

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue cap at the top. The globe in the top bulb is dark blue, while the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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February 2, 2009

Congressional Research Service

Report RL32286

*Asbestos Litigation: Prospects for Legislative Resolution*

Edward Rappaport, Domestic Social Policy Division

August 23, 2006

**Abstract.** This report describes how the asbestos litigation process has evolved, and then discusses the legislative "fixes" that have been tried or proposed. The discussion is thematic, highlighting the sub-issues remaining most in dispute.

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# CRS Report for Congress

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## **Asbestos Litigation: Prospects for Legislative Resolution**

**Updated August 23, 2006**

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<http://wikileaks.org/wiki/CRS-RL32286>

# Asbestos Litigation: Prospects for Legislative Resolution

## Summary

A large volume of litigation has been occasioned by occupational exposure to asbestos, which may ultimately result in payments of \$200 billion or more and has already bankrupted numerous companies. This litigation “explosion” has led to a number of innovations in legal process, but some of the more comprehensive settlements were overturned by the Supreme Court, with the Court suggesting that the situation “calls for national legislation.”

One approach proposed in the 109<sup>th</sup> Congress, embodied in H.R. 1957 (Cannon et al.), would conserve the resources of defendant corporations — many of which have been bankrupted by asbestos cases — so that funds could be applied first to workers who are already sick. This would be done by establishing precise standards for proving the presence of asbestos disease for legal purposes, and postponing the cases of those who might show evidences of exposure but are not yet impaired. H.R. 1957 would also apply to the asbestos problem a number of principles known under the more general rubric “tort reform.”

The bill receiving the most attention in the 109<sup>th</sup> Congress, S. 3274 (Specter and Leahy) would also establish standards for proving injury but, instead of taking the tort reform approach, would remove the cases from the court system entirely. In its place would be an administrative system and a special fund to pay claims. S. 3274 would define nine asbestos disease categories, each with a specified level of compensation, ranging from \$25,000 to \$1.1 million. The fund from which claims would be paid would be financed by assessments on defendant companies and their insurers. Each of the largest firms subject to assessment would be responsible for paying up to \$27.5 million per year for up to 30 years, with an overall funding goal of \$140 billion.

The most debated points of S. 3274 have included the adequacy of the funding scheme, the levels of compensation, medical criteria (especially as regards smoking history), and start-up and close-down issues.

This report discusses such issues thematically, and will be updated to reflect major legislative actions. A section-by-section analysis of S. 852 (the predecessor version of S. 3274, as reported by the Judiciary Committee) may be found in CRS Report RS22081, *S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, by Henry Cohen.

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# Asbestos Litigation: Prospects for Legislative Resolution

Asbestos has been widely used as an insulation material, friction product (e.g., in brakes and clutches) and textile reinforcement, due to its unique combination of strength, flexibility and resistance to heat and corrosion. Over the years, scientific studies have increasingly implicated the material as a cause of debilitating, fatal lung diseases. Protective standards have been adopted and progressively tightened, but human exposures continue to occur through ongoing use and from legacy buildings and equipment.<sup>1</sup> Moreover, cases of asbestosis, lung cancer and other diseases will be emerging for years to come because they occur after a long latency.

Although most cases of asbestos-related disease have occurred from occupational exposure, few of the affected workers have been able to obtain medical and financial assistance from their employers under state workers compensation law. (This was due to various legal hurdles, such as time limitations, and the difficulty of proving that lung cancer was caused by employment.) However, many have successfully sued the manufacturers of asbestos under claims of products liability, to such an extent that many large firms have been forced into bankruptcy. This litigation “explosion” has led to calls for legislation that would expedite the settlement process through administrative alternatives.

The legislation that has advanced the farthest is S. 852, which was marked up by the Judiciary committee on 26 May 2005 and debated in the Senate during 7 to 14 February 2006. A budgetary point of order was raised by Senator Ensign and sustained by a vote of 58 to 41 (60 being needed to proceed further with the debate), sending the bill back to committee. In May 2006, a revised version reflecting the managers’ amendment and other proposals raised in the floor debate was introduced as S. 3274.

This report describes how the asbestos litigation process has evolved, and then discusses the legislative “fixes” that have been tried or proposed. The discussion is thematic, highlighting the sub-issues remaining most in dispute. For a section-by-

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<sup>1</sup> The Environmental Protection Agency issued a regulation in 1986 that would have banned virtually all major uses, but most of the rule was overturned by the Fifth Circuit Court of Appeals (*Corrosion-Proof Fittings*, 947 F.2d 1201). A stand-alone bill in the 108<sup>th</sup> Congress, S. 1115 (Murray), would have mandated such a ban (with a procedure for EPA to allow exceptions). One of the bills for resolving litigation, S. 3274 (Specter and Leahy), would also include a ban on future usage. S. 668 (Specter) would establish criminal penalties for willful violation of occupational asbestos standards. Current regulatory standards are described in CRS Report RS21042, *Asbestos: Federal Regulation of Uses*, by Edward Rappaport.

section explanation, see CRS Report RS22081, *S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, by Nathan Brooks.

