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Asbestos Compensation Act of 2000

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Summary

This report summarizes H.R. 1283, 106th Congress, the Asbestos Compensation Act of 2000, as ordered to be reported with amendments by the House Committee on the Judiciary on March 16, 2000. The bill would create an administrative procedure for asbestos liability claims.

H.R. 1283, 106th 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.[1] 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.[2]

H.R. 1283 would create an administrative procedure for asbestos claims, which the bill defines as "any claim for damages . . . related to the health effects of exposure to asbestos" other than "any claim for workers' compensation benefits . . . or any claim for benefits under a veterans' benefits program" (§§ 601(1)).[3]

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

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

[3] There appears to be an inconsistency in two sections: § 601(1) defines "asbestos claim" to exclude a "claim for benefits under a veterans' benefits program," whereas § 701(d) provides that the bill would not affect the operation of any "veterans' *disability* benefit program" (emphasis added). Section 101(b) provides that the bill does not apply to any claim brought under a "veterans' benefits program."

The bill would establish in the Department of Justice the Office of Asbestos Compensation (OAC) to be headed by an Administrator. All asbestos claims would "be lodged with the office designated by the Administrator" (§ 101(a)), and "the OAC shall have exclusive jurisdiction over proceedings to determine if a claimant is entitled to compensation for an asbestos claim and the amount of such compensation" (§ 101(b)). In other words, a person with an asbestos claim could not file a lawsuit prior to participating in the administrative procedure that the bill would establish.

The Administrator would appoint the Medical Director (§ 101(c)). All claims when filed would be immediately referred to the Medical Director, who would determine whether claimants meet the requirements for medical eligibility in § 301 or the requirements for medical testing reimbursement in § 306 (§ 102(a)). A claimant who meets the requirements for medical testing reimbursement would be eligible for reimbursement for specified types of medical testing, apart from whether he pursues or recovers other damages. The requirements for medical testing reimbursement are specified lengths of time of exposure to asbestos and specified chest x-ray readings.

Medical Eligibility

In order to recover damages for an asbestos claim, a claimant would have to meet the requirements for medical eligibility by establishing, pursuant to § 301, that his condition is one of the eligible medical categories.[4] "The eligible medical categories under this Act are asbestos-related non-malignant conditions with impairment, asbestos-related mesothelioma, asbestos-related lung cancer, and asbestos-related other cancer" (§ 301(a)). A claimant would have to establish the existence of an eligible medical condition, and could do so either by demonstrating that he meets the prescribed standards and criteria for the four categories just mentioned, or by demonstrating to an "exceptional medical claims panel" that he has "an asbestos-related impairment that is substantially comparable to the condition of an exposed person who would satisfy the requirements of a given medical category" (§ 301(b)).

If the Medical Director issues the claimant a certificate of medical eligibility, then the claimant "may opt out of settlement proceedings provided for under sections 103 and 104 and elect to file suit in any State or Federal court of competent jurisdiction" (§ 102(f)). "A claimant may recover compensation for damages caused by an eligible medical condition only if the claimant presents a certificate of medical eligibility establishing its existence. A certificate of medical eligibility shall be conclusive unless rebutted by clear and convincing evidence. However, a certificate of medical eligibility shall not be conclusive as to allegations regarding exposure to asbestos or when medical eligibility is established pursuant to section 304(b)," which is when the claimant has asbestos-related lung cancer and "a substantial history of smoking" (§ 201). This rebuttable presumption would apparently apply whether the claimant uses the bill's administrative procedure or files suit in a state or federal court. Without the bill, a plaintiff must establish his medical condition, along with the rest of his case, in court, rather than at a pretrial administrative proceeding.

[4] For convenience, we refer throughout this report to a claimant's medical condition, though the claimant may not be the person with an asbestos-related illness, as the latter may have died.

Administrative Procedure

If a claimant receives a certificate of medical eligibility and opts for the administrative procedure, he "shall name defendants. Defendants shall receive notice from the Administrator" (§ 103(a), opening sentences). He would next provide each defendant with "a verified particularized statement of the basis for the allegation that the person is or may be responsible for the injury"(§ 103(a)(2)). The bill does not appear to explain what it means by "verified," and it drops that word when it goes on to say, "Upon finding that the claimant's particularized statement meets the requirements of paragraph (2), the Administrator shall provide notice to each named defendant" (§ 103(a)(3)). It is not clear whether the notice under § 103(a), opening sentences, is the same as the notice under § 103(a)(3).

"Within 21 days following the naming of all defendants, each defendant shall provide to the claimant in writing a good faith settlement offer, and shall provide a copy to the Trustee" (§ 103(b)(1)). This is the Trustee of the Asbestos Compensation Fund, which the bill would establish in the OAC as the source of payments to claimants; we discuss the Fund below. "Within 10 days of receiving all of the defendants' offers, the Trustee shall make an offer of compensation to the claimant, based on a compensation grid which shall be established and regularly revised by rule" (§ 103(b)(2)). At this point, the claimant could accept the defendant's offer or the Trustee's offer, or reject both.

