A Watched Pot: Congress’ Repeated Failure to Resolve the Asbestos Crisis May Prompt More State-Level Solutions

By: Maureen De Armond

I. Introduction

Asbestos personal injury litigation got its start in the 1970s and is still going strong. As many as 10,000 people die annually from asbestos-related illnesses. Asbestos litigation is long, costly, and inefficient, roughly 70 companies have declared bankruptcy as a result of asbestos-related lawsuits.

Given these very basic, yet compelling, facts one would think this is an appropriate topic for federal legislation and regulation. Congress should be able to devise a plan to protect companies from bankruptcy, thus preserving jobs and stabilizing the economy, while ensuring that ill and dying plaintiffs receive just legal remedies for their injuries. Indeed, the Supreme Court gave Congress a push in that direction in the 1997 case *Amchem v. Windsor*, noting such a national plan would be “the most secure, fair and efficient means of compensating victims of asbestos exposure.” Yet, seven years later, Congress is still debating what to do. The Senate’s latest attempt, Senate Bill (“S.”) 2290, is not expected to pass the Senate this session. Congress has turned its attention to other issues, such as the war and prison abuse scandal in Iraq, and has been sidetracked by the especially heated election-year politics.

Legal scholars, judges, and other stakeholders have repeatedly noted that federal involvement would be a necessary and desirable component of any resolution. Many ideally envision a combination of federal legislation and state-level tort reform to end the asbestos crisis. However, the legal and medical problems surrounding asbestos surfaced some 30 years ago and Congress’ latest legislative failure suggests that waiting for a national solution on this issue is an exercise in futility. For political, economic, or logistical reasons, Congress will not—or cannot—tackle this issue. This legitimizes the theory that states would benefit from pursuing their own solutions. Admittedly, this is not an ideal means to bring under control the continuous stream of asbestos litigation, but this crisis can no longer wait for an ideal solution. Soon stakeholders may decide that it is time the states take matters into their own hands. Some already have and more will likely follow suit.

Part two of this article briefly outlines the asbestos crisis. Though this topic has been extensively discussed in a variety of forums, it is important to frame this issue in its proper light: Resolving it competently should mean justice for plaintiffs, a sense of security for defendant companies (and their employees), and an unclogging of the courts. This is a matter of great importance, urgency, and concern for many different stakeholders—most notably seriously ill plaintiffs, companies in danger of going bankrupt, and judges with unreasonably full dockets.
The third part of this article examines what Congress has and has not done regarding the asbestos crisis. Earlier this year, the Senate tried, without success, to reach a compromise through legislation that would create a superfund for victims of asbestos-related illnesses. Though the latest Senate bill is not yet completely dead, its apparent failure further illustrates that those with interests in asbestos litigation should seek solutions elsewhere.

Part four explores what may become the next logical step in the process: more state-level solutions. Some states have already taken on the asbestos issue and other states, especially the states that litigate high volumes of asbestos cases, may also pursue state-level solutions to the asbestos crisis raging within their borders. Political theorists may view this as a perfect opportunity for the sort of state-level experiments federalists always champion. State legislators (or possibly even judges) might be more able and/or willing to act than their Washington counterparts. Lastly, lobbying groups may feel their time and money is better spent at this political level.

This article concludes by noting the importance of finding a solution to the asbestos crisis that is fair for both plaintiffs and defendants. While it is deeply regrettable that so many U.S. citizens have—and will—suffer from asbestos-related illnesses, this side of the crisis often receives a disproportionate amount of attention. Also regrettable is the fact that many companies, especially those without any direct ties to asbestos production, are dragged into lengthy and costly litigation. The legal costs of such lawsuits or settlements may result in bankruptcies, downsizing, or higher product costs—which impact national, state, and local economies; job markets; and the price of consumer goods.

In the alternative, even if Congress does eventually pass national asbestos legislation, there remains an important lesson for future crises of any magnitude: In lieu of waiting for national legislation, states should act quickly to protect their own judicial systems and constituents (including private citizens, employees, and businesses). Given the current political climate in Washington, waiting for federal action does not seem like a practical solution to any pressing issue that could potentially be resolved at the state level.

II. The Asbestos Crisis

The combination of asbestos personal injury litigation, related illnesses, and numerous bankruptcies warrant calling this public health, economic, and legal issue a crisis. Asbestos-related illnesses have led to pain, suffering, and death for tens of thousands of U.S. citizens. Asbestos litigation has resulted in dozens of companies declaring bankruptcy and tens of thousands of jobs lost. Additionally, legal costs, attorney’s fees, and the slow resolution of asbestos lawsuits create a tremendous waste of time and money and constitute a major burden on federal and state courts.

A. Plaintiffs

According to the Environmental Working Group ("EWG"), “asbestos-caused diseases in the United States . . . claim[] the life of one out of every 125 American men who die over the age of fifty. . . . Asbestos kills thousands more people than skin cancer each year, and is near the amount of people slain in assaults with firearms.” EWG further predicts that “over the next decade, four asbestos-related diseases—mesothelioma, asbestosis, lung cancer, and gastrointestinal cancer—will claim the lives of over 100,000 Americans.”