## Scope of Litigation

It is estimated that at least 730 thousand people had brought asbestos-related personal injury suits against more than 8,000 defendants by the end of 2002, and the number of new claims each year appears to be still increasing.<sup>2</sup> Typically, each plaintiff sues dozens of defendants, so the total volume of litigation is quite substantial. The total amount spent on asbestos litigation (awards and expenses) has been on the order of \$70 billion, most of this expenditure being financed by defendant companies and their insurers. The total ultimate bill may be on the order of \$200 to 250 billion. The amounts awarded in individual cases are difficult to estimate, as most are resolved confidentially by settlements, but among cases that have gone to trial and succeeded,<sup>3</sup> the average award has been about \$1.8 million. Negotiated settlements tend to be considerably less, however. Minus the legal expenses of both plaintiffs and defendants, about 42% of total spending has been reaching the claimants as their net recovery.

The resulting liabilities have forced some 73 companies into bankruptcy in the last 30 years, 37 of them since January 1, 2000. Among the most prominent of these firms are Armstrong World Industries, Babcock & Wilcox, Federal Mogul, Johns-Manville, Owens-Corning, U.S. Gypsum and W. R. Grace. Bankruptcy is not a desirable outcome for either the defendant firms or the claimants. Claims can be put on hold for five years or more, and in some cases the trusts established to take care of victims have been able to pay only 5% to 10% of what was expected. A subsidiary question is the extent to which defendants can rely on their insurance companies to cover their liabilities, an issue that is occasioning substantial litigation of its own.<sup>4</sup>

## Procedural Improvisation

The unprecedented scale of litigation has induced courts and the parties to develop new structures for resolution of cases. Whereas, at first, defendants vigorously contested such issues as whether a worker was “injured,” whether the cause was asbestos exposure, and which manufacturer’s asbestos was the particular asbestos at fault, by the 1980s new court procedures and decisions were establishing clearer bases for liability. Some judges encouraged consolidation of cases, for example, by selecting a few individual cases to go to trial as representative of the whole. Defendants found that their best opportunity was to negotiate settlements

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<sup>2</sup> Quantitative data cited here are from Stephen Carroll et al., *Asbestos Litigation* (Santa Monica, CA: RAND Institute for Civil Justice, 2005). Available at [<http://www.rand.org/pubs/monographs/MG162/index.html>].

<sup>3</sup> About two-thirds of plaintiffs going to trial win and receive awards.

<sup>4</sup> Randy Maniloff, “Asbestos: Insurance Coverage Issues on a Changing Landscape,” *Mealey’s Litigation Report: Insurance*, July 9, 2002.

through attorneys representing thousands of claims at a time, with the amounts for each individual to be determined by schedules of factors such as disease type. By the 1990s, the leading law firms representing claimants had standing agreements with the major defendants for settling claims (though that system has since lost much of its viability).

The bankruptcy courts have been a notable forum for resolving cases *en masse*, beginning with the pathbreaking Manville Trust.<sup>5</sup> In 1988, after six years under court supervision, Johns-Manville Corp. emerged from bankruptcy 50% owned by a trust charged with compensating current and future asbestos liability claimants. Administrative procedures were developed to streamline claims handling. The trust's operating expenditures are only 5% of benefits paid, and lawyers representing claimants cannot charge more than 25%. Thus, claimants receive 70% of what the trust pays out. Unfortunately, though, the amounts paid are quite low, since the assets of the trust have only been adequate to pay 5% to 10% of full value. The system became a model for other, solvent companies. Congress also codified the process for a bankrupt firm to resolve its liability for all pending *and future* claims via such trusts.<sup>6</sup> In short, some observers believe that through such innovations "asbestos litigation was transformed in fact — although not in form — into a quasi-administrative regime."<sup>7</sup> Much of the resulting concepts and language feed into the legislative measures discussed below.

Most recently, some corporations, including Halliburton, Honeywell and the European-based manufacturer ABB, have presented plans by which claims are to be resolved by the bankruptcies of their subsidiaries rather than the parent corporation, which would then be able to carry on freed of asbestos liabilities. This would make use of the 1994 bankruptcy law amendment, but leave the parent corporation solvent and still in control of its operations (unlike the Manville model, which put control of the whole corporation under the trust).<sup>8</sup>

Finally, many had expected eventually to come to a final resolution of most cases by "global" settlements. However, the two prominent asbestos settlements that were fully litigated up to the Supreme Court were overturned there.<sup>9</sup> The key features of the *Georgine* settlement were (1) definitive criteria for proving exposure

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<sup>5</sup> Homepage: [<http://www.mantrust.org>].

<sup>6</sup> Section 111 of the Bankruptcy Reform Act of 1994 (P.L. 103-394), also known as Section 524(g).

<sup>7</sup> Stephen Carroll et al., *Asbestos Litigation Costs and Compensation, An Interim Report* (Santa Monica, CA: RAND Institute for Civil Justice, 2002), p. 26.

