

History of Legislation in Asbestos Litigation

It appears in the Wall Street Journal. It is featured in Time and Newsweek. It is discussed weekly in the New York Times. It is blamed for the economic downturn of 2000. It is blamed for the docket backlog in many jurisdictions. It is cited by corporate America as the albatross of economic growth and development. It is Asbestos Litigation, and after two mandates from the United States Supreme Court, Congress is, yet again, taking a look at this massive litigation problem. It is 20 years, and over 20 bankruptcies of Fortune 500 companies in the making. It appears that currently there is a real chance of something being done to relieve the Court system, corporate America and the insurance industry of the largest mass tort litigation ever faced. The history of reform dates as far back as the 1980s, before tort reform was in vogue.

The history of attempts at legislative reform of asbestos litigation date back to U.S. Senator Milcent Fenwick of Manville, New Jersey who introduced reform measures in the 1980s. Obviously, little came of Senator Fenwick's efforts and little occurred until the United States Federal Courts, faced with huge litigation delays and the need to move its criminal docket, consolidated all pending Federal asbestos matters before the Honorable Charles Weiner of the United States District Court for the Third Circuit, in Philadelphia, Pennsylvania. (MDL 875) Judge Weiner immediately ordered all matters stayed and began taking a close look at exactly what was pending before him. What Judge Weiner saw was a massive amount of filings involving people with a lung disease which was neither life threatening nor an impairment to lifestyle. Judge Weiner ordered that all those claims which presented with an actual medical problem or financial concern would be addressed. Those claims which involved no pulmonary impairment were stayed until such time as the plaintiff actually got sick or suffered a financial situation.

As part of Judge Weiner's attempt to relieve the Federal Courts of its backlog of cases, he began a series of meetings between the then "major players" involved in the litigation. Largely, this effort focused upon the "CCR" defendants, a group of defendant manufacturers who were working together to resolve claims. These efforts resulted in a class action settlement effort filed in 1993, *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa 1994) The Georgine settlement sought to establish medical criteria for compensable injuries and to deal with the settlement of future claims. On appeal to the United States Supreme Court, the Court held that class certification was not appropriate in asbestos litigation as the class was too large, too diverse, and common questions of law and fact did not predominate within the class. The Supreme Court encouraged Congress to step in and deal with the situation.

In 1993, another group of plaintiffs attempted to obtain class action certification to resolve all pending and future claims against a single defendant-manufacturer Fiberboard. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The action, originally filed in Texas not only sought to deal with the present and future claims against Fiberboard, it also attempted to resolve a longstanding coverage dispute between Fiberboard and its insurers. Again, the U.S. Supreme Court, following appeals, decertified the class and again looked to Congress to deal with the problem.

The next attempt to address the asbestos problem came from Senator John McCain on November 7, 1997, in the Universal Tobacco Settlement Act. The bill proposed to create the Tobacco

Asbestos Trust Fund. The Fund was designed to compensate those with asbestos injuries which were worsened by tobacco use. Following revisions and recommendation to the Senate Committee on Commerce, Science and Transportation in June of 1998, the Act was indefinitely postponed and never enacted.

In 1999, Congressman Henry Hyde introduced the Asbestos Compensation Act of 1999. This bill sought to establish a quasi-governmental corporation, the Asbestos Resolution Corporation which would resolve all asbestos claims nationally. This bill looked to compensate only those individuals with a physical impairment caused by asbestos exposure. This bill was not enacted, but was subject to large revisions and emerged as the Asbestos Compensation Act of 2000. The Asbestos Compensation Act of 2000 would have created the Office of Asbestos Compensation, which was to conduct administrative hearings to determine if a claimant was entitled to compensation for an asbestos related disease. After review, defendants were then to submit settlement offers which could be rejected by the plaintiff. If offers of settlement were rejected, the plaintiff could then bring suit. Although the bill was endorsed by the Senate Judiciary Committee, it never came to the Congressional floor for a vote.

Asbestos litigation continued to receive constant press. By 2002, most of the major manufacturing defendants were under the protection of the bankruptcy courts including, Owens Corning Fiberglass, Armstrong World Industries, and GAF Corporation. The Johns Manville Trust announced that it had to devalue payments as a result of the overwhelming number of claims presented. Second tier defendants were filing bankruptcy with increasing frequency, including filings by Babcox & Wilcox, W.R. Grace, Rutland Fire Clay, and Porter Hayden Company. In February of 2003, the Asbestos Claims and Compensation Act of 2003 was introduced by Senator Don Nickles of Oklahoma.

The Asbestos Claims and Compensation Act of 2003 was heralded as the bill with the greatest potential for passage. The bill attempted to limit the types of plaintiffs who could file suit to only those who met certain medical criteria. The bill specifically sought to cease compensation to those plaintiffs with non-malignant asbestos related claims and no permanent respiratory impairment. The bill provided that plaintiffs were required to meet certain diagnostic levels consistent with American Medical Association guidelines and also preserved a claimant's right to bring suit. The bill attempted to address the issue of forum shopping by providing that suit could only be brought in the state where the claimant resided or was substantially exposed. The restriction, however did not apply to individuals suffering from mesothelioma (a cancer often indisputably linked to asbestos exposure). The statute of limitations was tolled for those individuals who do not meet the medical criteria. The bill acknowledged the two disease distinction between malignant and non-malignant disease processes. It did not effect any workers compensation benefits.

This bill was also endorsed by the American Bar Association. Additionally, it had the support of some members of the plaintiffs bar, but was not endorsed by ATLA. The bill did receive some support by corporate America, and did receive some favorable press. It was referred to the Senate Judiciary Committee on February 13, 2003. However, like its predecessors, this bill languished in committee and has never come to a congressional vote.

Since 2003, several new permutations of asbestos reform legislation have been introduced but have never come up for a formal congressional vote. Currently, both the House and the Senate have introduced new attempts at asbestos reform, but have received little support regarding these bills. The most recent attempt, the Fairness in Asbestos Injury Recovery Act of 2006, was introduced in the Senate by Sen. Arlen Specter (R-PA) in May of 2006, and was referred to the Senate Judiciary Committee in June. This bill, along with its sister bill in the House of Representatives, also sets forth medical criteria which claimants must meet prior to receiving compensation. No action has been taken on this bill since the Judiciary Committee hearings, and it appears all efforts at reform have stalled.

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