What makes matters worse is that “asbestos cancers and the fatal forms of asbestosis have a twenty to fifty year latency period, with the majority occurring at least thirty years after initial exposure. Exposure to asbestos peaked in about 1975 or 1980.” In total an estimated 27 million U.S. workers were exposed to asbestos in high-risk industries and occupations between 1940 and 1979. Given the current medical understanding of asbestos-related illnesses and their latency periods, those exposed to asbestos will continue developing, suffering from, and dying of these illnesses for at least another twenty years.
B. Defendants

Viewed from an alternative perspective, asbestos litigation has caused “over 6,000 companies [to be] named as defendants.” 21 Roughly 70 of the companies have declared bankruptcy, with more certain to follow. 22 A study conducted by Nobel prize-winning economist Joseph Stiglitz revealed that by 2002, roughly 60,000 people had lost their jobs as a result of asbestos-related bankruptcies. 23 Another startling estimate claimed that in 2002 “[t]he asbestos mess ha[d] already cost the [U.S.] economy more than 9/11, Enron, and WorldCom put together.” 24 Michael Baroody of the National Association of Manufacturers testified before the Senate Budget Committee in 2003, that the “asbestos litigation nightmare could ultimately cost as much as $275 billion.” 25 Further, it is impossible to predict the true extent and effect that pending and future asbestos lawsuits will have on employment, the insurance industry, and countless businesses and corporations across the nation.

C. The Courts

Before the crisis is over, people who have been exposed to asbestos are likely to file millions of additional lawsuits. 26 Existing and future lawsuits place an enormous burden on state and federal courts. One government report noted that:

Dockets in both Federal and State courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over again; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.27

Additionally, in class-action lawsuits where juries award money damages to plaintiffs, somewhere between 30-40% of the awards end up with the plaintiffs’ lawyers. Some estimates purport that plaintiffs receive only 39 cents out of every asbestos-litigation dollar spent, while attorney’s fees and high transactional costs account for the remaining 61 cents. 28 Further, given the slow legal process, many asbestos plaintiffs die before their cases are litigated or settled—illustrating another inefficient aspect of asbestos suits in court. 29

[The extent and depth of the asbestos crisis is best analyzed by approaching it from all perspectives.] While it may remain difficult to fully grasp the boundaries of this problem, one fact remains clear: the current litigation and settlement process serves no one well. 30 The asbestos crisis has aptly been described as a “disaster of major proportions to both the victims and producers of asbestos products.” 31 Passively hoping that Congress will act, and/or waiting out the next twenty years of litigation are likely to become equally unacceptable options to asbestos victims, defendant businesses, and the courts.

III. Congress’ Failures

Congress has had decades to tackle this important and costly issue, yet why has it not done so? The answer is dishearteningly political.

A. Able But Not Willing?

Historically, Congress has often been called to address national issues of major import. On many occasions Congress has acted with admirable competence and swiftness while putting aside partisan squabbles in order to protect U.S. citizens, companies, and interests. For example, Congress enacted the Federal Employers’ Liability Act of 1908 (“FELA”), 32 the Federal Coal Mine Health and Safety Act of 1969 and the subsequent Black Lung Benefits Act of 1972, 33 the Comprehensive Environmental Response, Compensation, and Liability Act (“the Superfund law”), 34 the Biomaterials
Access Assurance Act of 1998, and the string of legislation following the terrorist attacks of 9/11. While Congress has the power to take on the asbestos issue, what seems to be lacking is the will.

B. Tempting Fate: Ignored Pleas from the Supreme Court

The limits of legislative power and the threat of unfavorable Supreme Court rulings sometimes account for Congress’ hesitation to legislate in new areas. This, however, is not a valid defense when it comes to asbestos. The court has given the green light to Congress on more than one occasion. In three important asbestos-related cases, the court has spoken directly to Congress, using no uncertain terms, to articulate its approval and desire for a congressional solution to this crisis.

In the 1997 case, *Amchem Products, Inc. v. George Windsor*, the court noted that “[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.” A couple years later in *Oritz v. Fibreboard Corp.*, an impatient Justice Breyer warned in his dissent that “when ‘calls for national legislation’ go unanswered . . . judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.” This comment served both as prodding for Congress to act and a nod to state and federal judges to pursue their own alternate solutions if Congress failed. Just last year, Justice Ruth Bader Ginsberg renewed the court’s call for Congressional action. In *Norfolk & W. Ry. Co. v. Ayers*, Justice Ginsberg repeated the court’s view as expressed in *Oritz*, noting “‘the elephantine mess of asbestos cases’ lodged in state and federal courts, we again recognize, ‘defies customary judicial administration and calls for national legislation.’”

The Supreme Court cannot be criticized for any lack of clarity on this issue. The court wants a congressional solution to the asbestos crisis. Thus far, the court’s repeated pleas and warnings have failed to produce such a solution.

