

CIVIL RICO: AN EFFECTIVE DETERRENT TO FRAUDULENT ASBESTOS LITIGATION?

Lester Brickman[†]

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[†] Emeritus Professor of Law, Benjamin N. Cardozo School of Law (Yeshiva University). I want to acknowledge the excellent work of my three research assistants, Jessica Goudreault, Khadija Foda, and Jennifer Pierce. I wish to acknowledge the valuable assistance of Mark Behrens, David Carlson, Garland Cassada, Nora Engstrom, Jonathan Grey, and Peter Kelso.

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INTRODUCTION

In January 2014, U.S. Bankruptcy Judge George Hodges, presiding over the asbestos-related bankruptcy of Garlock Sealing Technologies, LLC, a manufacturer of gaskets containing asbestos, issued an order estimating Garlock’s liability for pending and future mesothelioma cases.¹ Judge Hodges, after hearing evidence discovered by Garlock in a sampling of settled cases, rejected using the usual bankruptcy court recourse to the debtor’s historic settlement values as a valid basis for estimating Garlock’s total future liability for asbestos-related injuries. He found that Garlock’s prior mesothelioma settlements were not a reliable predictor of Garlock’s liability because those settlements had

¹ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). The estimate did not include any liability for nonmalignant claims.

been infected by misrepresentations by the plaintiffs' counsel and plaintiffs.²

In *Garlock*, the evidence showed that, in responding to Garlock's interrogatories and in depositions and trial testimony, the plaintiffs falsely denied exposures to the more highly toxic asbestos-containing insulation and refractory products of ten of the leading asbestos defendants, referred to as the "big dusties," which had gone bankrupt in the early 2000s.³ The great majority of asbestos plaintiffs, prior to these bankruptcies, claimed exposures to the products of these companies. Admitting exposure to these products by the *Garlock* plaintiffs after the bankruptcies would likely have significantly diminished the settlement values of their suits and increased the chances of a defense verdict, or at least a much-diminished allocation of responsibility to Garlock. Despite their clients denying these exposures under oath, plaintiffs' counsel, either prior to, during, or shortly and even immediately after the conclusion of the personal injury suits against Garlock, submitted claims to the asbestos bankruptcy trusts funded with assets of the bankrupted companies⁴ created under the Bankruptcy Act.⁵ In these "proofs of claim," the plaintiffs' counsel stated "under penalty of

² *Id.* at 73 ("The estimates of Garlock's aggregate liability that are based on its historic settlement values are not reliable because those values are infected with the impropriety of some law firms and inflated by the cost of defense."). I was an expert witness on behalf of Garlock, submitted an expert report, and testified in the estimation proceeding. The documentary evidence as well as transcripts of expert testimony and the proceedings were sealed upon the motion of the counsel for the Official Committee of Asbestos Personal Injury Claimants (ACC or Garlock ACC) representing the interests of current asbestos claimants. In addition, the order required that the courtroom be vacated by anyone, including news media, who had not signed a confidentiality form when testimony about the practices of plaintiffs' counsel was to be presented. Legal Newline, an online legal news service, filed an appeal of Judge Hodges' order, and after protracted proceedings, the order was reversed. *See* Legal Newline v. Garlock Sealing Techs., LLC, 518 B.R. 358 (W.D.N.C. 2014). This resulted in the record of the proceedings, lightly redacted, becoming widely available.

³ *See In re Garlock*, 504 B.R. at 83–84 (finding "substantial evidence" of this practice); *see also* LLOYD DIXON & GEOFFREY MCGOVERN, BANKRUPTCY'S EFFECT ON PRODUCT IDENTIFICATION IN ASBESTOS PERSONAL INJURY CASES 8–10 (2015).

⁴ As of 2013, after having paid over \$15 billion to claimants, remaining asbestos bankruptcy trusts' assets totaled over \$30 billion. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12 MEALEY'S ASBESTOS BANKR. REP. 1, 2 (2013), https://www.bateswhite.com/media/publication/7_media.745.pdf [<https://perma.cc/4BV6-A7VE>].

⁵ 11 U.S.C. § 524(g) (2018).

perjury” that their clients had “meaningful and credible exposure” to the products of the companies that they and their clients had specifically denied having been exposed to.⁶

Judge Hodges concluded:

[T]he fact that *each and every one of the . . .* [fifteen settled cases] contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock’s settlement practices and results.⁷

Judge Hodges described the plaintiffs’ counsel’s conduct in these fifteen cases as forming a “startling pattern of misrepresentation”⁸ and stated that “more extensive discovery would show more extensive abuse.”⁹

The day before Judge Hodges issued his Estimation Order, Garlock filed Racketeer Influenced and Corrupt Organizations Act (RICO) suits against four law firms that had brought mesothelioma claims against Garlock which generated substantial settlements and judgments.¹⁰ U.S. District Judge Graham C. Mullen, presiding over the RICO cases, stated that the complaints alleged “that Defendants knowingly and intentionally concealed evidence of their clients’ exposure to other asbestos manufacturers’ products for the purpose of inflating the settlement value of their tort cases against Garlock while simultaneously pursuing or planning to pursue claims in the bankruptcy tort system

⁶ For a fuller discussion of plaintiffs’ counsel’s scheme to suppress Garlock’s ability to discover plaintiffs’ exposures to the insulation and refractory products of the bankrupted companies, see generally Expert Report of Lester Brickman, Esq., *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014) (No. 10-BK-31607), https://pl-garlock.s3.amazonaws.com/01-Estimation%20Trial%20Exhibits/GST%20Redacted%20Exhibits/GST-0969_redacted.pdf [<https://perma.cc/8TBL-GAGD>] [hereinafter Brickman, Garlock Expert Report]; Transcript of Estimation Trial Before the Honorable George R. Hodges, *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014) (No. 10-BK-31607), https://pl-garlock.s3.amazonaws.com/06-Estimation%20Trial%20Transcripts/07-26-13_PM%20Hearing_Vol%2005-B.pdf [<https://perma.cc/S8TH-SMYS>] (testimony of Lester Brickman) [hereinafter Brickman, Garlock Testimony].

⁷ *In re Garlock*, 504 B.R. at 85.

⁸ *Id.* at 86.

⁹ *Id.*

¹⁰ See sources cited *infra* notes 325–32.

against these other manufacturers.”¹¹ He then stated that “[t]hese allegations *echo* findings made by . . . [J]udge . . . Hodges, in conjunction with his estimation order . . .”¹² In rejecting a defendant’s motion to dismiss the RICO action because Garlock failed to plead sufficient facts to support a claim for fraud, Judge Mullen noted that “Garlock successfully alleges that Defendants engaged in a wide-ranging, systematic, and well-concealed fraud designed to suppress evidence and inflate settlement values for mesothelioma claims. Indeed, *the bankruptcy court found as much when it reviewed a number of these cases.*”¹³ In so stating, Judge Mullen characterized Judge Hodges’ findings as concluding that the plaintiffs’ counsel in the fifteen cases committed fraud.

Earlier, in 2005, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, presided over a multidistrict litigation (MDL) consisting of approximately 10,000 silicosis cases, virtually all of which were fraudulent.¹⁴ Despite concluding that the court lacked jurisdiction over the claims, Judge Jack was so offended by the practices of the diagnosing doctors and plaintiffs’ counsel that she issued a 110-page opinion dissecting the fraud as a guide to state court judges to whom the cases were ultimately remanded.¹⁵ A majority of the 10,000 silicosis claims, approximately 70%, were simply asbestosis claims that lawyers took from their files and retreaded as silicosis claims; doctors who had previously read the x-rays as “consistent with asbestosis” in many cases reread the same x-rays and found they were instead

¹¹ *Garlock Sealing Techs., LLC v. Shein*, No. 3:14-cv-137, 2015 WL 5155362, at *1–2 (W.D.N.C. Sept. 2, 2015).

¹² *Id.* at *1 (emphasis added).

¹³ *Id.* at *2 (emphasis added); *see also* *Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, No. 13-1639, 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) (“The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs’ law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system.”). For discussion of the fraud that has occurred in mesothelioma litigation, which was uncovered by Garlock in the course of proceedings in the *Garlock* bankruptcy, *see* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071 (2014) [hereinafter Brickman, *Mesothelioma Litigation Fraud*].

¹⁴ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005).

¹⁵ *See* Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289, 290, 299 (2005) [hereinafter Brickman, *Silica MDL*].

“consistent with silicosis”—a blatant fraud.¹⁶ Judge Jack concluded that “it is apparent that truth and justice had very little to do with these diagnoses [Indeed,] it is clear that the lawyers, doctors and screening companies were all willing participants” in a scheme “to manufacture . . . [diagnoses] for money.”¹⁷ Moreover, Judge Jack found that this massively fraudulent scheme, orchestrated by the same lawyers and screening companies who had brought hundreds of thousands of asbestos claims, replicated what was occurring in asbestos litigation.¹⁸

Except for an insignificant sum,¹⁹ no sanctions have ever been issued against the lawyers who orchestrated the fraudulent scheme to create a silicosis pandemic which prevalence was to be found not in hospitals but only in courtrooms in Mississippi and Texas. Indeed, despite the overwhelming evidence in asbestos litigation of massive numbers of fraudulent medical diagnoses of nonmalignant injury, mostly asbestosis, and perjurious testimony denying exposure to the “big dusties” in mesothelioma filings, law enforcement has been notable only by its near complete absence.

In recent years, several asbestos defendants and debtors in asbestos-related bankruptcies have responded to massively fraudulent

¹⁶ *Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 596–603. One plaintiffs’ counsel tried to justify this scheme by arguing that their thousands of clients had both asbestosis and silicosis. Judge Jack wrote, “a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a *single* case of both silicosis and asbestosis. N&M [a screening company] parked a van in some parking lots and found over 4,000 such cases.” *Id.* at 603 (emphasis added). An even more efficient variation of the “dual disease” fraud was practiced by a law firm that had their diagnosing doctor read a single x-ray and simultaneously issue two separate diagnoses, one for each disease. This enabled the law firm to file silicosis claims but refer the asbestosis claims to a satellite law firm so it could deny that it was filing dual disease claims. See Brickman, *Silica MDL*, *supra* note 15, at 300 n.42, 306–07. For discussion of fraudulent practices in several mass tort litigations, see Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1242–43 (2008) [hereinafter Brickman, *Mass Tort Fraud*].

¹⁷ *Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 635.

¹⁸ *Id.* at 629 (Judge Jack found that the “evidence of the unreliability of the B-reads performed for this [silica] MDL is matched by evidence of the unreliability of B-reads in asbestos litigation.”).

¹⁹ Judge Jack imposed a sanction of \$8,250 against one of the MDL law firms, see *Silica Prods. Litig.*, 398 F. Supp. 2d at 678, a rounding error in an aggregate litigation that, but for Judge Jack, could easily have generated as much as a billion dollars in settlements. See *infra* note 91.

asbestos litigation practices by filing civil RICO claims.²⁰ These filings have provoked intense criticism from the American Association for Justice²¹ and two scholars, Professors Briana Lynn Rosenbaum and Nora Freeman Engstrom.²² Rosenbaum decries the use of civil RICO to combat fraudulent claiming on a mass basis, such as that endemic in asbestos litigation, as a threat to plaintiffs' counsel and the civil justice system. Engstrom acknowledges that civil RICO is appropriately invoked in such circumstances but presents a litany of reasons why judges should restrain its application. In this Article, I critique these scholars' arguments and rebut the factual bases they advance in support. I conclude that although civil RICO is only modestly effective, it is nonetheless an essential tool for combating fraudulent asbestos litigation and other mass tort fraud.

I. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

In response to a significant rise in concern over organized crime, RICO was originally created to fight "systematic criminal conduct" as part of the 1970 Organized Crime Control Act.²³ The statutory scheme is designed to combat specific patterns of criminal activity in relation to

²⁰ See, e.g., Kyla Asbury, *Use of RICO in Civil Cases Rare, But Hitting Some Plaintiffs Attorneys*, LEGAL NEWSLINE (Apr. 17, 2014), <http://legalnewsline.com/stories/510517399-use-of-rico-in-civil-cases-rare-but-hitting-some-plaintiffs-attorneys> [https://perma.cc/9KAQ-YSZP]; Sara Corcoran Warner, 'Outlier': Garlock Case Gives Traction to Asbestos Fraud Claims, HUFFPOST (Sept. 16, 2016), http://www.huffingtonpost.com/sara-warner/outlier-garlock-case-give_b_8147618.html [https://perma.cc/Y9NL-99J8]; Amanda Bronstad, *RICO Action Filed Against Asbestos Lawyers*, NAT'L L.J. (June 10, 2016, 12:00 AM), <https://www.law.com/national-lawjournal/almID/1202759600617/RICO-Action-Filed-Against-Asbestos-Lawyers/> [https://perma.cc/59M2-Y97H].

²¹ Formerly the Association of Trial Lawyers of America. See generally Brief for American Ass'n for Justice as Amicus Curiae in Support of Defendants-Appellants & Reversal, *CSX Transp., Inc. v. Peirce*, No. 13-2235, 2014 WL 882782 (4th Cir. Mar. 3, 2014).

²² See Briana Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165 (2016); Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639 (2017).

²³ See Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 DEL. J. CORP. L. 519, 520 (2002).

organized crime,²⁴ and provides for sanctions for violations of RICO.²⁵ The statute also includes a private civil remedy (civil RICO) that awards treble damages and attorneys' fees.²⁶ This potentially large award of damages was apparently intended to counter defrauded plaintiffs' reluctance to take on "mobsters."²⁷

II. CIVIL RICO

Three terms of art dominate in the civil RICO statutory text: "racketeering activity,"²⁸ "pattern of racketeering activity,"²⁹ and "enterprise."³⁰ While these terms reflect the intent of RICO to target organized crime, there is no explicit reference in the statute to organized crime, and businesses and individuals alike may be held liable under the statute.³¹ In civil proceedings, plaintiffs must prove the elements of the crime underlying the racketeering activity. For example, if the alleged crime is mail fraud, plaintiffs must prove that "defendants (1) intentionally, (2) devised a scheme or artifice to defraud, (3) to obtain property or money, and (4) used or caused to be used the United States mail or an interstate commercial carrier."³² These requirements were designed to assist in limiting the applicability of civil RICO. Some critics argue that civil RICO's scope nonetheless remains too broad; others argue for its expansion.³³

²⁴ See John L. Koenig, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 830 (1986).

²⁵ 18 U.S.C. § 1963 (2018).

²⁶ 18 U.S.C. § 1964 (2018).

²⁷ See Koenig, *supra* note 24, at 844.

²⁸ 18 U.S.C. § 1961(1) (2018).

²⁹ 18 U.S.C. § 1961(5) (2018).

³⁰ 18 U.S.C. § 1961(4) (2018).

³¹ Andrew Kinworthy, *To Remedy or Not to Remedy: The Availability of Disgorgement Under Civil RICO*, 84 WASH. U. L. REV. 969, 973–74 (2006).

³² Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523, 527 (2013).

³³ See, e.g., Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 735–36 (1990) ("Since coming into vogue in the mid-1980s, civil RICO has often been criticized and targeted for reform. Critics claim that civil RICO is too broad because it potentially applies to all commercial transactions. More specifically, opponents claim that RICO's inclusion of mail and wire fraud as predicate acts unjustly subjects all

A. *Enlargement and Expansion of Civil RICO*

The scope of RICO has been significantly expanded in the last three decades, and now covers a wide range of fraudulent activities and statutory violations.³⁴ Likewise, the scope of civil RICO has also experienced substantial expansion.³⁵ This has been facilitated by a clause which reads, “[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes.”³⁶ Many scholars have endorsed a liberal construction of the statute based on its plain meaning, and opposed the constraints that a strict reading would place on application of civil RICO claims.³⁷

Critics allege that the expansion of civil RICO has gone too far³⁸ and is being used in “garden variety” frauds, thus expanding civil RICO past the core intention of combating racketeering enterprises.³⁹

‘legitimate businesses’ to liability.”). Others have argued for the further expansion and application of civil RICO, ranging on topics from Catholic sex abuse cases to patent trolling abuses. *See generally* Nicholas R. Mancini, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 ROGER WILLIAMS U. L. REV. 193 (2002); Blair Silver, *Controlling Patent Trolling with Civil RICO*, 11 YALE J.L. & TECH. 70 (2009); Katherine Lynn Morris, *Cardinal Law and Cardinal Sin: An Argument for the Application of R.I.C.O. to the Catholic Sex Abuse Cases*, 15 RUTGERS J.L. & RELIGION 298 (2014).

³⁴ 18 U.S.C. § 1964 (2018); *see also* Applebaum, *supra* note 23, at 519–22.

³⁵ It is believed that there were over 1,000 civil RICO filings each year in the late 1980s. *See* Engstrom, *supra* note 22, at 668 & n.127 (citing *RICO Reform Act of 1989: Hearings on H.R. 1046 Before the Subcomm. on Crime, H. Comm. on the Judiciary*, 101st Cong. 449 (1989) (statement of Robert L. Chiesa, Chairman, RICO Coordinating Committee, representing the American Bar Association)). The 1980s saw a rise in cases where civil RICO was alleged against defendants who were not a part of organized crime and were accused only of garden-variety fraud. *See* Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 1–2 (1993).

³⁶ Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influenced and Corrupt Organizations Act to Expand Beyond Its Intended Purpose*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 243 (2012). Justice Byron White took note that Congress intended to target both legal and illegal enterprises. *See* *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

³⁷ *See* Koenig, *supra* note 24, at 824 n.12.

