactment of the bill. These tiers and subtiers would determine the exact amount of each defendant participant's required annual contribution to the Fund, ranging from \$27.5 million down to \$100,000.³⁷ Defendant participants would be able to petition the Administrator for adjustments of their obligations in cases of severe financial hardship or "demonstrated inequity."³⁸ In addition, persons or businesses classified as "small business concerns" under section 3 of the Small Business Act³⁹ would be exempt from these payment obligations.⁴⁰

The aggregate annual payments to the Fund by defendant participants would have to be no less than \$3 billion for the first thirty years of the Fund.⁴¹ The bill would provide for ten-percent reductions in this minimum amount following the tenth, fifteenth, twentieth, and twenty-fifth years after enactment, unless the Administrator finds that a reduction could endanger the Fund's ability to satisfy future obligations.⁴² Further, beginning ten years after enactment, the Administrator would be empowered to suspend

³¹ *Id.* at § 212(a)(2)(A).

³² *Id.* at § 221(b).

³³ *Id.* at § 223.

³⁴ *Id.* at § 405(f).

³⁵ *Id.* at § 405(g).

³⁶ *Id.* at § 405(f)(7).

³⁷ *Id.* at §§ 202, 203.

³⁸ *Id.* at § 204(d)(1).

³⁹ 15 U.S.C. 632.

⁴⁰ S. 852, § 204(b).

⁴¹ *Id.* at § 204(h)(1). The bill would also establish a guaranteed payment account that could be used for years in which the aggregate payments of defendant participants fall below the minimum \$3 billion. *Id.* at § 204(k).

⁴² *Id.* at § 205(a).

all or part of the defendant participants' payments in a given year in which the Fund contains sufficient assets to satisfy that year's obligations.⁴³

Insurer Participants. S. 852 would establish the Asbestos Insurers Commission — composed of five members appointed by the President with the advice and consent of the Senate — charged with instituting a methodology for determining the amount to be contributed to the Fund by each insurer participant.⁴⁴ Insurer participants would be able to appeal such determinations to the D.C. Circuit.⁴⁵ The aggregate annual payments to the Fund by insurer participants would be \$2.7 billion for the first two years, \$5.075 billion for years three through five, \$1.147 billion for years six through twenty-seven, and \$166 million for year twenty-eight.⁴⁶

Prohibition on Asbestos-Containing Products

The bill would require the Administrator to promulgate regulations prohibiting the manufacture, processing, or distribution in commerce of products containing asbestos.⁴⁷ The Administrator would be empowered to grant exemptions where doing so would not unreasonably risk injury to the public health or the environment and those seeking the exemptions have made good faith, unsuccessful efforts to find minerals to substitute for asbestos in their products.⁴⁸ The bill would specifically exempt from the prohibition two asbestos-containing products: (1) asbestos diaphragms used in the manufacture of chlor-alkali and its derivatives; and (2) roofing cements, coatings, and mastics containing asbestos that is totally encapsulated by asphalt. The Administrator of the Environmental Protection Agency (EPA), however, would be required to review and possibly revoke this second exemption within eighteen months of enactment of the bill.⁴⁹

The Administrator of the EPA would be required to grant exemptions to the Defense Department and the National Aeronautics and Space Administration so long as the heads of those agencies certify to Congress that, with respect to a particular asbestos containing product, use of asbestos is vital to the agency's "critical functions," no reasonable alternatives exist, and use of the product will not pose an unreasonable risk to health or the environment.⁵⁰

⁴³ *Id.* at § 205(b).

⁴⁴ *Id.* at §§ 211, 212. Insurer participants would be able to petition the Commission for adjustments due to financial hardships. *Id.* at § 212(a)(3)(E).

⁴⁵ *Id.* at § 303.

⁴⁶ *Id.* at § 212(a)(2)(C).

⁴⁷ *Id.* at § 501.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*