C. Congress’ Latest Attempts: Senate Bills 1125 and 2290

The current Congress is attempting to deal with the asbestos crisis, without success. Sen. Orrin Hatch introduced S. 1125 on May 22, 2003, to no avail. After a year of negotiations, he made a last-minute substitution on April 7, 2004, replacing S. 1125 with an expanded version, S. 2290, expecting to bring the bill to a vote later that month. If enacted, S. 2290 would become the Fairness in Asbestos Injury Resolution Act of 2004 (or “FAIR Act of 2004”). Generally, this bill would create a superfund, allowing victims of asbestos-related illnesses to collect damages without litigation. In turn, asbestos manufacturers and insurers would avoid litigation by paying into the fund. During April negotiations, the fund was set to create a pool of $114 billion with an additional $10 billion contingency. Manufacturers and insurers would initially pay $57.5 billion into the fund while insurers would contribute roughly $46 billion.

Predictably, victims’ and labor groups opposed this particular solution as being insufficient to compensate all the people who are or will become ill over the next several decades. At the same time, corporations and insurance companies were not eager or financially able to contribute enough to the fund to appease the victims’ groups.

Senate Majority Leader, Bill Frist (“Frist”), tried to bring S. 2290 to the Senate floor on April 22, 2004. Lacking sufficient votes to avoid a Democratic filibuster, Frist and Senate Minority Leader Tom Daschle (“Daschle”) agreed to continue negotiating the size of the trust fund. However, all negotiations broke down within a couple of weeks, the bill appeared to be dead in the water, and the Senate turned its attention elsewhere.

In the meantime, the political climate in Washington is rife with partisan bickering—further diminishing the chances of a bipartisan compromise on this issue. Sen. John McCain joked in April: “Why don’t we just go home . . . rather than go through this charade of telling Americans that we are
Predictably, S. 2290 did not escape scorn or praise drawn down party lines. Commenting on the breakdown of negotiations regarding the size of the superfund, a spokesman for Daschle alluded to the GOP while commenting, “We are disappointed. It’s hard to reach an agreement when only one side is willing to negotiate.” Likewise, Republican leaders blamed Democrats for the stalemate. Sen. Hatch quipped, “[Democrats] want to drag [the asbestos talks] out as long as they can so they have a campaign issue.”

By mid-June 2004, the ultimate fates of S. 1125 and S. 2290 were still uncertain, but apparently grim, leaving stakeholders to think maybe next year Congress can make it happen. Meanwhile, additional asbestos lawsuits are filed, more plaintiffs get sick and die, the list of businesses forced into bankruptcy grows, additional workers lose their jobs, litigation costs continue to be passed onto consumers, and many court dockets remain jammed full with asbestos lawsuits.

IV. State-level Solutions

According to the RAND Institute’s studies, asbestos litigation has migrated geographically since entering the legal scene. For example, five states, Mississippi, New York, Ohio, Texas, and West Virginia, which accounted for only nine percent of asbestos cases filed before 1988, handled an astonishing 66 percent of the cases filed between 1998 and 2000. Interestingly, prior to 1988, the majority of asbestos lawsuits were filed in five different states California, Illinois, Maryland, New Jersey, and Pennsylvania—none of which remained on the top-five list by 2000.

These statistics speak volumes. First, this illustrates the (admittedly logical) trend for plaintiffs to strategically pick venues that are most likely to yield generous verdict awards. Second, these plaintiff-friendly venues shift over time. Third, since becoming a national crisis, the bulk of asbestos litigation has consistently been concentrated in only a handful of states at any given time. It is possible that lobbyists, who might even consider giving up some of their lobbying efforts in Washington, along with state politicians, will increase efforts for state-level reform in the leading asbestos states. As these states initiate reforms, asbestos plaintiffs will slowly migrate toward other states that still have attractive venues, laws, and juries. In turn, those states might then feel pressured to initiate reforms, thus spurring a slow domino-effect of state-level reform spreading from one plaintiff-friendly state to another.

Whether independently initiated or prompted by outside interests, some of today’s key asbestos states are trying to resolve their own asbestos (and tort) crises and others will likely follow suit.

A. Mississippi Tries and Tries Again

Mississippi’s state courts and legal system have gotten a lot of bad press over the last couple of years. Earlier this year the U.S. Chamber of Commerce ranked Mississippi as having the nation’s “worst legal climate” for the third consecutive year. Yet, this state’s legal system has a powerful influence over the nation’s asbestos suits. While Mississippi represents only one percent of the nation’s population, it houses twenty percent of pending asbestos claims. The reason for litigating a disproportionate number of asbestos suits: a reputation for handing out large jury verdicts, especially in Jefferson County. Such verdicts prompted journalists to dub these random but huge awards as “Jackpot Justice.” Exemplifying this term is a 2001 asbestos case where a jury awarded $150 million to only six plaintiffs, none of whom were sick or had any symptoms of impairment resulting from asbestos exposure.