³⁸ *See, e.g.*, Norman Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 1–2 (1989) (stating that critics assert “too many private civil RICO claims are being filed and that it has become commonplace to include civil RICO counts in litigation arising out of ordinary business disputes, that is, in cases which typically do not involve criminal activity”).

³⁹ *Id.* at 1–3.

Proponents of enlarged civil RICO application respond that very few civil RICO claims are based on simple frauds and that there is little evidence of abuse.⁴⁰ Moreover, as evidenced by the history of asbestos litigation, a curtailment of the scope of civil RICO would deprive those victims of fraudulent enterprises of a remedy that is not otherwise available.⁴¹

B. *Pertinent Provisions of Civil RICO*

1. Predicate Acts

In order to file a civil RICO claim, the plaintiff must allege a pattern of racketeering on the part of the defendant.⁴² Racketeering activity means any act under state or federal law punishable by imprisonment for more than one year.⁴³ To establish a pattern, there must be at least two acts, known as predicate acts, of racketeering activity.⁴⁴ The second act must be within ten years of the first. Thus, predicate acts, which term does not appear in civil RICO, are the acts giving rise to a pattern of fraud sufficient to bring a civil RICO claim.⁴⁵ The statute cites to thirty-five different crimes that constitute

⁴⁰ Abrams explains,

Among the opponents of civil RICO reform, there are those who maintain that although approximately 1,000 civil RICO cases are being filed annually, the relatively large number of cases (as recently as 1981, only about twenty cases a year were being filed) does not evidence abuse. Indeed, there is merit to the view that the sheer number of civil RICO claims is not an adequate index of overuse.

Id. at 4–5.

⁴¹ See *infra* Part V.

⁴² 18 U.S.C. § 1962(a) (2018).

⁴³ 18 U.S.C. § 1961(1) (2018).

⁴⁴ 18 U.S.C. § 1961(5) (2018).

⁴⁵ According to Black's Law Dictionary, a predicate act is defined as follows:

Under RICO, one of two or more related acts of racketeering necessary to establish a pattern An act that must be completed before legal consequences can attach either to it or to another act or before further action can be taken. A predicate act itself may be criminalized if it is followed by or performed in tandem with another prohibited act.

Predicate Act, BLACK'S LAW DICTIONARY (10th ed. 2014).

racketeering for purposes of civil RICO if committed by an “enterprise.”⁴⁶ Enterprises, as distinguished from individuals, can be street gangs, arguably cartels, corporations, political organizations, a lawyer, and a client.⁴⁷

As civil RICO evolved, so too did the requirements related to predicate acts. In *Sedima, S.P.R.L. v. Imrex Co.*,⁴⁸ the U.S. Supreme Court held that the defendant need not have been charged and convicted for the predicate acts prior to the plaintiff bringing the civil RICO claim, nor did the plaintiff have to establish a separate injury from racketeering—the injuries from individual predicate acts were sufficient.⁴⁹

When establishing a pattern of racketeering, the Supreme Court has ruled that predicate acts must take place over a lengthy period—those extending over only a few months would be insufficient to establish a pattern.⁵⁰ Alternatively, if the racketeering is open-ended, then the predicate acts must be a part of ongoing activity in the ordinary

⁴⁶ *Racketeer Influenced and Corrupt Organizations (RICO) Law*, JUSTIA, <https://www.justia.com/criminal/docs/rico.html> [<https://perma.cc/LUV6-QG3N>] (last visited Apr. 19, 2019) (“The law defines 35 offenses as constituting racketeering, including gambling, murder, kidnapping, arson, drug dealing, bribery. Significantly, mail and wire fraud are included on the list. These crimes are known as ‘predicate’ offenses.”). Of considerable significance in malignant asbestos litigation is the fact that perjury and subornation of perjury are not included in the list.

⁴⁷ *Id.*; see Pamela Bucy Pierson, *Rico, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523 (2013).

⁴⁸ 473 U.S. 479 (1985).

⁴⁹ *Id.* at 493–95; see also Catherine Reid, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 RUTGERS L.J. 201, 208 (1988) (“The *Sedima* Court held that section 1964(c) authorizes private plaintiffs to bring civil RICO suits where the injury alleged stems solely from a defendant’s predicate acts, rather than requiring the plaintiff to allege a ‘racketeering-type’ injury. Consequently, the injury need not be inflicted by racketeering activity in the traditional sense, so long as more than one of the predicate acts has been committed. Thus, the targets of civil RICO complaints are no longer confined to mobsters and racketeers, rather, such targets include businessmen, investors, and according to *Northeast Women’s Center*, even average citizens.”).

⁵⁰ See Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 227 (2013) (“The Court noted that closed-ended continuity may be shown ‘by proving a series of related predicates extending over a substantial period of time,’ and that ‘[p]redicate acts extending over a few weeks or months . . . do not satisfy this requirement.’”) (alteration in original) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989)).

course of business.⁵¹ However, the Supreme Court has rejected courts of appeals holdings that single schemes could not qualify for civil RICO application, fearing that such rigidity could unnecessarily exclude serious claims.⁵²

2. Litigation Activities as Predicate Acts

A recurring issue in civil RICO⁵³ litigation and especially in the context of asbestos litigation is whether litigation activities can be considered predicate acts under RICO.⁵⁴ As noted, the RICO statute does not use the term “predicate act” and gives no guidance as to its use; instead, its myriad requirements have evolved through case law.⁵⁵ Courts differ in their treatment of litigation activities—while some staunchly refuse to find that litigation activity can be sufficient to constitute a predicate act,⁵⁶ others hold that litigation conduct is not

⁵¹ See *id.* at 227–28 (“Open-ended continuity, on the other hand, may be shown by a ‘distinct threat of long-term racketeering activity, either implicit or explicit,’ such as a ‘specific threat of repetition’ or a ‘showing that the predicate acts . . . are part of an ongoing entity’s regular way of doing business.’”) (quoting *H.J. Inc.*, 492 U.S. at 242).

⁵² See *id.* at 228 (“It rejected the position of a number of the courts of appeals—including the Eighth Circuit in the case before it—that a single scheme could never constitute sufficient continuity to find a pattern. The Court deemed this rigid rule inappropriate, since such rigidity ‘introduc[ed] a new and perhaps more amorphous concept into the analysis that ha[d] no basis in text or legislative history.’”) (alteration in original) (quoting *H. J. Inc.*, 492 U.S. at 240–41 & n.3 (1989)).

⁵³ Hereafter all references to RICO are to civil RICO.

⁵⁴ “Litigation activities” refers to any filings in the course of litigation, such as pleadings, discovery notices, and requests for adjournment, among other things. See *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 170–71 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 Fed. App’x 582 (2d Cir. 2011) (finding the predicate acts alleged by plaintiffs to consist of entirely litigation activities and listing those activities).

⁵⁵ See, e.g., *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1102 (10th Cir. 1999) (explaining that racketeering activity under RICO is referred to as “predicate acts” to establish liability).

⁵⁶ See, e.g., *Curtis & Assocs.*, 758 F. Supp. 2d at 171; *Daddona v. Gaudio*, 156 F. Supp. 2d 153, 162 (D. Conn. 2000) (finding the litigation activities complained of to constitute a malicious prosecution claim and declining to allow it as a predicate act under civil RICO).

shielded from RICO liability where that conduct is part of a larger scheme to defraud.⁵⁷ These positions, however, are reconcilable.

Courts that reject litigation activities as predicate acts often do so on the grounds that the claims are better suited to be made as malicious prosecution claims; public policy concerns about diminished access to the court system often undergird these refusals.⁵⁸ Courts also reject litigation activities as predicate acts out of concern that to allow such claims would transform every state court litigation into a federal action in pursuit of treble damages.⁵⁹

Several courts have endorsed the view that under some circumstances, litigation activities can serve as predicate acts under RICO.⁶⁰ Generally, these courts find that litigation activities can constitute predicate acts under civil RICO when the litigation activity is part of a “larger scheme” to defraud or there are separate allegations of extortion or other substantial racketeering activity.⁶¹

In the context of asbestos litigation, courts are often faced with such wide-ranging fraudulent schemes. For example, in the CSX RICO litigation discussed *infra* Section IV.C, U.S. District Judge Frederick Stamp of the Northern District of West Virginia denied the lawyer

⁵⁷ See, e.g., *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 364–65 (9th Cir. 2005) (refusing to find immunity for litigation conduct); *Florida Evergreen Foliage v. E.I. DuPont de Nemours & Co.*, 336 F. Supp. 2d 1239, 1267–68 (S.D. Fla. 2004), *aff’d*, 470 F.3d 1036 (11th Cir. 2006) (noting the lack of controlling precedent but declining to find litigation conduct shielded from civil RICO).

⁵⁸ See, e.g., *Curtis & Assocs.*, 758 F. Supp. 2d at 173 (arguing that if routine litigation activities were to constitute predicate acts, it “would result in the inundation of federal courts with civil RICO actions that could potentially subsume all other state and federal litigation in an endless cycle where any victorious litigant immediately sues opponents for RICO violations.”).

⁵⁹ See *id.* at 172–74.

⁶⁰ See, e.g., *Living Designs, Inc.*, 431 F.3d at 364–65 (finding there is no immunity for litigation conduct under Civil RICO).

⁶¹ In *Curtis*, U.S. District Court Judge Kiyo Matsumoto of the Eastern District of New York first gave a resounding critique of the use of litigation activities as predicate acts, discussing at length the policy rationales mentioned above. *Curtis & Assocs.*, 758 F. Supp. 2d at 168–75. However, Judge Matsumoto then went on to clarify that litigation activities should be allowed to serve as predicate acts where the allegations of fraud involved “an extensive and broader scheme,” of which litigation activities were a part, which rendered them “more than mere ‘litigation activities’” *Id.* at 176.

defendants' motion to dismiss, which contended that litigation activities could not constitute predicate acts. The court found:

[T]he alleged mail and wire fraud violations in this case amount to more than mere claims for abuse of process or malicious prosecution. The third amended complaint describes a more complex scheme by the lawyer defendants⁶²

In one of the *Garlock* RICO cases, Judge Mullen, in denying a motion to dismiss by lawyer defendants, rejected their broad contention that litigation activities could not serve as predicate acts under RICO and concluded “that there exists no broad shield from RICO for attorney advocacy.”⁶³ Judge Mullen found that the conduct alleged “goes well past the kind of routine litigation activities that these courts have found inadequate to state a claim under RICO,” pointing to the widespread and long-term nature of the alleged fraud.⁶⁴

3. Damages and Attorney Fees

In RICO claims, plaintiffs are entitled to treble damages if their claim prevails.⁶⁵ This has been a contentious aspect of RICO since its inception, inspiring concerns that treble damages will increase pressure on RICO defendants to settle cases of dubious merit.⁶⁶ U.S. Supreme Court Justice Anthony Kennedy expressed concern over this potential abuse, noting the lack of prosecutorial discretion in RICO to keep

⁶² *CSX Transp., Inc. v. Gilkison*, No. 5:05-CV-202, 2012 U.S. Dist. LEXIS 61719, at *32 (N.D. W. Va. May 3, 2012).

⁶³ *Garlock Sealing Techs. v. Simon Greenstone Panatier Bartlett*, No. 3:14-CV-116, 2015 WL 5148732, at *5 (W.D.N.C. Sept. 2, 2015) (quoting *Crowe v. Smith*, 848 F. Supp. 1258, 1264 (W.D. La. 1994)).

⁶⁴ *Id.*

⁶⁵ “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee” 18 U.S.C. § 1964(c) (2018).

⁶⁶ See Christopher M. Maine, Note, *The Standard of Proof in Civil RICO Actions for Treble Damages: Why the Clear and Convincing Standard Should Apply*, 22 IND. L. REV. 881, 884–85 (1989) (“The greatly expanded use of civil RICO is probably due to its treble damages provision which is not only a great temptation in itself, but also carries great leverage for settlement value.”).

plaintiffs from bringing meritless claims and forcing unfair settlements.⁶⁷ Some have advocated changing the standard of proof from a preponderance to clear and convincing evidence as a way to limit the bringing of what they allege are meritless claims.⁶⁸ Others note that many plaintiffs have properly utilized treble damages to combat corporate looting and unfair competition.⁶⁹

RICO also allows for the award of attorneys' fees to the successful party,⁷⁰ which can easily amount to hundreds of thousands—and in heavily litigated cases, even millions—of dollars.⁷¹ The award of attorney's fees acts both as a deterrent for fraudulent behavior and as an encouragement to those parties who could bring RICO claims.⁷²

⁶⁷ See *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring); see also Maine, *supra* note 66, at 885.

⁶⁸ See Maine, *supra* note 66, at 885–86.

⁶⁹ See Benjamin M. Daniels, Note, *Proximately Anza: Corporate Looting, Unfair Competition, and the New Limits of Civil RICO*, 85 WASH. U. L. REV. 611, 611–14 (2007).

⁷⁰ “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover . . . the cost of the suit, including a reasonable attorney's fee.” 18 U.S.C. § 1964(c) (2018).

⁷¹ Extensive awards of attorneys' fees first came to prominence in the case of *Northeast Women's Center v. McMonagle*, where the plaintiffs in a civil RICO matter were awarded more than \$60,000 in attorneys' fees despite a damages award of only \$2,661. 889 F.2d 466, 469–70 (3d Cir. 1989). In that case, the defendants made two arguments against such a steep award of fees: (1) “limiting RICO plaintiffs to proportional attorneys' fees awards is justified by civil RICO's treble damage provision;” and (2) “a proportionality rule is warranted by the fact that ‘substantial’ criminal activity that may be the subject of a civil RICO action could also be targeted by the state or federal authorities in a criminal RICO prosecution.” *Id.* at 473. However, the court was unpersuaded by these arguments, holding that “[h]ad Congress believed that treble damages alone would be sufficient to encourage private litigation . . . it could have easily eliminated or modified the attorneys' fees provision of § 1964(c). We shall not impose such a change by judicial fiat.” *Id.* at 474. In the CSX civil RICO litigation, see *infra* Section V.C, the attorneys' fees due to CSX were estimated at \$10 million. See 3 *Defendants in Asbestos Fraud Conspiracy Agree to \$7.3 Million Settlement*, 37 WESTLAW J. ASBESTOS 4 (2014); Press Release, CSX, CSX Concludes Racketeering and Fraud Litigation Against Asbestos Lawyers (Nov. 6, 2014), <https://www.csx.com/index.cfm/about-us/media/press-releases/csx-concludes-racketeering-and-fraud-litigation-against-asbestos-lawyers> [https://perma.cc/BJ2W-2GKV].

⁷²

[I]t is also clear that, like § 1988, the attorneys' fee clause of § 1964(c) was designed to encourage private litigants to promote the policies underlying the substantive legislation. As we recently observed, “Congress provided fee shifting to enhance enforcement of important civil rights, consumer-protection, and environmental

III. TWO CRITIQUES OF THE USE OF CIVIL RICO

In two recent law review articles,⁷³ Professors Briana Lynn Rosenbaum and Nora Freeman Engstrom warn that use of civil RICO can pose a threat to the civil justice system by too easily allowing defendants to retaliate against plaintiffs' counsel, deterring them from providing effective counsel for their clients and threatening their use of aggregative litigation.

A. "*The Rico Trend in Class Action Warfare*"⁷⁴

Decrying what she describes as the ongoing attacks against "[a]ggregate litigation, including class-actions and mass actions," Rosenbaum asserts that:

[r]ecently, defendants in aggregate litigation have employed an additional tactic by filing civil RICO cases against plaintiffs' counsel. In a number of these cases, defendants' primary allegation is that plaintiffs' counsel are fraudulently inflating the value of lawsuits by filing baseless lawsuits as part of aggregate litigation. In some of these cases, the predicate acts consist solely of litigation filings: the filing of complaints and related litigation documents in aggregate litigation. Members of the defense bar have made no secret of the fact that these RICO cases are part of a larger strategy to prevent plaintiffs' attorneys from bringing large-scale litigation. Despite the rich literature on aggregate litigation, there is little scholarship exploring this recent aggressive use of RICO by the defense bar and corporate interest groups to punish plaintiffs' attorneys for the alleged fraudulent filing of aggregate litigation.⁷⁵

policies. By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated."

Northeast Women's Center, 889 F.2d at 474 (quoting *Student Pub. Interest Research Grp. of N.J., Inc. v. AT & T Bell Labs.*, 842 F.2d 1436, 1449-50 (3d Cir. 1988)).

⁷³ See sources cited *supra* note 22.

⁷⁴ Rosenbaum, *supra* note 22, at 165.

⁷⁵ *Id.*

Rosenbaum argues that use of RICO against plaintiffs' attorneys is "illegal on several grounds, most notably under the Rules Enabling Act and the RICO statute" and threatens "the right to petition the courts for redress."⁷⁶ Rosenbaum vastly overstates any threat that RICO may pose to the plaintiffs' bar's legitimate activity while vastly understating the quantum of fraud that underlies the RICO suits that she critiques. While acknowledging that deterring "frivolous litigation" is a worthwhile goal, she contends that there are already adequate remedies such as abuse of process, malicious prosecution, and Rule 11 actions.⁷⁷ However, the entire panoply of remedies she lists as adequate to the task (before she acknowledges that these remedies may not be effective) is nonetheless toothless when it comes to posing a serious threat to the fraudulent practices that have prevailed in the silicone breast implant, fen-phen, asbestos, silicosis, and welding fume mass tort litigations.⁷⁸ Indeed, the civil justice system is far too susceptible to mass tort fraud—and even hinders attempts to combat it.⁷⁹

Rosenbaum uses the term "frivolous litigation" with great frequency but in a manner that is confusing, comingling it with the terms "specious" and, to a lesser degree, "fraudulent," which are listed as equivalent if not synonymous in meaning.⁸⁰ To be sure, she recognizes

⁷⁶ *Id.* at 168.

