

FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003: SAVING THE “ELEPHANTINE MASS”

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INTRODUCTION

Asbestos can be blamed for hundreds of thousands of deaths and injuries and has the potential to be blamed for hundreds of thousands more deaths and injuries over the next few decades.¹ Asbestos has forced nearly seventy corporations into bankruptcy, has caused a near crisis in the insurance industry where it has raised questions of industry wide solvency, and has resulted in tens of thousands of lost jobs and millions of lost pension-fund dollars.² A single substance has caused all of these tragedies:

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¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (quoting Report of The Judicial Conference Ad Hoc Comm. on Asbestos Litigation 2–3 (1991)) (“Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.”); *see also* Fairness in Asbestos Injury Resolution Act (“FAIR Act”) of 2003, S. 1125, 108th Cong. § 2 (2003) (“A great number of Americans have been exposed to forms of asbestos that can have devastating health effects.”); *Asbestos Litigation Crisis: Hearing on S. 1125 Before the Senate Comm. on the Judiciary*, 108th Cong. 399 (2003) [hereinafter Dr. Peterson Testimony] (statement of Dr. Mark A. Peterson) (“By now 300,000 workers have died because of their asbestos exposures. Almost as many more will die over the next three or four decades. Millions more exposed workers have or will develop asbestosis or pleural disease.”).

² *See* FAIR Act of 2003, S. 1125, 108th Cong. § 2(a)(4) (“Asbestos litigation has had a significant detrimental effect on the country's economy, driving companies into bankruptcy, diverting resources from those who are truly sick, and endangering jobs and pensions.”). In 1982, Johns-Manville, the largest manufacturer of asbestos in the United States, declared the first asbestos-related bankruptcy. *See Asbestos Litigation Crisis: Hearing on S. 1125 Before the Senate Comm. on the Judiciary*, 108th Cong. 167 (2003) [hereinafter Senator Hagel Testimony] (statement of Senator Chuck Hagel, former Johns-Manville Trustee). Johns-Manville was the primary defendant in asbestos litigation in the 1970s. After *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973), where the Fifth Circuit held manufacturers of asbestos strictly liable, Johns-Manville had no choice but to file for bankruptcy. *See also* Alex Berenson, *Asbestos Accord is Said to be Near*, N.Y.

asbestos.³ Though the use of asbestos largely ended in the mid-1970s, the long latency period of asbestos-related bodily injuries has made this a modern problem.⁴ Nearly 300,000 asbestos personal injury cases are currently before courts throughout the United States and hundreds of thousands more are expected over the next few decades.⁵ The Supreme Court labeled the asbestos litigation problem an “elephantine mass.”⁶ The massive number of asbestos claims have clogged court dockets, unnecessarily delayed compensation for asbestos victims, and raised the transaction costs of bringing asbestos claims to an

TIMES, April 24, 2003, at A1 (“Already, lawsuits have forced into bankruptcy almost 70 companies, some of which were only peripherally connected to asbestos.”). At the Committee Hearings for the Fairness in Asbestos Injury Resolution Act of 2003, Dr. Frederick C. Dunbar’s testimony painted a bleak picture of the economic consequences of the asbestos crisis:

Asbestos-related bankruptcies and the associated layoffs will have ripple effects that harm many groups beyond company stockholders. Workers will suffer in many ways, including temporary or long-term unemployment, lower long-term earnings, and inadequate and/or more expensive interim health coverage. Taxpayers will bear the financial burden of publicly funded retraining programs and increased unemployment insurance payments. Residents and local businesses in affected communities will suffer as a result of reduced economic activity, lower property values, and reduced local tax revenues.

Asbestos Litigation Crisis: Hearing on S. 1125 Before the Senate Comm. on the Judiciary, 108th Cong. 314 (2003) [hereinafter Dr. Dunbar Testimony] (statement of Dr. Frederick C. Dunbar). Dr. Dunbar has estimated that between 52,000 and 60,000 workers have lost their jobs as a result of asbestos liability induced bankruptcies and he expects this number to continue to grow. *Id.*

³ See Dr. Peterson Testimony, *supra* note 1, at 399 (attributing hundreds of thousands of death and injuries to asbestos); see also FAIR Act of 2003, S. 1125, 108th Cong. § 2; Berenson, *supra* note 2 (discussing the problems caused by asbestos including death, personal injury, and a weakened economy).

⁴ See *Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 190 (2002) [hereinafter Kazan Testimony] (statement of Steven Kazan); see also Berenson, *supra* note 2, at C6 (“Most American companies stopped using asbestos decades ago, but the number of lawsuits continues to rise.”); *infra* notes 17–18 and accompanying text.

⁵ See Dr. Peterson Testimony, *supra* note 1, at 400–01 (calculating that there are approximately 294,800 claims pending before state and federal courts and that in the future somewhere between 1,903,331 and 2,439,507 more claims are expected); see also Berenson, *supra* note 2, at C6 (estimating that over 700,000 asbestos claims have been filed since asbestos was discovered and that approximately 200,000 of those claims have been filed in the past two years alone).

⁶ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[T]his case is a class action prompted by the elephantine mass of asbestos cases, and . . . this litigation defies customary judicial administration and calls for national legislation.”). The Court has reiterated its characterization of asbestos litigation in *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003).

enormous level.⁷ Citing these other problems, Congress has responded by attempting to create a national solution to the asbestos problem.⁸

Over the last decade, both houses of Congress have proposed several bills aimed at solving this problem, yet none have been enacted.⁹ In 2003, Senator Orrin Hatch proposed the Fairness in Asbestos Injury Resolution Act of 2003 (“FAIR Act”)¹⁰ before the Senate Committee on the Judiciary.¹¹ After a long series of hearings, compromises, and amendments, the bill passed in the Committee and was sent to the full floor of the Senate for further debate and ultimately a final vote.¹² While most of the contention surrounding the bill concerns the total value of the fund, other provisions require amendment or adoption in order for the FAIR Act to achieve its purpose of a nationwide solution to the asbestos problem.

Part I of this Note will consider the current problems associated with asbestos claims in the state and federal courts and in the insurance industry. Part II and III analyze the background of the FAIR Act, the mechanics of the Act, and how it will help the current asbestos litigation problems. Part IV discusses ways to improve the asbestos bill to ensure that it will

⁷ See *Ortiz*, 527 U.S. at 866–68 (Breyer, J., dissenting) (listing the numerous problems caused by asbestos personal injury litigation in its current state).

⁸ See FAIR Act of 2003, S. 1125, 108th Cong. § 2; *Asbestos Litigation Crisis: Hearing on S. 1125 Before the Senate Comm. on the Judiciary*, 108th Cong. 160–61 (2003) [hereinafter Senator Hatch Statement] (statement of Senator Orrin G. Hatch) (introducing the Fairness in Asbestos Injury Resolution Act to the Judiciary Committee for hearings by briefly describing the problems of asbestos litigation that require a national solution).

⁹ See, e.g., Fairness in Asbestos Compensation Act of 1998, S. 2546, 105th Cong. (1998); Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong. (1998); see also *infra* note 52 and accompanying text.

¹⁰ FAIR Act of 2003, S. 1125, 108th Cong.

¹¹ See S. REP. NO. 108-118, at 4 (2003). Senator Hatch has made a resolution of the asbestos crisis a top priority. See Senator Hatch Statement, *supra* note 8, at 159. This is not his first attempt at a nationwide solution to the asbestos crisis; Senator Hatch sponsored an asbestos fund bill in 1998. See Fairness in Asbestos Compensation Act of 1998, S. 2546, 105th Cong. (1998). The Committee did not approve the bill. However, the exponential growth of claims and bankruptcies in the past few years has raised interest in a nationwide legislative act on asbestos. See Dr. Dunbar Testimony, *supra* note 2, at 317 (determining that asbestos-related bankruptcies have increased dramatically since 1998); Berenson, *supra* note 2, at A1 (stating that over 200,000 claims have been filed in the last two years); see also *infra* note 57 and accompanying text.