In the fall of 2002, such cases, and the flurry of outcries that followed, prompted then Mississippi Gov. Ronnie Musgrove to hold a special legislative session, resulting in the passage of a tort reform bill, inspiring some to jab that if Mississippi could pass a tort reform bill anyone could. Earlier this year, current Mississippi Gov. Haley Barbour (“Barbour”) also decided to call a special session to deal with further tort reform legislation stalled in the legislature. The session began May 19 and resulted in
the passage of H.B. 13 on June 3. The bill includes, *inter alia*, a $1 million cap on pain and suffering in civil lawsuits against businesses or individuals and a requirement that cases be tried in the county in which the defendant resides or where the alleged act occurred—representing an effort to halt venue shopping.67 Barbour optimistically predicted: “The public is now going to have the benefit of a comprehensive tort reform package that, when it becomes law in a few months, will make a difference because it will end lawsuit abuse in Mississippi.” Barbour continued, “and as far as I’m concerned, [the new legislation] should put this issue behind us for a long time to come.”68

Collectively, Mississippi can serve as an example from which other states can learn valuable lessons. The Mississippi legislature should be commended for acting swiftly in response to public outcry and the apparent miscarriage of justice surrounding the $150 million asbestos verdict in 2001. While the 2002 legislation certainly did not resolve all the problems Mississippi lawmakers had hoped, the attempt alone is nonetheless admirable. While the effects of the 2004 reforms are still unknown, the successful negotiations and bipartisanship surrounding the legislation’s passage are also commendable. Also, the periodic large awards previously handed out by Mississippi juries illustrated the need to limit such asbestos-related awards to those who are truly sick. If this new legislation is as effective as its advocates predict, Mississippi may soon cease to be a primary state for asbestos litigation.

**B. The Ohio Legislature Breaks New Ground**

Earlier this year, the Ohio House and Senate passed the nation’s first state-level legislation, establishing “minimum medical requirements for filing certain asbestos claims.”69 Gov. Bob Taft signed the legislation June 3, 2004.70 Before its passage, a spokesman for the American Insurance Association, Jeffrey Junkas observed, “[t]his would be a landmark piece of legislation. You see the troubles at the federal level just getting the bill to the floor.”71

As noted above, Ohio, like Mississippi, is a major state for asbestos litigation. In fact, prior to this new legislation there were roughly 40,000 asbestos cases pending in Ohio courts.72 This groundbreaking legislation will now enable plaintiffs who are sick to move forward with their claims, while weeding out those plaintiffs showing no signs of asbestos-related illnesses.73 Many of the plaintiffs who do not meet the new medical requirements will likely pursue litigation in other states. Important to overall reform, this legislation will do more than just help provide quicker relief to those truly ill plaintiffs. Gov. Taft acknowledged that this legislation would equally benefit Ohio businesses and the state’s economy. He noted that, “[a] fair and effective civil justice system is an essential part of promoting and sustaining an attractive business climate in Ohio.”74 Of vital import is the potential for this legislation to improve circumstances for truly injured plaintiffs while also stabilizing the economic future of potential defendant companies. Ohio State Sen. Steve Stivers aptly explained: “[Ohio is] one of the states suffering the most from the asbestos crisis. Jobs have been lost. Otherwise healthy companies have gone bankrupt because of asbestos lawsuits. Because we are the poster-child for abuse, we should be a poster-child for reform. Several states are right behind us.”75

However, this legislation was not universally praised and its enactment was far from certain. Ohio Rep. Todd Book, a ranking member of the House Civil and Commercial Law Committee, alleged that out-of-state asbestos companies have lobbied hard for this legislation and he feared, if passed, it would “prevent Ohio citizens from receiving their fair share of compensation.”76 Defending the pending legislation is David Owsiiany (“Owsiiany”), a senior fellow in legal studies for the Buckeye Institute for Public Policy. Owsiiany charged that oppositional advertisements running in Ohio had been “misleading and disingenuous.” Owsiiany praised the legislation for doing exactly what it purported to protect Ohio companies from endless suits by people who “are not sick and may never get sick.”77 At this point, only time will tell whether this legislation will deliver the positive results and relief to Ohio
courts, plaintiffs, and defendants that its supporters anticipate. Time will also reveal whether this new legislation will spur a new phase in the migration of asbestos litigation.

C. Pennsylvania and Activist Judges

Some state courts grew impatient while waiting on state or federal legislative solutions, and, heeding Justice Breyer’s advice, took matters into their own hands. Though there are solid arguments to discourage judges from taking on the role of legislator, some asbestos experts and scholars see this as one of few viable options to curb the tide of asbestos lawsuits. Pennsylvania is arguably one state where such a judge-made law has worked.

In 1996 the Pennsylvania Supreme Court held that “asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action.” The court continued to explain that, “because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable.” The aftermath of this single holding prompted plaintiffs, notably plaintiffs showing no signs of physical impairments and those with nothing more than asymptomatic pleural thickening, to begin filing their asbestos suits in other states.