<sup>8</sup> Susan Warren and Alexei Barrionuevo, "Halliburton to Settle Asbestos Claims," *Wall Street Journal* (Dec. 19, 2002), pp. A3, A6. A recent ruling has cast doubt on the efficacy of this strategy. See Russell Gold and Goran Mijuk, "ABB Fails to get Court Approval for Asbestos Plan," *Wall Street Journal* (Dec. 3, 2004), pp. A3, A8.

<sup>9</sup> *Amchem Products v. Windsor*, 521 U.S. 591 (1997) [also known as the *Georgine* case] and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). See Deborah Hensler, "As Time Goes By: Asbestos Litigation after *Amchem* and *Ortiz*," *Texas Law Review*, v. 80, no. 7 (June 2002), pp. 1899-1924.

and illness, in a simplified and expedited process, (2) standardized compensation for actual illness only, (3) preservation of the right to compensation later if disease (or worsened disease) occurs later, (4) a cap on attorney fees, and (5) a limited right to opt out and rely on one's ordinary right to sue. These settlements were rejected for not meeting the requirements for establishing class actions under Federal Rule of Civil Procedure 23. *Georgine* was found wanting because various subgroups of claimants (and potential claimants) were in widely varying circumstances, so that common elements did not predominate among their cases. Also, adequate representation was not broadly enough assured, especially for those who might become aware of their injury only in the future. These defects were not adequately overcome by the agreement's provision allowing potential plaintiffs to opt out. The *Ortiz* class was established under a different subsection of Rule 23 that did not require meeting such criteria, but the Court said it had not been demonstrated convincingly enough that the settlement qualified for this alternate rule subsection (assets of defendants insufficient to meet liabilities).

What was notable about these cases is that members of the Supreme Court expressed discomfort with having to reject settlements with some merit for not meeting the detailed requirements of federal court procedure (which, of course, has its own merits). As stated by Justice Ginsburg in the *Georgine* case, "Rule 23, which must be ... applied with the interests of absent class members in close view, cannot carry the large load ... heaped upon it." More pointedly, Justice Souter in *Ortiz* commented that "this litigation defies customary judicial administration and calls for national legislation."

Thus, each of several hoped-for routes toward resolution — bankruptcy court, class actions, or consolidation of individual cases in one court (which is possible for federal court cases) has run into significant impediments in recent years. At the same time, differences have emerged between claimants who are critically ill and others who may be less sick (or show abnormal x-rays without apparent illness) but who sue immediately, either because of legal deadlines ("statutes of limitations") or because they fear that funds may not be available later.

## Policy Alternatives

### Status Quo

Despite warnings that the asbestos problem is reaching "crisis" proportions, it could be argued that the current legal regime has distinct advantages and should be allowed to proceed as it is, or with minor improvements. The current system is providing substantial assistance to large numbers of victims, most of whom do not have to pay lawyers' fees unless and until compensation is received. From a public policy perspective, the fact that defendant companies are the ones financing the benefits may be considered broadly beneficial. That is, companies in all industries are being put on notice that allowing harm to occur to employees and the public can be fatal to their own financial well-being.



On the other side of the ledger, the current system is not likely to have adequate resources to fully compensate all claimants. A substantial portion of the resources that are available is used to run the system rather than directly benefit claimants. It is also disorganized, with no oversight to assure that compensation is allocated primarily to those with the most compelling cases.

## Changes in Tort Law

Some observers see asbestos litigation as part and parcel of broader problems with personal injury litigation that justify more general “tort reform,” especially in cases with thousands of plaintiffs. Many specific measures have been suggested, such as caps on punitive damages, limitations on joint and several liability, and more narrowly specifying the court(s) in which each plaintiff can bring his/her case.<sup>10</sup>

A tort innovation peculiar to asbestos is the “pleural registry.” In a number of states, this device enables one to make a tentative filing when one learns of one’s injury (often upon diagnosis of *pleural plaques*),<sup>11</sup> and thus meet the legal deadline even though no (or minor) impairment has yet occurred. Trial of the claim is delayed until serious symptoms occur. And if a non-malignant case is established, a potential claim for cancer would be put aside until that disease becomes evident (a *two disease rule*). The idea behind the postponing of cases — many of which will never progress to debilitating disease — is to allow immediate resources to be concentrated on those with the most serious immediate problems.

## Medical Criteria

Building on the pleural registry concept, H.R. 1957 (Cannon et al.) would hold in abeyance statutes of limitations and other time limits until such time as impairment may occur and be diagnosed. Then, before plaintiffs can proceed further with an asbestos or silica<sup>12</sup> suit, they would first make a *prima facie* case that they have a physical impairment and that exposure to asbestos has been a substantial contributing factor. The bill specifies detailed *medical criteria* for establishing these claims. Factors to be considered include employment and smoking history, x-ray evidence of abnormalities such as pleural thickening or opacities, pathological evidence of lung scarring, and impaired breathing shown by measures such as forced vital capacity.

H.R. 1957 also incorporates a number of general tort reform features, as well as others to address the techniques of some lawyers and their medical associates who

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<sup>10</sup> Tort reform is discussed more generally in CRS Report 95-797, *Federal Tort Reform Legislation: Constitutionality and Selected Statutes*, by Henry Cohen.

