Order Code RS21540
Updated September 8, 2003

Fairness in Asbestos Injury Resolution Act of 2003 (S. 1125, 108th Congress)

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Summary

This report summarizes salient features of S. 1125, 108th Congress, the Fairness in Asbestos Resolution Act of 2003 (or FAIR Act of 2003), as reported by the Committee on the Judiciary on July 30, 2003 (S.Rept. 108-118). S. 1125 would create the Office of Special Asbestos Masters, within the United States Court of Federal Claims, 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 made payments related to asbestos claims filed against them, 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 proposals besides S. 1125 to address the situation, see CRS Report RS21398, *Asbestos Litigation: Prospects for Legislative Resolution*, by Edward Rappaport.

S. 1125, 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.[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]

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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." In *Norfolk & Western R. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003), the Court (continued...)

S. 1125 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" (§ 223), and the bill would create the Office of Asbestos Injury Claims Resolution (§ 221) to administer it. 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 be removable by the President only for good cause.

S. 1125 would also create the Office of Special Asbestos Masters, within the United States Court of Federal Claims, to award damages to asbestos claimants on a no-fault basis (§ 101(a)). The chief judge of the Court of Federal Claims, with the concurrence of a majority of the active judges of the court, would appoint the special asbestos masters (§ 101(c)).

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)).

Payment of Asbestos Injury Claims

"Any individual [or his representative or estate] who has suffered from an eligible disease or condition . . . may file a claim with the Court of Federal Claims for an award with respect to such injury"(§ 111(a)). "The term 'eligible disease or condition' means, to the extent that the illness meets the medical criteria requirements established under subtitle C of title I [§ 121], asbestosis/pleural disease, severe asbestosis disease, mesothelioma, lung cancer I, lung cancer II, other cancers, and qualifying nonmalignant asbestos-related diseases" (§ 3(8)).

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" (§ 111(c)). 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.

Any claimant who proves "by a preponderance of the evidence" (§ 113) that he suffers from an eligible disease or condition and files his claim within the statute of limitations may receive an award; he need not prove that his injury "resulted from the negligence or other fault of any other person" (§ 112). Therefore, although the Asbestos Injury Claims Resolution Fund, which would pay the awards, would be privately funded (as discussed in the next section of this report), a claimant would file a claim with the Court of Federal Claims and would not sue any private party in order to receive an award.

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[2] (...continued)
repeated that the "elephantine mass of asbestos cases . . . defies customary judicial administration," but held that courts may not "reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis."

The Office of Special Asbestos Masters would provide compensation to eligible individuals "in a nonadversarial manner" (§ 101(b)).

Within 20 days after a claim is filed, the Court of Federal Claims would refer it to a special asbestos master, who, within 60 days after the receipt of all required information, would determine the amount of any award to which the claimant is entitled (§ 114). A claimant would have 30 days "after receiving notice of the decision" to file an appeal with the United States Court of Asbestos Claims, which would be a three-judge panel established by the Court of Federal Claims (§ 141(a)).[3] The United States Court of Asbestos Claims could (1) "sustain the special asbestos master's decision," (2) "set aside any findings of fact or conclusion of law of the special asbestos master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law," or (3) "remand the petition to the special asbestos master for further action" (§ 141(b)). A claimant could then, within 30 days after the issuance of a final decision by the United States Court of Asbestos Claims, appeal that decision to the United States Court of Appeals for the Federal Circuit (§ 301). The Federal Circuit would have to uphold the claim unless it was "arbitrary and capricious"(§ 301). A claimant, finally, could ask the U.S. Supreme Court to review the case (§ 301).

The amount of an award under S. 1125 would be determined pursuant to the benefit table in section 131(b), which prescribes different amounts for different medical conditions, and different amounts for smokers, nonsmokers, and ex-smokers, as it defines those terms. 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 111" (§ 3(6)). S. 1125 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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[3] Section 141(a)(1)(B) provides that the 3 judges would come from the "Asbestos Court," but it apparently should say "Court of Federal Claims." The Asbestos Court was a court that S. 1125, as introduced, would have created to award damages to asbestos claimants, but the reported bill substituted the Court of Federal Claims for that purpose.

