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Legislative Attempts to Address Asbestos Litigation

Steven Kazan

I am going to talk briefly about the state of asbestos litigation. The problem is nowhere near over in a medical or social sense. You might be astonished to hear this: over 20,000 metric tons of asbestos fiber is still used in the United States every year. These fibers go into products such as gaseous materials, brakes, roofing materials, construction materials, and machinery. These materials will expose new generations of people to asbestos dust. This is just one of the reasons why anybody who knows anything about asbestos understands that the litigation is far from over. The long latency period for asbestos-related diseases is another reason the litigation will continue. The scientific community predicts that we will still see asbestos injuries for close to another fifty years. Lawyers can have a long and prosperous career in the field of asbestos litigation, assuming that Congress does not do something about it.

Most of the companies that are now in Chapter 11 bankruptcy proceedings are there because of asbestos liabilities, either exclusively or predominately. This phenomenon is a function of their inability to figure out how they are going to get out from under the burden of asbestos claims—not only the present claims, but also those they foresee in the future, absent a major change in the structure of the legal system that applies to asbestos claims.

In bankruptcy, the first big issue that gets resolved or debated in a reorganization proceeding is the dichotomy between people who are sick and people who are not sick. When I say sick, I mean people who have cancer or some other condition that actually impacts or interferes in some meaningful way with their daily lives to which asbestos plays at least some minimal contributing role.

In early 2003, the Supreme Court of the United States in *Norfolk & Western Railway Co. v. Ayers*¹ confirmed that, in railroad Federal Employers' Liability Act (FELA) cases, fear of cancer remains a compensable element of damages to the extent that it is part of an anxiety which, in turn, is part of pain and suffering in the case of a physical injury. That, at least in California, has always been the law. The Supreme Court passed up an opportunity, some suggested, that could have reshaped a federal common law concept with regard to asbestos. Instead, the Court again said: "This is for Congress to address. We are here to interpret the law, and this is the law right now. If you do not like it, go fix it."

The issue in some cases boils down to the issue that Judge Chiantelli mentioned. We need to address the fundamental question of whether each conceivable harm can rise to the level of an "injury" in tort law. In bankruptcies, that is one issue, but it plays a lesser role than the issue of comparing the present claims to the future claims.

In general, the core principal of every bankruptcy is that a corporation goes bankrupt because its liabilities exceed its assets. For example, if you have \$100 and you owe \$1,000, you would file for bankruptcy. Actually, in a bankruptcy, the lawyers will take \$95, and there will be only \$5 left to divide up among the creditors. In theory, however, the \$100 would be divided equally among the creditors. Assuming that there are ten creditors, each would receive ten percent. Figuring out what the company's assets are worth is not really rocket science. Figuring out what its individual debts are ought to be pretty easy as well.

In asbestos, the core principal is that Section 524(g) of the Bankruptcy Code, which creates asbestos trusts and provides a discharge so that companies can go on, requires a business to treat present and future claims with roughly an equivalent degree of fairness. Determining the value of the future claims can be problematic because, by definition, they do not exist.

How do you estimate the value of future claims? For cancer cases, we have science, we have epidemiology, and we have a twenty-plus year track record of experts making these predictions. The experts have been right with astonishing accuracy—within five to ten percent each year.

The problem is that companies must also predict the value of the non-cancer cases that are likely to be filed. Attempting to predict the future number of non-cancer asbestos claims that will be brought is very difficult. The reason is that the claiming propensities and rates for those cases have nothing to do with medical science. They are instead a function of the entrepreneurial zeal and efficacy of our free market system. The law creates an economic opportunity, and people take advantage of it.

The free market system creates a large potential reservoir of claims based on a fairly minimal level of criteria that must be met in order to file a case in the United States claiming an asbestos-related injury. There is no requirement in virtually any state that there be a real diagnosis of an asbestos-related disease, or even one that is asymptomatic. Rather, the minimal threshold level for filing a suit seems to be that a doctor

1. 123 S. Ct. 1210 (2003).

somewhere, usually working for a for-profit medical screening enterprise, is willing to sign a report that says he or she sees something on an x-ray that shows signs consistent with asbestos exposure. This report is not diagnostic of, but consistent with asbestos-related disease.