<sup>11</sup> Pleural plaques resemble calluses. They are patches of tough sinewy tissue which form on the inside of the chest wall and show up in chest x-rays. They are generally thought of as an indicator of asbestos exposure rather than a disease.

<sup>12</sup> H.R. 1957 notes in its findings section that the number of silicosis cases has been rising rapidly and that “it is necessary to address silica legislation to avoid an asbestos-like litigation crisis.”

allegedly have generated thousands of questionable cases. Thus, the bill attempts to avoid diagnosis “mills” by requiring that the *prima facie* evidence be developed by a qualified physician who “has or had a doctor-patient relationship” with the plaintiff.

Among the tort reform ideas in H.R. 1957:

- Venue: Cases may only be brought in federal court for the district where the plaintiff resides or experienced the asbestos exposure.
- Consolidation of cases: Only with the consent of all parties.
- Burden of proof: It must be shown that the conduct of each defendant and exposure to each defendant’s asbestos or silica was a substantial contributing factor to the disease.
- Proportional liability: One implication of this provision is that full damages would not be received if some potential defendants have not been sued or have become bankrupt.
- Cap on non-economic losses: \$250 thousand (\$500 thousand in cases of mesothelioma). Also, punitive damages not available.

A similar measure — though differing in particulars — was introduced as a substitute amendment during debate on S. 852 (see *infra*) but tabled on a vote of 70-27.)

The philosophy of “medical criteria” bills is that the court system (i.e., the federal court system) can handle the asbestos issue if cases are dealt with in an orderly, reasonable way. This means, above all, that awards be made if and when actual impairment occurs, on the basis of reliable, relevant evidence. Given these conditions, it is held that there would be no need for new governmental agencies and levies.<sup>13</sup>

## Administrative System

Two bills in the 108<sup>th</sup> Congress (H.R. 1114 and S. 2290) would have established administrative systems to settle claims along the lines of the *Georgine* settlement. Their intent was to circumvent the seemingly insurmountable requirements of the Federal Rules of Civil Procedure — while assuring a reasonable measure of justice for all parties. (New versions of S. 2290 have been introduced in the 109<sup>th</sup> Congress, and will be discussed extensively in the next section.)

Like the other bills just discussed, H.R. 1114 (Kirk) would require all claimants to first establish that they have an eligible asbestos-related medical condition; failing that, their right to future action would be preserved until such time as impairment occurs. The unique feature of H.R. 1114 was its establishment of a new agency

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<sup>13</sup> Debate on Cornyn amendment SA 2749 in *Congressional Record*, February 9, 2006. pp. S882-S885 and S944-S957.

within the Justice Department, the Office of Asbestos Compensation (OAC). The OAC would not only determine medical eligibility, but would also take direct part in litigation and settlement. First (upon issuing a claimant a certificate of medical eligibility), the OAC, acting through a Trustee, would receive offers of settlement from both sides. The Trustee would also make offers of its own to claimants. If a claimant accepts the Trustee's offer, the Trustee would assume the claim and pursue it against the defendants. Claimants could accept or reject any offers they wish, and for any cases not settled, either pursue a regular lawsuit or an administrative proceeding under the auspices of the OAC. A federal fund would be established for the purpose of facilitating the Trustee's assumption of claims, with the intention of the fund breaking even financially in the long run.

## The Trust Fund Approach

In 2003, the Senate Judiciary Committee began an extensive series of hearings on the asbestos issue and facilitated negotiations involving groups of diverse interests. Out of this process emerged a series of bills. At the beginning of the 109<sup>th</sup> Congress, the new chair of the committee, Senator Specter, introduced S. 852 with seven co-sponsors of both parties. It was reported in June 2005 (Senate Report 109-97) and debated in February 2006, failing a test vote at that time. A revised version, S. 3274, was introduced in May. The House has not taken up the asbestos issue since 2000.<sup>14</sup> (For further explanation of specific provisions, see CRS Report RS22081, *S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, by Henry Cohen.)

S. 3274 would facilitate the resolution of cases, not only, like the other bills, by specifying medical eligibility criteria, but also by establishing a schedule of benefits — ranging to over \$1 million for mesothelioma — and a fund financed by assessments on defendant companies and their insurers, through which all claims would be paid. Each of the largest firms subject to assessment would be responsible for paying up to \$27.5 million per year for as long as 30 years. The funding target is \$140 billion, consisting of \$90 billion from defendant companies, \$46 billion from insurance companies, and about \$4 billion from liquidation of existing bankruptcy trusts. The federal government is expressly excluded from any payment obligation.

In what follows, we discuss S. 3274 specifically, highlighting the particular points that have been most difficult and/or still attract opposition to the bill. They fall mostly under the headings of: funding adequacy, acceptability of the compensation schedule, basis for the diagnostic categories, and start-up and close-down issues. (Most of these points, it may be noted, were addressed in the 2003 committee report on S. 1125 (108<sup>th</sup> Congress), which still constitutes a useful overview despite subsequent changes in the details.<sup>15</sup>)

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<sup>14</sup> H.R. 1283 (Hyde)/S. 758 (Ashcroft) in the 106<sup>th</sup> Congress (H.Rept. 106-782). See Palmer, Elizabeth. "House Panel Approves Bill to Federalize Asbestos Cases," *CQ Weekly*, March 18, 2000, pp. 598-599.