⁷⁷ Rosenbaum discusses a variety of potential remedies that she argues can obviate the need for RICO including malicious prosecution and abuse of process. *Id.* at 179–81 ("lawyers who bring frivolous or vexatious lawsuits may face a host of statutory or procedural consequences" from the court). Next, she briefly addresses the court's ability to sanction attorneys who act in bad faith under Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 181–82 (stating, "Rule 11 sanctions are still carefully circumscribed to protect litigants' right to petition"). After discussing the "several remedial alternatives . . . already built into our legal system" that she contends should obviate the need for resort to RICO actions, *id.* at 168, Rosenbaum acknowledges that "[i]t is especially unclear whether those remedial options are effective in the aggregate litigation context." *Id.* at 184.

⁷⁸ See Brickman, *Mass Tort Fraud*, *supra* note 16.

⁷⁹ See *infra* Part VI.

⁸⁰ See Rosenbaum, *supra* note 22, at 169 ("frivolous litigation," "specious claiming"), 170, 172 ("frivolous or fraudulent litigation"), 175 ("frivolous litigation"), 179 ("RICO reprisal represents, in essence, frivolous litigation"), 180 ("frivolous or vexatious"), 182 ("frivolousness and fraud"), 183 ("frivolous and specious claiming"), 188 ("based on allegations of specious claiming . . . frivolous claiming"), 208 ("frivolous litigation"), 214 ("frivolous filings"). Overall, Rosenbaum uses the word "frivolous" seventy-three times throughout the Article. Another apparent equivalent of "frivolous litigation" that she intersperses in the Article is the term

that “the term frivolous litigation is itself a murky term,”⁸¹ but proceeds to use the term as if to maximize its murkiness. Lawsuits generating billions of dollars in the aggregate based upon fraudulent medical reports and perjurious testimony with regard to exposure to toxic substances are not frivolous. They are anything but. Her repeated use of the term “frivolous litigation” when referring to fraudulent actions appears intended to show that RICO suits are overkill for bringing a claim “that [merely] has little merit”⁸² or is “weak.”⁸³ But fraudulent mass tort litigations, such as those I have described,⁸⁴ that have generated billions of dollars in lawyers’ fees, are evidence of a critical civil justice failure, and go far beyond claims with “little merit.”

As evidence that remedies already exist to sanction frivolous litigation, thus obviating the need to resort to civil RICO, Rosenbaum cites to an \$8,250 sanction that Judge Jack issued in the silica MDL against a law firm that kept prosecuting several cases even when it became clear that the cases were based on unreliable medical reports.⁸⁵ Not only was the \$8,250 sanction little more than a rounding error considering what plaintiffs’ counsel were demanding to settle the 10,000 cases, but the sanctioned firm fraudulently misled both Judge Jack and the U.S. House Subcommittee on Oversight and Investigations in

“meritless.” *Id.* at 169, 175, 219. Rosenbaum cites to one of my Articles on asbestos litigation for the proposition that “defendants and defense groups,” of which I am neither, have presented evidence of “specious claiming” in asbestos litigation. *Id.* at 169 n.11 (citing Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 35 (2003) [hereinafter Brickman, *Asbestos Litigation*]). She then goes on to characterize the “specious claiming” that I identified as pervasive in asbestos litigation as “knowingly filing meritless claims.” *Id.* According to the Merriam-Webster dictionary, the definition of “specious” is “having a false look of truth or genuineness.” *Specious*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/specious> [<https://perma.cc/9TEV-ZARJ>] (last visited Apr. 19, 2019). The “malignant enterprise” of “specious claiming” that I described in that Article involved the creation of false medical evidence, subornation of perjury as set forth in the discussion of the Baron & Budd “script memo,” and other fraudulent acts. See Brickman, *Asbestos Litigation*, *supra*, at 141–47. These hundreds of thousands of lawsuits were dressed up as legitimate claims. “Knowingly filing meritless claims” may constitute an ethical violation but is a far cry from constituting fraud.

⁸¹ Rosenbaum, *supra* note 22, at 174.

⁸² *Id.*

⁸³ *Id.* at 178.

⁸⁴ See sources cited *supra* note 16.

⁸⁵ Rosenbaum, *supra* note 22, at 182; see *supra* note 19.

testimony at a 2006 hearing denying its role in the massive fraud being perpetrated in the silica MDL.⁸⁶

In the silica MDL, approximately 70% of the 10,000 claims in the MDL were former asbestosis cases that had been retreaded as silicosis claims.⁸⁷ Judge Jack, who has a medical background as a former nurse and is married to a cardiologist, was deeply offended by the fraudulent conduct of the doctors hired by the plaintiffs' counsel. Even though Judge Jack knew that her court lacked jurisdiction because the cases had been improperly removed to federal court, she nonetheless went on to conduct *Daubert* hearings that resulted in the doctors retracting *all* of their thousands of diagnoses, which she found had been "manufactured for money."

Another remedy for frivolous litigation that Rosenbaum cites is disciplinary proceedings. Would that it were so. Judge Jack's remanding of the vast majority of the 10,000 cases in the silica MDL back to state courts was accompanied by her 100-page scathing report exposing the fraud so that state courts would be informed of what played out in her courtroom. Included in the cases remanded back to Mississippi state court were 4,200 silicosis claims originally filed by the Campbell Cherry Harrison Davis & Dove law firm ("CCHDD"). The silica defendants in Mississippi moved for sanctions, arguing that CCHDD filed frivolous suits because the firm did not have valid diagnoses to sustain their claims of silica-related diseases.⁸⁸ After reviewing the standard for finding a matter "frivolous," the Supreme Court of Mississippi found that the cases were not frivolous because the plaintiffs had some hope of success when the claims were filed.⁸⁹ To boot, the court denied the defendants' request to conduct discovery.⁹⁰ The court's determination that the cases were not frivolous since the plaintiffs had some hope of success is empirically supportable. Hundreds of thousands of nonmalignant asbestos claims based on diagnoses "manufactured for money" had generated billions of dollars in settlements and judgments.

⁸⁶ See Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 582–84 (2007).

⁸⁷ See *id.* at 579–81.

⁸⁸ *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove*, 965 So. 2d 1041, 1044 (Miss. 2007).

⁸⁹ *Id.* at 1044, 1048–49.

⁹⁰ *Id.* at 1049–50.

Reliance on such medical reports had been standard fare in asbestos litigation and some other mass tort litigations, and highly successful in forcing defendants, overwhelmed by mass filings in selected jurisdictions, to pay out billions of dollars to settle hundreds of thousands of claims for which there was no valid medical evidence. But for the intervention of a federal judge whose medical and legal ethics were deeply offended, and who elected to devote substantial amounts of her time to exposing a massive fraud even though she lacked jurisdiction over the cases in the MDL, it is not unlikely that the silicosis “pandemic” would have added as much as a billion dollars to that total.⁹¹

Rosenbaum further argues that “[t]he use of civil RICO as a malicious prosecution action also results in a usurpation of the state forum. This ‘federalization of state tort law’ is particularly troubling when there are clear state-law remedies available and tailored to address the conduct at issue”⁹² To be sure, states have laws prohibiting fraud in its various forms. However, mass tort fraud perpetrated by lawyers and doctors is virtually never criminally prosecuted; nor are lawyers disciplined for their role in mass tort fraud.⁹³

After critiquing the court’s action in the CSX litigation, Rosenbaum acknowledges that “litigants like Garlock and CSX argue that . . . an ‘extensive and broader scheme to defraud’ are exactly the types [of cases] that should be prosecuted in federal court under RICO” and that “[t]here is some support for this argument.”⁹⁴ Although Rosenbaum acknowledges that the remedies she has advanced as obviating the need for RICO “including malicious prosecution and Rule 11 sanctions—

⁹¹ In the course of the silica litigation, it was reported that a member of the plaintiffs’ team wrote lawyers for the 250-plus defendant companies that the 10,000 person MDL litigation could be settled for a total of about \$1 billion. Moreover, a plaintiffs’ counsel asserted that if the defendants did not settle, it would cost them more than \$1.5 billion to take deposition testimony and cover other costs during trial preparation, with damages to be awarded in trial on top of that sum. See Lester Brickman, *Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 1027 n.151 (2005). The anticipated payday was not realized but only due to Judge Jack’s persistence in exposing the massively fraudulent enterprise that the plaintiffs’ lawyers embarked upon. *Id.*

⁹² Rosenbaum, *supra* note 22, at 208.

⁹³ See, e.g., *supra* note 88 (Supreme Court of Mississippi effectively holding that fraudulent silica litigation was not “frivolous” and therefore did not meet the standard for discipline).

⁹⁴ Rosenbaum, *supra* note 22, at 209.

have proven inadequate to the task,” Rosenbaum still asserts that “expanding civil RICO is not the answer.”⁹⁵ Rosenbaum then proposes ways of neutering the use of RICO in mass tort litigation.⁹⁶ High tolerance for the pervasive fraud that CSX documented in asbestos and silica litigation, is necessary, she argues, in order not to dissuade lawyers from bringing aggregate litigation.⁹⁷ For example, Rosenbaum also argues for using the litigation privilege to prevent retaliatory RICO suits, which could grant lawyers a license to commit fraud.⁹⁸ But such high tolerance, however, invites and facilitates the pervasive fraud that *Garlock* documented in its bankruptcy proceedings.

Rosenbaum’s fervent objection to the use of RICO to combat mass tort fraud is more extensively critiqued in the discussion of the CSX RICO litigation.⁹⁹ Based on her analysis of the CSX litigation,¹⁰⁰ Rosenbaum concludes that “[t]he RICO reprisal allows any defendant in aggregate litigation who discovers more than one known unjustified claim to allege a ‘scheme to defraud’ and, thereby, to use the federal forum to penalize plaintiffs’ attorneys for the entire action.”¹⁰¹ This is a leap into hyper-space.

B. “Retaliatory RICO and the Puzzle of Fraudulent Claiming”¹⁰²

Professor Nora Freeman Engstrom is also critical of efforts to “curtail individuals’ incentives and opportunities to seek redress” and the use of “a new fraud-fighting tool . . . retaliatory RICO suits against plaintiffs’ and their lawyers and experts . . . applauded by tort reform advocates . . .”¹⁰³ She rejects the underlying impetus for tort reform

⁹⁵ *Id.*

⁹⁶ *Id.* at 216–19.

⁹⁷ *Id.* at 216.

⁹⁸ *Id.* at 216–17; Marc I. Steinberg & Logan J. Weissler, *The Litigation Privilege as a Shelter for Miscreant Legal Counsel*, 97 OR. L. REV. 1, 24–25 (2018).

⁹⁹ See *infra* Section V.C.

¹⁰⁰ See *infra* text accompanying notes 289–323.

¹⁰¹ Rosenbaum, *supra* note 22, at 212.

¹⁰² Engstrom, *supra* note 22, at 639.

¹⁰³ *Id.* at 639. When defendants, having lost multiple state court actions brought by plaintiffs’ counsel, then file RICO actions alleging that counsel engaged in a widespread scheme to defraud defendants, it may be said, as does Engstrom, that this is a “retaliatory” action.

efforts, which she states is the view that “the tort liability system [is] actually brimming with fraudulent claims”¹⁰⁴ and that “conventional mechanisms to deter fraud fall short.”¹⁰⁵ She counters that RICO litigation poses such “sizable risks” as to “threaten to upset the delicate federal-state balance, limit court access, squander scarce judicial resources, exacerbate courthouse incivility . . . and ultimately, skew the civil justice system further in favor of well-heeled players.”¹⁰⁶

After expressing concerns about the potential for a rise in the number of RICO actions, Engstrom acknowledges that courts have been quite parsimonious in allowing RICO suits based on “garden variety litigation activity—including filing or prosecuting a single questionable claim”¹⁰⁷ Indeed, she acknowledges that “[w]ith limited exceptions . . . RICO suits initiated by aggrieved plaintiffs against corporate defendants for their allegedly wrongful litigation tactics have failed to gain much traction¹⁰⁸ . . . [and that] some courts have summarily dismissed RICO suits based on a defendant’s prior litigation activity, seemingly out of hand.”¹⁰⁹

Her stated motivation for writing the Article is to warn judges that in the face of “prominent calls [by tort reform advocates] that RICO ought to be sharpened into a retaliatory tool,” they should exercise “extraordinary care to ensure that RICO is fairly and equitably applied,”¹¹⁰ and that “unbridled use of retaliatory RICO carries substantial danger for . . . the civil justice system writ large.”¹¹¹ To be sure, “unbridled use” of RICO could significantly impact the civil justice

Adding the word “retaliatory” suggests that sharpened rhetoric is being used to indicate that something is inherently wrong with filing “retaliatory” litigation. The very purpose of criminal and civil RICO, however, is to enable victims and society the means to strike back against a pattern of racketeering activity.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 644–45.

¹⁰⁷ *Id.* at 699–700.

¹⁰⁸ *Id.* at 705.

¹⁰⁹ *Id.* Unlike Rosenbaum, Engstrom acknowledges that in the CSX litigation, discussed *infra* Section V.C, application of RICO was “reasonable” because the “fraud was apparently long-standing, far-flung, and involved numerous actors manufacturing myriad claims” Engstrom, *supra* note 22, at 700.

¹¹⁰ Engstrom, *supra* note 22, at 705.

¹¹¹ *Id.* at 706.

system—but there is no substantial evidence of “unbridled use” of RICO nor any reason to anticipate such use.¹¹² Engstrom’s sole support for the alarm she is sounding is her statement that “[i]n recent years, more than a dozen corporate defendants have filed such actions against plaintiffs, their lawyers, and their experts to retaliate for the initiation of a wide range of allegedly bogus litigation”¹¹³ The twenty-one cited cases and one newspaper article were brought or published between 1984 and 2016.¹¹⁴ Indeed, the paucity of RICO actions that have been brought in response to the widespread fraud in mesothelioma litigation that the *Garlock* bankruptcy brought to public light attests to the great difficulty faced by asbestos defendants, driven into bankruptcy by fraudulent claiming, in invoking RICO.¹¹⁵

Engstrom rejects Rosenbaum’s view that RICO should not be applicable even when there is considerable evidence that plaintiffs’

¹¹² The fact that CSX brought a successful RICO action against a law firm principal and a doctor he colluded with to defraud CSX, an outcome that Engstrom supports, *see supra* note 109; that RICO actions brought by Garlock against four law firms and principals survived motions to dismiss, *see infra* Section V.D; and that a leading asbestos defendant, John Crane, filed RICO actions against two leading asbestos law firms, one of which was dismissed on jurisdictional grounds and the other was settled, *see infra* Section V.E, in no way portends “unbridled use” of RICO actions that would pose a threat to the civil justice system. Nor does Engstrom acknowledge the considerable power of the plaintiffs’ bar in both the judicial and legislative arenas to protect its turf and advance its interests. *See* LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 119, 204, 533–34 (2011); *see also* KATHERINE HOBDDAY, LAWSUIT REFORM ALL. OF N.Y., POWER OF ATTORNEY: EXPOSING THE INFLUENCE ON THE PLAINTIFFS’ BAR IN NEW YORK STATE POLITICS (2016), <https://lran.org/wp-content/uploads/2016/08/POA-Report-2016-FINAL-WEB-LAYOUT.pdf> [<https://perma.cc/N9FU-V247>]; S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391 (2013).

¹¹³ Engstrom, *supra* note 22, at 643.

¹¹⁴ The dates were: 1984, 1985, 1988, 1990, 1994, 1995, 1996, 2000(3), 2002, 2003, 2010, 2012, 2014, 2015(4), and 2016(3). *Id.* at 643 n.15. Engstrom indicates support for several of the “retaliatory RICO” suits that were filed in 2014. *See* text at notes 66–67 (where Engstrom presents justification for the four Garlock RICO suits brought in 2015). Two of the 2016 cites are to RICO actions that were substantially identical to the four 2015 Garlock RICO suits. *See* Section V.E.

¹¹⁵ A RICO action alleging that a prominent asbestos law firm had brought thousands of fraudulent asbestos claims against an asbestos defendant was dismissed for lack of specificity as to the identity of the specific plaintiffs who were instructed by paralegals following a “script,” which told the plaintiffs how to testify falsely in the state court suits. The plaintiff in the RICO action could not provide the required specificity because it was denied the ability to conduct discovery that would have enabled it to provide that specificity. *See infra* Section V.B.

counsel in state court litigation engaged in an extensive and broad scheme to defraud defendants.¹¹⁶ She states that “RICO may be profitably used if the conduct at issue involves a large, far-flung, and orchestrated scheme.”¹¹⁷ She then goes on to state that “the [RICO] statute should not be used to penalize the initiation of any single lawsuit, no matter how unjustified that suit may be. . . . [and noting that] courts have, with only a few objections, hewed to this line.”¹¹⁸ As an illustration of a case which was a poor vehicle of RICO, she cites to *Feld Entertainment, Inc. v. ASPCA*,¹¹⁹ a view that most courts would support.¹²⁰ Beyond very few exceptions, what Engstrom proposes however, is, in fact, already black-letter law.¹²¹

While Engstrom and I concur that a RICO claim is appropriate when the defendant has engaged in a far-reaching scheme to use court litigation to perpetrate a fraud such that it would constitute a pattern of racketeering activity, we follow different paths with regard to the issues of the extensiveness of fraud in civil litigation, and the need for an expansive—indeed aggressive—application of RICO to mass tort fraud, which is largely insulated from law enforcement action no matter how compelling the evidence that counsel orchestrated fraudulent testimony and hired doctors with the understanding that they would “manufacture diagnoses for money.”

