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Fairness in Asbestos Injury Resolution Act of 2004 (S. 2290, 108th Congress)

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Summary

This report provides an overview of S. 2290, 108th Congress, the Fairness in Asbestos Injury Resolution Act of 2004 (or FAIR Act of 2004), as introduced by Senator Hatch on April 7, 2004 and placed on the Senate legislative calendar. S. 2290 is a revised version of S. 1125, 108th Congress, as reported by the Senate Committee on the Judiciary (S.Rept. 108-188).[1] S. 2290 would create the Office of Asbestos Disease Compensation, within the Department of Labor, to award damages to asbestos claimants on a no-fault basis. Damages would be paid by the Asbestos Injury Claims Resolution Fund, which would be funded by companies that have previously been sued for asbestos-related injuries, and by insurers of such companies. Asbestos claims could no longer be filed or pursued under state law, except for the enforcement of judgments no longer subject to any appeal or judicial review before the date of enactment of the bill.

For background information on the history of asbestos litigation and on other proposals to address the situation, see CRS Report RL32286, *Asbestos Litigation: Prospects for Legislative Resolution*, by Edward Rappaport.

S. 2290, 108th Congress, grows out of a Supreme Court decision that rejected the *Amchem* (also known as the "*Georgine*") asbestos settlement on the ground that it failed to satisfy Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal courts.[2] Justice Ginsburg, in her opinion for the Court, wrote:

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.[3]

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[1] S. 1125 is summarized in CRS Report RS21540, *Fairness in Asbestos Injury Resolution Act of 2003 (S. 1125, 108th Congress)*.

[2] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[3] *Id*. at 628-629. In *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999), Justice Souter wrote for the (continued...)

S. 2290 would "create a privately funded, publicly administered fund . . . that will provide compensation for legitimate present and future claimants of asbestos exposure" (§ 2). The fund would be called the "Asbestos Injury Claims Resolution Fund" (§ 221), and the bill would create, within the Department of Labor, the Office of Asbestos Disease Compensation to administer the fund (§ 101). The Office would be headed by an Administrator, appointed by the President with the advice and consent of the Senate. The Administrator would serve a five-year term and report directly to the Assistant Secretary of Labor for the Employment Standards Administration (§ 101(b)).

Asbestos claims could no longer be filed or pursued under state law, except for the enforcement of judgments no longer subject to any appeal or judicial review before the date of enactment of the bill (§ 403(d)). If the Fund were to sunset, however, suits could again be filed or pursued, but only in federal court and under "Federal common law" (see below).

Payment of Asbestos Injury Claims

"Any individual [or, if he is deceased, his personal representative] who has suffered from a[n eligible] disease or condition . . . may file a claim with the Office for an award with respect to such injury" (§ 113(a)). The claimant would have to "prove, by a preponderance of the evidence, that he suffers from an eligible disease or condition" (§ 111(2)). He would not have to prove that his injury "resulted from the negligence or other fault of any person" (§ 112).

The statute of limitations would be four years from the date the claimant first "received a medical diagnosis of an eligible disease or condition," or "discovered facts that would have led a reasonable person to obtain a medical diagnosis with respect to an eligible disease or condition" (§ 113(b)(1)). If, however, a claimant had filed a timely claim that was pending in federal or state court on the date of enactment of the bill, such claim would have to be dismissed, and the statute of limitations to file a claim under the bill would be four years from the date of enactment of the bill (§ 113(b)(2)).

"Not later than 90 days after the filing of a claim, the Administrator shall provide to the claimant (and the claimant's representative) a proposed decision accepting or rejecting the claim in whole or in part and specifying the amount of the proposed award, if any" (§ 114(b)). Any claimant not satisfied with the proposed decision of the Administrator would be entitled, on written request made within 90 days, to a hearing or to a review of the written record, by a representative of the Administrator" (§ 114(c)). After a hearing or review, or if no hearing or review is requested within 90 days, the Administrator would

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[3] (...continued)
Court: "Like *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation." In *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 166 (2003), the Court repeated that the "elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation," but held that courts may not "reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis."

issue a final decision (§ 114(d)). A claimant would then have 90 days to petition for judicial review of the final decision (§ 302(a)). Review would be by the U.S. Court of Appeals for the circuit in which the claimant resides at the time of the issuance of the final order (§ 302(b)). The court would uphold the decision unless it determined "that the decision is not supported by substantial evidence, is contrary to law, or is not in accordance with procedure required by law" (§ 302(c)).