<sup>15</sup> U.S. Congress, Senate Committee on the Judiciary, *The Fairness in Asbestos Injury Resolution Act of 2003*, 108<sup>th</sup> Cong. 1<sup>st</sup> sess., S.Rept. 108-118 (Washington: GPO, 2003), (continued...)

## Funding Adequacy

A number of unknowns mean the bill's stated funding capacity of \$140 billion, a substantial sum by any measure, may yet not suffice to pay all scheduled benefits. The Congressional Budget Office (CBO) estimated that the ultimate total claims would probably be in the range of \$120 to 150 billion.<sup>16</sup> Combined with administrative and financing costs, revenues of at most \$140 billion might not be sufficient. Moreover, some private estimates indicated that claims might be as much as double CBO's figures.<sup>17</sup>

The bill features a fixed schedule of benefits, while the adequacy of funding is addressed through a number of contingency measures (e.g., a "guaranteed payment account"). *The revenue side of the equation* thus becomes a bit complicated. In any case, it should be recognized that the "headline" figure of \$140 billion is a goal or estimate rather than a fixed mandate. Actual assessments on defendant companies will be determined by their assignment into tiers and sub-tiers, these being defined by the companies' historical asbestos payments and recent (2002) sales revenue. Annual assessments (for 30 years) will range from \$27.5 million (a company with historical asbestos payments greater than \$75 million and falling within the top quintile of these companies by revenue) down to the smallest assessment, \$100 thousand (a company with asbestos payments of \$1 - \$5 million and revenues in the smallest third of these companies). There is a blanket exemption for small businesses (as defined by the Small Business Act, 15 U.S.C. 632) and various "inequity adjustments." The bill also requires \$46 billion from the insurance industry, but leaves the allocation among companies to a special commission (Subtitle II B).<sup>18</sup> *On the expenditure side*, some flexibility could be provided by annual financial reviews, which would lead to reevaluation (and tightening) of diagnostic criteria if the number of claims in any category differs greatly (25% +/-) from CBO projections.

The debate in the Senate in February 2006 ultimately turned on the financial question. A point of order was raised and sustained that CBO's projections indicated at least the possibility of expenditures exceeding revenues in periods after the first 10 years of operation. The bill provides, however, that if funding proves inadequate, the program will be terminated and cases revert to the court system. This question of "sunset" is dealt with in the final section of this report.

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<sup>15</sup> (...continued)  
227 p. (Hereafter cited as "Committee report").

<sup>16</sup> CBO cost estimate for S. 852, August 25, 2005.

<sup>17</sup> Bates White, LLC. *Analysis of S. 852*. September 2005.  
[[http://www.bateswhite.com/news/pdf/2005\\_Bates\\_FAIR\\_Act\\_report.pdf](http://www.bateswhite.com/news/pdf/2005_Bates_FAIR_Act_report.pdf)].

<sup>18</sup> Groups of insurance companies (possibly even all companies in one group) can agree to any allocation of their total liability among themselves. Section 404, meanwhile, adjusts the obligations of insurers and reinsurers to each other and to defendant companies.

## Compensation Adequacy

The diagnostic categories and their compensable amounts are shown in **Table 1**. (The amounts are in 2005 dollars and are to be adjusted for inflation in future years.) At least three types of consideration have guided the development of these numbers: (1) the pattern of awards given by courts or agreed in settlements, (2) the severity of symptoms and prognosis for each category, and (3) the likelihood that asbestos is the principal cause of disease. For example, non-lung cancers (Level VI) are paid less than one-fifth of what is paid for mesothelioma (Level X). This is not only because mesothelioma is one of the most lethal of cancers (usually resulting in death within 18 months), but also because mesothelioma is almost always caused by asbestos.<sup>19</sup> (Diagnosis categories are discussed in more detail in the next section.)

**Table 1. Asbestos Disease Categories and Compensable Amounts**

Level	Disease or Condition	Award Amount
I	Asbestosis — normal lung function	Medical monitoring only
II	Mixed disease (asbestosis + other) with impairment	\$25,000
III	Asbestosis — TLC <sup>a</sup> 60-80%	\$100,000
IV	Severe asbestosis — TLC 50-60%	\$400,000
V	Disabling asbestosis — TLC < 50%	\$850,000
VI	“Other” cancers (non-lung)	\$200,000
VII A	Lung cancer with pleural disease — smokers	\$300,000
VII B	— former smokers	\$725,000
VII C	— non-smokers	\$800,000
VIII A	Lung cancer with asbestosis — smokers	\$600,000
VIII B	— former smokers	\$975,000
VIII C	— non-smokers	\$1,100,000
IX	Mesothelioma	\$1,100,000

**Source:** S. 852, Sections 121(d), 131.

a. TLC means Total Lung Capacity. For full diagnostic descriptions, see bill, subsection 121(d).