As noted above, prior to 1988 Pennsylvania had been on the short list of states where the majority of asbestos suits were filed. After this ruling, plaintiffs, who had not manifested what the Pennsylvania Supreme Court had deemed to be legitimate asbestos-related injuries, left and filed their lawsuits elsewhere, thus illustrating the impact one case (or law) can have on the national landscape of asbestos lawsuits.

While Ohio and Mississippi have both recently enacted legislative means to confront their respective asbestos crises, the results may end up being very similar to what happened in Pennsylvania: Plaintiffs will simply take their cases to more favorable venues. Those venues still regarded as plaintiff-friendly in asbestos litigation may need to brace themselves for an increase in claims, especially states like Texas, New York, West Virginia, and Illinois.

D. Illinois: Both Judges and Legislators Seek Solutions

Illinois serves as a state with a great variety of conflicting and contrasting interests in asbestos litigation. Illinois has historically been a state where many asbestos cases are litigated. A large number of asbestos-related lawsuits are litigated in Madison County. One if its most generous awards was a 2003 verdict where a single plaintiff, a former U.S. steel worker, was awarded $250 million for his asbestos-related cancer. The plaintiff had essentially no connection to Illinois, much less Madison County. His residency and place of employment were in Indiana.

Another factor tying Illinois to asbestos litigation is a rather tragic statistic. According to government data compiled by EWG, Cook County has the second-highest number of asbestos-related deaths of any county in the nation. Over a decade ago, the high volume of asbestos-related personal injury claims spurred Cook County Circuit Judge Dean Trafelet to establish an inactive docket in an effort to separate the claims of sick patients from those still healthy. This (judge initiated) tactic was both practical and fair. In fact, judges in other major cities have also created inactive dockets.

Illinois businesses and their employees have also had to weather the asbestos storm—fighting lawsuits and their unpredictable outcomes. Combined, these facts reveal that Illinois is a state dealing with some of the worst effects of the asbestos crisis. The effects consist of disproportionate and unpredictable jury verdicts, sick and dying citizens, business and employment losses, and a reputation (even if unfairly earned) of needing to improve its legal climate. Any attempt to remedy these legal woes would be a tall order for the Illinois legislature.

Impressively, the Illinois legislature was successful in enacting a general tort reform bill nearly a decade ago. The Civil Justice Reform Amendments of 1995 (“Reform Amendments”) was initially hailed as a great success—saving taxpayers an estimated $150 million only two years after
enactment. In the same two-year span, this legislation led to a 30% decline in the number of civil suits filed in the nine largest court jurisdictions in Illinois. Cook County “experienced a 63% reduction in product liability suits, a 39.6% reduction in medical malpractice suits and a 26.7% reduction in premises liability suits. The only category that did not reveal a less than 15% decline was suits involving motor vehicle injuries. In these particular cases, the decline was 13.5%.”

However, on December 18, 1997 the Illinois Supreme Court declared the Reform Amendments unconstitutional. In a five to one decision, the court found that the Reform Amendments’ core provisions improperly encroached on the judiciary’s powers, and also violated the “special legislation” clause of the Illinois Constitution by arbitrarily putting some injured plaintiffs at a legal disadvantage.

Nearly ten years have lapsed since the passage of the Reform Amendments, and the Illinois legislature may soon feel pressure to try again. Carefully crafted Tort reform legislation might bring some relief to the many different Illinois groups with vested interests in asbestos litigation and tort law generally. Believing that waiting for the U.S. Congress is no longer a rational alternative, outside interest groups may target Illinois with lobbying efforts. Alternatively, without some effort to curb the number or types of asbestos cases litigated in Illinois, the state’s asbestos dockets may soon feel some of the side-effects of the recently passed legislation in Mississippi and Ohio.

V. Conclusion

The first point to emphasize is the magnitude of the asbestos crisis; while other current issues might get more attention from the press, legislators, and the executive branch, asbestos is a crisis in the U.S. and should be treated, not just rhetorically labeled, as such. Despite pleas from the Supreme Court and the startling statistics that accompany this crisis, Congress has yet to enact national legislation to bring relief to the many different asbestos stakeholders.

Though a uniform solution would be ideal, it is no longer practical to wait for Congress. In order to encourage tort reform, interest groups may soon realize the most viable option today is to target the states and counties that litigate the majority of asbestos lawsuits. It is arguable that these states would serve their courts, constituent plaintiffs, and defendant companies well by enacting state-level legislation, in lieu of doing nothing. Such reforms could be designed to help truly sick victims receive quick compensation, while preserving the continued economic viability of the defendant companies and bringing some relief to the clogged courts.