The Administrator would "establish a comprehensive asbestos claimant assistance program" (§ 104(a)), including a "legal assistance program" (§ 104(d)). Attorneys could charge no more than 2 percent of the amount of the award for filing an initial claim, and "10 percent with respect to any claim under appellate review" (§ 104(e)). The term "appellate review" is not defined, so it is not clear whether it would include both the hearing or review by the representative of the Administrator, and judicial review.

The amount of an award under S. 2290 would be determined pursuant to the benefit table in section 131(b), which prescribes different amounts for different medical conditions, and, in cases of lung cancer, different amounts for smokers, nonsmokers, and ex-smokers, as it defines those terms.[4] Beginning in 2006, awards would be increased annually by a cost-of-living adjustment (§ 131(b)(5)).

Awards "shall be reduced by the amount of collateral source compensation" (§ 134(a)). But the term "collateral source compensation" would refer only to "the compensation that the claimant received, or is entitled to receive, from a defendant or an insurer of that defendant, or compensation trust as a result of a judgment or settlement for an asbestos-related injury that is the subject of a claim filed under section 113" (§ 3(6)). S. 2290 provides explicitly that collateral source compensation would not include workers' compensation or veterans benefits (§ 134(b)), but it would apparently also not include any other compensation, such as disability or health insurance payments, or medicare or medicaid, that was not paid by "a defendant or an insurer of that defendant, or compensation trust." A claimant, in other words, could receive all these amounts in addition to his award from the Asbestos Injury Claims Resolution Fund.

Asbestos claimants would not receive lump-sum awards, but "should receive the amount of the award through structured payments from the Fund, made over a period of 3 years, and in no event more than 4 years after the date of final adjudication of the claim" (§ 133(a)(1)).

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[4] The benefit table appears on page 77 of the pdf version of S. 2290; it does not appear in the html version. Some, but not all, of the amounts prescribed by S. 2290 are higher than the amounts prescribed by S. 1125. For example, the award for "severe asbestosis" was increased from $300,000 to $400,000, and the award for "disabling asbestosis" was increased from $750,000 to $850,000. But the award for "mixed disease with impairment" was kept at $20,000, and the award for mesothelioma was kept at $1 million — the highest award prescribed.

Funding of Asbestos Injury Claims

The Asbestos Resolution Claims Fund would be paid for by "defendant participants" and "insurer participants." Defendant participants would apparently be companies that have been sued for injuries caused by exposure to asbestos, and insurer participants would be the insurers of such companies.[5] Subject to a "contingent call for mandatory additional payments"(§ 204(m)), "the total payments required of all defendant participants over the life of the Fund shall not exceed" $57.5 billion (§202(a)(2)). "[T]he aggregate annual payments of defendant participants" would be at least $2.5 billion for the first 23 years of the Fund, unless the $57.5 billion is received sooner (§ 204(h)(1)). After the $57.5 billion has been paid, the Administrator could, if necessary, issue a contingent call for mandatory additional payments of up to an aggregate maximum of $10 billion. The Administrator would first, however, have to publish a notice in the Federal Register and consider comments from defendant participants on the necessity of additional payments (§ 204(m)).

"The total payment required of all insurer participants over the life of the Fund shall be equal to $46,025,000,000" (§ 212(a)(2)(A)). Insurer participants would pay prescribed amounts for 27 years (§ 212(a)(3)(C)). The United States government would not be liable for any asbestos claims, even if the Fund is inadequate to pay them (§ 406(b)).

The Administrator would be authorized to sue any participant for failure to pay any liability imposed under the bill. In addition to the amount due, the Administrator could seek punitive damages, the costs of the suit, "including reasonable fees incurred for collection, expert witnesses, and attorney's fees," and "a fine equal to the total amount of the liability that has not been collected" (§ 223(c)).

"At any time after 7 years following the date on which the Administrator begins processing claims, if the Administrator determines that . . . the Fund will not have sufficient resources," then the Fund would sunset (§ 405(f)). If the Fund sunsets, then claimants could again file or pursue lawsuits. "[T]he applicable statute of limitations" would be deemed tolled for the time during which a claim had been pursued against the Fund, and "the applicable statute of limitations would apply, except that claimants who filed a claim against the Fund" before sunset would have two years after sunset to file a claim (§ 405(f)(6)). Claims would have to be filed in federal district court, and "Federal common law" would govern, "except that where national uniformity is not required the court must utilize otherwise applicable state law . . ." (§ 405(g)).