In several articles on mass tort fraud, I have critiqued legal scholars who write about the tort system for failing to acknowledge the massive fraud that has permeated several mass tort litigations, and indeed, instead studiously avoiding the subject of fraud in these litigations.¹²²

¹¹⁶ Rosenbaum, *supra* note 22, at 209, 216.

¹¹⁷ Engstrom, *supra* note 22, at 647, 699.

¹¹⁸ *Id.* at 647.

¹¹⁹ 873 F. Supp. 2d 288, 301 (D.D.C. 2012)

¹²⁰ Engstrom, *supra* note 22, at 700.

¹²¹ *Rooker-Feldman* is discussed *infra* Section IV.A. The *Rooker-Feldman* doctrine prohibits federal courts from allowing a losing party in state court to seek what is effectively appellate review of a state court judgement, based on the losing party’s claim that plaintiff’s counsel in the state court action was using the litigation to perpetrate a fraud on the defendants.

¹²² Brickman, *Asbestos Litigation*, *supra* note 80, at 166–170; Brickman, *Mass Tort Fraud*, *supra* note 16, at 1227 n.21; see also Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers’ Compensation: The Recent California Experience*, 52 MD. L. REV. 983, 1011–12 (1993) (stating that he knew “of no major law review articles in the modern era that have dealt with the problems of waste, fraud, and abuse in . . . tort law itself.”)

This refusal has a political dimension. Torts scholars contend that the tort system is an effective and efficient distributor of injury avoidance costs and a deterrent to unsafe corporate behavior. Though there is contrary empirical evidence that casts doubt on this proposition,¹²³ numerous articles incorporate those propositions as fundamental premises. In the view of most torts scholars, the tort system is a bulwark that holds back a tide of egregious corporate behavior that would otherwise engulf the polity. But that bulwark can only be maintained if tort lawyers receive “substantial fees.”¹²⁴ Otherwise, says one commentator, “there will be no plaintiff’s bar capable of carrying on the fight to balance the scales of civil justice.”¹²⁵ And that would lead, according to another commentator, to fewer “[l]awsuits [that] shine light into dark corners, exposing corporate wrongdoing”¹²⁶ Thus, the argument is two-fold: (1) acknowledging that lawyers have engaged in fraudulent practices in mass tort litigations could be an impetus for regulatory reforms and facilitating use of RICO that would undermine this bulwark; and (2) by allowing more egregious corporate behavior to go unpunished, that conduct would proliferate.¹²⁷

Engstrom breaks from this mold and, citing to my critique of this failure of tort scholarship, acknowledges that “[t]he problem of fraud [in tort litigation] is undeniably significant.”¹²⁸ Engstrom then proceeds to defang the fraud problem by equating it with meritless litigation, then citing to studies concluding that “most tort lawsuits are meritorious.”¹²⁹

¹²³ See BRICKMAN, LAWYER BARONS, *supra* note 112, at 135.

¹²⁴ STUART M. SPEISER, LAWSUIT 570 (1980).

¹²⁵ *Id.*

¹²⁶ Carl T. Bogus, *Introduction: Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 5 (2008).

¹²⁷ This view may also partly explain why most tort scholars align with tort lawyers in opposing most tort reform proposals and refusing to acknowledge that fraudulent practices abound in some mass tort litigations. Tort reform, including reforming the civil justice system so that it no longer facilitates mass tort fraud, *see infra* Part VI, is seen as limiting lawyers’ fees—leading to less exposure of corporate wrongdoing and potentially stripping away protections created by the tort system’s expansion of the scope of liability. Thus, the tort system and its reform have a political dimension. Tort scholars and tort lawyers mutually reinforce each other’s interests within this arena.

¹²⁸ Engstrom, *supra* note 22, at 645, 699 (“the problem of fraud in civil litigation is all too real”).

¹²⁹ *Id.* at 648.

In further support, she quotes me as agreeing with her, when I stated that only “a minute fraction” of filed tort claims are “totally without any legal or factual basis.”¹³⁰ The quoted words do not have the meaning that Engstrom attributes to them. They appear in a discussion of “frivolous litigation” in which I characterize most usage of the term “frivolous litigation” as frivolous—an iconic phrase most frequently used to characterize litigation that one believes, principally as a matter of one’s politics, should not be permitted.¹³¹ Truly frivolous litigation, that is, where there is absolutely no rational legal and factual basis for the action, per the quote, is rare. The subject of my concern is not frivolous litigation—it is fraudulent litigation of which there is a surplus.

On the plus side of the ledger, Engstrom appears to firmly reject Rosenbaum’s interchangeable use of “frivolous” and “fraudulent” litigation, recognizing the “need to draw a clear line between the constellation of claims that may be considered ‘frivolous’ and the smaller constellation of claims properly considered ‘fraudulent.’”¹³² Nonetheless, in “[d]efining the ‘Fraudulent Claim,’”¹³³ Engstrom appears to have followed a similar path as did Rosenbaum in equating fraudulent litigation with “groundless” or frivolous litigation.¹³⁴ Indeed, she states that “frivolous litigation” is a “close cousin” of “fraudulent claiming.”¹³⁵ Claims that lack all merit may be equated with frivolous litigation, but as I explained in critiquing Rosenbaum on this point, it is not fraudulent absent a scheme to create and use false evidence and perjurious testimony, often orchestrated by counsel. Engstrom then proceeds to distinguish “‘Fraud’ from ‘Frivolity.’”¹³⁶ Here, she offers as a definition of a fraudulent claim where “the plaintiff or his or her lawyer

¹³⁰ *Id.* (quoting BRICKMAN, *LAWYER BARONS*, *supra* note 112, at 121).

¹³¹ *See* BRICKMAN, *LAWYER BARONS*, *supra* note 112, at 122.

¹³² Engstrom, *supra* note 22, at 649.

¹³³ *Id.* at 648.

¹³⁴ *Id.* at 648–50.

¹³⁵ *Id.* at 645. Going further, in rejecting claims that “the tort system as a whole is beset with fraudulent, abusive, or vexatious litigation,” she cites to a recent study that shows that U.S. district court judges believe that “‘groundless litigation’ is either ‘no problem’ or is a small or very small problem.” *Id.* at 647–48.

¹³⁶ *Id.* at 649.

has actual or constructive knowledge that some material element of the claim is not as it is portrayed.”¹³⁷

She then presents a typology of fraud’s five types of claiming activity: “(1) injury exaggeration, (2) injury fabrication, (3) obstacle avoidance, (4) the wholly manufactured claim, and (5) over subscription.”¹³⁸ These classifications of fraud may be of some utility for those studying the subject but do little to advance the ability to either detect or deter fraud.

As for fraudulent litigation, Engstrom contends that a number of “mechanisms [that] have . . . sprung up around particular areas of practice” to curtail fraud¹³⁹ “are working.”¹⁴⁰ But a closer look at several of these mechanisms that Engstrom contends “are working” reveals that there is less here than meets the eye. For example, in her quest to demonstrate that “criminal convictions [for fraudulent claiming] are . . . sharply on the rise,” thus curtailing fraudulent claiming activity,¹⁴¹ she cites to, among other cases, the fen-phen diet drug litigation, where, because of “dubious claims, indictments flew and convictions followed.”¹⁴² Not hardly. In support, she cites the conviction of cardiologist Dr. Abdur Razzak Tai¹⁴³ for fraudulent claims by misreporting measurements from echocardiograms, exaggerating claimants’ medical conditions, and improperly qualifying claimants for hundreds of thousands of dollars more in benefits even though he knew

¹³⁷ *Id.* This cumbersome definition is both over- and under-inclusive. A more comprehensive definition is Black’s definition of fraud, which she later quotes as “an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.” *Id.* at 704. Thus, fraudulent litigation is where one party has filed a litigation in order to perpetrate a fraud against the other. This belies Engstrom’s assertion that fraudulent claiming is a “close cousin” of both frivolous and groundless litigation.

¹³⁸ *Id.* at 650.

¹³⁹ *Id.* at 677. Engstrom lists eight mechanisms: the Federal Rules of Civil Procedure (Rule 11, Rule 60); the State equivalent of those rules (numerous states have provisions that mirror or mimic Rule 11 or 60); 28 U.S.C. § 1927; state counterparts; inherent authority; malicious prosecution lawsuits; bar disciplinary proceedings (Model Rules 1.2(d), 3.1, 3.3, 3.4, 4.1, 8.4); and criminal prosecution. *Id.* at 680.

¹⁴⁰ *Id.* at 690.

¹⁴¹ *Id.* at 688.

¹⁴² *Id.* at 688 n.241.

¹⁴³ *Id.*

they did not qualify.¹⁴⁴ In fact, Dr. Tai's false diagnoses pale into insignificance when compared to the evidence that lawyers, cardiologists, and sonographers (who administer echocardiograms, which are used to measure heart valve regurgitation) collaborated in an elaborate scheme in the fen-phen litigation to generate thousands of false results of moderate aortic valve regurgitation and then submitted those manipulated results to several cardiologists who, for \$1,500 a crack, signed hundreds of such "diagnoses."¹⁴⁵ However, my search of "fen-phen criminal prosecutions" and "fen-phen criminal convictions" and related search terms, turned up only one conviction--that of Dr. Tai. Moreover, the evidence of fraudulent claiming in some mass tort litigations, and especially in asbestos litigation, well exceeds that which Dr. Tai was charged with and convicted.¹⁴⁶ Yet the number of criminal prosecutions of lawyers and doctors for fraudulent claiming in the mass tort litigations that I have written about number even less than the number in the fen-phen litigation.

With further reference to the fen-phen litigation, another mechanism she lists as fraud-curtailling is "settlement funds and bankruptcy trusts increasingly conduct[ing] audits to identify fraudulent filings."¹⁴⁷ One such audit she discusses was ordered by the presiding judge in the fen-phen diet drug litigation that Engstrom contends ultimately resulted in many denials of the bogus claims that were found to be inundating the \$3.75 billion settlement trust.¹⁴⁸ Fraud, however, ultimately won out as many of the dismissed claims were aggregated and settled for a substantial sum.¹⁴⁹

¹⁴⁴ Press Release, Fed. Bureau of Investigation, Fen-Phen Fraud Doctor Convicted (Sept. 14, 2012), <https://archives.fbi.gov/archives/philadelphia/press-releases/2012/fen-phen-fraud-doctor-convicted> [<https://perma.cc/6PA8-5649>]. Dr. Razzak was sentenced to six years in prison. Press Release, Fed. Bureau of Investigation, Fen-Phen Doctor Sentenced to 72 Months in Prison (Mar. 26, 2013), <https://archives.fbi.gov/archives/philadelphia/press-releases/2013/fen-phen-fraud-doctor-sentenced-to-72-months-in-prison> [<https://perma.cc/Y4BG-KS35>].

¹⁴⁵ See Robert Lenzner & Michael Maiello, *The \$22 Billion Gold Rush*, FORBES (Apr. 10, 2006), https://www.forbes.com/home/free_forbes/2006/0410/086_3.html [<https://perma.cc/JEE2-5V7X>]; see also Brickman, *Mass Tort Fraud*, *supra* note 16, at 1243-47, 1258-61.

¹⁴⁶ For a description of the fraudulent claims activity in some mass tort litigations, see Brickman, *Mass Tort Fraud*, *supra* note 16, at 1242-1312.

¹⁴⁷ Engstrom, *supra* note 22, at 679.

¹⁴⁸ *Id.*

¹⁴⁹ See Brickman, *Mass Tort Fraud*, *supra* note 16, at 1265-66.

Another example she identifies of the use of an audit to identify fraudulent filings involved the Manville Trust--set up after the bankruptcy of the leading asbestos-containing products manufacturer to which all asbestos claims were channeled. She states that the audit “helped to identify ten diagnosing doctors with abnormally high failure rates.”¹⁵⁰ Even though this resulted in many other asbestos bankruptcy trusts rejecting claims that were supported by these doctors’ x-ray readings or diagnoses, this made not a whit of difference in asbestos litigation. The unmasked litigation doctors were simply replaced by other doctors eager to share in the spoils by also “manufacturing diagnoses for money.”

As a further example of a successful mechanism to counter fraud, Engstrom cites to a U.S. Government Accountability Office (GAO) report on a 2011 study of asbestos bankruptcy trusts, which included “interview[ing] trust officials that had conducted audits.”¹⁵¹ She reports that the GAO study stated that “none of these officials ‘indicated that these audits had identified cases of fraud.’”¹⁵² Engstrom states that “[t]hat finding may indicate that double dipping is indeed very rare, but it is far from definitive, as it may say more about audits’ rigor, than about the actual level of impropriety.”¹⁵³ Double dipping is used here to apparently mean the use of perjurious testimony to deny exposure to the products of bankrupted companies in tort litigation while filing claims with the trusts resulting from the bankruptcies stating under oath that the claimants were exposed to the very products that they denied exposures to in tort litigation. Engstrom’s caution about the GAO report is well taken. The “Trust Distribution Procedures” (TDPs), which state how the trusts are to process and pay claims, are written by the very plaintiffs’ counsel that will be submitting claims to the trusts.¹⁵⁴ As stated by a leading plaintiffs’ lawyer, the trusts have been set up to

¹⁵⁰ Engstrom, *supra* note 22, at 679.

¹⁵¹ *Id.* at 659 n.68. I am listed in the report as one of two experts consulted by the GAO in preparing its report.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ For a detailed analysis of how asbestos bankruptcy trusts are created and how the provisions of the TDPs are designed to facilitate fraudulent practices including perjury and subornation of perjury, see Brickman, *Mesothelioma Litigation Fraud*, *supra* note 13, at 1097–1107.

permit claimants to withdraw as much money as possible from the trusts as quickly as possible.¹⁵⁵ Not surprisingly, trusts do not conduct *any* audits designed to ferret out fraudulent trust claims despite considerable evidence that work histories included with trust claims are essentially fungible, and that the dates of various employments of claimants by companies that manufactured asbestos-containing products are tailored to each trusts' exposure requirements, resulting in the filing of multiple inconsistent employment histories for the same claimant.¹⁵⁶ As a consequence of the failure to monitor the veracity of trust claims, asbestos bankruptcy trusts have had to severely cut back on their payments to subsequent claimants, thus making a mockery of trusts' stated intentions of treating all claimants equitably.¹⁵⁷

Engstrom also lists as another example of a mechanism successfully operating to deter fraud, the action of a federal judge who, *sua sponte*, appointed an independent expert under the authority of Federal Rule of Evidence 706, to examine the x-rays of sixty-five tire workers who claimed to have a nonmalignant asbestos disease caused by their exposure to the defendants' products.¹⁵⁸ Engstrom states that the expert found that forty-two of the sixty-five plaintiffs "were found to be free of any condition giving rise to a cause of action."¹⁵⁹ In fact, as reported, only ten (15%) were found by neutral court-appointed experts to have contracted asbestosis, as compared to the sixty-five litigants whom plaintiffs' experts would have found to have asbestosis.¹⁶⁰ However, the judge's resort to appointment of an independent expert was a one-off in asbestos litigation. It never happened again. As I stated in a previous Article, "[h]ad Judge Rubin's decision been replicated in other asbestos litigations, billions of dollars of claim value created by asbestos lawyers would have been destroyed."¹⁶¹

¹⁵⁵ See William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 257, 261-62, nn.17, 20 (2008) (citing to Deposition Transcript of Perry Weitz dated September 2, 2003).

¹⁵⁶ See Brickman, *Mesothelioma Litigation Fraud*, *supra* note 13, at 1112-15, 1126-27.

¹⁵⁷ See *infra* note 363.

¹⁵⁸ Engstrom, *supra* note 22, at 678.

¹⁵⁹ *Id.*

¹⁶⁰ For a more detailed analysis of this litigation, see Brickman, *Asbestos Litigation*, *supra* note 80, at 104 n.220.

¹⁶¹ *Id.*

Another example of a mechanism to curtail mass tort fraud that Engstrom lists is “the litigation over silicone-gel breast implants [in which] transferee Judge Sam C. Pointer famously used Rule 706 to appoint a ‘National Science Panel,’ and the Panel’s conclusion that implants did not cause autoimmune disease [which] helped bring that sprawling litigation to its ultimate end.”¹⁶² Alas, as I have previously written,¹⁶³ despite the substantial epidemiological evidence that the implants did not and do not cause autoimmune disease, the defendants had to pay at least \$4 billion and perhaps as much as \$6 billion to resolve this litigation of which I estimate that between \$1 and \$2 billion went to plaintiffs’ counsel.

Finally, as an indication “that many of these efforts [referring to the various mechanisms she lists as contributing to curtailing fraud] are working . . . [as] for example in asbestos litigation . . . we see that within the past decade claim volumes have plummeted.”¹⁶⁴ Once again, this widely misses the mark. It is true that the filing of nonmalignant asbestos claims peaked in 2003 and then rapidly declined. The reason, however, was not because of any of the mechanisms listed by Engstrom. It is because in the mid-2000s, many states and courts in leading asbestos “magnet” jurisdictions enacted statutes or adopted rules to filter out and set aside the claims of unimpaired asbestos plaintiffs.¹⁶⁵ In addition, Judge Jack’s finding in the silicosis MDL that the diagnosing doctors, lawyers, and screening companies had engaged in fraudulent conduct also had a chilling effect on nonmalignant claims. Finally, in 2002, U.S. Senator Orrin Hatch first introduced legislation (the Hatch

¹⁶² Engstrom, *supra* note 22, at 679.