The fact is that there are about 150 medical conditions that cause the same types of lung changes that are consistent with asbestosis, not the least of which are smoking and air pollution. I have an expert friend who says that these changes are consistent with life on this planet, which is to say, if you live in an urban environment in this country, and you get to the age of approximately forty or better, the odds are fifty-fifty that you will have a chest x-ray that a doctor working for a screening company could sign off on as being consistent with an asbestos-related disease. This means that there are 100 million Americans with potential asbestos claims.

The problem, then, in bankruptcy proceedings is: how do you predict what is going to happen in the future so that you can provide for all of those cases? The predictions keep increasing almost exponentially each year. This means that increasing amounts of money must be set aside for this potential future liability, resulting in less money for present claimants, whether or not they have cancer.

In bankruptcies, lawyers who work on the asbestos creditor committees are instructed that they have no fiduciary obligation to future claimants. Those obligations are to be discharged by future court-appointed representatives. As a result, there is a tendency to try to inflate the number of future claims because it increases the theoretical value of the asbestos liability. Increasing this theoretical value essentially swamps things like trade debt and bank debt, which are finite existing obligations. This reduces the amount allocated to anyone but asbestos creditors. Then the question is: how do you divide money between present and future claimants? There are some solutions that are coming along, including dividing the available funds between cancer cases and non-cancer cases, and imposing real medical requirements on people in bankruptcy claims.

Professor Hensler mentioned the issue of a tax reform to allow trusts to avoid paying taxes on their profits so that increased money is available for victims. One can be optimistic about such legislation.

There is a long history of other legislative efforts to deal with asbestos litigation. Going back to the late 1970s, a Congresswoman from Manville, New Jersey proposed some changes. They went nowhere. Senator Hart from Colorado also proposed changes. They too, went nowhere. Ever since, there have been repeated efforts in Congress to address the litigation. In more recent years, there was an effort sponsored by one company that became known as the Hyde Bill (named after Representative Henry Hyde (R-IL), who chaired the House Judiciary Committee at the time). That bill also went nowhere.

More recently, in the summer of 2001, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and others asked us to draft some proposed language. Shortly thereafter, everyone's attention was diverted for some time for an obviously very good reason—the September 11, 2001 terrorist attacks. The effort to look at the issue began again in 2002. Chairman Leahy held hearings in September of 2002, in which just about everyone agreed that there was a problem that needed to be fixed.

After the November 2002 election, leadership of the Judiciary Committee was transferred to Senator Orrin Hatch (R-UT). He called more hearings, which were held in the Spring of 2003. Yet, some legislative proposals surfaced prior to the hearing. For example, American Bar Association President-Elect Dennis Archer, former Mayor of Detroit, decided that one of the tasks of his administration would be to try and help solve the asbestos problem. He convened a commission to make recommendations. They were adopted overwhelmingly at the ABA House of Delegates in February of 2003, despite opposition from the Association of Trial Lawyers of America (ATLA).² The ABA resolution helped provide some additional impetus for congressional legislation.

Senator Don Nickles (R-OK) proposed legislation in early 2003 to establish medical criteria in asbestos cases, with some limits on consolidation and venue restrictions.³ That has been the subject of some discussion. I think that bill was put in more as a marker to stake out a position rather than to solicit extensive co-sponsors.

After the Spring 2003 Senate Judiciary Committee hearings, Senator Christopher Dodd (D-CT) announced that he would convene a summit conference on asbestos, presided over by Senators Hatch, Dodd, Leahy, and Mike DeWine (R-OH). The April 1st Summit brought together all the asbestos litigation “stakeholders”—including corporate representatives from the Asbestos Study Group and the National Association of Manufacturers, insurance representatives from the American Insurance Association and the reinsurance carriers, the AFL-CIO, the ATLA, and the asbestos cancer victims.

In the U.S. House of Representatives, Republican Mark Kirk (R-IL) introduced a bill in 2003 that effectively tried to resuscitate the Hyde Bill.⁴ No one thinks that effort will succeed. On April 3, 2003, Representative Chris Cannon (R-UT) introduced another bill in the House.⁵ His bill is a medical criteria plus tort reform bill that, in essence, imposes venue and consolidation restrictions, eliminates punitive damages and joint and several liability in asbestos cases, apportions fault among all persons (including the plaintiff and those who have filed for bankruptcy protection), and places caps on noneconomic damages.