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<sup>19</sup> For general information about asbestos-related diseases, see [<http://www.nlm.nih.gov/medlineplus/asbestos.html>], and [[http://www.health.nih.gov/result.asp?disease\\_id=54](http://www.health.nih.gov/result.asp?disease_id=54)].

Claimants could receive net payments somewhat less than these amounts due to certain contingencies, particularly:

**Attorney fees:** While a program of assistance in filing claims (including information about *pro bono* attorneys) would be established, claimants could use their own fee-based attorneys. However, the bill would limit fees to 5% of the benefit received.

**Collateral sources:** Benefits would be reduced for collateral sources (i.e., other payments received from defendants and insurers). However, there would be no offset for workers compensation or veterans benefits. The case of railroad and maritime workers is complicated because they are covered by the Federal Employers Liability Act (FELA, 45 U.S.C. 51 et seq.) or Jones Act (46 U.S.C. App. 688), both of which have aspects both of workers compensation and of tort liability. S. 3274 (subsection 131(b)(4)) deals with this complication by awarding — in lieu of what they might have gotten by workers compensation — an additional “special adjustment” equal to 110% of the average amount received by asbestos victims (at the claimant’s disease level) in recent years.

## Diagnostic Categories

Eligibility for benefits would require certain kinds of evidence, including documentation of occupational exposure to asbestos (preceding a minimum 10-year latency period), smoking history, physical examination, pulmonary function test, x-rays (and possibly CAT scans), and pathology report.<sup>20</sup> With this evidence, administrators are to apply the criteria in Subsection 121(d) and determine the highest of the 10 disease levels to which each claimant belongs (if any). The goal is a non-adversarial system that is prompt, efficient, and as accurate as possible in a field where there are substantial scientific uncertainties. While in some respects the benefit of the doubt is given to claimants, on the other hand the system is meant to eliminate screening “mills” that produce thousands of claims upon evidence that is fragmentary at best, if not fraudulent.<sup>21</sup>

**Disputed Categories.** Several of the disease categories have drawn criticism on the ground that they are not credibly linked to asbestos exposure. Among these are as follows:

- Simple asbestosis (Level I). It is agreed on all sides that claimants at Level I are not impaired (“ill”), hence do not receive cash compensation, only the right to monitoring. If illness on other levels is subsequently found, compensation can then be claimed. Some

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<sup>20</sup> There are special allowances for victims of the World Trade Center attack and Hurricane Katrina, and for residents of Libby, Montana (who received substantial exposure from the dust of a vermiculite mine). The bill mandates a study of whether significant exposure occurred to people living near about 18 sites around the country where vermiculite was processed.

<sup>21</sup> On allegations of fraudulent testing, see Sen. Kyl’s statement, Committee report pp. 95-98. Also, Parloff, Roger. “Diagnosing for Dollars,” *Fortune*, 13 June 2005. p. 97 ff.

dispute the rationale for monitoring, arguing that being at Level I does not imply any higher probability of subsequent illness than for other workers who are not at Level I. On the other side it is argued that, as done with many toxic substances, all exposed workers should get screening regardless of whether they show symptoms.<sup>22</sup>

- “Other cancers” (Level VI). There is dispute here on whether asbestos causes non-lung cancers (such as colorectal). Proponents of the provision note that the existing bankruptcy trusts compensate for non-lung cancers, but opponents claim that this is due to quirks of bankruptcy bargaining dynamics. At any rate, an independent physician panel must determine in each Level VI case that asbestos was a substantial contributing factor to the cancer. The bill would also mandate a study by the Institute of Medicine, the conclusions of which will be binding, regarding the issue of causation at Level VI.
- Lung cancer without evidence of asbestos disease. Previous versions of the bill included a level for lung cancer without evidence of pleural disease or asbestosis. But S. 3274 has no such level, in effect accepting the argument that when asbestos causes lung cancer, there is almost always identifiable asbestos damage.
- “Mixed dust” / Silicosis. Oftentimes asbestos exposure occurs in combination with silicosis. Concern about potential use of “mixed dust” lawsuits to circumvent the ending of asbestos suits<sup>23</sup> led to a new subsection, 403(b). It requires, in effect, that anyone suing over silica disease must show that asbestos was **not** a substantial contributing factor to one’s impairment.

**The Tobacco Question.** Underlying most of these disputes is the relevance of smoking history. The committee report stated that “The Fund is not intended to be a compensation system for smokers, which would otherwise overwhelm the Fund, leaving no money for asbestos victims.” Thus the compensation scheme discounts the awards to smokers in two ways. First, the three lung cancer levels (two in the current version of the bill) are distinguished by the degree of pathology or x-ray evidence linking the cancer to asbestos. Implicitly, a higher probability is attributed to other causes (e.g., tobacco or radon) where the link to asbestos causation is less certain (and a third level was deleted altogether). Second, levels are divided explicitly into sub-levels for smokers, former smokers<sup>24</sup> and non-smokers.

