Testimony of

Mr. Steven Kazan

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Mr. Chairman and members of the Committee: I am a plaintiffs' trial lawyer. I speak for myself and other members of the asbestos bar who stand up for the interests of asbestos cancer victims. For 25 years I have concentrated on obtaining compensation for people who are dying from asbestos cancers. I appeared before you before you last September to explain why I believe that asbestos litigation has become a tragedy for my clients.

I am grateful for the chance to appear before you again to address a different issue: what should be done?

In my view, the solution is simple. I believe in the civil justice system, and I do not think that we need a big-government solution to asbestos litigation. Nor do we need an elaborate National Trust Fund administered by a private bureaucracy. Asbestos litigation has become a nightmare because the courts have been inundated by the claims of people who may have been exposed to asbestos but who are not sick - who have no lung function deficit. This flood is conjured up through systematic, for-profit screening programs designed to find potential plaintiffs with some x-ray evidence "consistent with" asbestosis. Ironically, and tragically, in many states, that x-ray evidence triggers the statute of limitations, literally forcing the filing of premature claims. These claims are choking the asbestos litigation system and keeping the courts from doing their job: providing compensation for people who are genuinely injured by asbestos diseases.

If the fundamental cause of the asbestos litigation crisis is the flood of "unimpaired" claims, the obvious solution is to defer the claims of the "unimpaired" until they are sick, while preserving their right to sue by tolling the statute of limitations and making that a meaningful right - there would still be asbestos defendants to sue. Such legislation would allow the courts to focus on the 10-15% of claims where the plaintiff is really injured. I have no doubt that our civil justice system would be up to the task of providing fair and even-handed justice in these cases.

1. The Medical Criteria Approach. Over the years, Congress has considered many asbestos bills. Most of them involved creating some kind of government compensation scheme, like Black Lung or the 9/11 program, but the problems involved proved too daunting. That was true even when filing rates were one-tenth what they are today, and when there were only 200-300 potential defendants. Today there are 8,400 defendants representing every major industrial sector in the country, and 60,000 to 100,000 new claims filed every year. Moreover, with an almost infinite supply of exposed people, even this volume of new claims could be dwarfed in coming years.

Perhaps it is time to consider a simpler approach. Rather than supplanting the civil justice system, let's consider creating the conditions necessary to allow it to work. That is the approach that was advocated by the American Bar Association in its historic February 11 vote to support asbestos legislation that would defer the claims of the unimpaired while tolling the statute of limitations. And, that is the approach taken in S. 413, which was introduced by Senator Don Nickles on February 13, 2003. I call this the "medical criteria" approach. It makes a lot of sense. The purpose of medical criteria is to distinguish between people who are sick as a result of asbestos exposure and those who are not. Thus, the medical criteria proposals leave the cancer

victims alone. Cancer victims are clearly impaired, and the courts are perfectly capable of sorting out the questions about causation that are usually the key to cancer cases. Cancer criteria are simply unneeded.

The ABA criteria and those in the Nickles bill are generally similar. Both are based upon medicine, and yet both take into consideration the special problems involved in integrating medical standards into the legal system. While leaving purely medical issues to the doctors, I would like to comment on some key issues in making medical criteria effective in the courts.

First, "forensic medicine" should observe the same standards as real medicine. In the real world, a person who wants to receive medical advice about a symptom, or even about risks of future illness from some exposure, would go to a doctor, explain his occupational and medical history, undergo tests that comply with generally accepted technical standards, and receive a considered diagnosis. That is the medical model. And that is precisely what does not happen in asbestos litigation.

In asbestos litigation, screening firms recruit asbestos-exposed individuals as clients. Technicians employed by those firms administer tests that rarely comply with applicable technical standards. The test results are provided to doctors who are often not licensed in the relevant state, who do not consider themselves to be in a doctor-patient relationship with the potential claimant, and who often have a financial interest in identifying as many potential plaintiffs as possible. The doctor usually does not render a diagnosis, but merely affirms that the x-rays presented to him are "consistent with" asbestosis. If this were medicine, it would be malpractice. But it is not medicine: It is the medical side of legal entrepreneurship.