Defendant participants. "Defendant participants shall be liable for payments to the Fund . . . based on tiers and subtiers assigned to [them]" (§ 202(a)(1)). "Tier I shall include all debtors that . . . have prior asbestos expenditures greater than $1,000,000" (§ 202(b)). A "debtor" would be defined as a company, including its subsidiaries, that has filed in bankruptcy within a year preceding enactment of the bill, but a "debtor" would not include a company whose bankruptcy had been finally adjudicated (§ 201(3)). Tiers II through VI would include "persons or affiliated groups . . . according to the prior asbestos expenditures" they paid, ranging from $75 million or greater for Tier II, down

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[5] "Participant" is defined as any defendant participant or insurer participant subject to payments under the bill (§ 3(11)).

to $1 million to less than $5 million for Tier VI (§ 202(d)). An "affiliated group" would be defined as "an ultimate parent and any person [defined in § 3(12) as individual or business] whose entire beneficial interest is directly or indirectly owned by that ultimate parent (§ 201(1)), and an "ultimate parent" would be defined as a person "that owned, as of December 31, 2002, the entire beneficial interest, directly or indirectly, of at least 1 other person; and . . . whose own entire beneficial interest was not owned on December 31, 2002, directly or indirectly, by any other single person (other than a natural person)" (§ 201(9)).

The term "prior asbestos expenditures" — the amount of which would determine the amount that a defendant participant would have to contribute to the Fund — would be defined as "the gross total amount paid . . . before December 31, 2002, in settlement, judgment, defense, or indemnity costs related to all asbestos claims against" the defendant, and would include payments made by insurance carriers, but would not include payments made "by persons who are or were common carriers by railroads for asbestos claims" brought under the Federal Employers' Liability Act (§ 201(7)).[6]

"A person or affiliated group that is a small business concern (as defined under section 3 of the Small Business Act (15 U.S.C. 632)), on December 31, 2002, is exempt from any payment requirement under this subtitle" (§ 204(b)). "[A] defendant participant may seek adjustment of the amount of its payment obligation based on severe financial hardship or demonstrated inequity" (§ 204(d)(1)).

Insurer participants. S. 2290 would establish the Asbestos Insurers Commission, which would be composed of five members, appointed for the life of the Commission, by the President, with the advice and consent of the Senate (§ 211). "The Commission shall determine the amount that each insurer participant will be required to pay into the Fund" (§ 212(a)(1)(B)).

"Insurers that have paid, or been assessed by a legal judgment or settlement, at least $1,000,000 in defense and indemnity costs before the date of enactment of this Act in response to claims for compensation for asbestos injuries . . . shall be insurer participants in the Fund" (§ 212(a)(3)(A)). "The Commission shall establish payment obligations of individual insurer participants to reflect, on an equitable basis, the relative tort system liability of the participating insurers in the absence of this Act . . . ." (§ 212(a)(3)(B)(i)).[7]

Judicial review. Defendant participants and insurer participants would be able to seek judicial review, in the U.S. Court of Appeals for the District of Columbia, of a final determination by the Administrator or the Asbestos Insurers Commission (§ 303(a)). The U.S. District Court for the District of Columbia would have exclusive jurisdiction over any action for declaratory or injunctive relief challenging any provision of the bill (§ 304).

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[6] The inclusion of "defense" costs (which is not defined), suggests that even a defendant who had been found not liable, or against whom a suit had been dismissed or dropped, would ordinarily have to contribute to the Fund, because it would likely have incurred "prior asbestos expenditures" in defending the suit brought against it.

[7] "Insurer" and "insurer participant" are defined to "include direct insurers and reinsurers, as well as any run-off entity established, in whole or in part, to review and pay asbestos claims" (§ 212(a)(1)(A)).

Prohibition of Asbestos-Containing Products

Title V of S. 2290 would add a section to the Toxic Substances Control Act that would require the Administrator of the Environmental Protection Agency to issue regulations that "prohibit persons, [sic] from manufacturing, processing, or distributing in commerce asbestos containing products." The Administrator would be permitted to grant an exemption if he determines that it "would not result in an unreasonable risk of injury to public health or the environment," and the person seeking the exemption "has made good faith efforts to develop, but has been unable to develop, a substance, or identify a mineral that does not present an unreasonable risk of injury to public health or the environment and may be substituted for an asbestos containing product."

The Administrator would also be able to grant exemptions to the Secretary of Defense and the Administrator of the National Aeronautics and Space Administration if "necessary to the critical functions" of the Defense Department or NASA, "no reasonable alternatives" exist, and "use of asbestos containing products will not result in an unreasonable risk to health or the environment."

Finally, Title V would exempt the following two items from the prohibition: "(A) Asbestos diaphragms for use in the manufacture of chlor-alkali and the products and derivative [sic] therefrom. (B) Roofing cements, coatings and mastics utilizing asbestos that is totally encapsulated with asphalt, subject to a determination by the Administrator of the Environmental Protection Agency . . . ."