¹² See S. REP. NO. 108-118, at 4–16.

become law and will be a successful and permanent solution to the asbestos litigation problems.

I. ASBESTOS-RELATED BODILY INJURY CLAIMS CREATE UNIQUE PROBLEMS IN TORT LAW REQUIRING NATIONAL ACTION

Asbestos cases are unique among other mass torts because of the high rate of exposure, the long latency period, and the variety and seriousness of illnesses associated with the substance—all of which require the legislature to take national action to solve this problem. Asbestos, when first discovered, was considered a miracle substance and was widely used in insulation, bricks, brake pads, and many other common products.¹³ Because of the widespread use of asbestos, tens of millions of people have been exposed to the substance.¹⁴ Many of those exposed to asbestos will not become ill because the exposure was not severe enough.¹⁵ However, persons who have been severely exposed, or exposed for a long period of time, are at a greater risk of developing an asbestos-related illness.¹⁶ Because asbestos is, for the most part, no longer used in industry, one would expect that everyone who has been seriously

¹³ See *id.* at 16–17. As described by the Committee Report accompanying the FAIR Act:

Asbestos is a fibrous mineral used in many products due to its resistance to fire, corrosion, and acid. In the early part of the 20th Century, asbestos was regarded as a miracle fiber because it was versatile enough to weave into textiles, integrate into insulation, line the brakes of automobiles, and construct flame-retardant hulls for naval and merchant ships. Annual asbestos production climaxed some 30 years ago, and had been incorporated into thousands of products by this time.

Id. at 17.

¹⁴ See *Asbestos Litigation Crisis: Hearing on S. 1125 Before the Senate Comm. on the Judiciary*, 108th Cong. 450 (2003) [hereinafter Dr. Welch Testimony] (statement of Dr. Laura Welch). The exact number of workers exposed to asbestos is unknown. *Id.* However, the consensus estimate is that 27.5 million people were occupationally exposed, in addition to an unknown number of family members of those workers due to take home exposure. *Id.* Of these 27.5 million occupationally exposed, it is estimated that 18.8 million can qualify as having serious exposure. *Id.*

¹⁵ See Kazan Testimony, *supra* note 4, at 194 (noting that some exposed plaintiffs will not manifest any symptoms).

¹⁶ *Id.* Workers that mined asbestos or handled the product in its raw form, such as for insulation of fireproofing, are most likely to develop an illness. See Dr. Welch Testimony, *supra* note 14, at 456. In addition, the longer a person worked with asbestos, the exponentially greater the chance of developing an asbestos-related disease. See *id.*

exposed has been identified.¹⁷ However, asbestos-related illnesses are unique because of the extremely long latency period of the diseases associated with exposure to asbestos.¹⁸ The latency period after the final exposure to asbestos can be as long as forty years before the person manifests any symptoms or discovers evidence of a potential injury,¹⁹ which means that the extent of the asbestos problem cannot accurately be predicted.

The long latency period has also created a problem with the statute of limitations for asbestos claims in many states. Aggressive plaintiffs' lawyers, through solicitations and advertisements, have identified people who have been exposed to asbestos in the past, and have secured free screenings for them.²⁰ Some plaintiffs' lawyers have used advertising campaigns that ask the public to come in for a free screening to "[f]ind out if

¹⁷ See Kazan Testimony, *supra* note 4, at 190. After Congress created OSHA in the early 1970s and began setting safety standards for employers, companies for the most part stopped using asbestos. *Id.* Because of these regulations, there were few new exposures after 1973. *Id.* However, some companies continue to use asbestos and some new exposures are occurring.

¹⁸ See *id.* at 191–92. Exposure to asbestos causes the fibers to be inhaled into the lungs. *Id.* The fibers gradually travel to the outside lining of the lung called the pleural lining. *Id.* The fibers cause the pleural lining to scar. *Id.* These scars eventually become so numerous that they form a plaque on the lung and are visible on x-rays. *Id.* The plaque prevents the flow of oxygenated blood to the rest of the body, which causes breathing problems and a gradual weakening of the lungs. *Id.* The plaque can also cause lung cancer and mesothelioma, which are almost invariably fatal. *Id.*

¹⁹ See *id.* at 191–92 (concluding that the latency period is usually 30 years, but for mesothelioma the latency period can be as long as 40 years); see also *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997).

²⁰ See Kazan Testimony, *supra* note 4, at 197. This phenomenon began after plaintiffs' lawyers were able to win verdicts and settle cases against asbestos defendants with plaintiffs that have proof of exposure through an x-ray showing a pleural plaque, but have not manifested any symptoms. See *id.* Once this practice had been established, the following practice became common:

“[P]laintiff law firms in areas of heavy asbestos exposure (such as jurisdictions with shipyards or petrochemical facilities) had learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group

To identify more potential claimants, plaintiff law firms began to promote mass screenings of asbestos workers at or near their places of employment. Plaintiff law firms would bring suit on behalf of all of the workers who showed signs of exposure, sometimes filing hundreds of cases under a single docket number.”

Id. at 197–98 (quoting RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report*, at 23 (September 2002)).

YOU have MILLION DOLLAR LUNGS.”²¹ The statute of limitations on an asbestos claim in many states begins to run when the exposure has been identified, which is called the “discovery” rule.²² Many of the people who have been found positive for potentially harmful exposure are then forced to bring suit before they have manifested any symptoms or been specifically diagnosed.²³ The identification of potentially harmful exposure can turn out to be nothing, or can be an early warning sign of a deadly form of cancer—mesothelioma.²⁴ Plaintiffs who are not accurately diagnosed will often settle their claims for a minimum amount, thereby foreclosing them from further recovery should a more serious illness manifest itself in the future.²⁵

The current state of asbestos litigation is plagued with problems, including extremely long delays in claim resolution, inconsistent results, and defendants being forced into bankruptcy. The long delays associated with bringing asbestos claims are most notable in the federal courts. Under the Judicial Panel on Multidistrict Litigation, all of the asbestos claims in federal court were transferred to a single court.²⁶ This massive class action, representing tens of thousands of claims, has been going on for over a decade with no settlement or trial in sight.²⁷ One district court calculated that “[i]f the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing. Transaction costs

²¹ Kazan Testimony, *supra* note 4, at 208.

²² *See id.* at 207. The statute of limitations varies from state to state; however, many states have a discovery rule for a latent injury caused by prior exposure. This means that once a potential plaintiff discovers the exposure, his cause of action is ripe and the statute of limitations begins to run. For example, Ohio, a state where asbestos claims are common, has adopted the discovery rule. *See, e.g.,* Melnyk v. Cleveland Clinic, 290 N.E.2d 916, 917 (Ohio 1972).

²³ *See* Kazan Testimony, *supra* note 4, at 207 (stating that people “are often forced by the statute of limitations to file lawsuits before they are really sick”).

²⁴ *See id.* at 193–94 (stating that the early diagnosis of a pleural plaque, which proves asbestos exposure, does not reveal a true diagnosis that requires a full physical exam).

²⁵ *See id.* at 207 (“This can come back to haunt individuals who later develop cancer, because some states still maintain a ‘single disease’ rule, which precludes a second lawsuit just when the individual is facing a serious injury and needs to provide for his family.”).

²⁶ *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 599 (1997).

²⁷ *See id.* at 599–602.

would be astronomical.”²⁸ The same court estimated that of every dollar spent on asbestos litigation and resolution, only thirty-nine cents is going to plaintiffs and the remaining sixty-one cents is spent on transaction costs.²⁹ All of the parties are suffering from serious delays, which have led to mounting attorney fees.