The very first thing a medical criteria bill should do is require a genuine diagnosis based upon generally accepted medical procedures. Both the ABA criteria and the Nickles bill do that.

Second, a medical criteria bill should rely on workable, objective tests for determining whether the claimant has a breathing impairment. The Nickles bill uses the American Medical Association's Guides for the Evaluation of Permanent Impairment (5th edition) for this purpose. Although the AMA Guides address respiratory impairments generally, they do not focus on causation and thus do not determine if an impairment is asbestos related. However, they are objective and are widely used in state and Federal workers' compensation programs in evaluating claims of asbestos-related disability. Indeed, the AMA Guides have been incorporated by reference in the Longshore and Harbor Workers' Act for evaluating claims of retirees, including those claiming asbestos-related conditions.

The ABA criteria are based upon the work of a Commission on Asbestos Litigation appointed by President-elect Dennis Archer (on which I had the privilege of serving). Those criteria are specifically aimed at asbestos-related diseases and may be easier to administer than the AMA Guides. At the end of the day, however, they are likely to have a broadly similar effect.

Third, medical criteria should be able to sort out conditions that are and are not caused by asbestos. Accordingly, it is necessary to have x-ray evidence that supports the conclusion that the claimant has an asbestos-related disease. It is also necessary to distinguish people whose breathing problems are caused by "chronic obstructive pulmonary disease" or "COPD" - a disease usually related to smoking -- rather than asbestos exposure. While the ABA resolution and the Nickles bill differ in specifics, both take a reasonable approach to this problem.

Fourth, medical criteria need to be objective and need to be applied at the outset of a case. Doctors treating patients normally start with a careful evaluation but understandably wish to consider developing information and where necessary make last-minute, subjective judgments, based on all relevant circumstances. But, as a lawyer who has tried asbestos cases for 30 years, I

know that will not work in asbestos litigation. In practically every other kind of personal injury case, a plaintiff is expected to be able to provide sufficient grounds for filing a lawsuit when the case begins. It is reasonable to require the same in asbestos cases. If medical criteria are not applied then, they will be ineffective. Unfortunately, it is all too easy to find doctors on both sides of any question, and all too often their disagreements will be resolved at trial. In asbestos litigation, that is a recipe for continued screening. Lawyers for both sides know that it is unlikely that there will ever be a trial, or even real investigation or discovery, because the pressures for settlement are too intense, especially in "magnet" jurisdictions where large numbers of cases are consolidated for trial. The only way to break the vicious cycle that has brought untold numbers of asbestos "cases" into the courts is to apply objective medical criteria at the beginning of the case to distinguish between the sick and those who have not yet become sick.

There is nothing radical about this approach. Courts in New York City, Baltimore, Chicago, South Carolina, and other jurisdictions accomplish the same result through inactive dockets. Both the ABA proposal and the Nickles bill envision early application of objective medical criteria to make sure that people who are sick will have immediate access to the courts while deferring the claims of people who do not have anything wrong with them and protecting their right to bring a lawsuit if they fall ill.

The medical criteria approach will also have a tremendous beneficial effect on the currently pending bankruptcies. As a practical matter, it is impossible to reorganize successfully under Chapter 11 of the Bankruptcy Code without a so-called "section 524(g) injunction" which requires future asbestos claims to be presented to the trust that results from the reorganization. To be approved, a plan proposing a section 524(g) injunction must receive the affirmative vote of 75 percent of present claimants (regardless of the amount of their claims). While there is some controversy over whether people who are unimpaired have present claims and are entitled to vote, historically the unimpaired - or, more exactly, the lawyers who represent them - have held the key to approval of any bankruptcy reorganization. For that reason, reorganization plans systematically favor the unimpaired at the expense of people with fatal diseases. Indeed, this has led to instances where debtors or their parent corporations overpay present cases in an attempt to buy approval of unfair reorganization plans that hurt present and future cancer victims.

