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CONGRESS

TSCA

Asbestos litigation showed the limits of the Environmental Protection Agency's regulatory authority under the Toxic Substances Control Act (TSCA). As the House and Senate hash out a final version of a rewrite of the law, Linda Reinstein of the Asbestos Disease Awareness Organization highlights why we need a law that better protects citizens and the environment from exposure to toxic materials that are deeply entwined in the economy. Reinstein has testified before the Senate about TSCA reform and concerns expressed by the ADAO over previous TSCA reform legislation were cited by key lawmakers as reasons for stronger legislative measures. This is the third in a three-part series focused on negotiations to reform TSCA.

Toxic Substances Control Act Reform or Irreversible Rollback?

By Linda Reinstein

Linda Reinstein is president and chief executive officer of the Asbestos Disease Awareness Organization, a public health advocacy group that aims to eliminate asbestos-caused diseases through education and advocacy.

This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.

The Senate and House are in the midst of reconciling bills to reform the Toxic Substances Control Act (TSCA) of 1976. The final bill the conference committee produces will shape the future of chemical safety for decades to come. If the committee protects public health and the environment, its work will greatly improve the safety of American families. The litmus test for the success of TSCA reform is ensuring that the U.S. Environmental Protection Agency (EPA) can expeditiously ban asbestos, once and for all.

Before my husband, Alan, was diagnosed with mesothelioma, an asbestos-caused cancer, we were like most

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American families—blissfully unaware that the chemicals in the foods we ate, clothes we wore, water we drank and air we breathed were largely unregulated by our government. I had never heard of TSCA and had no idea that one of the most important laws in our country had been rendered essentially ineffective decades ago. But after Alan's diagnosis in 2003, I learned that the law governing the chemicals in our country was so weak, the EPA wasn't even able to ban known toxic chemicals as notoriously poisonous as asbestos.

Alan and I co-founded the Asbestos Disease Awareness Organization (ADAO) to educate the public about the dangers of asbestos, build a community to help prevent deadly exposure and protect asbestos victims' rights.

Asbestos, a human carcinogen, causes mesothelioma and lung, gastrointestinal, laryngeal, colorectal and ovarian cancers, as well as nonmalignant lung and respiratory diseases. Asbestos was heavily used in homes, workplaces and schools between the 1940s and the late 1980s, and its use continues to this day. Today, asbestos fibers often are released into the air during building renovations or other unintended disturbances. The inhaled fibers lie in wait in victims' lungs, only to gradually eliminate the ability to breathe years later.

Asbestos-related diseases are often misdiagnosed and under-reported. Most patients die within six to 12 months after diagnosis. Exacerbated by a latency period of 10 to 50 years, late-stage diagnosis often limits their treatment options.

Alan had both occupational and non-occupational asbestos exposures.

He paid the ultimate price for his job: his life.

During my past 12 years as the founder and president of ADAO, I have seen little progress from our elected officials in the fight to protect the public and prevent asbestos-caused diseases. Seven bills to ban asbestos have been introduced, but all have failed. With this paralysis comes a very real human cost. Each year, up to 15,000 Americans die from preventable asbestos-caused diseases.

Asbestos Under TSCA.

Forty years ago, Congress recognized the need to protect the public from toxic chemicals with the passage of TSCA. This landmark law gave the EPA the authority to regulate industrial chemicals, and gave hope to Americans that they could live in an environment that was free of dangerous chemicals. It has failed, however, and hazardous chemicals remain present in U.S. homes, schools, the environment and consumer products.

''More than three and a half decades since the passage of TSCA, the EPA has only been able to require testing on just a little more than 200 of the 84,000 chemicals listed on the TSCA inventory and has regulated or banned only five of these chemicals under TSCA's Section 6,'' said Jim Jones, assistant administrator of the Office of Chemical Safety and Pollution Prevention of the EPA.

In 1973, under the EPA's Clean Air Act, most spray-applied asbestos products were banned for fireproofing and insulating purposes. But that was just the tip of the iceberg when it came to asbestos use in America.

Under TSCA, the EPA was provided with the authority to require reporting, record keeping and testing, along with restrictions related to chemical substances and/or mixtures. In 1989, the EPA issued a final rule under Section 6 of TSCA banning most asbestos-containing products.

''The poster child for TSCA reform is asbestos.''

SEN. TOM UDALL (D-N.M.)

Before the ban could go into effect, the asbestos industry sued the EPA over the rule. The EPA defended the ban, arguing it was needed to address the unreasonable risk of harm imposed by the continued use of asbestos. But just two years after issuing the final rule, the U.S. Court of Appeals for the Fifth Circuit overturned the ban in the now infamous case, *Corrosion Proof Fittings vs. EPA*. The court found that the EPA failed to present ''substantial evidence'' to justify the ban under TSCA. Specifically, its decision was based on language in TSCA that the court said required the EPA to weigh the ''costs'' and ''benefits'' of banning asbestos and choose the ''least-burdensome'' regulatory alternative. Though these words may sound innocuous, given the context of the TSCA legislative text, they inhibited the EPA's ability to actually regulate toxic chemicals and led to regulatory paralysis.