Like the federal court system, the state courts also suffer from long delays and increased transaction costs. However, the states face a unique problem related to inconsistent results.³⁰ In states that are generous to asbestos claimants, such as Mississippi, plaintiffs have quickly gone to trial and have obtained multi-million dollar verdicts.³¹ Juries in Mississippi have returned twenty verdicts of \$9 million or more since 1995, and at least seven were for more than \$100 million.³² Some commentators and plaintiffs’ lawyers have labeled it the “magic jurisdiction” because of these astounding results.³³ In states traditionally hostile to asbestos claims, plaintiffs have received smaller verdicts or have been forced to settle.³⁴

In addition, many claims in the last few decades have been taken out of the civil court system by the bankruptcy courts because asbestos claims made many defendants insolvent.³⁵ These claims were then satisfied under trusts set up under the bankruptcy code, by which plaintiffs did not receive the anything near the full value of their claim.³⁶ Overall, in the absence of a national solution to the asbestos problem, the current state of litigation is not achieving justice for any of the parties involved.

A. Problems in the State Court Systems

In order to understand the impact of the FAIR Act and how it can be improved, the full scope of the asbestos problem must be examined. At the state level, the differences in procedures

²⁸ *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990), *rev’d*, 151 F.3d 297 (5th Cir. 1998).

²⁹ *Id.* at 651.

³⁰ See Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, THE WASHINGTON POST, Sept. 25, 2002, at E01.

³¹ *See id.*

³² *Id.*

³³ *See id.*

³⁴ *Id.*

³⁵ See *In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y. 1987).

³⁶ See Crenshaw, *supra* note 30, at E01; see also 11 U.S.C. § 524(g) (2000).

and substantive laws have led to unequal and inconsistent litigation outcomes, and as a result, claimants over the last decade have begun forum shopping.³⁷ For example, some plaintiffs, in generous states, have received verdicts of up to \$250 million. Certain states do not scrutinize plaintiff classes, as do the federal courts following the Federal Rules of Civil Procedure,³⁸ often resulting in classes where there may be conflicts of interest and unfairness.³⁹ Many times, seriously ill plaintiffs are grouped together with plaintiffs that have been exposed to asbestos but have not exhibited any symptoms.⁴⁰ Despite very different interests, these plaintiffs are treated the same for the purposes of litigation in certain states.

Though asbestos claimants are found in almost every state, the majority of claims have been brought in Mississippi, New York, Texas, West Virginia, and Ohio.⁴¹ Over 21,000 claims were filed in Jefferson County, Mississippi where the population is only 9,700.⁴² States with sympathetic juries that grant favorable

³⁷ See *Asbestos Litigation Crisis: Hearing on S. 1125 Before the Senate Comm. on the Judiciary*, 108th Cong. 360 (2003) [hereinafter Dr. Hartwig Testimony] (statement of Dr. Robert Hartwig) ("Under the present tort system, hundreds of thousands of victims—up to 90% of whom are unimpaired by any asbestos related-illness—are able to move from state to state setting their sights on the most sympathetic jurisdictions and judges."). The result of forum shopping has led to significant verdicts in some jurisdictions and much smaller judgments in others. See *id.*

³⁸ See Kazan Testimony, *supra* note 4, at 207, 211–12. Though many states have, for the most part, adopted the Federal Rules of Civil Procedure, the results often turn out to be different. See *id.* at 211–12. For example, though many asbestos classes have been certified by state courts, the Supreme Court has twice decided that asbestos classes generally cannot legally be certified. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997). The Supreme Court decisions suggest that in federal courts, the state classes would not be certified.

³⁹ See *Amchem*, 521 U.S. at 628 (refusing to certify the class of asbestos victims because an inherent conflict exists between current and future plaintiffs).

⁴⁰ See Kazan Testimony, *supra* note 4 at, 207, 214 (discussing how the consolidation of unimpaired plaintiffs with seriously ill plaintiffs often results in the ill plaintiffs receiving a smaller recovery). Seriously injured plaintiffs seek high levels of compensation to offset the loss of income and expensive medical bills, while unimpaired plaintiffs will usually look to settle quickly just so they can recover something.

⁴¹ S. REP. NO. 108-118, at 15 (2003). This trend is alarming considering that many asbestos plants and manufacturers of products containing asbestos were not located in these states. See Kazan Testimony, *supra* note 4, at 212–13.

⁴² See Crenshaw, *supra* note 30, at E01. Jefferson County is known to be extremely sympathetic to asbestos plaintiffs and has awarded huge verdicts, leading many plaintiffs to shop for this and other forums in Mississippi. See *id.* ("[The

verdicts to asbestos plaintiffs are flooded with claims, while plaintiffs in other jurisdictions, unable to afford litigation in a foreign state court, are deterred from bringing suit.⁴³ In addition to the differences in laws between the states, settlement amounts and verdicts differ significantly among various geographic regions.⁴⁴

B. Problems in the Federal Courts and a “Supreme” Plea for Congressional Action

Cases filed in federal court are plagued with similar problems of delay, enormous transaction costs, and clogged dockets.⁴⁵ The federal court system attempted to resolve these problems for asbestos litigation through the use of the Judicial Panel on Multidistrict Litigation (“JPML”).⁴⁶ In 1993, the JPML transferred all asbestos personal injury cases pending in federal

asbestos problem has led to] ‘forum shopping’ by trial lawyers seeking friendly juries.”).

⁴³ See Kazan Testimony, *supra* note 4, at 213 (“[Forum shopping] allows plaintiffs’ lawyers to avoid the effect of state efforts to bring asbestos litigation under control. Thus, for example, if Pennsylvania requires functional impairment as a prerequisite for bringing an asbestos claim, Pennsylvania cases will migrate to other jurisdictions, such as West Virginia or Mississippi [where the requirement does not exist].”).

⁴⁴ See Berenson, *supra* note 2, at A1 (“Under the current system of lawsuits, some people who are sick or dying from asbestos exposure receive little money . . . Others, including some who are not sick, get millions of dollars from sympathetic juries.”).

⁴⁵ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 866–68 (1999) (Breyer, S., dissenting) (discussing the “[u]nusually high litigation costs,” “unusually long delays,” and clogged dockets that would take years to resolve).

⁴⁶ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 599 (1997) (“In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation.”). The Judicial Panel on Multidistrict Litigation was created by Congress to transfer related cases for pretrial proceedings to a single district court. See 28 U.S.C. § 1407(a) (2000) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”). The purpose of the statute is to promote efficiency and uniformity of pretrial proceedings, and eliminate repetitive discovery. See *In re Corrugated Container Antitrust Litigation*, 644 F.2d 70, 74 (2d Cir. 1981). Transferring asbestos cases via the JPML seems to clearly satisfy the purpose of the statute, even though the JPML had refused to transfer asbestos cases in the past. See, e.g., *In re Asbestos School Products Liability*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906, 910 (J.P.M.L. 1977).

courts to the Eastern District of Pennsylvania under Judge Weiner.⁴⁷ A steering committee of plaintiffs' lawyers organized a massive class action under the federal rules and began negotiating a settlement with the asbestos defendants.⁴⁸ The parties eventually concluded two settlements, the first involving all current claimants, and the second involving all future claimants.⁴⁹ The massive settlements suggested that a judicial solution to the asbestos problem would be possible if the court would certify the class and approve the settlement, which the Federal Rules of Civil Procedure require.⁵⁰ Judge Weiner conditionally certified the class for settlement purposes only,⁵¹ but the Third Circuit reversed.⁵² The Supreme Court granted certiorari⁵³ and affirmed the Third Circuit's decision.⁵⁴

The Court held that the class did not satisfy the requirements of the Federal Rules and conflicts of interest

⁴⁷ See *In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415, 422–24 (J.P.M.L. 1991); see also *Amchem*, 521 U.S. at 599. The JPML chose the Eastern District of Pennsylvania because that district had the most claims pending of any of jurisdiction, was experienced in complex litigation, and was willing to take on all of the asbestos cases. *In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. at 422–23. Judge Weiner was selected because he had significant experience with asbestos litigation on the bench and was agreeable to the majority of the parties to the cases. *Id.* at 423. The transfer of cases to Judge Weiner, being the first asbestos transfer to the JPML, suggests that the growing litigation problem and lack of congressional action played a role in the decision.