A medical criteria bill would make clear that people who are exposed to asbestos but who are not sick do not have present claims in bankruptcy. People who are truly injured - the sick and dying - could receive full compensation, because they would not be required to compete for funds with the mass of unimpaired claimants, as they do today. This benefit of a medical criteria bill is especially important when an injured person's only claim is against a bankrupt company.

As I noted above, the medical criteria approach is reflected in the Nickles bill, which I think is a very good start. That bill does, however, affect cancer claims in certain respects. In principle, I would prefer a bill that did not address cancers at all. Cancer claims are not the problem. But, in any event, I think that the provision of S. 413 on venue is wrong. Section 5(b) of the bill generally requires asbestos claims to be brought in a jurisdiction where the plaintiff lives or where his exposure to asbestos took place. Appropriately, there is an exception for cancer cases. That exception only applies, however, when a doctor certifies that the plaintiff can expect to die within 3 years after the date of filing a claim. While this would cover all, or practically all, claims filed by living cancer victims, if the victim has already died when the case is filed, the venue limitations of the bill would fully apply. I believe that this distinction between claims brought by cancer victims themselves and claims brought by their widows and children is unfair and unjustified. It could also create an anomalous situation where the surviving aspect of the victim's

personal injury case is in one state and the wrongful death case must be in another.

2. Letting the Civil Justice System Work. I have devoted my life to representing seriously injured people in the civil justice system. I believe in trial by jury. I believe that the courts do a good job in dealing with claims brought by injured people against the people or companies that injured them. If asbestos litigation involved only 7,000-8,000 cancer cases a year and a few thousand more non-cancer claims involving real breathing impairment, no one would be arguing the need for significant reforms. Certainly I would not.

Asbestos is unique, even by mass tort standards. More than 500,000 asbestos cases had been filed by 2001, and the current rate of filing is 60,000-100,000 per year. This flood of cases has forced the courts to adopt a variety of measures, including mass consolidations, designed to force settlements. These measures have in turn stimulated more lawyer-funded screenings, more filings, and even more intense pressure on courts to depart from the traditional legal process in order to deal with the onslaught of claims.

A medical criteria bill would relieve this pressure. It would let the courts go back to doing what they do best - resolving real cases and controversies between genuinely injured people and the defendants that they allege caused their injuries. In my view, this solution is most consistent with traditional American values.

We do not need a new federal entitlement program to compensate asbestos victims. We do not need federal officials to allocate responsibility among the 8,400 companies that have been named in asbestos lawsuits, or to unravel the tangled insurance relationships that have evolved over time. Nor do we need to build a quasi-public National Trust to do so. I strongly believe that substituting an administrative compensation scheme for the civil justice system is inappropriate. The federal government has not been notably successful in past schemes of this kind. It is far wiser to fix the problem - the filing of scores of thousands of claims on behalf of people who are not sick - and then let the courts do the rest.

3. "It's Time for Congress To Act". I am here today because I am very concerned about those who are hurt the most from asbestos, people who are dying of asbestos cancers, and their families. We have been talking about ending the asbestos nightmare for years. The first bills were introduced a generation ago. The Judicial Conference's Ad Hoc Committee on Asbestos Litigation called for asbestos legislation in 1991. The Supreme Court challenged Congress to legislate in this area in its Amchem opinion in 1997 and again, even more forcefully, in its Ortiz opinion in 1999. Meanwhile more than 60 companies have gone bankrupt, the litigation has spread to touch every sector in the American economy, and my clients are increasingly in danger of dying without viable defendants who can compensate their families for this tragic loss.

Mr. Chairman, the title of this hearing says it all: "It Is Time for Congress to Act." Congress needs to act now, to establish medical criteria to ensure that those who are sick today, and the many more who will become sick in the years to come, are protected and that their right to a jury trial will be truly meaningful because the responsible companies will still exist and be able to pay for the harm they have caused.