Testimony of

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Statement of Michael Forscey, on behalf of
The Association of Trial Lawyers of America
On "The Fairness in Asbestos Injury Resolution Act"
Before the
U.S. Senate Committee on the Judiciary
216 Senate Hart Building
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My name is Michael Forscey. I am a partner in the Washington, D.C. law firm of Forscey and Stinson. I am appearing here today on behalf of the Association of Trial Lawyers of America (ATLA). I have represented ATLA in the discussions conducted by Judge Becker pertaining to the establishment of a trust fund to pay asbestos claims.

ATLA members represent the vast majority of the 500,000 existing victims who would lose - in unprecedented fashion -- their constitutional right to a jury trial and be required to navigate a new bureaucracy to obtain compensation for the asbestos-related injuries they have suffered. These victims have filed claims, in good faith under the prevailing law, for which they can expect substantial recovery in the courts. To radically change the rules governing how these claims are to be adjudicated now is inherently unfair. We therefore deeply appreciate your willingness to listen to our views and to include us in the discussions that this Committee has sponsored and that Judge Becker has facilitated over the past several months.

At the outset, let me say I believe that no organization or lawyer should oppose the theoretical possibility of a trust fund that would provide fair compensation, paid promptly, to the approximately million and a half of our fellow citizens who will develop asbestos disease in the future. ATLA has always said it could support a fully funded trust fund that would guarantee payment to future victims.

We believe that Judge Becker's involvement in this negotiation has produced a number of improvements that have moved us closer to the goal of a fair resolution for victims. First, and foremost, the current draft brings us much closer to both the language and the intent of the sunset provisions, commonly referred to as the Biden Amendment, than does S. 2290. This sunset, as we see it, has always been a critical incentive to achieve guaranteed funding, not an excuse to avoid it. Second, Judge Becker's recognition that a 2% attorney fee is not adequate to ensure legal representation of claimants is also an improvement over earlier drafts. Third, Judge Becker's proposal to increase award values is another welcome improvement. Fourth, we believe that a medical screening and monitoring program, as Judge Becker included in his draft, is the least that Congress should provide to victims whose established right to compensation is being taken away. We believe this program should be fully funded. Finally, we appreciate the Judge's decision to remove a confusing provision that would have moved claims stayed by the trial courts back and forth between the tort system and the trust with no prospect of quick resolution.

Notwithstanding these positive steps forward, many of these improvements represent compromises, which go only part of the way toward correcting the flaws of S. 2290, which was itself a retreat from S. 1125, the bi-partisan Committee reported bill. We remain concerned that the inflexibility shown by some of the other stakeholders on several key issues may need to lift if a balanced package is to be produced through a negotiated process.

It is important to remember that the public health crisis caused by asbestos is real and continues to grow. When asbestos legislation was first considered by the Judiciary Committee in the last Congress, many Senators had been led to believe that few workers were still getting sick from asbestos exposure. Recent evidence suggests the opposite.

Today, 4000 workers have mesothelioma, a fatal lung cancer who's only known cause is asbestos exposure. Each year, approximately 3000 more workers are diagnosed with mesothelioma. Additionally, according to the National Institute for Occupational Safety & Health, the incidence of asbestosis is also rising, whereas other occupational respiratory diseases are declining. All told, over 300,000 U.S. workers have died because of exposure to asbestos, and approximately 10,000 people each year die from asbestos related diseases. Epidemiologists expect these trends to continue for decades.

The money necessary fairly to compensate these victims for the harm willfully caused by asbestos manufacturers is obviously daunting. We believe the cost of compensating victims is clearly greater than $140 billion and could approach $200 billion. In the first five years, if all pending claims are forced through the Fund, at least $60 billion will be necessary. If borrowed funds are used to pay pending claims, as is currently envisioned, required interest payments on these funds will deplete the money available to pay benefits by as much as 25%. Unless legislative proposals include guarantees of funding at substantial levels, the proposed asbestos trust will fail.

Thus, while the draft circulated by Judge Becker includes several proposed changes that we support, the central issue of financing - who pays into the Fund and how much - is far from resolution. It seems unconscionable to move forward without a resolution to this issue that is grounded in sound claims estimates. We believe this issue has remained unresolved largely because manufacturer and insurers have insisted on artificial, low liability caps. Such caps render unreasonable a demand that all pending claims be forced into an administrative system that does not yet exist, and that will likely not be operational for 18 months even under the best of circumstances.

The demand that all pending claims be resolved by the trust fund is at the heart of many of the unresolved issues with which this Committee continues to struggle: up front funding, administrative gridlock and reversion to the tort system. Forcing the pending claims into the Fund also produces a substantial cost-shift, away from those with vast current liability to those with relatively few current claims. Manufacturers and insurers have objected to honoring many settlement agreements into which they have voluntarily entered -- agreements to pay specific sums to specific victims, which if honored would significantly reduce the up front funding needed for the bill and would greatly improve the fairness of the draft. Finally, these same defendants and insurers unfairly insist on forcing into the Fund even those cases that have produced a judgment and an award, forcing claimants to start anew if that judgment is appealable.

We are also concerned that the Department of Labor will not be able to process claims at the rate envisioned by the bill, likely making pending claimants wait years for compensation payments to begin. We know from experience with other government compensation programs that claims projections have historically been low. We also know that it is unrealistic to assume this program can be up and running and paying claims in 90 days. Substantial delays have plagued both the Black Lung Compensation program and the Energy Employees Occupational Illness Program Act. These two programs are only a fraction of the size of this trust, should it become law. The Committee must solicit the Department of Labor's views on whether it can do what is being asked of it as quickly as the bill requires. If the Department of Labor cannot get this program running in a matter of months, Congress should not, as a matter of fundamental fairness, include the pending claims in the trust.

In addition to our overarching concerns about the Fund, ATLA has some specific reservations about other provisions of the bill, which include, but are not limited

to the following:
? Subrogation - We should revisit the subrogation provision, as it is unfair to any claimant with current workers' compensation payments. The Energy Employees Occupational Illness Compensation Program Act contains language barring any person from placing liens on awards. We believe this language should be included in asbestos legislation as well.
? Mesothelioma Values - While the claims values in the latest draft are an improvement over those included in S. 2290, we believe the claims value for mesothelioma victims remains too low. We propose a 1.8 million dollar base award for mesothelioma victims - the average death benefit under the September 11th Fund. Moreover, we continue to believe that awards should be adjusted upwards based on a victim's age and number of dependants.
? Transparency - Transparency is a hallmark of public programs. The Fund will relieve defendants and insurers of substantial asbestos liability. Congress and the public have a fundamental right to know - before a fund is enacted, not afterwards - which companies would gain from this action.
? Mixed Dust Cases - There is no evidence that mixed dust cases burden the courts, are not fairly resolved, or require federal intervention. This legislation should not address these cases.

Past federal compensation programs have been designed to provide a benefit to victims of harm when the courts have failed to do so. Never before has Congress adopted a compensation program that takes away from victims an established right to obtain compensation in the courts. As we move forward, let us not lose sight of the fact that preserving the right to full and fair compensation for victims, their wives, husbands and children must remain the driving force for any asbestos legislation.