As a result, most of the original ban on the manufacturing, importation, processing and distribution in commerce for the asbestos-containing products covered in the 1989 final rule was overturned. The only five asbestos-containing products banned under TSCA were corrugated paper, rollboard, commercial paper, specialty paper and flooring felt. Without a complete ban, this toxic compound remains legal and lethal in the U.S. and imports continue.

The court's ruling also led many to question, ''If the EPA can't ban asbestos—a known carcinogen, at which no level of exposure is safe—how can the EPA regulate any toxic substance?''

Presently, the agency says, ''3,000 different types of commercial products contained asbestos. The amount of asbestos in each product varied from as little as 1 percent up to 100 percent. Many older plastics, paper products, brake linings, floor tiles and textile products contain asbestos, as do many heavy industrial products such as sealants, cement pipe, cement sheets and insulation.''

Stakes Are High.

The recent efforts by the House of Representatives and Senate to revise TSCA present a promising opportunity to right this wrong. As Sen. Tom Udall (D-N.M.) acknowledged, ''The poster child for TSCA reform is asbestos.''

He is absolutely right. Real TSCA reform must ensure the EPA can expeditiously take action on asbestos. But not just asbestos, the primary goal of TSCA reform must be to protect public health.

When the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697), sponsored by Sens. Udall and David Vitter (R-La.), and the TSCA Modernization Act (H.R. 2576), sponsored by Rep. John Shimkus (R-Ill.), were introduced, there were serious concerns if either bill would in fact better protect the public or if they

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instead served to benefit the chemical industry by streamlining regulations.

The Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act (S. 725), sponsored by Sens. Barbara Boxer (D-Calif.) and Edward Markey (D-Mass.), promised true reform with the goal of keeping American families safe from chemicals, but Congress chose to move forward with S. 697 and H.R. 2576.

After many hours of negotiations and multiple hearings, progress has been made on both bills—but we aren't at the finish line yet.

The bill the Senate passed ensures that decisions about chemical safety will be made solely on the basis of their impact on health and the environment, not costs. Additionally, under the Senate bill, asbestos is recognized as a carcinogen by its attributes, ensuring that it will receive the highest priority for review and regulation by the EPA.

While the House bill fails to address the cost-benefit analysis problem or ensure that the EPA moves expeditiously on asbestos, it allows states to regulate chemicals if a final and enforceable EPA regulation is not yet in effect. The House bill also helps reduce unnecessary regulatory delay by eliminating the high-low prioritization scheme for reviewing chemical substances.

Astonishingly, both bills fail to even mention the word ''asbestos,'' and neither provides for expedited action specifically for asbestos. The Senate Environment and Public Works Committee had the opportunity to address this when Sens. Boxer and Markey introduced the Alan Reinstein Asbestos Amendment to ensure that the EPA will expeditiously review and take action to ban asbestos within three years. It was defeated after every Republican on the committee voted against it.

Discretionary or Mandated?

Since the two bills are vastly different, the conference committee has its work cut out. But the goal should be clear: Protect public health and the environment from dangerous chemicals.

The final product from the conference committee must ensure that the EPA has the regulatory power to expeditiously review chemicals and take action to ban asbestos and prohibit imports.

We've known for decades that all forms of asbestos are deadly; Americans can't wait for the EPA administrator to place asbestos on a regulatory ''to-do'' list.

Rather, TSCA reform legislation must mandate that the EPA administrator include all forms of asbestos as high priority and complete a safety assessment and safety determination no later than two years after the date of enactment of the final TSCA reform bill. And, the EPA must promulgate a final rule no later than three years after the date of enactment of the final TSCA reform bill.

The ''least-burdensome'' requirement must be stricken and decisions about chemical safety must be made solely on the basis of impact on health and the environment, not costs. The Senate bill satisfies this key litmus test, yet the House bill has work left to accomplish with regard to costs.

In what is known as the ''third wave of exposure,'' many victims encounter asbestos after disasters. The aftermath of a natural disaster like Hurricane Sandy left toxic debris in its wake. There was more than 5.6 million cubic yards of debris removed after Hurricane Sandy. Toxic debris remains a threat in the U.S. considering that more than 30 million homes, offices and schools contain asbestos.

The final TSCA reform bill also must protect states' rights to take action against dangerous chemicals, particularly if the federal government and the EPA fail to act. Since TSCA's failure, states have filled the void to protect the public from dangerous chemicals. A prime example of this is California's Proposition 65, which requires businesses to provide a ''clear and reasonable warning'' to consumers if a product contains a chemical known to cause cancer or birth defects. It was this state law that enabled ADAO to advocate for the successful removal of an asbestos-containing children's toy from the market and hold the manufacturer accountable.

The Right to Know.

True TSCA reform must empower the public to protect themselves from asbestos exposure through knowledge, awareness and transparency. With greater awareness, we can save lives and dollars. Diseases caused by asbestos exposure currently cannot be cured, but they can be prevented by reducing and eliminating exposure. To do so, we have to know where the asbestos is in our country.

Americans cannot identify asbestos in their homes, workplace or consumer products, nor can they manage the risk. As recently as October 2015, the Cannon U.S. House Office Building was closed due to concerns of asbestos contamination. Congress and staffers remain at risk.

Without training and testing, it is nearly impossible to manage the risk during repairs, renovations and hazardous debris removal after disasters. Asbestos fibers can be nearly 700 times smaller than a human hair and are odorless, tasteless and indestructible. Our inability to identify and manage the risk of asbestos perpetuates this threat to the lives of future generations.

The public should have access to a database of asbestos-contaminated products. TSCA reform should urge the U.S. Surgeon General to issue public health warnings about asbestos dangers. The final bill also should improve current laws to protect students, teachers, staff and parents from asbestos exposure in schools.

The Evidence.

The asbestos industry and the government have known for more than 100 years that asbestos caused diseases; however, since 1900, more than 31 million metric tons of asbestos have been used in buildings and consumer products, and it is still found in homes, schools and workplaces. In fact, the U.S. Geological Survey reported that in 2014 alone, the U.S. consumed 406 metric tons of asbestos. The reason? To meet ''manufacturing needs''—even when safer substitutes exist.

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U.S. GEOLOGICAL SURVEY

In 1984, the EPA published the Asbestos in Buildings National Survey, which ''estimated that asbestos-containing materials (ACM) existed in most of America's approximately 107,000 primary and secondary schools, as well as 733,000 public and commercial buildings.'' Furthermore, the survey found that ''approximately 34,800 schools were believed to have friable ACM, potentially exposing an estimated 15 million students and 1.4 million school employees.''

Even after the 1984 EPA asbestos survey confirmed the health dangers, asbestos use continued. Between 1984 and 2015, the U.S. consumed 1,038,481 metric tons of asbestos.

In 1986, Congress passed the Asbestos Hazard Emergency Response Act (AHERA) requiring ''local educational agencies to inspect their school buildings for asbestos-containing building material, prepare asbestos management plans, and perform asbestos response actions to prevent or reduce asbestos hazards.''

In 2015, Sens. Markey and Boxer wrote a letter to all 50 governors inquiring as to how many of their school districts were following the AHERA requirements. Only 20 states replied and only three appeared to be following the AHERA regulations.

The U.S. lags the European Union and Australia in regulating asbestos. More than 50 countries have banned it and they remain economically viable without asbestos in consumer products and toys. Unlike the U.S., the EU has placed the burden of protection on industry instead of the everyday consumer, and established the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation to hold industries responsible for assessing and managing the risks posed by the chemicals they produce, use and sell. Instead of individuals and nonprofits spending time and dollars privately investigating asbestos in consumer products, they consider it industry's responsibility.

Who's at Risk Now?

In 2013, a National Institute for Occupational Safety and Health (NIOSH) study of three cohorts in San Francisco, Chicago and Philadelphia provided new data. As reported, ''The population of firefighters in the study had a rate of mesothelioma two times greater than the rate in the U.S. population as a whole.''

In May 2010, the U.S. President's Cancer Panel reported, ''Construction workers were found to be 11 times more likely to develop mesothelioma, due to asbestos exposures at the site.''

Shockingly, independent investigations in 2000, 2007 and 2015 confirmed asbestos contamination in consumer products and children's toys. In 2000, the Seattle Post-Intelligencer confirmed that asbestos had been found in crayons. Seven years later, ADAO confirmed asbestos in five consumer products, including a child's toy. The EPA and the Consumer Product Safety Commission (CPSC) were hand-delivered full reports, but no action was taken. A new investigation in 2015 by the Environmental Working Group (EWG) Action Fund has once again found asbestos in children's crayons and toys. Asbestos was found in four of the 28 boxes of crayons and two of the 21 kids' fingerprinting kits purchased online and at stores.

There are an alarming number of younger victims in their 20s and 30s developing asbestos-related diseases through ''secondary exposure''—which is exposure to asbestos through contact with someone who carried the toxic particles away from the original site. Many secondary exposure victims inhaled the fibers when they hugged their dads who unknowingly brought home asbestos on their work clothes.

Ignorance Isn't Bliss.

I watched my husband die a slow and painful death for preventable mesothelioma, caused from asbestos.

Acting U.S. Surgeon General Boris Lushniak stated: ''The asbestos issue is not a thing of the past. It continues to this day.''

The conference committee must work together on behalf of those silenced by asbestos and other toxics. The time is now to reform TSCA and ensure that the EPA can and will expeditiously ban asbestos and other deadly chemicals.

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