"The claimant shall notify each defendant and the Trustee whether the claimant accepts or rejects the defendant's settlement offer under section 103(b)(1). If the claimant accepts any such offer, or any other settlement offer, the Trustee's offer of compensation shall be automatically reduced by the amount of such settlements" (§ 104(a)). This presumably refers to a situation where there is more than one defendant, and the claimant does not accept all the defendants' offers.

"If the claimant accepts the Trustee's offer of compensation, the Trustee shall assume the claim. The Trustee may accept any defendant's settlement offer under section 103(b)(1) or may prosecute the claim against any defendant [in an administrative adjudication] as provided in section 105, or may prosecute the claim in any State or Federal Court" (§ 104(d)). A claimant would presumably accept the Trustee's offer if, after having been reduced by the defendants' offers that the claimant has accepted, it is greater than the sum of the defendants' offers that the claimant has rejected. If the Trustee chooses not to prosecute a claim against any defendant, then the Trustee presumably would have to make up the difference from the Fund. The Trustee presumably would choose to prosecute a claim against any defendant from whom he thought he could recover substantially more than the defendant had offered the claimant.

"If the claimant rejects any defendant's settlement offer and also rejects the Trustee's offer of compensation, the claimant may elect an administrative adjudication under section 105 . . ." (§ 104(e)). And, as noted, if the claimant accepts the Trustee's offer, the Trustee may elect the administrative adjudication under section 105. Section 105 provides: "If a claimant [or, presumably, the Trustee] elects adjudication under this section, the OAC shall assign an Administrative Law Judge to conduct a hearing on the record and to determine whether compensation is to be provided and the amount of such compensation. . . ."

Judicial Review

"Any person aggrieved by a final decision of the Administrator [this apparently should say "Administrative Law Judge"] under section 105 or a final denial by the Medical Director [as to medical eligibility] under section 102, may seek review of that decision or denial in the United States Court of Federal Claims, which shall uphold the decision or denial if it is supported by substantial evidence and is not contrary to law. . . . Decisions of the United States Court of Federal Claims are appealable . . . to a United States Court of Appeals . . ." (§ 106).

Applicable Law

Title II of the bill is titled "Law Applicable to Asbestos Adjudications," but the law it prescribes, except for section 208, which contains "special rules applicable to section 105 adjudications," is apparently applicable both to administrative adjudications and to court litigation. Section 201 provides, as noted above, that a claimant may recover only if he presents a certificate of medical eligibility, and that such certificate, except in cases of smokers with lung cancer, shall be conclusive as to his medical condition unless rebutted by clear and convincing evidence. Section 202 provides that a claimant "shall be entitled to compensatory damages to the extent provided by applicable law, including damages for emotional distress, pain and suffering, and medical monitoring where authorized. Such damages shall not include punitive damages or damages solely for enhanced risk of a future condition, except as provided in section 208(d)." Section 208(d), discussed below, allows limited punitive damages in section 105 adjudications, but does not authorize damages solely for enhanced risk of a future condition. Thus, damages for enhanced risk would never be allowed, but limited punitive damages would be allowed in adjudications but not litigation – presumably to create an incentive for claimants to elect adjudications.

Section 202, as just quoted, provides that a claimant "shall be entitled to compensatory damages to the extent provided by applicable law." "Applicable law" presumably refers to state law as modified by the bill – specifically, by section 202 and by the bill's definition of "compensatory damages" in section 601(9). This definition, however, appears no different from the way the term is generally used in state law. As state laws do not generally cap compensatory damages, and as sections 202 and 601(9) define the term for purposes of the bill, state law would appear to have little effect in determining the extent to which compensatory damages would be available in asbestos cases.

Section 203 provides that state statutes of limitations, statutes of repose, or any other defense based on the timeliness of a claim, would not apply to an asbestos claim "unless such claim was untimely as of the date of enactment of this Act." This means that, if a timeliness defense did not bar a suit as of the date of enactment, then a claim could be brought regardless of how much time had passed since the claimant had been exposed to asbestos or suffered symptoms as a result of exposure, and regardless of when the asbestos had been manufactured or distributed.

Section 204, titled "Come Back Rights," provides that "a judgment or settlement of an asbestos claim for a non-malignant disease shall not preclude a subsequent claim with respect to the same exposed person for an eligible medical condition" that is malignant.[5]

Section 205 provides: "No joinder of parties, aggregation of claims, consolidation of actions, extrapolation, or other device to determine multiple asbestos claims on a collective bases shall be permitted without the consent of all parties, except as provided in subsection (b) [which allows class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure] or unless the court . . .to promote the just and efficient conduct of asbestos civil actions, orders such procedures . . . ." Section 205 also provides: "In any proceeding under section 105, the Administrative Law Judge may order adjudication of claims on a collective basis."