In the alternative, if Congress does ultimately create a superfund or some other type of asbestos solution, the lesson to be gleaned from this experience is clear: waiting for Congress to save the day is like watching water come to a boil. The asbestos experience has clearly illustrated that political obstacles can paralyze Congress, especially in an election year. As unfortunate as it may be, the current climate in Washington is partisan and highly divisive. This is not to suggest that there are no partisan stalemates at the state level, or that state senators and representatives are not concerned about their political futures. However, individual states have shown more resolve to address the asbestos crisis than their Washington counterparts. Lastly, these observations may be helpful in addressing future tort crises looming on the horizon, such as fast food/weight management or toxic mold, just to name a couple.

Endnotes

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100,000 are disabled. All told, over the next 20 years more than 200,000 Americans will be affected by or from asbestos disease, and another 2 million will be disabled.”). See also, Freeman, supra note 1.


4 It is difficult to get current or accurate figures. There exists no state or national registry on asbestos claims or lawsuits and the numbers are constantly changing. See, Id. (claiming somewhere between both “more than 60” and “at least 70” U.S. companies have filed for bankruptcy because of asbestos litigation). See also, Stephen J. Carroll, et al., Asbestos Litigation Costs and Compensation: An Interim Report, RAND INSTITUTE FOR CIVIL JUSTICE (2002), at 5, available online at http://www.rand.org/publications/DB/DB397/DB397.pdf (last visited May 20, 2004) [hereinafter Interim Report].


6 2004 Bill Tracking S. 2290, 108th Cong. Sess. 1 (2003) (designated as “a bill to create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure . . .”). See infra § III.

7 See infra § III.

8 See generally, Jan Amundson, How a Congressional Answer to Asbestos Litigation Would Help Litigants, Courts, and the American Economy, 44 S. TEX. L. REV. 925 (2003) (explaining vividly the extent of the asbestos crisis and why Congress should act. Amundson is General Counsel and Senior Vice President of the National Association of Manufacturers—one of the nation’s largest and oldest multi-industry trade associations.).

9 See, e.g., At Which Level of Government are Tort Reforms Best Aimed?, CRAIN COMMUNICATIONS, INC., BUS. INSURANCE, Feb. 16, 2004, at 22 (noting, inter alia, that “[t]he American judicial system needs reform at the federal and state levels . . . Without meaningful tort reform at both the state and federal levels, U.S. liability costs will continue upward and unchecked . . .”). See infra § IV.

10 See infra § IV.

11 See, e.g., Amundson, supra note 8 (providing a compelling account of the extent and severity of the asbestos crisis for both plaintiff and defendant stakeholders).

12 Supreme Court Justice Louis Brandeis promoted this theory, contending that when the states act as “social laboratories” the whole country could benefit from each state’s attempt to find a different solution to common social and economic problems. In theory, this sort of experimentation protects the rest of the country when experiments fail, but extends the opportunity to all states to benefit whenever experiments succeed. For Brandeis’ famous dissent, see The New State Ice Company v. Liebmann, 285 U.S. 262, 280-311 (1932).

13 Indeed, both Congress and the Supreme Court use the term ‘crisis’ when referencing this issue. See respectively, Asbestos Litigation Crisis, 149 Cong. Rec. S. 11514, 108th Cong., Sess. 1, (Nov. 22, 2003) and Amchem, 521 U.S. at 597.

14 See infra § II.A. See also, supra note 3.

15 See infra § II.B. See also, supra note 2.

16 See infra § II.C. See also, supra note 4.


18 Id. See also, Interim Report, supra note 2, at 16 (predicting more than 225,000 premature deaths through 2009).


20 Interim Report, supra note 2, at 13.

21 Id., at vi. Note that some of these companies have only the most tenuous connection to asbestos, but are nonetheless forced into the asbestos litigation fray.

22 See, Freeman, supra note 1. Legal counsel for the U.S. Chamber Institute for Legal Reform recently noted there are estimates that an additional 250 or more companies could end up filing for bankruptcy, if nothing is done. See, Steven Brostoff, Don’t Hold Your Breath On Tort Reform, THE NAT’L UNDERWRITER CO., PROP. & CAS. ED., Mar. 15, 2004, at 10.


25 Eryn Gable, Asbestos ‘Nightmare’ Weighing Down Economy, NAM Says, ENV’T & ENERGY DAILY, Jan. 30, 2003, vol. 10, no. 9 (quoting Baroody as he testified at a Senate Budget Committee hearing on the state of the economy). Alternatively, the RAND Institute estimated in 2002 that total costs could range from $200-265 billion, see Interim Report, supra note 2, at viii.
See, Alex Berenson, A Surge in Asbestos Suits, Many by Healthy Plaintiffs, N.Y. TIMES, Apr. 10, 2002, at A1 (predicting “as many as 2.5 million people could file asbestos-related suits before the litigation begins to fade around 2030.”).


For these and other statistics see, e.g., Marty Coyne and Colin Sullivan, Congressional Cure Needed For Cancer of Asbestos Lawsuits, Nat’l Taxpayers Union & Nat’l Taxpayers Union Foundation, at http://www.ntu.org/main/press_commentaries.php?PressID=242&org_name=NTU (last visited May 20, 2004). See also, Interim Report, supra note 2, at vii (claiming “transaction costs have consumed more than half of total spending.”).