2. See *Hearing on “Asbestos Litigation,” Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of the Hon. Dennis Archer, President-elect, American Bar Association).

3. See S. 413, 108th Cong. (2003).

4. See H.R. 1114, 108th Cong. (2003).

5. See H.R. 1586, 108th Cong. (2003).

The Cannon bill, in my view, is going nowhere. Another bill with medical criteria, venue, and consolidation provisions was introduced on April 10, 2003 by Representative Cal Dooley (R-CA).⁶ The Dooley Bill included medical criteria based on those recommended by the American Bar Association, provided for venue restrictions on non-malignant asbestos cases, and allowed limited trial consolidation of cases while prohibiting the mixing of both cancer and non-cancer cases together. At the conclusion of the April 1st Summit Conference, the convening Senators instructed the stakeholders to meet and work together to see if they could arrive at a mutually satisfactory resolution. Thereafter, the ATLA and cancer victim representatives were told that they were no longer welcome as participants in the discussions.⁷

As for the future: what will happen? First of all, unless something is done, cases will continue to be filed at accelerating rates each year. Many of these cases start with screening programs that run through unions. Newspaper ads also invite people to free screenings. Signs on telephone poles in poor neighborhoods read: "Come find out if you have million dollar lungs." Recently, I received a mailing at my home. I have to tell you, I live in a nice neighborhood in Northern California. The letter was addressed to me or "current resident" in both English and Spanish. It sought sandblasters, shipyard workers, and railroad workers. There are as many of them in my neighborhood as there are living in Malibu. But, this was a mass mailing. I called the "800" number to find out about my free screening. It turned out that the program was being conducted by a medical screening company headquartered in Pascagoula, Mississippi that works on contract for lawyers around the country. For-profit enterprises organize screenings, find cases, and sell them to the lawyers who sponsor the programs. Unless something happens, we are not at the end of this litigation.

After waiting in vain for a consensus to emerge from the remaining asbestos stakeholders, Senator Hatch offered his own solution in S-1125, the "Fairness in Asbestos Injury Resolution Act of 2003," on which he held hearings on June 4, 2003. In essence, his approach was to create a new federal judicial bureaucracy to process claims according to a defined schedule of benefits and funded from annual contributions made by insurers and defendants in defined and prescribed amounts. The fund would be the exclusive remedy for all asbestos claims, present and future, with the right to a jury trial eliminated.

Senator Hatch's proposal creates what is primarily a defined contribution plan, but seeks to marry it to a defined benefits program. S-1125 went through several extended mark-up sessions, leading to a near

6. See H.R. 1737, 108th Cong. (2003).

7. Personal communication from Senator Hatch's staff to the author.

party line vote bringing it out of Committee on July 10, 2003. The adopted amendments increased backend funding potential, raised schedule payment amounts, deferred application of the provisions to pending cases until the fund was up and running, and added a sunset provision. The bill as reported has engendered substantial opposition from the insurance industry, which has reversed its prior support of the bill to strong and vehement opposition, organized labor, asbestos victims, and the attorneys who represent them. Predicting the course of events for S-1125 is difficult. The situation is extremely fluid, but it now appears unlikely that it will come to the floor for a vote this session. Most of the changes made during the mark-up were designed to appeal to Democrats in an effort to garner bipartisan support. Ironically, the more Senator Hatch moved towards the Democrats, the more he alienated the conservative wing of the Republican party, whose basic fear is that the defined contribution, defined benefit mismatch will mean that any shortfall will turn into a federal entitlement program requiring vast appropriations to fund this system. Indeed, analysis by Dr. Mark Peterson, a recognized expert in the field of asbestos claims estimation, demonstrates that this system will be dramatically under-funded from the day it opens and will soon run out of money. The current consensus seems to be that, if the bill is brought to the floor, there will be a Democratic filibuster and not enough votes to support cloture. Thus, it seems likely that S-1125 will fail, and the brief window of opportunity in the spring and summer of 2003, during which a limited rational bipartisan legislative solution could have been achieved, will close with nothing having been done. It may well be too late for those interested in a solution to coalesce around a rational, narrow, targeted federal approach that could solve most of the real problems in asbestos litigation. It seems likely that nothing will happen until, at least, after next year's presidential election.