¹⁶³ See Brickman, *Mass Tort Fraud*, *supra* note 16, at 1266–78, for an analysis of the silicone breast implant litigation and the extensive fraudulent practices that permeated that litigation. It is notable that after there had been a settlement of the litigation, in the subsequent Dow Corning bankruptcy precipitated by the inundation of hundreds of thousands of at best questionable claims of autoimmune diseases alleged to have been caused by use of Dow Corning’s silicone breast implants by claimants rounded up by lawyers seeking a share of the multi-billion dollar settlement, Dow Corning sought to put on a general causation trial so it could show the epidemiological evidence that undisputedly provided that silicone breast implants did not cause autoimmune diseases. The bankruptcy court declined to allow such a trial. *See infra* note 450.

¹⁶⁴ Engstrom, *supra* note 22, at 690.

¹⁶⁵ See Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIGATION 500, 505, 507, 523 (2009).

Act) that would remove asbestos claims from the courts and transfer them to an administrative structure for resolution, to be financed by payments from asbestos defendants, as well as impose medical evidence requirements that would render invalid the vast majority of nonmalignant claims of the type that have been brought and cap plaintiffs' counsel's contingency fees at 5%.¹⁶⁶ Plaintiffs' counsel, concerned that the proposed Hatch Act was attracting political support, and could eliminate most nonmalignant asbestos claims from eligibility for compensation and severely restrict their fees, curtailed their investments in asbestos screenings that were the sole generators of these claims and, in collusion with screening companies, created what they believed would be a replacement for lucrative asbestos screenings: the silica "pandemic."¹⁶⁷

In addition to listing mechanisms that in her view are increasingly curtailing fraud and thus limiting the need for use of RICO, Engstrom provides a list of the risks that would accrue were RICO to be invoked on a wider scale than the handful of RICO cases that have been brought to address mass tort fraud, including: distortion of existing remedies,¹⁶⁸ "dampen[ing] attorney advocacy and chill[ing] the initiation of valid, as well as invalid, claims,"¹⁶⁹ overdeterrence,¹⁷⁰ additional costs,¹⁷¹ satellite litigation,¹⁷² and eroding the finality of judgments.¹⁷³ In support of the latter argument, she cites to a First Circuit case where the court affirmed the dismissal of a retaliatory RICO complaint and stated: "In essence, simply by alleging defendants' litigation stance in the state court was

¹⁶⁶ Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005) (also known as the FAIR Act). The Senate Judiciary Committee undertook hearings on early forms of the Hatch Act in 2002. In May 2003, Senator Hatch introduced Senate Bill 1125, the FAIR Act of 2003. For analysis of the Hatch Act, see Brickman, *supra* note 91.

¹⁶⁷ See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 620 (S.D. Tex. 2005); *Asbestos: Mixed Dust and FELA Issues: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11–12 (2005) (statement of Lester Brickman) (quoting Heath Mason, co-owner of N&M, Inc., one of the most active asbestos screening companies, who testified that the reason his company changed from asbestos to silica screening is because of the Hatch Act).

¹⁶⁸ Engstrom, *supra* note 22, at 692.

¹⁶⁹ *Id.* at 693.

¹⁷⁰ *Id.* at 693.

¹⁷¹ *Id.* at 696.

¹⁷² *Id.*

¹⁷³ *Id.* at 698.

‘fraudulent,’ plaintiff is insisting upon a right to relitigate that entire case in federal court . . . [t]he RICO statute obviously was not meant to endorse any since occurrence.”¹⁷⁴ Of course, the suit Engstrom has selected to support her claim that RICO will erode the “finality of judgments” would be quickly rejected by 100 out of 100 federal courts as a clear violation of the *Rooker-Feldman* doctrine.¹⁷⁵

Engstrom is to be commended for breaking from the solid front of torts scholars’ refusal to acknowledge “the problem of fraud in the tort litigation environment,”¹⁷⁶ which is “all too real.”¹⁷⁷ She states that her intent in writing her Article is “to highlight the problem of fraud in the tort litigation environment—a problem that is often discussed and frequently lamented but rarely studied and poorly understood.”¹⁷⁸ Distancing herself from Rosenbaum, she rejects the view that “retaliatory RICO actions are never justified,”¹⁷⁹ instead recognizing that there are circumstances where “courts should permit retaliatory RICO actions”¹⁸⁰ But balancing against that, she finds that “even if retaliatory RICO suits do successfully reduce litigation fraud, that benefit will come at a very high cost.”¹⁸¹

Unfortunately, she does not regard “the problem of fraud in tort litigation” to be sufficient to warrant a more aggressive response than has heretofore been the case. Though acknowledging that there “has only been a smattering of [RICO] suits,”¹⁸² far short of the “trend” that Rosenbaum perceives,¹⁸³ she warns “that the unbridled use of retaliatory RICO carries substantial danger”¹⁸⁴ The evidence, however, that she offers that we are headed toward “unbridled use” is gossamer. Furthermore, I have questioned the efficacy of the evidence she offers

¹⁷⁴ *Id.* at 698 (quoting *Gabovitch v. Shear*, No. 95-1055, 1995 WL 697319, at *3 (1st Cir. Nov. 21, 1995) (per curiam)).

¹⁷⁵ See *supra* note 121.

¹⁷⁶ Engstrom, *supra* note 22, at 706.

¹⁷⁷ *Id.* at 696.

¹⁷⁸ *Id.* at 706.

¹⁷⁹ *Id.* at 699.

¹⁸⁰ *Id.* at 690.

¹⁸¹ *Id.* at 647.

¹⁸² *Id.* at 705.

¹⁸³ Rosenbaum, *supra* note 22, at 198.

¹⁸⁴ Engstrom, *supra* note 22, at 706.

that the fraud-curtailling mechanisms she lists substantially reduces the need to have a recourse such as RICO. What is, or at least should be, unquestioned, is that fraud has permeated certain areas of the civil justice system, in particular, mass torts, and that there is a compelling need for more effective mechanisms, including RICO, to combat that fraud.

IV. DEFENSES ASSERTED TO CIVIL RICO FILINGS

A. Rooker-Feldman

The *Rooker-Feldman* doctrine is a federalist doctrine giving deference to states as government entities by barring lower federal courts from “exercising appellate jurisdiction over final state court judgements.”¹⁸⁵ The doctrine stems from two cases: *Rooker v. Fidelity Trust Co.*, decided in 1923, which held that lower federal courts did not have jurisdiction over state court decisions—that power was reserved only for the United States Supreme Court;¹⁸⁶ and *District of Columbia Court of Appeals v. Feldman*, which reaffirmed *Rooker’s* holding and added greater clarity to it, leading to the title of this doctrine.¹⁸⁷ Together, these two cases preclude “a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.”¹⁸⁸

¹⁸⁵ *Lance v. Dennis*, 546 U.S. 459, 463 (2006). *Rooker-Feldman* is “the rule that a federal court cannot consider claims actually decided by a state court or claims inextricably intertwined with an earlier state-court judgment.” *Rooker-Feldman Doctrine*, BLACK’S LAW DICTIONARY 12 (10th ed. 2014).

¹⁸⁶ 263 U.S. 413, 415–16 (1923).

¹⁸⁷ 460 U.S. 462 (1983). “[T]he United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in [the Supreme] Court.” *Id.* at 476.

¹⁸⁸ *Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994). The doctrine does not consider the validity of any claims; it simply addresses a federal court’s jurisdiction to hear the claims. See *Charles v. Levitt*, 716 Fed. App’x 18, 21 (2d Cir. 2017). The doctrine has four requirements for application: (1) that the federal-court plaintiff lost in state court; (2) that the plaintiff suffered injuries from the state court judgment and complains of those injuries; (3) that the plaintiff is seeking district court review and rejection of the state court judgment; and (4) that the complained-of judgment was issued before the federal proceedings were initiated.

Application of *Rooker-Feldman* is limited to the circumstances that closely track those addressed in the *Rooker* and *Feldman* decisions,¹⁸⁹ “in which a party suffered an adverse final judgment rendered by a state’s court of last resort, and then initiated proceedings in a lower federal court seeking review and reversal of the state-court judgment.”¹⁹⁰

Accordingly, the doctrine usually applies only when a plaintiff explicitly attacks the validity of a state court’s judgment, though it can also apply if the plaintiff’s federal claims are so inextricably intertwined with a state judgment that the federal court is in essence being called upon to review the state court decision.¹⁹¹

In cases where the plaintiff in a RICO suit is alleging fraudulent conduct by the defendant lawyer who filed multiple state court suits against the plaintiff, the distinctions drawn by federal courts between what does and does not run afoul of *Rooker-Feldman* can be difficult to parse,¹⁹² but appear to reflect a considerable degree of latitude for

¹⁸⁹ *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

¹⁹⁰ *Ill. Cent. R.R. Co. v. Guy*, 682 F.3d 381, 390 (2012); *see also* *United States v. Shepherd*, 23 F.3d 923 (5th Cir. 1994); *Turner v. Chase*, 334 Fed. App’x 657 (5th Cir. 2009); *Sappington v. Deutsche Bank Nat’l Tr. Co.*, No. 15 C 6039, 2016 WL 3406403 (N.D. Ill. June 21, 2016).

¹⁹¹ *Ill. Cent. R.R. Co.*, 682 F.3d at 390–91 (quoting *Feldman*, 460 U.S. at 483 n.16).

¹⁹² “When a ‘disappointed litigant . . . regrets its initial decision to litigate its federal claims in state court,’ our instincts tell us not to allow a federal suit, but the supporting reasoning can be slippery.” Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1086 (1999). The difficulty of parsing whether *Rooker-Feldman* applies to bar a RICO action is illustrated in *William v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014), where the appellate court found that the plaintiffs were not claiming any state-court judgment injured them—their federal claims only concerned the “independent torts committed to obtain” those judgments. *BASF Catalysts*, 765 F.3d at 315. *Rooker-Feldman* thus did not apply. *Id.* The case was remanded for the District Court to find whether or not the plaintiffs successfully pleaded their claims. *Id.* at 329. The litigation is ongoing. *Williams v. BASF Catalysts, LLC*, No. 11-1754, 2017 WL 3317295 (D.N.J. Aug. 3, 2017); *see also* *Johnson v. Draeger Safety Diagnostics, Inc.*, 594 Fed. App’x 760 (3d Cir. 2014). In *Johnson*, the District Court found that *Rooker-Feldman* applied and dismissed the suit for lack of subject matter jurisdiction. *Id.* at 763. Disagreeing with the District Court, the Court of Appeals compared the facts here to the ones in *BASF*, asserting that the plaintiffs complain that their convictions, or previous state court judgments, “were procured on the basis of fraud,” and therefore the source of the injury here is the false testimony, not the previous judgments. *Id.* at 765. While the court recognized that a judgment that the plaintiffs’ convictions “were tainted by alleged fraud would undermine the force of those [state court] judgments,” that would not reject the state court judgment. The RICO claim was an “independent claim,” and so *Rooker-Feldman* would not prevent the case from being heard in federal court. *Id.* at 766. However, the

federal RICO plaintiffs. Providing that the federal plaintiff is not seeking to overturn a state court decision, the more extensive and well-supported the claim of fraudulent conduct perpetrated by the plaintiffs' state court counsel, the more likely the federal court is to reject the applicability of *Rooker-Feldman* to a RICO action. Nonetheless, if the RICO suit is seeking damages for fraudulent concealment of evidence in a state court action, but that action is found to be a "work-around" that effectively seeks nullification of the state court decision, or one that only concerns the independent torts alleged to have been committed by the plaintiff's counsel to obtain the state court judgment, *Rooker-Feldman* will bar the RICO suit.¹⁹³ If, however, there is "sufficient distance" between the allegations of fraudulent conduct in the state court proceeding and the relief sought in the RICO action, then *Rooker-Feldman* would not apply.¹⁹⁴

court ultimately held that the fraud claim was not plausible because the plaintiffs could not prove that Draeger's vice president knew his statements were false. *Id.* at 767.

¹⁹³ *Sanders v. JGWPT Holdings, Inc.*, 82 F. Supp. 3d 767, 772 (N.D. Ill. 2015).

¹⁹⁴ *See, e.g., Ill. Cent. R.R. Co.*, 682 F.3d 381. *Illinois Central* involved claims by the railroad of fraud and breach of the duty of good faith (but not a RICO claim) against two attorneys whose alleged misrepresentations induced Illinois Central to settle the asbestos exposure claims of two former employees of the railroad who were part of a mass filing of 170 other asbestos plaintiffs whom the lawyers represented in a state court suit. *Id.* at 384–85. A federal jury returned a verdict in favor of the railroad and the defendant lawyers appealed, arguing that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. After the state court multi-plaintiff suit was filed, the defendant lawyers and Illinois Central entered an agreement establishing a process for expedited evaluation and settlement of all of the plaintiffs' claims. The agreement provided that for approximately 160 of the plaintiffs who were not scheduled for the first trial, the defendant lawyer would provide plaintiffs' sworn responses to a "pulmonary questionnaire." *Id.* The questionnaire required listing the plaintiffs' employment history, any other known history of asbestos exposure, and any other involvement in prior asbestos litigation. *Id.* at 386. Though the lawyer defendants were aware that two of the plaintiffs in the asbestos litigation had previously filed asbestos claims, they withheld that fact from Illinois Central. As a result, under the terms of the settlement agreement, one of the plaintiffs was paid \$120,000 and the other \$90,000. *Id.* at 386. Subsequently, during the state court litigation, the lawyer defendants provided false affidavits regarding their clients' previous asbestos claim filings. *Id.* at 389. The federal court rejected application of *Rooker-Feldman* because there was sufficient distance between the instant facts and the state court judgments. The court acknowledged that the defendants' omissions were material to the legal issues the state court addressed, but found that hearing the railroad company's claims of fraud would not require the court to change the state court result. *Id.* at 391. The company did not seek to rescind the decision nor to dismiss its required settlement procedures, and litigating the fraud claims did not require a review of that decision—thus, the doctrine did not provide a barrier to

B. Noerr-Pennington

The *Noerr-Pennington* doctrine establishes that activities attempting to eliminate commercial competition through influence of legislative, executive, administrative, or judicial actions are excluded from the reach of antitrust laws.¹⁹⁵ The doctrine is based on the First Amendment to the Constitution, which guarantees the right to petition the government for redress of grievances.¹⁹⁶ It further supports a policy of transparency between government officials and private individuals by ensuring that deals are not being made behind closed doors to influence the decisions of the executive and legislative branches.¹⁹⁷ Courts have extended this doctrine to certain civil RICO cases, protecting the defendants from liability where they were attempting to influence government decisions but allegedly doing so by using misinformation.¹⁹⁸

the company's claims. *Id.* In the end, the court found sufficient evidence of fraud. *Id.* at 394. The jury returned a verdict awarding Illinois Central \$210,000 in compensatory damages and \$210,000 in punitive damages.

¹⁹⁵ “The Noerr-Pennington Doctrine refers to a trilogy of Supreme Court cases: *Eastern Railroad Presidents v. Noerr Motor Freight*, *United Mine Workers v. Pennington*, and *California Motor Transport Co. v. Trucking Unlimited*. That trilogy of cases holds that activities attempting to influence legislative, executive, administrative or judicial action to eliminate competition are wholly immune from federal antitrust liability unless the conduct falls within the ‘sham exception’ to the doctrine.” Robert L. Tucker, *Vexatious Litigation as Unfair Competition, and the Applicability of the Noerr-Pennington Doctrine*, 22 OHIO N.U. L. REV. 119, 133 (1995).

¹⁹⁶ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); see *Corporate Counsel’s Primer on the Noerr-Pennington Doctrine*, 183 CORP. COUNS. PRIMERS, art 1, Mar. 2009.

¹⁹⁷ See *Corporate Counsel’s Primer on the Noerr-Pennington Doctrine*, *supra* note 196.

¹⁹⁸ For example, in *International Brotherhood of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 821 (7th Cir. 1999), a welfare fund sued cigarette manufacturers claiming that the company had suppressed information about the negative health effects of smoking. However, the court ruled that the *Noerr-Pennington* doctrine applied to this case, and “circumscribed the cigarette manufacturers’ liability to the extent that such liability was premised on attempting to influence Congress to pass favorable laws with misstatements concerning the relation between smoking and health.” Craig Drachtman, *Taking on Patent Trolls: The Noerr-Pennington Doctrine’s Extension to Pre-Lawsuit Demand Letters and Its Sham Litigation Exception*, 42 RUTGERS L. REC. 229, 241 (2015).

The most important limit on the *Noerr-Pennington* doctrine in the context of RICO actions is the sham exception.¹⁹⁹ This exception covers acts that may appear to be influencing government action but are actually actions to interfere with business relations.²⁰⁰ The Ninth Circuit has explained:

The sham exception . . . reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the [F]irst [A]mendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the “sham” petitioning activity is not entitled to [F]irst [A]mendment protection, because it is not an exercise of [F]irst [A]mendment rights.²⁰¹

The sham exception is divided between improper purposes and improper means. The former involves use of the government for illegal, inappropriate, or fraudulent purposes, while the latter uses illegal schemes or fraudulent activity to achieve a certain result in government. For both purposes, there are requirements that the activity be a pattern of claims, all of which are baseless, that bars access to a government entity.²⁰² Thus, many plaintiff firms would not be able to claim *Noerr-Pennington* protection from retaliatory RICO claims where the basis for the claim is fraudulent (sham) litigation.²⁰³ While some bemoan the lack of *Noerr-Pennington* protection,²⁰⁴ others assert that the sham exception

¹⁹⁹ “Where a company tries to interfere with the business operations of a competitor and uses lobbying, litigation, or administrative action as a ‘cover’ or a ‘sham’ to achieve protection from the antitrust laws, the courts will apply the ‘sham exception’ to the *Noerr-Pennington* doctrine.” *The Sham Exception*, in WILLIAM M. HANNAY, CORPORATE COUNSEL’S ANTITRUST DESKBOOK § 14:8 (2018).