Except maybe plaintiffs’ lawyers, see Schmidt, supra note 28 and accompanying text.

Committee Report, supra note 27, at 2 (emphasis added).

45 U.S.C. 51-69 (2000) (providing rules governing, inter alia, personal injury and wrongful death claims against railroads engaged in interstate commerce. Note also, this was Congress’ second attempt at passing such a law, in 1906 the Supreme Court declared an earlier version of the FELA unconstitutional, see The Employers’ Liability Cases, 207 U.S. 463, 499 (1908)).


42 U.S.C. 9601 et seq. (called one of the boldest environmental statutes in U.S. history, the Superfund was created to ensure the clean-up of toxic-waste dumps in the United States).

Pub. L. No. 105-230, 112 Stat. 1519 (1998) (responding to liability related to implantable medical devices, such as heart valves, artificial joints, pace makers, etc.).


For a review of Congress’ potential power to legislate in this area, see generally Griffin B. Bell, Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions: Asbestos and the Sleeping Constitution, 31 PEPP. L. REV. 1 (2003).

Amchem, 521 U.S. at 628-29. Even this was not the first call on Congress to act by a member of the Court. In 1991, Chief Justice William Rehnquist headed the Report of the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, that noted, inter alia, “[t]he worst is yet to come . . . unless Congress acts to formulate a national solution . . . . all resources for payment will be exhausted . . . . That will leave many thousands of severely damaged Americans with no recourse at all.” Committee Report, supra note 27.


2003 Bill Tracking S. 1125, 108th Cong. Sess. 1 (2003) (designated as “a bill to create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure . . . ”). This bill was harshly criticized, see e.g., Greg Gordon, Asbestos Bill Heads for Showdown; Business and Labor are Facing Off as a Vote Nears on a Proposed Trust Fund For Victims, STAR TRIB. (Minneapolis, MN), Mar. 17, 2004, at 5A (noting labor negotiators described the fund as ‘grossly deficient’, while a California attorney called it both ‘a terrible piece of legislation’ and ‘a Pipe dream’). Id. See also, AFL-CIO Telling U.S. Senators Not to Vote For Asbestos Litigation Reform Bill, BESTWIRE, Mar. 12, 204 (outlining the AFL-CIO’s criticisms of S. 1125). For more on the last minute substitution of S. 2290 for S. 1125, see Marty Coyne and Colin Sullivan, Senate GOP Leaders Float New Asbestos Bill, Send it to the Floor, ENV’r & ENERGY DAILY, Apr. 9, 2004, vol. 10, no. 9.

2004 Bill Tracking S. 2290, 108th Cong. Sess. 1 (2003) (also designated as “a bill to create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure . . . ”).

Likewise, if passed S. 1125 would have become the Fairness in Asbestos Injury Resolution Act of 2003 (or FAIR Act of 2003).


Coyne and Sullivan, supra note 42.

The exact amounts have fluctuated during negotiations. Also note, in the first draft of S. 1125, the insurance industry agreed to pay $45 billion into the superfund, but after further investigation the Senate Judiciary Committee determined that that “industry’s potential liability was much higher. Some say . . . unlimited.” See, Steven Brostoff, Asbestos Reform Bill: ‘Dead Man Walking,’ THE NAT’L UNDERWRITER CO., PROP. & CAS. ED., Feb. 9, 2004, at 25 [hereinafter Dead Man Walking].
The AFL-CIO. This article contains a variety of quotes further illustrating the extent of party bickering on this.

Approves Lawsuit Bill with Caps - Barbour Lauds Effort to End 'Abuse' in awards, on employers to protect employees from asbestos exposure).

will do the same."

belief that the Democratic resistance to his bill was founded on anticipated campaign donations from trial lawyers and (noting Hatch's belief that "the Democrats' opposition is grounded on presidential politics." Hatch also asserted his

2003 (quoting the Governor as saying "We've got to get jackpot justice under control in Mississippi. We've got to end

lawsuit abuse.") [hereinafter 2004) (quoting Steve Forbes, of FORBES MAG., as saying "If Mississippi can pass tort reform, the U.S. Senate, I think,


The U.S. Congress is not the only national legislative body grappling with the asbestos crisis. Indeed, the British

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would "be a good idea to let [S.B. 1125] die and start over next year with a more realistic approach.")., see Dead Man Walking, supra note 47.

The U.S. Congress is not the only national legislative body grappling with the asbestos crisis. Indeed, the British Parliament recently enacted new asbestos legislation that took effect May 21, 2004. See, e.g., Sion Barry, Act on Asbestos Now. . ., WESTERN MAIL, May 21, 2004, at 17 (providing details about the British legislation creating a duty on employers to protect employees from asbestos exposure).

Interim Report, supra note 2, at iv.

Id., at 34. Note: the RAND Institute does not have a list newier than 2000, which would likely indicate further

migrations by 2004.