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<sup>22</sup> Compare Committee report pp. 98-99 and pp. 212-213. The bill also allocates \$20 to \$30 million per year for at least five years for a screening program “for individuals at high risk of asbestos-related disease.” (Sect. 221(c))

<sup>23</sup> The issue gained considerable attention in the wake of an unexpected court ruling in June 2005. (Glater, Jonathan. “The Tort Wars, at a Turning Point,” *New York Times*, October 9, 2005, Business p. 1,7) The Senate Judiciary Committee held a hearing on the issue on February 2, 2006.

<sup>24</sup> Those who quit at least 12 years before diagnosis.

The resulting scheme has been criticized from both sides. On the one hand, as noted, some claim that asbestos is almost never the cause of cancer without also causing clinical asbestosis, so there should be no Level VII. On the other side, plaintiff advocates note that a high percentage of the blue collar workers most exposed to asbestos were indeed smokers, so that the widely publicized figure of up to \$1 million for lung cancer would be received by very few.

A key point of disagreement is whether there is *synergy* between tobacco and asbestos in causing cancer. Many believe that there is such a synergistic effect (i.e., when one is exposed to both asbestos and tobacco), the risk of lung cancer is enhanced greatly beyond the sum of the two factors independently. If this is so, then it could be argued that the awards to smokers should not be reduced very much vis-a-vis non-smokers. However, differing testimony on the matter was received by the committee and consensus not reached.<sup>25</sup>

**Diagnostic Quality Control.** In addition to the foregoing disagreements about defining eligible medical categories, there is the issue of types of evidence to be deemed credible. In the existing tort law system, plaintiffs present evidence favorable to their case and defendants have an opportunity to challenge it. Since S. 3274 would replace tort law with a non-adversarial, administrative system, it explicitly defines what kinds of evidence are necessary and acceptable, and requires auditing of the results.

Subsection 121(b) sets general rules for expertise of those developing evidence. Thus, (1) x-ray interpretations must be done by “B-readers,” a certification overseen by the National Institute for Occupational Safety and Health; (2) pulmonary function testing for asbestos (Levels III to V) is to be done in accordance with the standards of the American Thoracic Society; and (3) diagnosis of malignancies (Levels VI through IX) must be done by board-certified pathologists.<sup>26</sup> Furthermore, guidelines are to be developed relating to CT scans in the diagnosis of lung damage, for future use in the program (subsection 121(h)).

Section 115 provides for reviews and audits, including the empaneling of independent B-readers to spot check accuracy of submitted readings. Certain B-readers who have previously been paid for testimony are disqualified from the program. The Administrator is also instructed to develop methods for evaluating general medical evidence. If the evidence presented by particular physicians or

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<sup>25</sup> Both sides were supported by expert witnesses. The committee majority in favor of the bill relied particularly on testimony of Dr. James Crapo of the University of Colorado. The dissenting minority claimed a “scientific consensus” for synergy as expressed by institutions such as the National Toxicology Program (Department of Health and Human Services) and the International Agency for Research on Cancer. Compare Committee report pp. 64-66 with pp. 200-202.

<sup>26</sup> According to the bill text, diagnoses of non-malignant conditions (Levels I through V) can be rendered by any physician. However, the Committee report (at p. 39) expressed the intent that “the documentation would be provided by an appropriately board-certified physician in occupational medicine or pulmonary medicine,” while recognizing that access to same “may not be feasible for all claimants due to geographical constraints.”



facilities is found “not consistent with prevailing medical practices or the applicable requirements of this act,” consequences may include disqualification. Finally, Section 401 provides criminal penalties for fraud or false statements.

## Transition Issues

S. 3274 would pre-empt all cases pending on the date of enactment, and all future cases, in favor of the new system.<sup>27</sup> Possibly hundreds of thousands of cases would be transferred at the outset, so that getting the system established and making what are supposed to be prompt decisions might be an administrative as well as financial challenge. Concern has been expressed about at least three transition issues: claimants potentially caught between systems, status of settlements, and a possible cash “crunch” in the first few years.

**Pending Cases.** Concern has been expressed about claimants who may have their pending cases dismissed but must wait for the new system to begin. Proposals have been made (and included in S. 1125, 108<sup>th</sup> Congress, as reported) to delay termination of tort proceedings until the administrative system was up and running, but this was not included in subsequent versions of the bill. Rather, S. 852 contains certain deadlines for getting the process going. First, case processing is to begin immediately, even before funding is established. “Exigent health claims” (e.g., cases of terminal illness) are to be given priority, and the administrator is to certify within nine months of enactment that the office is ready to review and pay exigent claims. In cases of mesothelioma, payment of 50% is to be made within 30 days of approval, the rest in six months. On another track, incentives are given (subsection 106(f)(2)) to promptly reach negotiated settlements for mesothelioma cases. For participants in existing bankruptcy settlements, the trusts are to set aside 10-12 % of their assets to continue making payments until the Fund is operational. Finally, the office must be ready to start processing all types of claim within 24 months. If the start-up deadlines are not met, claimants may pursue their cases in court (at least until such time as the program does become operational).