⁴⁸ See *Amchem*, 521 U.S. at 599–601. Plaintiffs appointed a steering committee to handle settlement negotiations, while the defendants created a joint defense arrangement called the Center for Claims Resolution (“CCR”). *Id.* The CCR consisted of twenty former asbestos manufacturers. *Id.*

⁴⁹ *Id.* at 600–01. The settlement of all future asbestos cases arose from the settlement discussion for the pending plaintiffs. See *id.* The CCR refused to settle the pending claims without “some kind of protection for the future.” *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 294 (E.D. Pa. 1994).

⁵⁰ See FED. R. CIV. P. 23. In order to certify the class, the court must be satisfied that the class meets the requirements of numerosity, commonality, typicality, and adequacy of representation. FED. R. CIV. P. 23(a). The class must also then fit into one of three different categories of classes. FED. R. CIV. P. 23(b). Once the court has certified the class, it must approve the settlement. FED. R. CIV. P. 23(e). The court will only approve a settlement if the terms are fair to all of the class members. *Amchem*, 521 U.S. at 605.

⁵¹ *Georgine*, 157 F.R.D. at 246, 337. The class was certified for settlement only—it was considered a settlement class because the complaint, answer, joint motion for certification, and proposed settlement agreement were filed together. See *Amchem*, 521 U.S. at 601–02 (“The class action thus instituted was not intended to be litigated.”).

⁵² *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 635 (3d Cir. 1996).

⁵³ *Amchem Products, Inc. v. Windsor*, 519 U.S. 957 (1996).

⁵⁴ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997).

prevented the approval of the settlement.⁵⁵ Justice Ginsburg, writing for the Court, reluctantly refused to certify the class.⁵⁶ Though the class could not legally be certified, the Court recognized the asbestos problem and articulated a need for a national solution.⁵⁷ Despite the Court's desire for a solution, it acknowledged that the federal courts could not solve the asbestos problem.⁵⁸ Instead, Justice Ginsburg called on the legislature to take action and form a "national asbestos dispute-resolution scheme."⁵⁹ Two other similar asbestos cases have reached the Supreme Court, and each time the Court has been unable to help solve the asbestos problem.⁶⁰ In both cases, the Court reiterated the need for a national legislative solution.⁶¹

⁵⁵ See *id.* at 626 ("[T]he interests of those within the single class are not aligned. . . . [F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.").

⁵⁶ See *id.* at 597–98. Justice Ginsburg recognized the seriousness of the asbestos crisis, but acknowledged that the courts lack the power to create a nationwide solution and cannot change the laws governing the asbestos problem. See *id.* at 599 ("In the face of legislative inaction, the federal courts . . . lack[] authority to replace state tort systems with a national toxic tort compensation regime"); see also *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 141 (2003) (stating that the laws could not be rewritten solely because of the asbestos crisis).

⁵⁷ See *Amchem*, 521 U.S. at 598–99.

⁵⁸ See *id.* at 598–99. *But see* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 868 (1999) (Breyer, J., dissenting) (arguing that the asbestos problem is so severe that the Court should stretch the laws to their maximum and allow the class to be certified). Justice Breyer's dissent cites the long delays, massive number of claims, the clogging of court dockets, and the fact that many seriously injured plaintiffs do not survive long enough to receive compensation as reasons why the Court must take some action. *Ortiz*, 527 U.S. at 867–68 (Breyer, J., dissenting). These problems led Justice Breyer to state that "in these circumstances, I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides." *Id.* at 868 (Breyer, J., dissenting). In addition, Breyer stated that asbestos-related injuries are tort claims and are traditionally resolved by the courts. *Id.* at 868 (Breyer, J., dissenting).

⁵⁹ *Amchem*, 521 U.S. at 595, 628 ("[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

⁶⁰ See *Norfolk & Western Ry. Co.*, 538 U.S. 135; *Ortiz*, 527 U.S. at 864–65. In *Norfolk & Western Ry. Co.*, railroad employees sued their employer for negligence in exposing them to asbestos and causing their asbestosis. *Norfolk & Western Ry. Co.*, 538 U.S. at 140. Plaintiffs also sued to recover damages for their fears of developing cancer due to their asbestos exposure. *Id.* Defendants challenged recovery on this ground and also argued against joint and several liability in asbestos cases. *Id.* at 141. The Supreme Court held that damages for fear of developing cancer are recoverable and that joint and several liability applied in asbestos cases, stating that the court "decline[s] to write new law by requiring an initial apportionment of

C. Problems in the Insurance Industry: Solvency in Doubt

Asbestos claims have also had a significant impact on the insurance industry.⁶² Almost all of the asbestos manufacturers and other asbestos-related defendants were insured for asbestos claims on policies written decades ago. The insurance industry has been hit hard by the flood of asbestos claims in recent years and has been forced to significantly increase its reserves in order to pay these claims on the old policies.⁶³ Many insurance companies have now started to specifically write out pollution or asbestos-type claims from their policies to avoid a similar situation in the future.⁶⁴ Though the new exclusionary language in these policies may solve future problems for the insurance industry, the industry still faces significant liability for all of the current claims. Under some estimates, the value of the asbestos claims may exceed the total amount of some insurers' reserves for all claims.⁶⁵ These problems have been recognized, and the

damages among potential tortfeasors." *Id.* By limiting the damages to defendants and rejecting joint and several liability, the Court would have made the asbestos problem less devastating for defendants, and therefore more manageable. However, the Court was unwilling to change the laws to adapt to asbestos litigation. *Id.*

In *Ortiz*, a group of defendant manufacturers of asbestos products agreed to a global settlement with a group of plaintiffs' lawyers that represented approximately 45,000 claimants. *Ortiz*, 527 U.S. at 824. The global settlement included all current and future claimants against the defendants. *Id.* at 827–28. The parties filed a motion for class certification under the Limited Fund Doctrine, FED. R. CIV. P. 23(b)(1)(B). *Id.* at 828. The District Court certified the class and the Fifth Circuit affirmed. *Id.* The Supreme Court reversed, holding that the class could not meet the requirements of predominance and commonality and that the limited fund doctrine did not apply to situations where the parties agreed that the fund was limited. *See id.* at 864–65.

⁶¹ *See Norfolk & Western Ry. Co.*, 538 U.S. at 166; *Ortiz*, 527 U.S. at 821. In *Ortiz*, the Court referred to its discussion in *Amchem* regarding the necessity for "federal legislation creating a national asbestos dispute-resolution scheme." *Ortiz*, 527 U.S. at 821–22 (quoting *Amchem*, 521 U.S. at 598 (quoting Report of The Judicial Conference Ad Hoc Comm. on Asbestos Litigation 2–3 (1991))). More recently, in *Norfolk & Western Ry. Co.*, the Court stated that the asbestos problem "defies customary judicial administration and calls for national legislation." *Norfolk & Western Ry. Co.*, 538 U.S. at 166 (quoting *Ortiz*, 527 U.S. at 821–22).

⁶² *See* Diane Levick, *Insurers Need Government Help in 'New Era of Risk'*, HARTFORD COURANT, October 1, 2003, at E2.

⁶³ *See id.* Ms. Levick compared the asbestos problems to the problems of insuring against terrorist strikes, which was the subject of a recent federal enactment to provide a federal backstop for these claims. *See id.*

⁶⁴ *See* Carolyn Aldred, *U.K. Asbestos Exclusions Likely to Spread*, BUSINESS INSURANCE, July 7, 2003, at 37.

⁶⁵ *See id.*

insurance industry has been included in the national dispute resolution scheme described in the FAIR Act of 2004.⁶⁶

II. CONGRESS STRIKES BACK: THE BEGINNINGS OF NATIONWIDE SOLUTION TO THE ASBESTOS PROBLEM

In response to the calls of the Supreme Court, Congress has made several attempts to create a national trust fund for victims of asbestos-related bodily injury.⁶⁷ Seemingly every member of Congress agrees that a national solution is preferable to the current state of asbestos litigation. However, Congress has been unable to agree on how to accomplish this objective.⁶⁸ Previous attempts to create a fund, such as the Fairness in Asbestos Compensation Act, proposed in 1998, suffered from a variety of problems and quickly died in congressional committee.⁶⁹ Nevertheless, Senator Orrin Hatch made the establishment of an asbestos trust fund one of his main priorities and proposed the FAIR Act in late April 2003.⁷⁰ Senator Hatch built on the failures of previous asbestos bills, similar national trust funds, and bankruptcy trusts of asbestos defendants.⁷¹

⁶⁶ See FAIR Act of 2004, S. 2290, 108th Cong. (2004).