²⁰⁰ See Tucker, *supra* note 195, at 134.

²⁰¹ *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1255 (9th Cir. 1982).

²⁰² Lawrence D. Bradley, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 CORNELL L. REV. 1305, 1315 (1984).

²⁰³ Engstrom, *supra* note 22, at 692 n.260.

²⁰⁴ Bradley, *supra* note 202, at 1318 (the *Noerr-Pennington* doctrine “may have a chilling effect . . . A litigant who claims to have been the victim of a competitor’s sham suits need only allege that the competitor did not genuinely seek to influence governmental decisionmaking and produce evidence of the competitor’s unsuccessful suits.”).

insulates civil RICO from a *Noerr-Pennington* attack where the acts being complained of are fraudulent.²⁰⁵

The U.S. Supreme Court addressed the issue of sham litigation in *California Motor Transport Co. v. Trucking Unlimited*.²⁰⁶ In *Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27*, the Fourth Circuit applied the *California Motor* standard to deny the *Noerr-Pennington* defense in a RICO action.²⁰⁷

[W]hen purported sham litigation encompasses a series of legal proceedings rather than a singular legal action, we conclude the sham litigation standard of *California Motor* should govern. In this context, the focus is not on any single case. Rather a district court should conduct a holistic evaluation of whether “the administrative and judicial processes have been abused.”²⁰⁸

In each of the *Garlock* RICO actions, the lawyer defendants asserted the *Noerr-Pennington* doctrine, arguing that the state court mesothelioma claims that they had brought “‘constitute classic petitioning activities and, therefore, cannot be collaterally attacked’ by *Garlock’s* RICO and fraud claims.”²⁰⁹ *Garlock* argued that the case fell

²⁰⁵ See Daniel J. Davis, *The Fraud Exception to the Noerr-Pennington Doctrine in Judicial and Administrative Proceedings*, 69 U. CHI. L. REV. 325, 340 (2002) (“A business, intending to keep its competitor out of the market by crippling it with litigation costs or an adverse judgment, could use misrepresentations to distort litigation and procure a favorable outcome. Thus, the existence of the tort of abuse of process shows that the right to petition or engage in political activity does not have an unlimited extension. Fraud and deliberate misrepresentations should therefore be acceptable grounds to eliminate *Noerr-Pennington* immunity in the judicial setting. Fraud and misrepresentation place an action outside the realm of the right to petition on which *Noerr-Pennington* is based.”); see also C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 ANTITRUST L.J. 403, 415 (2001) (“Recognition of a rule that would vitiate antitrust petitioning immunity for the effects of anticompetitive federal and state governmental action induced by deliberate fraud would not frustrate the ability of federal and state agencies to make considered judgments that anticompetitive policies should be adopted.”).

²⁰⁶ 404 U.S. 508 (1972).

²⁰⁷ 728 F.3d 354, 364 (4th Cir. 2013).

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-116, 2015 WL 5148732, at *3 (W.D.N.C. Sept. 2, 2015).

within the “sham litigation” exception under the *California Motor* standard.²¹⁰

Though the *Garlock* court viewed Garlock’s argument favorably, it deferred ruling on the lawyer defendants’ motions to dismiss based on *Noerr-Pennington*, finding the motion as premature as it did other dispositive motions presented by the lawyer-defendants²¹¹ and thus allowing Garlock to proceed with discovery.

C. *Litigation Privilege*

Litigation privilege is an absolute privilege of the litigating attorney that provides complete immunity from civil liability to non-clients for statements made in connection with representing a client in litigation.²¹² The privilege only extends to communications involving litigants or other participants in the trial, as its goal is to prevent adversaries from seeking retribution.²¹³ The privilege’s ostensible purpose is to protect clients’ rights to the zealous prosecution of their claims by insulating their counsel from liability for statements made in the course of the proceeding. A number of recent decisions have embraced an expansive approach with respect to the applicability of the litigation privilege.²¹⁴ The privilege has been extended to claims other than defamation such as “negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations, fraud, and, in some cases, malicious prosecution.”²¹⁵ Of the forty-eight states that recognize the litigation privilege, forty-two have done so by judicial action and six by statute.²¹⁶

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Loigman v. Twp. Comm. of Twp. of Middletown*, 889 A.2d 426, 433 (N.J. 2006) (“The litigation privilege generally protects an attorney from civil liability arising from words he has uttered in the course of judicial proceedings.”).

²¹³ T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 916 (2004).

²¹⁴ Steinberg & Weissler, *supra* note 98, at 5–6.

²¹⁵ Anenson, *supra* note 213, at 927–28.

²¹⁶ *See id.* at 917 n.7.

Rosenbaum argues for using the litigation privilege to bar RICO suits, which she regards as “retaliatory.”²¹⁷ Her proposal would thus ban RICO suits that are based solely on frivolous filings in aggregate litigation, given that such filings can be an “everyday reality”²¹⁸ in aggregate litigation.²¹⁹ However, Rosenbaum’s equating of fraudulent and specious litigation with frivolous litigation²²⁰ makes it unclear whether she is also proposing to insulate fraudulent litigation from RICO applicability.

Whether or not the litigation privilege insulates a lawyer from a claim of fraud is subject to some dispute.²²¹ Extending immunity to lawyers committing fraud in the course of litigation is rejected by the American Bar Association (ABA) Model Rules of Professional Conduct, which provides that it is professional misconduct for an attorney to engage in fraud or dishonesty, or to knowingly assist his client to engage in fraudulent conduct.²²² Immunity for lawyers’ committing fraud in the course of litigation is also rejected by the American Law Institute. Section 56 of the Restatement (Third) of Law Governing Lawyers states that “misrepresentation is not part of proper legal assistance.”²²³ This position has been adopted by several courts.²²⁴

A recent case, however, has expanded the scope of the privilege in Texas.²²⁵ In *Cantey Hanger, LLP v. Byrd*, the Supreme Court of Texas held that attorneys are immune from a third-party claims for fraud

²¹⁷ Rosenbaum, *supra* note 22, at 173.

²¹⁸ “[A]pplication of the existing common law immunity and malicious prosecution standards to aggregate litigation attorneys in the civil RICO context simply recognizes the everyday reality of aggregate litigation, and situates that reality within the existing tort and ethical standards.” *Id.* at 217.

²¹⁹ *Id.* (“Under my proposal, the mere act of filing complaints in court—even frivolous complaints—would no longer justify RICO liability for aggregate litigation attorneys. Instead, some broader scheme, linked with (or evidencing) an intent to harm must be shown.”).

²²⁰ See *supra* notes 80–98.

²²¹ See Steinberg & Weissler, *supra* note 98, at 22.

²²² See MODEL RULES OF PROF’L CONDUCT r. 1.2(d), 4.1, 8.4 (c) (AM. BAR ASS’N 1983).

²²³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. f (2000) (AM. LAW INST. 2000).

²²⁴ For a listing, see Steinberg & Weissler, *supra* note 98, at 24–25.

²²⁵ *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015).

when they assisted their client in the alleged fraudulent transfer of assets she claimed as the result of a divorce judgment.²²⁶

The case against immunizing lawyers from suits by a third party alleging fraudulent acts committed in the course of litigation is set out by the Third Circuit in the *BASF* litigation,²²⁷ where it held that New Jersey's Supreme Court "has never recognized the litigation privilege to immunize systematic fraud, let alone fraud calculated to thwart the judicial process. . . . The purposes of the privilege are never served by allowing counsel to practice deceit and deception in the course of litigation, nor by permitting counsel to make false and misleading statements in the course of judicial proceedings."²²⁸

²²⁶ *Id.* at 480. For additional discussion of this case, see Steinberg & Weissler, *supra* note 98, at 36–46. In another Texas case, *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018), the plaintiff brought an action against an attorney, asserting fraud and conspiracy claims based on allegations the attorney had entered into a settlement agreement on behalf of his clients in their prior real estate property dispute action despite knowing that his clients had no intention to comply with the agreement and that the attorney aided his clients' avoiding compliance with the agreement by preparing documents and filing a lawsuit. *Id.* at 679. The Supreme Court of Texas found that the Texas Citizens Participation Act immunized a counsel from charges of fraud and conspiracy. *Id.* at 678. The Act "protects citizens who [associate,] petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *Id.* at 679 (internal citation omitted). Thus, the Act is broader than the litigation privilege in that it is not limited to in-court statements. In dismissing the plaintiff's action, the court said that the Act insulates a lawyer from liability to a client's defrauded opponent if the lawyer's actions, even though wrongful, are "within the scope of his representation of his client," moreover, the court rejected cases that had recognized a "fraud exception" to attorney immunity. *Id.* at 682–83. The court did go on to qualify its holding, stating that "[t]hough attorney immunity is broad, it is not limitless. . . . [For example,] conduct that may fall outside the reach of the attorney-immunity defense [includes] participation in a fraudulent business scheme with a client. . . . Thus, we recognize that some fraudulent conduct, even if done on behalf of a client, may be actionable." *Id.* at 682–83. On the basis of that qualification, the fraudulent scheme orchestrated by counsel for an asbestos plaintiff to suppress evidence of his client's exposures to various products of bankrupted companies would appear to fall outside the protection of the Texas Act.

²²⁷ See *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 317–18 (3d Cir. 2015).

²²⁸ *Id.* at 318.

V. INVOCATION OF CIVIL RICO IN ASBESTOS LITIGATION

A. *The Owens Corning RICO Litigation*

The vast majority of the tens of millions of claims of nonmalignant asbestos-caused injury, mostly asbestosis, brought by over 700,000 litigants, have been based on x-ray readings and diagnoses by litigation doctors often paid to find disease irrespective of whether disease was present, with error rates approaching 90%.²²⁹ The value of these unimpaired claims could be significantly augmented by a showing of lung impairment, which is measured by a series of tests called pulmonary function tests (PFTs).

For the most part, the administration of these PFTs in asbestos litigation and their interpretation by doctors was an overwhelmingly fraudulent enterprise.²³⁰ The fraud included manipulating medical equipment to produce false readings, usually done under the supervision of a medical doctor who was an intrinsic part of the fraud.²³¹

In 1996, Owens Corning filed a RICO action against one of the leading PFT enterprises, alleging that the enterprise “engaged in a scheme to generate false medical test results” and “systematically and deliberately deviated from the . . . established standards in order to create false ‘positive’ PFT results, that is, results which falsely indicate pulmonary impairment.”²³² Extensive litigation ensued, with the docket indicating 562 entries.²³³ In each of four depositions of the principals, supervising doctors and the asbestos lawyer for whom the tests were performed, the deponents invoked their Fifth Amendment right to refuse to testify.²³⁴ The case was settled in 1999 for approximately \$1.2 million.²³⁵ Most of the proceedings are subject to protective orders.²³⁶

²²⁹ See Brickman, *supra* note 86, at 544–66, 577–80.

²³⁰ For a detailed analysis of PFTs’ role in nonmalignant asbestos litigation, the fraudulent administration of these tests, and the resultant litigation, see Brickman, *Asbestos Litigation*, *supra* note 80, at 111–28.

²³¹ See *id.*

²³² See Complaint at ¶¶ 1, 4, *Owens Corning v. Pitts*, No. 96-CV-2095 (E.D. La. June 19, 1996).

²³³ Brickman, *Asbestos Litigation*, *supra* note 80, at 117 n.289.

²³⁴ See *id.*

²³⁵ *Id.*

Ensuing litigation between the defendants over who was responsible for paying the settlement to Owens Corning provides substantial insight into the motivation for the settlement.²³⁷ According to an affidavit submitted in the litigation, the asbestos lawyer was in part motivated to advance \$100,000 towards payment of the settlement because “if the Owens Corning litigation could be settled, a parallel Department of Justice criminal investigation that encompassed repeated questions about the asbestos attorneys that had utilized the pulmonary testing services of the defendants in the Owens Corning litigation would in all likelihood be resolved favorably.”²³⁸

The sealed settlement of this RICO litigation coincided with a major settlement entered into by Owens Corning, then the leading asbestos defendant, with leading plaintiffs’ counsel called the “national settlement program” (NSP). In the NSP, plaintiffs’ counsel agreed to limit the number of asbestos suits filed against Owens Corning so that it could avoid immediate bankruptcy. It is my view that the settlement of the PFT litigation and the sealing of the record was likely a condition for plaintiffs’ counsel agreeing to the NSP—a settlement that staved off Owens Corning’s bankruptcy filing for only a short period.

It is notable that in the settlement of Garlock’s bankruptcy proceeding, plaintiffs’ counsel appears to have conditioned that settlement upon Garlock withdrawing its RICO actions against four leading mesothelioma firms.

B. *The G-I Holdings RICO Litigation*

GAF Corporation manufactured an insulating cement, Calsilite, containing asbestos. Its successor, G-I Holdings (Holdings) was one of a score of defendants that were being widely sued for asbestos-related injuries in the late 1980s and early 1990s. After Holdings filed for bankruptcy, it filed actions against several of the leading asbestos plaintiffs’ counsel asserting RICO claims and a number of common law

²³⁶ *Id.*

²³⁷ *See id.*

²³⁸ *See id.*

fraud actions for prosecuting fraudulent claims.²³⁹ Two of the counts for violation of RICO were specifically directed at Baron & Budd—one of the largest asbestos law firms in the country—claiming that its use of a twenty-page witness preparation memo inadvertently produced by a novice lawyer, was used to defraud GAF.²⁴⁰ The memo, which I have termed the “Script Memo,” was titled “Preparing For Your Deposition” and set forth specific instructions to clients as to the answers to give during the course of depositions about which products they were exposed to and which products they were to deny exposure to (even if they had been exposed to that product).²⁴¹ In addition, they were warned never to say that they had seen warning labels on product packages.²⁴² They were also assured that defense lawyers deposing them would have no way of knowing what products they had actually used, inferring that they could not be challenged regardless of how false their exposure claims were.²⁴³ A remarkable series of articles published by the Dallas Observer²⁴⁴ provided substantial detail on how the firm’s paralegals were instructed to prepare clients for deposition by creating “false memories” with regard to product exposure, instructing them, for example, to deny exposure to products of bankrupted manufacturers even if the client had been exposed and knew that the product was dangerous.²⁴⁵ Defense counsel immediately sought to introduce the

²³⁹ See *G-I Holdings, Inc. v. Baron & Budd*, 199 F.R.D. 529 (S.D.N.Y. Apr. 9, 2001); *G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 241–42 (S.D.N.Y. Dec. 11, 2001); *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521 (S.D.N.Y. July 17, 2002); *G-I Holdings, Inc. v. Baron & Budd*, No. 01-civ-0216, 2002 U.S. Dist. LEXIS 14571 (S.D.N.Y. Aug. 7, 2002); *G-I Holdings, Inc. v. Baron & Budd*, No. 01-civ-0216, 2002 U.S. Dist. LEXIS 15443 (S.D.N.Y. Aug. 16, 2002); *G-I Holdings, Inc. v. Baron & Budd*, No. 01-civ-0216, 2002 U.S. Dist. LEXIS 19006 (S.D.N.Y. Oct. 8, 2002); *G-I Holdings, Inc. v. Baron & Budd*, No. 01-civ-0216, 2003 U.S. Dist. LEXIS 1107 (S.D.N.Y. Jan. 29, 2003); *G-I Holdings, Inc. v. Baron & Budd*, No. 01-civ-0216, 2004 Dist. LEXIS 2775 (S.D.N.Y. Feb. 25, 2004).

²⁴⁰ In pursuit of those allegations, G-I Holdings sent investigators to Dallas to interview former Baron & Budd employees. *G-I Holdings*, 238 F. Supp. 2d 521.

²⁴¹ For a detailed analysis of the contents of the Script Memo and the judicial proceedings that ensued, see Brickman, *Asbestos Litigation*, *supra* note 80, at 141–166.

²⁴² *Id.* at 144.

²⁴³ *Id.*

²⁴⁴ See, e.g., Thomas Korosec, *Homefryin’ with Fred Baron*, DALLAS OBSERVER (Mar. 29, 2001, 4:00 AM), <https://www.dallasobserver.com/news/homefryin-with-fred-baron-6398334> [<https://perma.cc/TG2E-LBW5>].

²⁴⁵ Brickman, *Asbestos Litigation*, *supra* note 80, at 140, 152.

Script Memo in the course of asbestos litigations. They argued that even if the Memo was privileged, the privilege failed because of the crime-fraud exception.²⁴⁶ However, a Texas Court of Appeals rejected the argument, holding that the crime-fraud exception applied only when a client approached the attorney seeking his assistance in committing a fraud and not when the attorney was the one proposing to the client that they jointly engage in a crime.²⁴⁷

Ultimately, after rejecting Baron & Budd's motion to dismiss the RICO claims against the firm and individual lawyers because it alleged predicate acts of mail fraud based on the falsification of product identification affidavits in asbestos lawsuits,²⁴⁸ U.S. District Court Judge Robert Sweet dismissed Holdings' RICO claims based on the Script Memo because Federal Rule of Civil Procedure 9(b) required that allegations of mail and wire fraud, which include RICO claims, be pleaded with particularity.²⁴⁹ He found that Holdings, which had settled tens of thousands of asbestos claims, was unable to identify which of the claimants, who had brought actions and settled their claims against Holdings, had been prepped for their deposition testimony using the Memo.²⁵⁰ In his decision, Judge Sweet stated:

Holdings realleges that the Defendants used the "Baron & Budd Memorandum," entitled "Preparing Your Deposition," to manufacture evidence and coach answers from clients. This claim was dismissed from the [First Amended Complaint] for lack of specificity. . . . [Despite adding a list of thirty claimants with whom the memo may have been] used to create false product identification

²⁴⁶ See TEX. R. EVID. 503 (listing the requirements of a crime-fraud exception); see also TEX. R. CIV. P. 192.5(c) (listing exceptions to the protection of work product).