**Pending Settlements.** Subsection 403(c) of S. 3274 would terminate “inventory” or “matrix” agreements, which are open-ended, standing arrangements that pay specified amounts to claimants who qualify currently or in the future. One’s view on whether these or other agreements should be terminated will probably correspond with one’s overall evaluation of the fairness of the proposed system vis-à-vis the current tort system. For example, it is argued that some companies that have agreed to settlements will pay much less under the bill’s terms.<sup>28</sup> But, as argued by the committee majority for passage (108<sup>th</sup> Congress), “The purported unfairness of

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<sup>27</sup> There are a few exceptions. For example, non-consolidated cases may proceed if at the presentation of evidence stage. (Subsection 403(d)(2))

<sup>28</sup> The January 2006 bankruptcy settlement of USG Corp. (the former U.S. Gypsum) explicitly provides that if an asbestos bill is passed in the 109<sup>th</sup> Congress, then the company will put \$900 million into its trust fund for injury claims (roughly what it estimates it would owe to the government fund), but the company will deposit another \$3 billion if no such bill is enacted. Johnson, Fawn. USG Corp. Announces Asbestos Settlement that Would Resolve 150,000 Workers’ Claims. *Daily Labor Report*, 31 January 2006. p. A7, A8.

preempting non-final settlement agreements ... [etc.] ... rests on the faulty premise that the existing system is somehow fair.”<sup>29</sup>

**Funding Schedule.** As noted, a large number of cases may be expected at the outset. Concern has been repeatedly expressed, during the debate on an asbestos resolution fund, about whether sufficient amounts would be available to promptly pay a large expected number of claims in the first years. Final decisions (in uncontested cases) could possibly start coming within 180 days of enactment, and the first (40%) installment on each claim is to be paid within one year of the award decision.<sup>30</sup> In anticipation of this demand, the bill front-loads the collection of funds. The stated goals of the funding program are to: (a) collect \$3 billion each year from defendant companies; (b) collect more than \$20 billion from insurers over the first five years;<sup>31</sup> and (c) receive the assets of bankruptcy trusts within six months of enactment. This would come to more than \$35 billion within five years. Moreover, the compensation fund could borrow, both from the Federal Financing Bank and the private sector. The limits of borrowing authority are not specified numerically, but defined in terms of what could be repaid from anticipated revenues over the subsequent 10 years (Subsection 221(b)(3)).<sup>32</sup> The bill also authorizes surcharges for various contingencies.

In order to provide greater assurance to those claimants who are most ill, there is a lockbox-type mechanism (Section 221(c)). Under this provision, the administrator would establish separate accounts for each of the most serious diagnoses (Levels IX, VIII, V and IV) and reserve needed funds to them first. Implicitly, claimants in other levels would not be paid if sufficient funds are not available for the four protected levels.

## Sunset

The ultimate guaranty that the program would not add to the federal deficit is that the fund’s fiscal status will be regularly monitored and, if insolvency is foreseeable and unavoidable, the program will be wound up and cases be returned to the court system. Although the nominal life of the program is 30 years, it could be terminated earlier if the fund is found to be inadequate to meet all claims. With each annual report, the administrator is to analyze whether the fund will be able to pay all claims as due at any time within the next five years. If such shortfall is projected, the administrator is to make recommendations for reform or termination. Recommendations are referred to a special commission consisting of five Cabinet members, who will hold public hearings and forward its recommendations to the

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<sup>29</sup> Compare Committee report pp. 69-71 with pp. 206-208.

<sup>30</sup> The administrator can extend the claim payment schedule to four years instead of three years “if such action is warranted in order to preserve the overall solvency of the Fund” (Subsection 133(a)(3)). Even so, 50% of each award must be paid within two years.

<sup>31</sup> \$2.7 billion in years 1 and 2, \$5.075 billion in years 3 through 5.

<sup>32</sup> Repayment is not a general government obligation, but “is limited solely to amounts available in the ... Fund” (Subsection 221(b)(4)).

Congress. However, if the administrator, at any time after claim processing has begun, conducts an operational review and determines “that if any additional claims are resolved, the Fund will not have sufficient resources when needed<sup>33</sup> to pay 100% of all resolved claims while also meeting all other obligations...,” then the program is to terminate 180 days thereafter.

Thus the annual report, with its five-year financial projections, gives regular opportunities for deliberative mid-course corrections. But if insolvency (inability to meet all currently assumed obligations) ever becomes imminent, the administrator is authorized to terminate the program. In that case, unresolved or new asbestos cases can be pursued in court, albeit with certain restrictions. In particular, there would not be as wide a choice of venue as at present. The suits could be filed either in the federal courts or in a state court where the claimant resides or experienced the asbestos exposure.

In the debate on the budget point of order, critics of the bill disputed whether such a scenario would ever be followed, arguing that political pressures to “save” the program in the event of a financial shortfall would be irresistible. Thus, they cautioned, the acceptability of a possible shortfall should be considered before going ahead with the program.

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<sup>33</sup> The phrase “when needed” would seem to allow for the slowing of payments from a three-year to a four-year schedule as authorized by Subsection 133(a)(3).