⁶⁷ The most recent response by Congress to the calls of the Supreme Court is the Fairness in Asbestos Injury Resolution Act of 2004. *Id.* In the findings section of this bill, the text cites to *Amchem*, *Ortiz*, and *Norfolk & Western Ry. Co.* and comments that “[t]he United States Supreme Court has recognized that Congress must act to create a more rational asbestos claims system.” *Id.* § 2(a)(6).

⁶⁸ See S. REP. NO. 108-118, at 1–2 (2003) (Minority Views of Senators Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, and Edwards). The Minority Views Statement of the eight senators who voted against the bill reveals that they want a national solution to the asbestos problem through a trust fund, but disagreed with some of the provisions of the bill. See *id.* at 1–3. Based on their statement, it seems clear that if certain amendments to the bill are made, they will vote in favor of the FAIR Act. See *id.*

⁶⁹ Fairness in Asbestos Compensation Act of 1998, S. 2546, 105th Cong. (1998); H.R. 3905, 105th Cong. (May 20, 1998). This bill was referred to the Judiciary Committee, where no further action was taken on the bill. See 105 CONG. REC. S11,344 (Oct. 2, 1998). In 2003, the asbestos crisis had been a major issue for many in Congress. There were four different asbestos bills proposed, none of which did not make it out of its committee. See generally Asbestos Victims’ Compensation Act of 2003, H.R. 1737, 108th Cong. (2003); Asbestos Compensation Fairness Act of 2003, H.R. 1586, 108th Cong. (2003); Asbestos Compensation Act of 2003, H.R. 1114, 108th Cong. (2003); Asbestos Claims Criteria and Compensation Act of 2003, S. 413, 108th Cong. (2003).

⁷⁰ See S. REP. NO. 108-118, at 4; Senator Hatch Statement, *supra* note 8.

⁷¹ See Senator Hatch Statement, *supra* note 8. While introducing the FAIR Act to the Judiciary Committee, Senator Hatch noted that he had worked on a similar bill in the past, which surely had an impact on the FAIR Act. See *id.* In addition,

One example of a national fund where Congress created a compensation scheme for tort claims is the Black Lung Benefits Act.⁷² Congress created the Black Lung Benefits Act to provide compensation for coal miners who had become ill as a result of their employment.⁷³ The Black Lung Benefits Act creates a no-fault compensation system for miners, which is incorporated into state workers' compensation programs.⁷⁴ Contributions by mine operators are required to be paid into the state workers' compensation program.⁷⁵ The Black Lung Benefits Act illustrates that congressional action to correct a mass tort crisis is not a novel and unpopular concept.

testimony taken at the committee hearings discussed other similar legislation and how those past experiences can aid the FAIR Act, including: the Black Lung fund, September 11th Victims Compensation Fund, Vaccine Compensation, state workers compensation statutes, and national bankruptcy funds, like the Johns-Manville Trust Fund. See Dr. Hartwig Testimony, *supra* note 37.

Similar to the Black Lung Benefits Act, the FAIR Act has also been influenced by the Johns-Manville Trust Fund ["Manville Trust"]. The bankruptcy court created the Manville Trust to compensate asbestos plaintiffs and protect the future of the company. *In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y. 1987). Congress based § 524(g) of the bankruptcy code on the Manville Trust. Section 524(g) authorizes the bankruptcy court to enjoin potential plaintiffs from filing claims against a bankrupt party. 11 U.S.C. § 524(g)(1)(A) (2000). Instead, the parties with claims file them against a trust fund that is established by the bankruptcy court to settle the claims and make payments to the parties. *Id.* § 524(g)(2)(B). The fund is administered privately, through a court-appointed administrator. *Id.* § 524(g)(4)(B)(i). There are currently numerous § 524(g) trust funds in operation, with approximately twenty more pending approval by bankruptcy courts. Senator Hagel Testimony, *supra* note 2.

A failure of the Manville Trust has influenced the FAIR Act. The Manville Trust underestimated the number of claimants and proved to be severely under-funded. *Id.* This led to many claimants receiving only five cents on the dollar. See *id.* At the Committee Hearings for the FAIR act, the former trustee, Senator Hagel, testified that:

During 1986, expert claims forecasters testified in the Manville bankruptcy court that between the late 1980's and 2049, the Manville Trust would receive between 83,000 and 100,000 claims. . . [but] only 15 years later, the Manville Trust has received . . . over 620,000 claims
. . . . A recent forecast predicted that by 2049 the trust would receive between 750,000 and 2.7 million additional claims.

Id. The experience of the Manville Trust is a constant reminder that the extent of asbestos liability and the number of claims is uncertain and should not be underestimated. Congress must ensure that the FAIR Act will not suffer the same fate of paying cents on the dollar.

⁷² 30 U.S.C. § 901 (2000).

⁷³ See *id.*

⁷⁴ See *id.* §§ 901–945.

⁷⁵ See *id.*

In addition to considering past congressional action, Senator Hatch clearly stated that the bill was not to be rigid, allowing for negotiations, amendments, and deletions in order to ensure the bill's success.⁷⁶ He put the goal of a bipartisan legislative solution ahead of the specific bill he drafted.⁷⁷

The FAIR Act went through days of hearings and negotiations resulting in dozens of amendments.⁷⁸ After nearly two months of work on the bill in the Senate Committee on the Judiciary, Senator Hatch called for a vote so that the bill could move on to the full floor of the Senate for further debate.⁷⁹ Despite the compromises made during the hearings, the bill narrowly passed the Committee roll call vote, along party lines, on July 22, 2003 by a count of 10-8.⁸⁰ Senate Majority Leader Frist placed the bill on the legislative calendar, and more hearings and negotiations took place. A busy Senate calendar in late 2003 and early 2004—including the war in Iraq and budget appropriations—delayed the Senators from taking any serious

⁷⁶ See Senator Hatch Statement, *supra* note 8. Upon introducing the bill, Senator Hatch stated that “we are open to constructive suggestions and to improvements to this bill.” *Id.* He also admitted that there were flaws in the bill as drafted and it needed improvement. See *id.* (“[The bill] is not without flaws and this hearing today is intended to provide expert advice on how best to improve it.”). Senator Hatch’s openness to criticism led to a significantly improved bill, compared to what was first proposed in April of 2003, coming out of the Judiciary Committee.

⁷⁷ See *id.* Senator Hatch declared his commitment to a bipartisan solution from the outset by taking input from all parties when drafting the bill. *Id.* (“[T]he legislation we are examining today, S. 1125 is a product of much discussion and input from all interested parties. We introduced S. 1125, the bipartisan ‘Fairness in Asbestos Injury Resolution Act of 2003,’ in an effort to move the legislative process along.”). This commitment continued throughout the legislative process and Hatch noted that “[he] incorporated a number of very constructive suggestions by Senator Leahy and Senator Dodd, and [he] look[s] forward to continuing to work with them and [his] other colleagues so that [he] can win their full support.” *Id.*

⁷⁸ See S. REP. NO. 108-118, at 5–15 (2003). The FAIR Act was in hearings and markups for four days, during which time numerous amendments were proposed and brought to a vote. *Id.* Some examples of amendments that the Judiciary Committee passed include banning most uses of asbestos, indexing awards for future inflation, removing most collateral source offsets, establishing new medical criteria, and creating a backstop provision. *Id.* Many of these amendments were proposed by the minority Senators and received bipartisan support. See *id.* at 5–15, 190.