Worth noting is that of the current top-five states for asbestos litigation, Mississippi, West Virginia, and Texas, have all passed various pro-business measures since late 2002, and Ohio is on the verge passing innovative legislation to deal with, inter alia, asbestos lawsuits. See infra § IV. A & B.

See, Tom Ramstack, Mississippi Ranked 'Worst Legal Climate': Congress, Bush Push for Reform, WASH. TIMES, Mar. 10, 2004, at C7 (noting after Mississippi: West Virginia, Alabama, Louisiana, California, Texas, Illinois, Montana, Arkansas, and Missouri rounded out the U.S. Chamber of Commerce's top-ten list of states with the worst legal climates.).


Id. See also, Mississippi Governor Barber's New Campaign Slogan: Stop Jackpot Justice?, THE HOTLINE, Mar. 28, 2003 (quoting the Governor as saying "We've got to get jackpot justice under control in Mississippi. We've got to end lawsuit abuse."). [hereinafter Mississippi Governor].

Id.

Former Mississippi Gov. Ronnie Musgrove signed MS H.R. 19 into law Dec. 3, 2002. This bill was generally
designed to protect business interests in that state.


The bill also includes a $500,000 cap in medical malpractice cases. The bill passed the House 75-39. The Senate

passed its version of the bill a day earlier, 37-11. See, 2004 MS H.B. 13A. See also, Emily Wagster Pettus, House Approves Lawsuit Bill with Caps - Barbour Lauds Effort to End 'Abuse' In awards, THE ASSOCIATED PRESS (printed in THE COMMERCIAL APPEAL (Memphis, TN), June 4, 2004, at DS1). See also, Miss. Sends Torts Bill To Gov; For Signing, NATIONAL JOURNAL'S CONGRESSDAILY, June 7, 2004.
See, supra note 67.


See, 2003 Bill Tracking OH H.B. 292. See also, Jim Provance, Ohio Governor Signs Bill Curbing Asbestos Suits, KNIGHT RIDDEN/TRIBUNE BUSINESS NEWS (printed in THE BLADE (Toledo, Ohio)), June 4, 2004 [hereinafter Ohio Governor].

Separate Asbestos, Tort, and Silica Bills Advancing in Ohio Legislature, BESTWIRE, May 17, 2004 [hereinafter Separate Asbestos].

Id.

Id.

Id.

Ohio Governor, supra note 70.


See, supra note 40 and accompanying text.

See, e.g., James A Henderson, Jr. and Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C.L. REV. 815, 849 (2002) (arguing the courts deal with the inequality of recovery systems that often allow those with minor or no existing injuries to recover, while those with life-threatening injuries do not, and calling on the courts to “put an end to the madness.”).

Though tort law historically has been largely the result of court-created common law at the state level. See, Congress Should Act, supra note 37, at 840-41.


Id. at 238.

See, Interim Report, supra note 2, at 34.

See, supra note 58 and accompanying text.

Madison County has been described as a friendly jurisdiction for asbestos lawsuits by the American Tort Reform Association. See, http://www.atra.org (last visited May 20, 2004).


See, Government Statistics on deaths due to Asbestos-related diseases, EWG, available at http://www.ewg.org/reports/asbestos/tables/deathdetails_top100.php (last visited May 20, 2004). (coming in first place is Los Angeles County, CA, followed by Cook County, IL, and Philadelphia County, PA, also on the top 100 list from Illinois is Lake County in forty-first place).


E.g., Baltimore and Boston. Judges in these cities believe this has been a very successful experiment, see Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?, HARRIS/MARTIN’S COLUMNS: ASBESTOS, Feb. 2002, at 2-4.

See, supra note 60 and accompanying text.


Id.


Ill. Const. 1970, art. IV, § 13 (reading: “The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.”).

Best v. Taylor Machine Works, Inc., 689 N.E.2d 1057 (Ill. 1997) (holding, inter alia, “[i]f a statute is unconstitutional, this court is obligated to declare it invalid. This duty cannot be evaded or neglected, no matter how desirable or beneficial the legislation may appear to be.”)Id. at 1064 (citations omitted).

Ohio is at the forefront again, earlier this year the Ohio House passed H.R. 350—a bill that would grant food manufacturers and restaurants immunity from obesity lawsuits. See, T.C. Brown, Senate OKs Limit on Right to Sue Bill Curbs Awards, Protects Restaurants From Obesity Claims, PLAIN DEALER (Cleveland, Ohio), May 6, 2004, at B4.
Consider also, in April 2004, a Texas jury awarded more than $1 billion to the family of a woman who died from taking the diet drug Pondimin, see Rachel Stone, *Beaumont, Texas, Jury Awards $1 Billion to Family in Wyeth Diet Drug Death*, KNIGHT RIDDER, Apr. 28, 2004 (noting also that at least 100 more similar cases are pending against the company that makes Pondimin and that the company was worth about $8 billion before this verdict).


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