²⁴⁷ Brickman, *Asbestos Litigation*, *supra* note 80, at 154–56. In an affidavit that I prepared in October 1997, as an expert retained in litigation involving the Script Memo, I stated that "[i]n my opinion, the witness preparation document blatantly violated Texas Disciplinary Rules 3.03 (a)(5), 3.04 (b), 8.04 (a)(3) and 8.04 (a)(2). In addition, designated paragraphs of the document constituted the crime of subornation of perjury by witnesses." Affidavit of Lester Brickman, *Rice v. Owens-Corning Fiberglas Corp.*, No. 96-06277-B (Dallas Cty, Tex. Oct. 6, 1997) (on file with author).

²⁴⁸ *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 539 (S.D.N.Y. 2002).

²⁴⁹ FED. R. CIV. P. 9(b) ("In alleging fraud, or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

²⁵⁰ *G-I Holdings*, 238 F. Supp. 2d at 538–39.

testimony in the depositions . . . Holdings [still] fails to allege which claimants were in which case, which claimants were actually deposed, and whether depositions were taken in the cases. In addition, Holdings still does not provide the date of a single deposition, the participating individuals, or the false identification made during the deposition. Importantly, it does not state that the deponents even viewed the Baron & Budd Memorandum.²⁵¹

The predictable effect of Judge Sweet’s ruling was to place Holdings in a classic “Catch 22” situation. Holdings had been precluded by Texas court rulings obtained by Baron & Budd from “communicating in any manner” with former Baron & Budd employees because any information they obtained was likely “privileged and confidential.”²⁵² In addition, Holdings was also precluded from directly approaching Baron & Budd clients by Texas rules of ethics, because doing so would violate rules that prohibit attorneys from approaching claimants who it knows are represented by counsel.²⁵³ While Judge Sweet did allow Holdings to depose former Baron & Budd employees, Holdings was unable to determine in which of the over 900 cases referenced in Holdings’ complaint where the Script Memo was allegedly used,²⁵⁴ the plaintiffs had testified falsely with regard to product identification and other matters. Without the kinds of inquiries that, for example, the Dallas Observer was able to undertake, Holdings could not identify any Baron & Budd clients who had sued GAF who were prepared for deposition or trial by use of the Script Memo and had testified falsely.²⁵⁵

Because Holdings could not identify any specific plaintiffs, it could not allege in its RICO proceeding that the attorney-client privilege did not apply to protect both the client and Baron & Budd from discovery as to the use of the Script Memo because of the crime-fraud exception. It

²⁵¹ *Id.*

²⁵² Korosec, *supra* note 244.

²⁵³ *Id.*

²⁵⁴ See *G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 262–63 (S.D.N.Y. 2001).

²⁵⁵ Compare *G-I Holdings*, 179 F. Supp. 2d at 262–63, with Korosec, *supra* note 244 (illustrating that the Dallas Observer’s investigation was the type of investigation Holdings sought to conduct in order to substantiate its fraud claims). Holdings was similarly unable to determine if any of the 110–130 claimants who Baron & Budd had identified as being prepared using the Script Memo, and whose cases were pending in Travis County, Texas, were among the plaintiffs who had sued GAF. See Korosec, *supra* note 244.

could attempt to invoke the latter to strip away the privilege only if it could first identify which Baron & Budd clients, if any, had been prepared by use of the Script Memo.²⁵⁶ Since it could not do so, it could not argue the crime-fraud exception and could not engage in discovery that might have identified such clients because of the privilege.²⁵⁷

Judge Sweet's dismissal of the two counts alleging fraudulent use of the Script Memo, as well as his dismissal of most of the other counts of Holdings' lawsuit, may be seen as expressing a high degree of reluctance to preside over a trial in which the civil justice system would have been an unnamed defendant. Failure to dismiss Holdings' causes of action would have effectively allowed Holdings to seek to prove that on a large scale, the civil justice system had been corrupted. Coupled with provisions of the civil justice system that facilitate the use of fraudulent testimony by doctors in mass tort litigation,²⁵⁸ the *Holdings* decision makes it apparent why denial of RICO as a remedy against mass tort fraud can serve to insulate fraudulent litigation from exposure.

C. *The CSX RICO Litigation*

CSX Transportation (CSX) is a rail-based freight transportation company that operates throughout the United States.²⁵⁹ The company has been sued by thousands of its employees for personal injury alleging that CSX recklessly exposed them to asbestos.²⁶⁰ A large majority of the suits were brought by the Robert Peirce & Associates, P.C. law firm (Peirce). In 2011, CSX brought suit against members of that firm (lawyer defendants) and Dr. Ray Harron, who had provided thousands of x-ray readings in support of the claims that CSX alleged were "objectively unreasonable, false and fraudulent."²⁶¹ The Peirce firm's

²⁵⁶ *G-I Holdings*, 179 F. Supp. 2d at 262.

²⁵⁷ *Id.* at 261–62.

²⁵⁸ See *infra* Section VI.A.

²⁵⁹ *About Us*, CSX, <https://www.csx.com/index.cfm/about-us> [<https://perma.cc/9SHV-V82Q>] (last visited Apr. 21, 2019).

²⁶⁰ See, e.g., *Gillon v. CSX Transp., Inc.*, No. 11-0498, 2011 WL 8197426 (W. Va. Oct. 11, 2011).

²⁶¹ Third Amended Complaint at ¶¶ 2–3, *CSX Transp., Inc. v. Peirce*, No. 2:05-cv-202, 2011 WL 9698685 (N.D. W. Va. Oct. 19, 2011). I was retained by CSX as an expert witness and provided two expert reports, but did not have any role during the trial portion of the

core business was identifying former and current employees of railroads on behalf of whom it filed suits alleging personal injuries and occupational diseases, most notably asbestosis.²⁶² CSX alleged that beginning in the late 1990s, the lawyer defendants developed “a pattern and practice of unlawful conduct, including bribery, fraud, conspiracy, and racketeering” to defraud CSX.²⁶³ The strategy included:

1. Using unlawful means to obtain CSX employees as clients by providing thousands of dollars in cash to certain transportation union officials in exchange for “designated counsel status” that allowed the firm to attend union meetings to directly solicit clients—payments by Peirce and others that resulted in the conviction of union officials, including those to whom Peirce had given thousands of dollars.
2. Hiring former union members who had left railroad employment as “runners” claiming varying degrees of disability for which they were receiving federal retirement benefits. Peirce paid these agents sums calculated to allow them to continue to remain eligible for federal retirement benefits, and paid them additional sums “off the books” over a period of over fifteen years, thus defrauding the U.S. government and resulting in a civil action brought against a member of the Peirce firm that was settled for \$200,000.²⁶⁴
3. Obtaining most of the claimants by use of mass screenings, the sole purpose of which was to generate thousands of claimants who were previously or currently employed by CSX.²⁶⁵ To this end, Peirce hired James Corbitt and his company, U.S. X-ray, to administer x-ray screenings in the period 1993–2004, using an x-ray unit mounted on a truck, the back of which had been

extensively litigated case. See Expert Report of Lester Brickman, *CSX Transp., Inc. v. Gilkison*, No. 5:05-cv-202, 2009 WL 6633969 (N.D. W. Va. Mar. 12, 2009); Expert Report of Lester Brickman, *CSX Transp., Inc. v. Peirce*, No. 5:05-cv-202 (N.D. W. Va. July 17, 2012) (on file with author).

²⁶² Third Amended Complaint, *supra* note 261, at ¶ 17.

²⁶³ *Id.*

²⁶⁴ *Id.* ¶¶ 21–22, 25–27, 28–31.

²⁶⁵ See *id.* ¶¶ 32–33. See Brickman, *Asbestos Litigation*, *supra* note 80, at 62–103, for a detailed analysis of mass screenings as part of the scheme to fraudulently manufacture medical reports for hundreds of thousands of asbestos litigants.

divided into a waiting room and an x-ray room.²⁶⁶ However, Corbitt was not licensed to administer x-rays in most states in which he worked for the Peirce firm, nor was his mobile x-ray machine inspected and certified with states' Boards of Health, as required.²⁶⁷ Corbitt's unlawful conduct resulted in chronically underexposed x-rays, facilitating Dr. Harron's asserting that there were opacities (lung scarrings) on the x-rays.²⁶⁸

4. Hiring Dr. Harron to read the x-rays, knowing full well that Dr. Harron's readings were fraudulent.²⁶⁹
5. All of those components, according to the complaint, allowed Peirce to embark on a concerted campaign to defraud CSX by filing six mass lawsuits in West Virginia on behalf of over 5,300 plaintiffs, the vast majority of whom were not from West Virginia.²⁷⁰ The filing of a thousand or more lawsuits all at once was intended to force CSX to settle thousands of bogus lawsuits.²⁷¹ Moreover, the six complaints filed contained no

²⁶⁶ Third Amended Complaint, *supra* note 261, at ¶¶ 39–40.

²⁶⁷ *See id.* ¶¶ 46–60.

For example, in Virginia, where Corbitt admittedly performed screenings on a regular basis, it is “unlawful for a person to practice or hold himself out as practicing as a radiologic technologist or radiologic technologist, limited, unless he holds a license as such issued by the Board [of Health].” Va. Code Ann. § 54.1-2956.8:1. Furthermore, “All X-ray machines shall be registered with the Board of Health, and inspected and certified as meeting the standards established pursuant to its regulations. The inspections shall be conducted periodically on a schedule prescribed by the Board.” Va. Code Ann. § 32.1-229.1. Finally, pursuant to 18 Va. Admin. Code § 85-101-100(A), “All services rendered by a radiologic technologist shall be performed only upon direction of a licensed doctor of medicine, osteopathy, chiropractic, or podiatry.”

Id. ¶ 48. In 2001, the Texas Department of Health issued an Emergency Order against U.S. X-ray to immediately cease using x-ray equipment in Texas. *See id.*

²⁶⁸ *See* Third Amended Complaint, *supra* note 261, at ¶ 55. Corbitt was disciplined by two states for his screening-related conduct and when deposed about his compliance with licensing requirements, he invoked his Fifth Amendment privilege against self-incrimination. Moreover, prior to being hired by the Peirce firm, Corbitt was convicted by a federal court of theft of government property, sentenced to eighteen months in prison, and required to pay \$192,641.29 in restitution to the U.S. Department of Health and Human Services. *Id.* ¶¶ 39–56.

²⁶⁹ *See id.* ¶¶ 58–61, 62–64, 71–73. For evidence of Dr. Harron's culpability, see Brickman, *supra* note 86, at 529 n.33, 578 n.216.

²⁷⁰ *See* Third Amended Complaint, *supra* note 261, at ¶ 89.

²⁷¹ *See id.*

individualized allegations, as illustrated in the following example:

While working for the defendant, the plaintiffs were exposed to and caused to inhale asbestos fibers, free silica, diesel fumes, solvent fumes, gasoline fumes, fibrogenic materials, carcinogenic materials and/or other substances deleterious to the respiratory system.

As a . . . direct and proximate result of the defendant's negligence, the plaintiffs have developed asbestosis, asbestos related pleural disease, silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, cancer, and increased risk of cancer and/or other serious and severe respiratory diseases, and have suffered other bodily injuries, including a greatly increased risk of developing mesothelioma, bronchogenic carcinoma, or other cancerous conditions, and suffer difficulty breathing, as well as other serious and severe injuries which may be permanent.²⁷²

These generic complaints failed to inform CSX of even the most basic facts on which each plaintiff's claim was based. In response to this inundation of the West Virginia courts, the courts created a mediation process under which the railroad was limited to conducting one-hour depositions on an as-needed basis. This limitation would deny CSX any realistic opportunity to cross-examine plaintiffs. The cases that did not settle were to be resolved in a single mass trial—a process that, in other jurisdictions, invariably deprived defendants of any semblance of due process.²⁷³ The trials succeeded in coercing the defendants into settling tens of thousands of claims based on fraudulent medical evidence and perjurious testimony²⁷⁴—an outcome that the Peirce firm was seeking so as to avoid trials where the medical evidence would have had to be produced and would then have been contested by CSX. As stated in the complaint, “the lawyer Defendants succeeded in their scheme to deprive CSXT of access to discovery by repeatedly filing mass lawsuits in an

²⁷² *Id.* ¶ 92.

²⁷³ See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 *CARDOZO L. REV.* 1819, 1873–81 (1992).

²⁷⁴ See, e.g., *id.*

overburdened court system.”²⁷⁵ In response to CSX’s motion, the West Virginia courts issued a case management order (CMO) requiring each claimant to certify in writing that they were aware of their lawsuit and believed that their claims “are well-founded in fact.”²⁷⁶ In addition, the CMO required the plaintiffs to provide relevant defendants with a complete set of information in their counsels’ possession or subject to their control, relating to their claimed exposure, diagnostic imaging, medical reports, submissions to asbestos bankruptcy trusts, and materials relating to occupational illness screening sponsored by the Pierce firm and attended by the plaintiffs. The CMO also provided that the defendants would have the right to subject the plaintiffs’ experts to a *Daubert* challenge with respect to the validity of their x-ray reads, medical reports, physical examinations, and pulmonary functions tests. In response, the lawyer defendants moved to voluntarily dismiss all but two of the approximately 1,400 claims to which the CMO applied. These claims were dismissed *with prejudice*, lending further proof, if any was needed, that the claims were beyond being merely baseless.²⁷⁷

Extensive litigation ensued over a period of several years,²⁷⁸ resulting in the focus of CSX’s case shifting from broad scale allegations of fraud to, simply, whether CSX had stated a claim that met RICO requirements.²⁷⁹ At trial, CSX had to narrow its case to eleven specific fraudulent claims, ten of which had been dismissed on procedural grounds, admitting in court “that it could prove no other actual instances of illegal conduct.”²⁸⁰ Prior to trial, the defendants brought a

²⁷⁵ See Third Amended Complaint, *supra* note 261, at ¶ 109.

²⁷⁶ *Id.* ¶ 138.

²⁷⁷ See *id.* ¶ 142.

²⁷⁸ During this period, the trial court dismissed four of the plaintiffs’ counts, issued summary judgment as to one of the claims; a jury found in favor of the defendants with regard to another one of the fraud allegations, see *CSX Transp., Inc. v. Gilkison*, No. 5:05-cv-202, 2012 U.S. Dist. LEXIS 61719, at *3–6 (N.D. W. Va. May 3, 2012); the U.S. Court of Appeals for the Fourth Circuit upheld the jury’s verdict but vacated the dismissal of the four counts and reversed the summary judgment, *id.*; a third amended complaint was filed which significantly narrowed the scope of the case. *id.*; and some defendants were dropped.

²⁷⁹ *CSX Transp., Inc. v. Peirce*, 974 F. Supp. 2d 927, 933 (N.D. W. Va. 2013).

²⁸⁰ See Motion in Limine No. 7 to Limit CSX’s Damage Claims and Evidence to Alleged Damages Specifically Related to the Eleven Claims at Issue by Robert N. Peirce, Jr. & Louis A. Raimond at 2, *CSX Transp., Inc. v. Peirce*, No. 5:05-cv-202, 974 F. Supp. 2d 927 (N.D. W. Va. 2013).

motion in limine seeking to preclude CSX from presenting any evidence about claims other than the eleven that the court granted.²⁸¹

The lawyer defendants also argued that the court should not “allow a RICO case to proceed where 99.8% of [the] alleged racketeering enterprise has not been alleged to be fraudulent.”²⁸² CSX responded that the Third Amended Complaint encompassed far more than just the filing of the eleven allegedly fraudulent claims,²⁸³ and then went on to restate that its allegations in the Third Amended Complaint—that the entire process of recruiting plaintiffs, procuring medical diagnoses, fabricating asbestos claims, embarking on a concerted campaign to overwhelm CSX and the West Virginia courts by filing six mass lawsuits asserting claims on behalf of 5,300 plaintiffs in courts across West Virginia, and repeatedly filing motions to compel mandatory mediation designed to deny CSX access to full discovery—were all elements of a racketeering enterprise.

The lawyer defendants further argued that “[their] filing of pleadings and related letters . . . [could not] be [considered] predicate acts of mail and wire fraud”²⁸⁴ and “that the purported predicate acts alleged by CSXT relate[d] solely to routine litigation activity.”²⁸⁵ Judge

²⁸¹ See Memorandum Opinion and Order Confirming the Pronounced Rulings of this Court Relating to Lawyer Defendants’ Motions in Limine at 2, *CSX Transp. v. Gilkison*, No. 5:05-cv-202 (N.D. W. Va. Jan. 7, 2013), 2013 WL 85253.

²⁸² See Plaintiff CSX Transportation, Inc.’s Combined Opposition to the Lawyer Defendants’ Motions to Dismiss the Third Amended Complaint at 23–24, *CSX Transp., Inc. v. Peirce*, 974 F. Supp. 2d 927 (N.D. W. Va. 2013) (No. 5:05-cv-202), 2011 WL 11069401.

²⁸³ *Id.* at 24.

²⁸⁴ *Id.* at 11.

