

The New Asbestos Bill, Part Two: Why This Crucial Legislation Is Facing Huge Obstacles

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*This is Part Two of a two-part series on the Fairness in Asbestos Injury Resolution Act of 2003.
- Ed.*

As I explained in [my last column](#), the Fairness in Asbestos Injury Resolution Act of 2003 (FAIR) is designed to replace the current tort system for asbestos with a no-fault scheme. The no-fault system would be organized by the U.S. Government, but funded by private industry and insurance companies.

In my previous column, I also explained why it is imperative that the bill pass. Yet since then, the prospects for the bill to become law have only grown dimmer. Both the insurance industry and their sworn enemies, the trial lawyers, have come out strongly against the bill - albeit for very different reasons. So have consumer groups, and unions.

Although I understand these concerns, in the end I think the bill is still a highly valuable one that strongly deserves to be enacted into law. This Fall, Congress will again take up the question of FAIR. In this column, I want to stress the fundamental reason why I think that FAIR--or something like it--is the right way to go.

Different Groups' Concerns About FAIR

First, it's important to understand the concerns different groups have raised about FAIR.

The insurance industry thinks that Senator Orrin Hatch, the bill's chief architect, conceded too much to the Democrats on the Judiciary Committee in order to pick up their support. Originally, the plan was supposed to cost \$108 billion. But in its final form, FAIR might cost over \$150 billion. (For this concession, Senator Hatch gained just one Democratic vote.) At base, the insurance industry fears that it will end up contributing more than they would otherwise have to pay if left to the old litigation system.

Meanwhile, consumer groups have pointed out that under FAIR, some companies, such as Halliburton (Vice President Cheney's former company) will pay less into the program than they have already agreed to pay to settle existing lawsuits. They fear that certain members of corporate America are going to get off "too easily" at the end of the day.

Furthermore, the trial lawyers are quick to point out that the largest award guaranteed under FAIR - \$1 million for someone suffering from mesothelioma, a horrible, fatal disease--is much less than what some plaintiffs are now winning in court. They fear that these plaintiffs will get less than they deserve.

Should Individualized Justice Be the Ideal In the Asbestos Crisis?

Taken together, these concerns are similar; each seeks individualized fairness. All concerned are asking for exact, individualized justice for both plaintiffs and defendants.

Thus, some fear that the parties responsible for the asbestos crisis will pay more than they should; others, less. Some fear that the victims will get less than they deserve, given what they have suffered; others, more.

Unfortunately, a close examination of the history of the asbestos crisis shows that the idea of meting out precise, individualized justice in asbestos litigation - justice that would take from true wrongdoers, and give to victims, in the correct amounts - is an illusion. That is the case for several reasons.

First, in practice, asbestos plaintiffs (except for some mesothelioma victims) find that their cases are bundled together, and traded like commodities in mega-settlement negotiations between plaintiffs' lawyers and defendants. After these mega-settlements are concluded, the defendants often elect - or are forced - to go into bankruptcy. If they do, the victims often receive compensation in amounts that have little to do with either the extent of their injuries or the degree of the defendant's wrongdoing.

Second, one of the most important wrongdoers in the asbestos liability story - the U.S. Government - cannot be held accountable. In the early years of asbestos use, the government--especially the military--turned a willfully blind eye to the risks that were becoming well known in the scientific community. Private industry memos uncovered from the 30's and 40's are truly disgusting. But the U.S. Navy, too, was on notice about what their contractors knew.

Third, the other remaining wrongdoers are virtually all gone. All the major asbestos producers have either been rendered bankrupt by their wrongdoing, or have been purchased by other companies.

The companies that have been bankrupted--such as Manville--have been punished for the wrongdoing in a way that is fundamental and undeniable. Even if some of them might return from bankruptcy because of FAIR, it seems to me that the message has been delivered loud and clear. In the case of Manville, it has labored on for many years now as an empty trust owned by the very people it injured.

What about the companies that have been purchased, and merged into other companies? They raise more complex questions. Halliburton, for example, settled very large asbestos obligations incurred by companies it purchased after the fact. Halliburton is legally responsible to assume those debts, of course. But it was not the original wrongdoer, and thus the case for punishing Halliburton is less strong than the case for punishing Manville.

Moreover, there are almost no Manvilles out there, and many, many Halliburtons - or semi-Halliburtons. Six thousand companies are now defendants in asbestos litigation. That is because asbestos has literally worked its way into the very fabric of corporate America, through purchases and mergers - often of companies that were not asbestos producers, but rather assemblers or retailers. Again, the case for punishment is less strong.

Why Asbestos Is a Collective Injustice, and FAIR Is Best Seen as a Tax

Asbestos was a mass injury that began in the 1930's, and was allowed to continue through the 1970's. The fault belonged to a whole host of culpable actors in government and industry.

As a result, tens of millions of people were injured and killed by asbestos. At the same time, hundreds of millions of people benefited from their suffering. Indeed, everyone who lives in America today has benefited from the industrial and military use of asbestos in the middle of this century.

Even with torts on this scale, a search for precision is possible--certainly, it may be the case that Halliburton will get off too easy, and another firm might pay too much; that one victim might be shortchanged, and another, with a minor disease, overcompensated. But the cost of imposing corrective justice at the micro-level - through numerous trials and settlements - for such a macro-injury, will inevitably be that many victims will get too little too late. And that has been the story of asbestos litigation thus far. That is also the story that FAIR is trying to rewrite.

The best way to look at FAIR is as a tax - not a substitute for the tort system. FAIR will force virtually every major insurer and a very large portion of corporate America to pay something. Those costs will be passed on, and thus in the end, all of us--as consumers of products and insurance--will pay to compensate of the victims of asbestos. That is only fair, for we have all benefited, albeit innocently and unwittingly, from the wrongs that were done to them.

In truth, all of America is responsible for the injuries suffered by those who built our warships, our factories and our buildings. Given that obligation, adopting FAIR is the next best thing to a direct tax on everyone in America. It is rough justice, but with a sound foundation.