⁷⁹ See *id.* at 4.

⁸⁰ See *id.* One Senator declined to vote on the bill. *Id.* Of the ten favorable votes for the FAIR Act, only one came from a Democrat, Senator Diane Feinstein, while the other senators voted along party lines. *Id.* at 5; see also Alex Berenson, *Senate Panel Approves Bill to Establish Asbestos Trust*, N.Y. TIMES, July 11, 2003, at C1 (discussing the Committee roll call vote that approved the FAIR Act).

action on the bill. On April 7, 2004, Senator Hatch reintroduced the FAIR Act, amended to reflect the results of nearly one year's worth of compromises since the bill was first introduced.⁸¹ Although this amended version of the FAIR Act is the most promising version, it still requires more work, and on October 8, 2004, Congress recessed without voting on it.

III. FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2004: THE MECHANICS OF THE SOLUTION TO THE ASBESTOS CRISIS

The FAIR Act proposes to establish a national trust fund for asbestos victims and mandates that insurers and direct asbestos defendants participate in the fund.⁸² All present and future claims would be removed from the civil court system and compensation would be paid to plaintiffs on a no-fault basis.⁸³ Though the FAIR Act does not require proof of liability or causation, claimants must meet certain standards in order to establish a right to recover.⁸⁴ In addition to basic identification information, a claimant must provide a detailed work history and description of asbestos exposure, identify the asbestos-related disease and submit certifying medical documentation, and disclose any previous lawsuits and recovery amounts from judgments or settlements.⁸⁵ A significant compromise during the committee hearings resulted in the elimination of the requirement that claimants must identify the specific product or defendant that caused the exposure.⁸⁶ This would have made it more difficult for claimants to recover under the Act, since many people were exposed up to forty years ago and may not remember the exact product.

The fund would remain in effect for twenty-seven years, after which time participation by defendants and insurers would

⁸¹ FAIR Act of 2004, S. 2290, 108th Cong. (2004).

⁸² *See id.* § 2(b)(1).

⁸³ *Id.* §§ 111–112 (stating what is and what is not required for making claims from the national fund); *id.* § 403 (allowing all claims to be removed from both state and federal courts and barring future asbestos claims in both court systems).

⁸⁴ *Id.* §§ 111–114(b).

⁸⁵ *Id.* § 113(c).

⁸⁶ *Id.* In addition to the aforementioned requirements, the claimant must also include a description of the claimant's history of tobacco use, because the illnesses are similar and tobacco use combined with asbestos exposure increases the risk of illness even further. *Id.* § 113(c)(5). A claimant who has a history of smoking would stand to receive less compensation under the Act. *See id.* § 131.

be voluntary, and any opting-out defendants would again be subject to tort liability.⁸⁷ The FAIR Act awards compensation based on certain categories of illnesses, gradually increasing with the seriousness of the injury to a maximum recovery of approximately one million dollars.⁸⁸ There are ten different categories of illnesses listed in the FAIR Act.⁸⁹ For each category, the Act lists the specific type of medical evidence to establish compensation under each category.⁹⁰ The evidence required for the categories generally consists of chest x-rays and the diagnosis of a certified physician.⁹¹ Placement within a category depends on the number of years the claimant was exposed to asbestos and the seriousness of the exposure.⁹² Five categories are for non-malignant diseases including: exposure only, difficulty breathing, and varying degrees of asbestosis.⁹³ There are also five categories of malignant diseases: varying types of cancers (throat, stomach, etc.), lung cancer, and, the most serious, mesothelioma.⁹⁴ These categories include a designation for plaintiffs who have been exposed to asbestos but remain uninjured or have not yet manifested any symptoms.⁹⁵ For these plaintiffs, the Act allows compensation for medical monitoring and for reclassification into a different illness category should any symptoms manifest themselves during the traditionally long latency period of asbestos related illnesses.⁹⁶ Plaintiffs who have exhibited symptoms would need only to submit medical documentation and the exposure details in order to secure compensation from the fund.⁹⁷ The relatively low

⁸⁷ See *id.* § 203(c)–(h) (providing a schedule of payments for years one through twenty-seven for the sub-tiers of defendants); *id.* § 212 (stating the commissioners collection powers over defendants and insurers).

⁸⁸ See § 121(d), 131. Categorization is also effected by the smoking history of the claimants. See *id.* §§ 131(b)(2)–(3).

⁸⁹ See *id.* § 121(d).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ § 121(d)(1)–(5).

⁹⁴ *Id.* § 121(d)(6)–(10).

⁹⁵ *Id.* § 121(d)(1).

⁹⁶ *Id.* § 131; see also *id.* § 132(b) (“Reimbursable medical monitoring costs shall include the costs of a claimant not covered by health insurance for an examination by the claimant’s physician, x-ray tests, and pulmonary function tests every 3 years.”).

⁹⁷ See *id.* § 121(d). If a potential plaintiff does not meet the required medical documentation or exposure details, he may still submit an exceptional medical

evidentiary requirements and expedited schedule of recovery ensures that claimants will receive timely compensation and significantly lowers transaction costs.⁹⁸

As currently proposed, the mandatory contributions to the fund would total approximately \$125 billion over twenty-seven years, with \$57.5 billion paid by defendants and \$46.025 billion paid by insurers and reinsurers, and the remaining \$18 billion to be paid by preexisting bankruptcy trusts, smaller defendants, and from interest.⁹⁹ The payments by each individual contributor are to be calculated based on the dollar amount of previous asbestos expenditures for settlements, judgments, and transaction costs; the categories are permanent for the life of the fund.¹⁰⁰ The highest payment for a contributor is estimated at under \$1 billion, spread out over twenty-six years.¹⁰¹ The Act offers defendants the opportunity to plan for these payments so that bankruptcy can be avoided and defense costs can be substantially reduced.¹⁰² It would also end the corporate

claim. *See id.* § 121(f). The Asbestos Court, provided for by the act, will review any other medical documentation or evidence submitted by the claimant that may be relevant. *See id.* The Act also provides for an appeal if the claim is rejected. *See id.*

⁹⁸ In addition to these benefits for claimants, the bill provides for award values that are to be increased by a cost-of-living increase, to protect future claimants from inflation which would affect the value of the compensation. *See id.* § 131(b)(5).

⁹⁹ *See id.* §§ 202–203. The total amount of the fund is constantly changing due to negotiations over this bill. The bill originally called for \$90 billion, but was later amended to \$108 billion. FAIR Act of 2003, S. 1125, 108th Cong. §§ 202–203 (2003). Contributions are required of any defendant that has had “prior asbestos expenditures greater than \$1,000,000.” *See* FAIR Act of 2004, S. 2290, 108th Cong. § 202(b).

¹⁰⁰ *See* FAIR Act of 2004, S. 2290, 108th Cong. § 202. The categories are not affected by a sale of assets, filing of bankruptcy or discharge from bankruptcy. *Id.*

¹⁰¹ *See id.* § 203; David G. Savage, *Asbestos Bill Could Be Windfall for Business*, L.A. TIMES, July 14, 2003, at 1. The payments into the fund by the tier one contributors in sub-tier one are the group with the highest asbestos expenditures. *See* FAIR Act of 2004, S. 2290, 108th Cong. § 203. These contributors are to pay into the fund a percentage of their gross revenues for the 26-year period with a maximum rate in year one of 1.5184% and reducing each year throughout the life of the fund. *See id.* With certain maximum provisions in the fund, it is approximated that the top tier will have to pay a maximum of under \$1 billion. *See id.*

¹⁰² *See* FAIR Act of 2004, S. 2290, 108th Cong. § 2. The main purposes of the FAIR Act are to prevent future bankruptcies, to reduce the transaction costs of asbestos claims, and to allow more of the money spent on asbestos litigation to end up in the hands of the victims. *See id.*; *see also* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998) (estimating that only thirty-nine cents of every dollar spent on asbestos personal injury litigation goes to victims, with the rest going to lawyers fees and costs); *supra* note 2 and accompanying text.