²⁸⁵ See Memorandum Opinion and Order Denying Lawyer Defendants’ Motions to Dismiss at 7–8, *CSX Transp., Inc. v. Gilkison*, No. 5:05-cv-202 (N.D. W. Va. May 3, 2012), 2012 WL 1598081. Rosenbaum adds arguments that the litigation activities in CSX did not constitute predicate acts because of “potential constitutional and legal concerns this raises . . . [and because it] would also lead to absurd results.” Rosenbaum, *supra* note 22, at 207. To find otherwise, she argues, would lead to the proliferation of civil RICO claims, allowing them to arise from every state and federal filing. *Id.* Rosenbaum also states that civil RICO in this context leads to the usurpation of state law, as any claims against the lawyer defendants are better suited to abuse-of-process or malicious prosecution actions. *Id.* at 209. These are not arguments that have gained validation from courts.

Rosenbaum’s policy arguments draw heavily on Judge Matsumoto’s decision in *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153 (E.D.N.Y. 2010), *aff’d sub nom.* *Curtis v. Law Offices of David M. Bushman, Esq.*, 443 Fed. App’x 582 (2d Cir. 2011). While, as noted, Judge Matsumoto discussed the policy rationales at length for holding

Stamp, citing cases where courts have held that the filing of a fraudulent lawsuit can be a predicate act of mail and wire fraud,²⁸⁶ denied the lawyer defendants' motions to dismiss, holding:

that the alleged mail and wire fraud violations in this case amount to more than mere claims for abuse of process or malicious prosecution. The third amended complaint describes a more complex scheme by the lawyer defendants—one that allegedly involved more than the filing and service of eleven fraudulent complaints. Even in the light [of] the Fourth Circuit's expressed policy of construing civil RICO narrowly, this Court finds that CSXT's had alleged predicate acts that survive the motions to dismiss.²⁸⁷

The case proceeded to trial, resulting in a jury verdict in December 2012 in favor of CSX in the amount of \$429,240,²⁸⁸ which was then to be trebled with attorney fees added.

Rosenbaum is highly critical of the CSX litigation, expressing incredulity “that a law firm could file a mass action consisting of over 5300 claims [filed over eight years] on behalf of asbestos victims and then be forced to pay over \$7 million dollars to the opposing party because 11 of the plaintiffs—or just 0.2%—did not actually suffer the alleged harms.”²⁸⁹ Judge Stamp had addressed this issue, stating that:

While the eleven fraudulent claims may have been a relatively small percentage of the total number of claims included in the mass lawsuits, the third amended complaint defines the predicate acts as

that litigation activities alone cannot suffice as RICO predicate acts of mail and wire fraud, she went on to distinguish *Eisen*, finding that “predicate acts in *Eisen* amounted to far more than mere ‘litigation activities’ and instead involved an extensive and broader scheme to defraud defendants” *Curtis & Assocs.*, 758 F. Supp. 2d at 170–76.

²⁸⁶ Memorandum Opinion and Order Denying Lawyer Defendants' Motions to Dismiss, *supra* note 285, at 24–25.

²⁸⁷ *Id.* at 25 (internal citations omitted).

²⁸⁸ Verdict, *CSX Transp., Inc. v. Pierce*, 974 F. Supp. 2d 927 (N.D.W. Va. 2013) (No. 5:05-cv-202), 2012 WL 6677272.

²⁸⁹ Rosenbaum, *supra* note 22, at 166.

the mass lawsuits themselves and the commission of other acts of mail and wire fraud in furtherance of those claims.²⁹⁰

After the jury verdict in favor of CSX,²⁹¹ the lawyer defendants moved for judgment as a matter of law or, in the alternative, for a new trial, both of which were denied by the court.²⁹²

²⁹⁰ Memorandum Opinion and Order Denying Lawyer Defendants' Motions to Dismiss, *supra* note 285, at 35.

²⁹¹ *See* Verdict, *supra* note 288.

²⁹² *CSX Transp., Inc. v. Peirce*, 974 F. Supp. 2d 927, 932 (N.D. W. Va. 2013). One of the main arguments advanced was that CSX violated the court's order in response to the lawyer defendants Motion in Limine No. 1, "which precluded CSX from presenting evidence or argument that any claims other than the eleven claims at issue were fraudulent." *Id.* at 935. The violation claimed was the testimony of CSX's expert witness, Dr. John E. Parker, one of the leading experts on occupational lung diseases. He concluded that Dr. Harron's 25,000 x-ray reads for the Peirce firm—of which Dr. Harron found that 73% had asbestos-related fibrosis—did not conform to medical protocols for diagnosing asbestosis and were unreliable. Report of John E. Parker, M.D. at 9, *CSX Transp.*, 974 F. Supp. 2d 927 (No. 5:05-cv-202), 2012 WL 6626122. His testimony was thus not limited to the eleven claims that bore the RICO mantle but instead encompassed all of Dr. Harron's diagnoses for Peirce. *CSX Transp.*, 974 F. Supp. 2d at 935. Dr. Parker was asked by CSX to conduct an x-ray reading study of x-rays that had been read by Dr. Harron for the Peirce firm as positive for lung fibrosis. *See* "Contested 2012 chest radiographic reading study," in Report of John Parker, M.D., *supra*, at 1. He selected three "highly qualified, respected, and expert study readers," *id.* at 2, to reread a random sample of the x-rays read by Dr. Harron. *Id.* at 2–4. None of the sample x-rays that were readable were found to have fibrosis, whereas Dr. Harron had "found every individual [in the study] to have at least one abnormal film." *Id.* at 5–6. Dr. Parker concluded that "[t]he disparity between the findings by the expert study readers and the findings of the plaintiff physician readers are so extreme that I have no confidence in the accuracy of the classifications or interpretations by Drs. Harron and Breyer." *Id.* at 7. Dr. Breyer was another chest x-ray reader hired to replace Dr. Harron by Peirce when it became clear to everyone that Dr. Harron was "manufacturing diagnoses for money" and his x-ray readings were no longer acceptable by asbestos bankruptcy trusts or defendants. *See* Expert Report of Lester Brickman, *CSX Transp., Inc. v. Peirce*, *supra* note 261, at ¶¶ 42–48 (July 17, 2012). Dr. Breyer did 15,000 readings for Peirce, mostly rereading the Harron-read x-rays, and classified over 95% of the films he read as showing evidence of fibrosis. *Id.* at 8. Judge Stamp acknowledged that allowing this testimony violated his order but held that the effect on the jury was insubstantial because when the lawyer defendants objected at trial, he sustained their objection and directed the jury to disregard that part of Dr. Parker's testimony. *CSX Transp.*, 974 F. Supp. 2d at 935–36.

The lawyer defendants also argued that the court erred when it allowed Dr. Parker to testify that the prevalence of asbestosis in railroad workers, as determined in two clinical trials, was 1.6–2.0%. *Id.* at 939; *see infra* note 312. The court rejected this argument, saying the evidence was relevant to whether defendant Harron's x-ray readings were accurate and truthful. *CSX Transp.*, 974 F. Supp. 2d at 940.

After the motion was denied, the parties entered into a settlement calling for the defendant lawyers and Dr. Harron to pay CSX \$7.3 million.²⁹³

Rosenbaum's critique of the court for: (1) approving a RICO action based on litigation activities, (2) allowing damages to be calculated on the basis of the three mass actions consisting of over 5,300 claims even though CSX had limited its fraud case to eleven specific claims, ten of which had been dismissed on procedural grounds, and (3) admitting Dr. Parker's testimony, focuses on individual elements in the case but appears oblivious to the grand scheme that Harron, Peirce, and company had orchestrated and perpetrated. Indeed, she states that "CSX never alleged, nor argued, that any of the thousands of other claims [than the eleven] were fraudulent."²⁹⁴ In fact, CSX alleged that Peirce had embarked on a concerted campaign to defraud CSX by filing six mass lawsuits in West Virginia on behalf of over 5,300 plaintiffs.²⁹⁵ Judge Stamp concurred, stating that CSX alleged that it was the victim of a long term, massive fraud, encompassing all elements of the entrepreneurial model of fraudulent claim generation.²⁹⁶ The jury agreed.

Consistent with her critique, Rosenbaum basically dismisses CSX's allegations in the Third Amended Complaint with regard to the use of litigation screenings, which have been an integral part of the process of generating hundreds of thousands of nonmalignant asbestos claims, mostly based on medical reports "manufactured for money."²⁹⁷ Indeed, she contends that various components of the process are "quite legal."²⁹⁸ By contrast, in the federal multi-district silicosis litigation, Judge Jack found that the same elements of the entrepreneurial model constituted a

²⁹³ Press Release, CSX, CSX Concludes Racketeering and Fraud Litigation Against Asbestos Lawyers (Nov. 6, 2014), <https://www.csx.com/index.cfm/about-us/media/press-releases/csx-concludes-racketeering-and-fraud-litigation-against-asbestos-lawyers> [<https://perma.cc/5VVL-QMVN>].

²⁹⁴ Rosenbaum, *supra* note 22, at 212.

²⁹⁵ See Third Amended Complaint, *supra* note 261, at ¶ 89.

²⁹⁶ See Memorandum Opinion and Order Denying Lawyer Defendants' Motions to Dismiss, *supra* note 285, at 24–25. Engstrom supports the use of RICO in the CSX litigation. See Engstrom, *supra* note 22, at 700.

²⁹⁷ Rosenbaum, *supra* note 22, at 189.

²⁹⁸ *Id.* at 192.

scheme by “lawyers, doctors and screening companies . . . to manufacture[] [diagnoses] for money.”²⁹⁹ Put simply, litigation screenings are used to generate large, if not massive numbers of fraudulent claims in mass tort litigation.³⁰⁰ Indeed, litigation screenings are at the core of the entrepreneurial model of fraudulent claim generation.³⁰¹ Rosenbaum contends that litigation screenings are needed because “these procedures are often the only realistic means of . . . making workers exposed to asbestos aware of the harm done to them.”³⁰² As stated by Most Health Services, however, which screened over 400,000 potential asbestos litigants for plaintiffs’ counsel, Most Health Services provides no health services; its sole purpose is to generate litigation materials for lawyers.³⁰³

A significant part of CSX’s lawsuit focused on the Peirce firm’s use of Dr. Ray Harron to read the plaintiffs’ x-rays. Rosenbaum acknowledges that Dr. Harron “had a positive asbestosis diagnosis rate three to four times higher than the Peirce firm’s previous B-readers—a fact that . . . the Peirce firm was well aware of.”³⁰⁴ She further acknowledges that, in the silica MDL, Judge Jack called Dr. Harron’s diagnoses “‘unreliable,’³⁰⁵ and his procedures ‘distressing and disgraceful’ and ‘not remotely resemble[ing] reasonable medical practice.’”³⁰⁶ Rosenbaum goes on to assert, approvingly, that, nonetheless, “many of the activities of Dr. Harron and the Peirce firm are not unique.”³⁰⁷

²⁹⁹ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005); *see supra* note 17.

³⁰⁰ *See* Brickman, *Asbestos Litigation*, *supra* note 80, at 35–128; Brickman, *Mass Tort Fraud*, *supra* note 16, at 1232–43.

³⁰¹ *See* Expert Report of Lester Brickman, *CSX Transp., Inc. v. Peirce*, *supra* note 261 (July 17, 2012) (in which I describe the entrepreneurial scheme that plaintiffs’ counsel have used to generate hundreds of thousands of nonmalignant asbestos claims supported by medical reports that were “manufactured for money”).

³⁰² Rosenbaum, *supra* note 22, at 189.

³⁰³ *See* Brickman, *Asbestos Litigation*, *supra* note 80, at 65; RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 35 (2007).

³⁰⁴ Rosenbaum, *supra* note 22, at 191.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 189.

In support of Dr. Harron and, presumably, the other two dozen or so litigation doctors who provided the great majority of x-ray readings and diagnoses “manufactured for money” in asbestos litigation, Rosenbaum poses the subjective nature of reading chest x-rays as evidence of asbestos-caused fibrosis. This is the familiar trope of “inter-reader variability.” She states that “[t]he fact that there is some variation [in x-ray readers’ findings] is not only natural, but expected.”³⁰⁸ Inter-reader variability as an explanation for the gross disparities between the outcomes of clinical studies and litigation screenings,³⁰⁹ has been thoroughly debunked by studies of x-rays read by litigation doctors as “consistent with asbestosis,” which have later been reread by neutral experts who found error rates in excess of 90%.³¹⁰ Dr. Harron’s predominantly positive x-ray readings for Peirce³¹¹ may be usefully contrasted with the testimony by Dr. Parker that clinical studies of asbestos-related disease in railroad workers show that the existence of radiographic evidence of interstitial disease (asbestosis) ranged from 1.6 to 2.0%.³¹²

Rosenbaum’s acknowledgement of Judge Jack’s characterization of Dr. Harron’s diagnoses as “unreliable” could have been supplemented by reporting Judge Jack’s additional findings that “when Dr. Harron first examined 1,807 Plaintiff x-rays for asbestos litigation . . . he found all [that is, 100%] to be consistent only with asbestosis and not with silicosis. But upon re-examining these 1,807 MDL Plaintiffs’ x-rays for silica litigation, Dr. Harron found evidence of silicosis in every case.”³¹³ That is, upon rereading the x-rays that he had found were all “consistent with asbestosis,” he found 0% of these identical x-rays as “consistent with asbestosis” and 100% as “consistent with silicosis.” Also that Dr.

³⁰⁸ *Id.* at 191.

³⁰⁹ See Brickman, *supra* note 86, at 544–66.

³¹⁰ See *id.* at 550–57.

³¹¹ See *supra* note 292.

³¹² See Martin-Jose Sepulveda & James A. Merchan, *Roentgenographic Evidence of Asbestos Exposure in a Select Population of Railroad Workers*, 4 AM. J. INDUST. MED. 631 (1983); L. Christine Oliver et al., *Asbestos-related Disease in Railroad Workers*, 131 AM. REV. RESPIRATORY DISEASE 499 (1985); Yutaka Hosoda et al., *Railways and Asbestos in Japan (1928–1987)—Epidemiology of Pleural Plaques, Malignancies and Pneumoconioses*, 50 J. OCCUPATIONAL HEALTH 297, 299 (2008) (citing to a Pennsylvania study of railroad workers).

³¹³ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 608 (S.D. Tex. 2005).

Harron's doing so "cannot be explained as intra-reader variability. . . . [I]t can only be explained as a product of bias—that is, of *Dr. Harron finding evidence of the disease he was currently being paid to find.*"³¹⁴ Judge Jack also found that there were "two reports from Dr. Harron, wherein Dr. Harron diagnosed the same individual . . . on one date with silicosis and on another date with asbestosis (and neither report references the other)."³¹⁵ She noted that the two diagnoses were for the same chest x-ray, "meaning the diagnoses and the inconsistent work histories originated from the same mass screening."³¹⁶ The owner of the screening company that hired Dr. Harron testified that Dr. Harron was paid an additional \$50 to write a second diagnosis of silicosis at the time he diagnosed a person with asbestosis.³¹⁷

In March 2006, Dr. Harron and several other litigation doctors were subpoenaed to appear before the U.S. House of Representatives Energy and Commerce Subcommittee on Oversight and Investigation to answer a series of questions. The first question was: "Will you certify that each of these diagnoses [referring to Dr. Harron's diagnoses in the silica MDL] and all others that you made on this litigation are accurate and made pursuant to all medical practices, standards and ethics?"³¹⁸ Dr. Harron declined to respond, invoking his Fifth Amendment right against self-incrimination (as did Drs. Andrew Harron and James Ballard).³¹⁹ Dr. Harron also "took the Fifth" in asbestos litigation in Ohio,³²⁰ West Virginia, and in the course of the W.R. Grace bankruptcy proceeding.³²¹

³¹⁴ *Id.* at 608, 638 (emphasis added).

³¹⁵ *Id.* at 603.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Press Release, House Comm. on Energy & Commerce, Doctors Refuse to Testify at Silicosis Hearing; Others Recount Diagnoses 'Manufactured for Money' (Mar. 30, 2006), http://energycommerce.house.gov/108/News/03092006_1810.htm [https://web.archive.org/web/20060428005619/http://energycommerce.house.gov/108/News/03092006_1810.htm].

³¹⁹ *Id.*

³²⁰ Defendants' Brief in Support of Their Motion for an Evidentiary Hearing and Their Motion to Dismiss at 8, *In re All Asbestos Cases*, No. 073958 (Ohio Ct. Com. Pl. Feb. 3, 2006) (indicating that Dr. Ray Harron refused to answer questions about the medical evidence he had provided on Fifth Amendment grounds).

³²¹ See Expert Report of Lester Brickman, *CSX Transp., Inc. v. Peirce*, *supra* note 261, at ¶¶ 68–71 (July 17, 2012). The Manville Trust provides more damning evidence of Dr. Harron's

The evidence that Dr. Harron was a fraudster who “manufactured [tens of thousands of] diagnoses for money” is compelling.³²²

To put the capstone on Rosenbaum’s contention that Peirce’s claim generation process passed scrutiny, as noted, when the West Virginia court issued a CMO during the Peirce filings against CSX requiring each claimant to certify in writing that they were aware of their lawsuit and believed that their claims were “well founded in fact,” and requiring the plaintiffs to provide the defendants with all material in the possession of the plaintiffs and their counsel regarding claim exposure, diagnostic imaging, medical reports, and occupational illness screening. In addition, the CMO provided that the plaintiffs’ experts were subject to *Daubert* challenge with respect to the validity of their x-ray reads, medical reports, physical examinations, and pulmonary function tests. In response, the lawyer defendants moved to dismiss all but two of the 1,400 claims to which the CMO applied, and the court granted these dismissals *with prejudice*. This may be contrasted with Rosenbaum’s insistence that the core of the CSX litigation was a “few bad cases.”³²³

fraudulent practices. