Testimony of

Mr. Frederick M. Baron

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Mr. Chairman and Members of the Committee, my name is Fred Baron and I am a partner in the law firm of Baron & Budd of Dallas, Texas. I have been involved in asbestos litigation for over twenty-five years. I served as president of the Association of Trial Lawyers of America (ATLA) between July, 2000 - July, 2001. I am pleased to appear today to present ATLA's views on the current state of asbestos litigation.

The asbestos litigation issue has been with us for almostover three decades. Over the years, defendants and their insurers have periodically asked Congress to changereform the tort system to reduce their liability to the victims of the asbestos epidemic. To date, Congress has rejected every industry backed asbestos tort reform effort.

This hearing has been scheduled to review the current state of asbestos litigation, to evaluate claims for relief by certain corporations and insurance companies, and to determine whether a more efficient and equitable system of compensating asbestos victims can be developed. We are extremely skeptical that any proposal put forth by the asbestos defendants and their insurersthe Congress could or would act to improve the current system of compensation to the benefit of asbestos victims. In summary, ATLA believes that the current state law tort system has proven, over the past decade, that it can deliver benefits in a reasonably short period of time to the hundreds of thousands of asbestos victims who have filed for and received compensation. The fact that in excess of 50,000 claimants per year receive payments and only a very small number of the cases are tried to verdict, signals that this system is working for the vast majority of injured victims.

Tort Remedies are Essential to Compensate Injured Workers

Over the years, the proponents of change asbestos reform have identified a variety of so-called litigation crises that, in their view, justify federal intervention in state tort law. Although the defendants' reasons for demanding asbestos tort reform have varied, their definition of success has always been, and remains, eliminating the vast majority of valid claims that are valid under state law. Although they will argue that the only way to pay more to the sickest is by paying less to others, the defendanmts' real goal is to pay less total asbestos compensation. Recently, their preferred device has been proposed restrictive, mandatory, federal medical criteria that would eliminate tens of thousands of claims which would otherwise be entitled to compensation under state law. Without such restrictive medical criteria, I doubt industry will support any form of federal legislationasbestos reform.

ATLA believes that thereThere is no valid basis for providing legal relief to solvent asbestos defendants or their insurers. Thirty years of actual experience in the state tort law systems, where over 500,000 asbestos victims have sought and obtained compensation for their injuries, is conclusive evidence that there is and no more effective mechanism for ensuring that victims get compensation than the tort system. Workers who have been injured by asbestos exposure are entitled to seek receive compensation under the laws of each of the 50 states.in the tort system. Any proposed lLegislation should not include medical standards more restrictive than those used

by state courts today, otherwise many injured workers who would otherwise be entitled to benefits will be left without a remedy for the harm they have suffered.

Unimpaired Claims

The lynchpin of the industry argument for restricting asbestos victims' recovery rightsasbestos reform is that most new claims are filed by people who, although suffering from asbestos related disease, are not functionally impaired.sick, and thus, are not impaired. By seeking to classify all claims filed by asbestos workers with pleural plaques, pleural thickening or pleural calcification, and even many cases of asbestosis as unimpaired, this argument inaccurately suggests that none of these claims are deserving of compensation.

Tort law compensates injuries. Tort law has never does not required functional impairment as a precondition for awarding compensation. The concept that a victim must be impaired before their claim can be heard is an invention of the asbestos defendants designed to limit their liability to those who have been most seriously harmed by exposure. Although a person with less severe asbestos injuries is likely to have less substantial damages and receive a smaller tort award., indeed But, because asbestos disease is progressive, OSHA requires that all workers exposed to asbestos be provided with regular medical surveillance to detect disease. Certainly, those workers who incur substantially increased medical expenses as a result of the harms caused by asbestos manufacturers should be entitled to recover for those losses.

Let me offer a simple example. If my car is hit in a rear end collision and I am hospitalized, however briefly, the other driver (or the driver's insurer) pays my damages. The other driver pays these costs regardless of whether or not my injuries cause functional impairment.

What is more, the charge that most claims are filed by those who are not sick and that these so called "unimpaired" cases represent a growing proportion of overall claims is wrong. The most recent data from the Manville Trust, the benchmark for trends in asbestos litigation, show more than 850% of claims have been filed by those diagnosed with cancer, asbestosis or other illnesses. Today, fewer than 1520% of claims are classified as pleural, a proportion that has been shrinking since 1995. Thus, the assertion that an explosion of unimpaired claims justifies federal intervention is not supported by the available evidence.

Asbestos Claims Do Not Burden the Courts.

Twenty years ago, thousands of injured claimants had difficulty obtaining relief in the courts because the asbestos industry was involved in a lengthy and complex struggle with plaintiffs over responsibility for the diseases caused by their products. The issues that animated that earlier litigation have long ago been resolved in favor of the claimants. Liability of the defendant companies is no longer seriously disputed. Juries across this country have demonstrated time and again that they will find the defendant companies liable at trial and impose substantial damages for their conduct.

It should be noted that over 90% of all of the cases are filed in state courts, not federal, and that better than 85% of the cases are filed in only 10 states. The relatively small number of courts that have been dealing with these claims over the past two decades are well equipped to handle the pending and future asbestos cases that will require trial. A litigation crisis, as that term is usually understood, does not exist. In 2001, in all state and federal courts in America, there were only 60XXX asbestos trials, involving less than 150xxxx individuals. The best information available indicates that more than 50,000 claims settled during the same period. , were completed in all

state and federal courts. These statistics clearly do not present a case management crisis for asbestos litigation.

As a result, it is simply inaccurate to any longer claim that asbestos litigation is placing an undue, or in fact, any burden on the courts. As the statistics clearly show, claims filed do not translate into cases tried. The vast majority of cases do not take up the time of the courts. Today, the problems the courts confronted during the last decade have largely been eliminated and the industry and the claimants have, by and large, accommodated themselves to the risk of litigation. We believe that the large volume ofApproximately 50,000 cases that are settled every year, providing compensation to victims and their families, settle in a fraction of the time it would take to process claims under any newly devised administrative scheme. Most claimants do not wait years to receive payments. In my experience, my asbestos clients wait an average of less than six monthsxxxx to start receiving payments. And in virtually every jurisdiction, asbestos victims who are classified as "in extremis," typically are given docket priority and can usually access a trial setting in less than 12 months. ATLA believes that any change to the present system of asbestos litigationAsbestos reform that alters the risk of litigation, would slow, rather than speed, payment to claimants.

Tort Reform Will Not Fix Problems in Bankruptcy Law

One reason Congress periodically inquires into asbestos litigation is that a significant number of corporations have filed for reorganization because of potential asbestos liabilities. Although nobody encourages bankruptcy filings, anxiety about asbestos defendants filing for reorganization under Chapter 11 of the Bankruptcy Code may be misplaced.

Most, if not all, of the asbestos defendants who have filed for bankruptcy do so to continue operating. Few, if any, jobs are lost as a direct consequence of reorganization. Reorganization is a means to set aside a pool of corporate assets to pay claims. Victims receive compensation from a separate trust which typically owns at least 85% of the bankrupt defendant's stock. Asbestos defendants emerge from reorganization as viable economic entities. As the wealth of these new companies grows, its new shareholders and asbestos claimants both benefit. In adopting section 524(g), Congress preserved the rights of future claimants by prohibiting bankrupt trusts from spending their assets now on current cancer cases rather than preserving those assets for future claims.

The only time Congress has legislated on the issue of asbestos compensation was to codify the innovative settlement reached in the Manville bankruptcy and to adopt section 524(g) to preserve trust assets for future claimants. Congress made the right choice.

Those who argue that under the current system mesothelioma victims do not get their fair share of compensation really want to upset Congress' decision to preserve trust assets for future claimants. For it is only where limited assets are available to pay claims, as in bankruptcy, that mesothelioma claimants receive limited awards. Mesothelioma claims filed against solvent defendants receive substantial awards (usually in excess of several millions of dollars) in their state based tort suits. or settlements in tort. And, most courts hear these claims on a priority basis so victims receive compensation promptly.

Moreover, section 524 is sufficiently flexible to allow adjustments in the amounts paid for different categories of illness, where fairness so requires. Just a few weeks ago, a federal court approved a change in the payment formula used by the Manville Trust which substantially increases the total dollars and percentage of dollars paid to those most seriously ill. It is expected that other trusts will follow this precedent.

Administrative Compensation May Create More Problems Than It Solves

Some industry advocates and academics have long sought to substitute an administrative compensation scheme for tort law. Administrative compensation programs have a history ofusually do not working as advertised. They may not speed the payment of benefits to injured workers. An administrative agency charged with determining asbestos compensation would take several years to begin operation.get up and running. It would need a very large staff to process claims. In the early years, thousands of claims, quickly settled each year by the tort system, would get backlogged and it would take several more years for the agency to clear the old cases. If the companies responsible for compensation are permitted to contest claims, a hearing is required, and administrative and judicial review often delay compensation for several more years. This would not represent an improvement.

Moreover, Congress has never before intervened when state law is providesing an adequate remedy to injured workers, as is the case in asbestos litigation. Congress has never adopted legislation to prevent injured workers from obtaining compensation under state law.

An administrative system for asbestos compensation will almost certainlymay cost the federal government substantial sums even if Congress imposes a tax on the asbestos defendants to pay claims costs. That is why, before Congress considers asbestos reform legislation, it is essential that ashould determination be made ofe the total assets of the defendants and their insurers available to pay claims. We do not presently know how much money is available to pay current and future claims; moreover no accurate information exists as to whether. We do not know whether this pool of assets is adequate to cover anticipated claims.

When federal compensation programs protect the interests of a particular industry, such as under the Black Lung or Vaccine Injury programs, the affected industry is charged the costs of compensation. Often, estimates of how much it will cost industry or how easily those costs will be assessed against industry substantially underestimate costs and the federal government must make up the difference. This is the likely result if an asbestos compensation program is established. Asbestos manufacturers, suppliers or premises owners and their insurers should be responsible for the full costs of any compensation program, including the costs of administration.

Experience with other compensation programs is illustrative. Congress established the Black Lung compensation program because state workers compensation laws did not cover pneumoconiosis. As one academic has observed, however, the program "quickly became a disaster" for several reasons. (Peter Barth "The Tragedy of Black Lung at 42"). First, substantially more claims were filed than had been predicted. "Phenomenal " delays developed in processing claims at the Department of Labor. In 1973 a task force predicted claims would be processed in 90 days. By 1976, a DOL study found actual claims processing time was 630 days on average. Second, coal operators vigorously fought claims. In virtually every instance where a determination was made that an employer should pay compensation, the matter was appealed. Finally, the federal government paid a large proportion of the program, because assessments against coal operators were inadequate to cover claims costs. Today, Black Lung is an extremely cumbersome scheme under which few workers actually receive benefits.

Substantial delays also have plagued the Energy Employees Occupational Illness Compensation Program adopted in 2000. Two years after this law was adopted, the Department of Energy has yet to process a single claim for workers' compensation under Subtitle D. Over 20,000 claims are pending. At the National Institute of Occupational Safety and Health, more than 10,000 claims

await radiation dose reconstruction; NIOSH has completed only a handful so far. Both programs provide serve an exposed population substantially smaller than those injured by asbestos exposure.

New Defendants

The most recent alleged abuse in asbestos litigation is that with the growth of bankruptcies among traditional asbestos defendants claims are migrating to companies that "had nothing to do with asbestos." This charge is false. We are prepared to submit to the Committee a brief description of the conduct of some of the most prominent of these so called "uninvolved" defendants. (supplied by Lee Ann Jackson) While these companies did not manufacture asbestos, they used, distributed or otherwise sold products to others knowing that their asbestos content was likely to injure downstream users. Other defendants purchased companies, often at a discount, knowing these companies had substantial asbestos liability. While these defendants may have presumed they could avoid paying victims' claims, the courts have found no basis for relieving these companies of asbestos liability. We do not believe Congress should do so either.