paralysis caused by the massive potential asbestos liabilities in the court system, which has resulted in layoffs and decreases in pension fund sizes.¹⁰³

The insurance industry is required to contribute a total \$46.025 billion to the fund over the fund's twenty-six-year life.¹⁰⁴ In its current state, the bill authorizes creation of an Asbestos Insurers Commission, with members appointed by the President, to be made up of independent insurance experts who represent both insurers and reinsurers.¹⁰⁵ The Commission would study the insurance industry, hold hearings and determine its own apportionment of the contribution amount, and require the insurance companies to pay that amount.¹⁰⁶ The Asbestos Insurers Commission would submit their plan in an Allocation Agreement, which would, in turn, be submitted to Congress and the Administrator of the fund for approval.¹⁰⁷

Moreover, the bill includes other special provisions to aid its passage.¹⁰⁸ The FAIR Act includes a ban on the use of asbestos in the United States with only minor exceptions.¹⁰⁹ It also expands the potential group of plaintiffs by including workers'

¹⁰³ See FAIR Act of 2003, S. 1125, 108th Cong. § 2. Because of massive potential asbestos liability, certain companies have been unable to expand, merge with another company, acquire another company, or sell off assets as a result of the uncertainty of the amount of money required to compensate asbestos victims. See *id.*; see also Berenson, *supra* note 2, at A1 (acknowledging the effect of asbestos litigation on defendants and their businesses).

¹⁰⁴ See FAIR Act of 2004, S. 2290, 108th Cong. § 212(a)(2)(A).

¹⁰⁵ See *id.* § 211 (discussing the establishment and formation of the asbestos insurers commission).

¹⁰⁶ See *id.* § 212(a)(1)(B).

¹⁰⁷ See *id.* § 212(a), § 212(c)-(d).

¹⁰⁸ See S. REP. NO. 108-118 (2003) (containing various provisions that are not directly related to the fund). Many of these special provisions were added as part of a compromise during the committee hearings. See *id.* It is expected that more provisions of this type will be added as the bill is considered by the full floor of the Senate in order to garner support for the FAIR Act. See *id.* at 187.

¹⁰⁹ FAIR Act of 2004, S. 2290, 108th Cong. § 501 ("Prohibition on Asbestos Containing Products"). Senator Feinstein proposed this amendment during the June 24, 2003 markup session in the Senate Judiciary Committee and the Committee approved of the amendment. See S. REP. NO. 108-118. Although most companies have stopped using asbestos, the decision was based on their individual corporate policies and studies which revealed the dangers of exposure to asbestos. See Berenson, *supra* note 2, at C6. Despite the serious and well-known risks of exposure to asbestos it is still used in some limited circumstances. See S. REP. NO. 108-118, at 58. The ban in the FAIR Act allows exception only in very limited cases including uses certified by the Department of Defense, NASA, or the EPA. See FAIR Act of 2004, S. 2290, 108th Cong. § 501.

family members who have been exposed by the asbestos fibers that were brought home by workers on their clothes and in their hair.¹¹⁰ In section 121(c)(3), the FAIR Act allows claims from a “person who alleges their exposure to asbestos was the result of living with a person who, if the claim had been filed by that person, would have met the exposure criteria.”¹¹¹ Many workers who were severely exposed to asbestos inadvertently brought home asbestos fibers on their clothes, exposing their family members.¹¹² This provision ensures that these victims can make claims against the fund. However, these claimants are not able to recover as easily as people occupationally exposed.¹¹³ All “Take-Home” claimants, except for those who have mesothelioma, must submit a claim to the special board for review of the evidence.¹¹⁴ Likewise, the FAIR Act has a special provision for the people of Libby, Montana, who resided near asbestos mines and have been heavily exposed.¹¹⁵ The bill also commissions a study of asbestos-related illnesses and ultimately seeks a cure to the ailments asbestos has caused.¹¹⁶

A. Critics Sound Off on the FAIR Act

Though the bill offers significant improvement over the current asbestos-liability system, numerous critics have expressed concerns that threaten its passage. Some who oppose

¹¹⁰ FAIR Act of 2004, S. 2290, 108th Cong. § 121(c)(3).

¹¹¹ *Id.*

¹¹² See S. REP. NO. 108-118, at 195.

¹¹³ See FAIR Act of 2004, S. 2290, 108th Cong. § 121(c)(3)(B).

¹¹⁴ *Id.*; see also *id.* § 121(f) (setting up a special board to review claims of claimants that do not fit into a specific category or do not meet the medical criteria); *supra* note 66 and accompanying text.

¹¹⁵ See FAIR Act of 2003, S. 1125, 108th Cong. § 121 (2003). The FAIR Act also provides a special provision for the residents of Libby, Montana. See *id.* Libby is a small town where a common strand of asbestos was mined and processed, and as a result enormous quantities of fibers were released into the community. *Id.* Many people became seriously ill as result of this non-occupational exposure. See *id.* This type of claimant must provide medical documentation like other claimants, but instead of work history, must prove residency within twenty miles of Libby, Montana for at least twelve consecutive months in order to make a claim. *Id.*

¹¹⁶ See *id.* § 121(e). The FAIR Act orders the Institute of Medicine of the National Academy of Sciences to complete a study within two years of enactment of the bill to study the causal link between asbestos and forms of cancer, including colorectal, stomach, esophageal, and laryngeal. *Id.* The study is to be presented to the Court of Federal Claims and Congress. *Id.* This study will allow Congress to make necessary adjustments such as broadening the medical criteria or changing the categories of compensation.

the bill in its current state argue that the payouts to victims are too low, and do not come close to matching the compensation available through litigation.¹¹⁷ Others have expressed concerns about the long-term solvency of the fund and the ability to adapt, depending on the number of claimants that emerge, over the life of the fund.¹¹⁸ Further, some fear that the fund would not be able to handle the flood of claims that asbestos victims will file in the early years of the fund.¹¹⁹ Finally, critics representing the defendants and insurers argue that no additional money is available to contribute to the fund, and that requiring additional compensation at various times throughout the life of the fund would give rise to the same uncertainties and corporate paralysis as the current litigation system.¹²⁰ With significant concerns being raised by both sides, it is clear that in order for this Act to become law, serious compromises and changes must be made to the bill to ensure a satisfactory solution for all parties.

IV. IMPROVING THE FAIR ACT TO ENSURE THAT IT REALLY IS FAIR AND WILL RESOLVE THE ASBESTOS CRISIS

Despite the promise of the FAIR Act, it is not a perfect solution to the asbestos crisis. The critics of this bill have raised serious concerns which may prevent it from becoming law or, if it is enacted, which may hamper its success. There are three main improvements that this bill requires: an increase in the size and timing of the contributions of the eligible defendants and insurers, a mandatory backstop provision, and a strengthening

¹¹⁷ See S. REP. NO. 108-118, at 188–205 (Minority Views of Senators Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, and Edwards). In the Minority Statement, the dissenting Senators argue that the compensation amount for each disease category should be increased to more closely match the average recovery amount from litigation. *See id.* at 199. This contention means that the overall size of the fund must be raised to meet these demands. *See id.* at 199, 206. Some estimates of the overall cost of asbestos litigation will be around \$200 billion and the minority requests that the fund be brought a little closer to this number. *See id.* at 58, 206.

¹¹⁸ *See id.* at 195–97.

¹¹⁹ *See id.* at 208 (“It will take at least several years for the trust fund to process the 290,000–300,000 asbestos cases that are currently pending. According to expert testimony before the Committee, . . . it might take at least 8 years to fully pay pending claims.”).

¹²⁰ Crenshaw, *supra* note 30 (mentioning the economic consequences on corporations with asbestos liabilities because of the uncertainty of the total cost of resolving those claims).

of the power of the trust fund's administrator to adapt it to changing circumstances.