Section 206 provides: "This Act shall not be construed to limit joint and several liability under applicable Federal or State law. In any core claim that is successfully asserted against a defendant, such defendant shall be held jointly and severally liable for full compensatory damages to the claimant notwithstanding any contrary provision of law." To be jointly and severally liable means that a defendant is liable for the claimant's total damages, even if the defendant was only partially responsible for the claimant's injury. If, for example, two defendants are each 50 percent responsible for the claimant's injury, the claimant may collect 100 percent of his damages from one and none from the other, or 75 percent from one and 25 percent from the other, or any other combination. A defendant who paid more than his share may then, under state law, seek contribution from a defendant who paid less than his share.

Under section 206, joint and several liability would apply to any "core claim." Section 601(10) defines this term as an asbestos claim against a defendant who has paid out $50 million if it was a manufacturer or $100 million if it was a non-manufacturer (presumably a distributor) over the 10-year period preceding the filing of the claim. For non-core claims, the first sentence of section 206, quoted above, would apparently govern. This sentence appears to mean that, in non-core claims, applicable Federal or State law would apply. There apparently is, however, no applicable Federal law on joint and several liability in asbestos cases. In the states, joint and several liability is the common- law rule, but some states, by statute, have eliminated or limited it. Those that have limited it generally allow it only for economic damages (*e.g.*, for medical bills and lost wages but not for pain and suffering) or only for defendants more than a specified percent (typically 50 percent) responsible.

Section 207 provides that, in core claims, the issues to be decided shall be limited to (1) whether the claimant has an eligible medical condition (with section 201 giving the defendant the burden of proof on this issue), (2) whether the claimant's exposure to the

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[5] This is not generally the rule under state law. The general rule under state law is that "the injured plaintiff is limited to but one recovery for all of his injuries, presently ascertainable and foreseeably predictable, proximately resulting from a single tort, [and] the juridical system must respond fairly, adequately and completely in one trial of the issues. In doing so, the court may permit the plaintiff . . . to recover for the future effects of his injuries. . . ." *Jordan v. Bero*, 210 S.E.2d 618, 633 (W. Va. 1974); *see* David Carl Minneman, Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery*, 50 A.L.R.4th 13, 24 (1986).

product of the defendant was a substantial contributing factor in causing that eligible medical condition, and (3) the amount of compensation to be provided. An additional issue that might arise with respect to non-core claims is whether the asbestos was defective. In asbestos cases, this usually means whether the defendant failed to warn of its dangers.

Section 208, as noted, contains special rules applicable to section 105 adjudications. Subsection (b) provides that, notwithstanding state law, "full compensatory damages, including damages for non-economic loss, shall be awarded in wrongful death claims involving mesothelima." Subsection (c) provides that, "if the final offer made by any defendant is less than the share of the total liability awarded against that defendant," a prescribed penalty shall be added to the award. Subsection (d) would require that claims for punitive damages be established by clear and convincing evidence (rather than a preponderance of the evidence) and be capped at "3 times the amount of the award pursuant to a section 105 adjudication plus any penalties added to that award pursuant to subsection (c)."

Funding

H.R. 1283 would establish in the OAC an Asbestos Compensation Fund to provide payments to claimants under the Act (§ 101(d)). "The Administrator shall adopt rules for calculating and collecting from defendants all costs associated with the determination of claims and payments to claimants" (§ 401(a)). This sentence is not entirely clear, but may refer to costs associated with the determination of claims, and costs associated with the Trustee's making payments to claimants who accept the Trustee's settlement offer.

The Fund would be financed by a one-time loan to the Fund and then by defendants' payments of "any amounts related to settlements or judgments, including damages, interest, litigation costs, specific administrative costs that may be required by the Administrator through rulemaking, and interest costs incurred by the Fund in connection with payment of settlement offers made under section 103" (§ 402(b)(1)). The one-time loan would come from the AOC out of an appropriation of up to $100 million (§ 403(a)).

Pending Claims; Existing Asbestos Trusts; Qualifying National Settlement Plans

The bill would be effective upon enactment with respect to any asbestos suit in which trial has not commenced, but a claimant with a civil action pending on the date of enactment would not be required to obtain a certificate of medical eligibility "if trial commences within 6 months of the date of enactment of this Act" (§ 501(a),(b)). The bill would not apply to any asbestos trust in existence on the date of enactment unless it elects to be subject to the bill (§ 701(b)). A defendant that is a party to a qualifying national settlement plan, which is one where the defendant "has resolved or agreed to at least 50 percent of the asbestos claims that were pending against" it (§ 601(34)), may elect to defer application of the bill (other than sections 201-207) "for a period not exceeding 7 years from a date relative to the commencement of the Qualified National Settlement Plan" (§ 704). The term "date relative" is not defined.

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