Funding of Asbestos Injury Claims

The Asbestos Resolution Claims Fund would be paid for by "defendant participants" and "insurer participants." S. 1125 would define neither of these terms, but 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.[4] The total contribution required of all defendant participants over the life of the Fund, would be $52 billion; the total required of all insurer participants would be the same (§§ 202(a)(2), 212(a)(3)(A)). The aggregate contributions of all mandatory participants could not exceed $5 billion in any calendar year unless otherwise provided (§ 223(b)). The minimum aggregate contributions of defendant participants would be at least $2½ billion per year for the first five years, and lesser amounts for succeeding years, down to $250 million for year 27 (§ 204(h)). The bill specifies no minimum aggregate contribution for insurer participants.

The United States government would not be liable for any asbestos claims, even if the Fund is inadequate to pay them (§ 405(b)).

Defendant participants. "The Administrator [of the Office of Asbestos Injury Claims Resolution] shall assess from defendant participants contributions to the [Asbestos Injury Claims Resolution] Fund in accordance with this section based on tiers and subtiers assigned to defendant participants" (§ 202(a)(1)). Though S. 1125 does not define "defendant participant," it does state which entities would be assigned to the various tiers and subtiers, and these entities would apparently be defendant participants.

"The Administrator shall assign to Tier I all debtors that, together with all of their direct or indirect majority-owned subsidiaries, 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)). The Administrator would assign "persons or affiliated groups" to Tiers II through VI, "according to the prior asbestos expenditures" they paid (§ 202(d)). An "affiliated group" would be defined as an "ultimate parent" or any person whose entire beneficial interest is owned by an ultimate parent (§ 201(1)), and an "ultimate parent" would be defined as a person who owned, as of December 31, 2002, the entire beneficial interest of at least one other person and whose own entire beneficial interest was not owned on that date by any other single 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

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[4] The bill would define "participant" as any defendant participant or insurer participant subject to an assessment for contribution to the Fund (§ 3(11)).

payments made "by persons who are or were common carriers by railroads for asbestos claims" brought under the Federal Employers' Liability Act (§ 201(7)).[5]

"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 contribution requirements under this subtitle" (§ 204(b)). "A defendant may apply for an adjustment based on financial hardship" (§ 204(d)(2)) or "based on inequity" (§ 204(d)(3)).

Insurer participants. S. 1125 would establish the Asbestos Insurers Commission, which would be composed of five members, appointed for the life of the Commission, by the President "after consultation with" (not with the "advice and consent" of) the Senate majority and minority leader and the House speaker and minority leader (§ 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 mandatory insurer participants in the Fund" (§ 212(a)(4)(A)). "Contributions shall be determined by establishing an individual contribution obligation for each insurer participant . . . on an equitable basis" (§ 212(a)(4)(B)).

Judicial review. A participant would be able to seek judicial review, in the U.S. District Court for the District of Columbia, of an assessment imposed by the Administrator of the Office of Asbestos Injury Claims Resolution, or the Asbestos Insurers Commission (§ 302(a)). The district court would uphold the determination of the Administrator or the Commission unless it was arbitrary or capricious (§ 302(c)(1)). After the district court issues its judgment, a participant could ask the U.S. Supreme Court to review the case (§ 302(c)(2)).[6]

Prohibition of Asbestos Containing Products

Title V of S. 1125 would create 18 U.S.C. § 838 to require the Administrator of the Environmental Protection Agency, after consultation with the Assistant Attorney General for the Environmental an Natural Resources Division of the U.S. Department of Justice, to issue regulations that "prohibit persons 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

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[5] 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.

[6] As noted above, appeals by claimants would be brought in the U.S. Court of Appeals for the Federal Circuit.

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 NASA 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: (1) "Asbestos diaphragms for use in the manufacture or chlor-alkali and the products and derivative therefrom," and (2) "Roofing cements, coatings and mastics utilizing asbestos that is totally encapsulated with asphalt, subject to a determination by the Administrator . . . ."