A. Asbestos Fund: Too Little, Too Late?

One main concern about the asbestos bill is the amount of payments required by the asbestos defendants. The maximum level of payment by an asbestos defendant is estimated to total less than \$1 billion.¹²¹ Though this amount of money is considerable, consider that Halliburton has recently proposed a settlement of its asbestos claims at approximately \$4 billion.¹²² Under the FAIR Act, Halliburton's contribution would be much less, saving them in the range of \$2.5 billion.¹²³ Other asbestos defendants have achieved settlements that far exceed their required contributions under the FAIR Act, which suggests that these defendants would stand to receive a windfall under the Act.¹²⁴ This result suggests that the categories of the defendants should be adjusted. A category at the top should be created to represent those companies that have the highest levels of liability, such as Halliburton, to more closely match what its liability would have been in the court system.

Another suggestion for the FAIR Act is to change the timeline for payments into the fund by insurers and defendants. In its current state, the bill requires payment into the fund each year for twenty-seven years.¹²⁵ This would create a problem because of the early rush to compensation under the fund.¹²⁶ Instead, the legislature should calculate the value of all of the currently pending claims under the FAIR Act and order this

¹²¹ See FAIR Act of 2003, S. 1125, 108th Cong. § 203; Savage, *supra* note 101, at 1.

¹²² See *Halliburton Seeks Support for Asbestos Settlement*, N.Y. TIMES, Sept. 23, 2003, C4.

¹²³ See Berenson, *supra* note 2, at A1 ("Another potential complication is that one of the biggest beneficiaries of any such settlement could be Halliburton, . . . which faces asbestos suits that have depressed its stock price. Because Vice President Dick Cheney was chairman of the company, any settlement that benefits Halliburton may be criticized by Democrats.")

¹²⁴ See, e.g., Senator Hagel Testimony, *supra* note 2 (estimating that Johns-Manville has paid out \$3.1 billion through 2002).

¹²⁵ See FAIR Act of 2003, S. 1125, 108th Cong. §§ 202–223.

¹²⁶ See S. REP. NO. 108-118, at 208 (2003) (Minority Views of Senators Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, and Edwards) (discussing possible lag time of eight years to handle all of the claims that would be filed upon the enactment date of the fund).

amount to be paid as an initial payment by the contributors. The fund should then collect the scheduled first year amount to better handle any additional claims not currently in the court system that would be filed upon the passage of the bill. This would ensure that the early claimants would not be subject to delay, as the fund would be waiting to collect the next year's payments.

B. Voluntary Backstop Provision: Too Weak to Prevent the Same Problems?

The FAIR Act does not contain a mandatory backstop provision to deal with asbestos claims after the fund expires. While the bill has contemplated voluntary contributions,¹²⁷ there is no guarantee that defendants will make these payments, or have any incentive to make them.¹²⁸ If defendants decide that they will be able to save money by defending claims in the court system rather than contributing to the fund, the same problems that exist now will reoccur. As a result, the FAIR Act is only a temporary solution to the asbestos problem.¹²⁹ At the end of the fund, defendants that do not make the voluntary contributions will again be subject to tort liability. Through the ban on asbestos, and due to the fact that most companies stopped using asbestos in the 1970s, the exposure of new plaintiffs after the enactment of this bill will be unlikely.¹³⁰ However, the long and uncertain latency period suggests that there will be claims that outlive the fund.¹³¹ Though these claims will be less numerous, the same problems will arise—long delays, expensive transaction costs, and clogged dockets.

The FAIR Act should provide the Administrator of the fund the power to extend the fund as long as necessary and require mandatory contributions to continue. Future victims of asbestos should not be penalized solely because of the long and unpredictable latency period. The extension should be from

¹²⁷ FAIR Act of 2003, S. 1125, 108th Cong. § 223(g).

¹²⁸ *See id.* In addition, if a defendant has become insolvent, the voluntary contribution could become problematic because of the involvement of the Bankruptcy Court.

¹²⁹ *See id.* §§ 201–204 (requiring mandatory funds in years one through twenty-seven, while subsequent contributions are voluntary).

¹³⁰ *See* Kazan Testimony, *supra* note 4; *see also* FAIR Act of 2003, S. 1125, 108th Cong. § 838 (prohibition on asbestos containing products).

¹³¹ FAIR Act of 2003, S. 1125, 108th Cong. § 121(b).

year-to-year based on a study of the number of claims received in past years or from experts' estimations of the number of remaining claims. Though defendants would likely be against extending the life of the fund, a mandatory extension would surely be a better solution than revisiting the resolution of claims through the tort system that currently exists.

C. In Twenty-Seven Years, Will It Still Work? Giving the Administrator Greater Power

One of the problems with the FAIR Act is that the administrative system to manage the funds is insufficient to handle the enormous load of asbestos claims—especially in the first few years. In the original version of the bill, a special court was to be set up, called the United States Court of Asbestos Claims, to administer the fund.¹³² The special court was eliminated from the bill during committee hearings in order to minimize the bureaucracy and cost of administering the fund. Instead, the second version of the bill proposed administering the fund through the Court of Federal Claims.¹³³ Now, the bill creates the Office of Asbestos Disease Compensation, a branch of the Labor Department.¹³⁴ Considering that there have been at least three different vehicles for administering the fund, it seems that Congress is unclear on how it should be administered. Congress should consider reverting to the original idea of creating a special court for asbestos claims that would be mostly independent of the three branches of government, and would not be politicized. Though creating a special court would raise the administration cost of the fund, the legislative purpose of the fund would be better served by its creation. In the first year of the fund, the nearly 300,000 pending claims will flood the system and impede its administration.¹³⁵ If a special court is created, it would be better equipped to handle the claims efficiently and ensure rapid compensation for victims of asbestos-related bodily injuries. In addition, an independent court will not be influenced

¹³² *Id.* § 201.

¹³³ *Id.* The Court of Federal Claims currently handles monetary claims against the United States. Even with staff increases, it may be overburdened by the new responsibilities affecting the performance of the fund.

¹³⁴ FAIR Act of 2004, S. 2290, 108th Cong. § 101 (2004).

¹³⁵ See Dr. Peterson Testimony, *supra* note 1; *supra* note 5 and accompanying text.

by elections and party politics. Compared to the cost of delay and inefficiency, the cost of the creation of a special court is not great.

Another concern for the bill is the long-term solvency and success of the national fund. The FAIR Act takes little measure to ensure that, throughout the life of the fund, it is working as expected and remaining successful. What if, in year 20, the fund has run out of money and can no longer make payments to claimants? The administration of the fund should be empowered to make periodic adjustments to the fund and recommendations to Congress. With the FAIR Act intended as a long-term solution to the asbestos problem, Congress cannot expect to enact the bill and then assume that the problem has been solved. For example, the fund should require the administrator of the fund to report to Congress every five years on the functioning of the bill and forecast the success of the bill for the next five years. After receiving the report, Congress can make adjustments as necessary, such as speeding up the contributions, reducing the contributions, or requiring additional contributions. Insurers and defendants would be hesitant to accept this proposal. However, to soften the impact of this provision the bill should include a clause that would prevent Congress from abandoning the bill and returning to the tort system.

CONCLUSION

The problems caused by asbestos and the subsequent litigation are obvious—death, injury, economic downturn, clogged court dockets, massive transaction costs, long delays in recovering compensation, and questions about the solvency of the insurance industry. The court system is ill-suited to solve these problems; rather, a national legislative act is necessary. The atmosphere in Congress suggests that most members support such action, yet everyone agrees that they must proceed carefully in developing legislation that will be effective.

The FAIR Act, with some adjustments, is the bill that will ensure a successful solution to the asbestos problem. As the bill proceeds through the legislative process, Congress must consider adjusting the amount and timing of the contributions to the fund to protect initial claimants, and strengthening the back-end of the fund to protect claimants who have not yet discovered their injury. Since most Democrats oppose the bill, the prospects of

this bill being enacted in its current state are slim. However, making the changes stated in this Note would help to sway the necessary votes. Both sides are willing to work together and compromise on this bill, which suggests that the FAIR Act or a modified form of it will eventually be enacted.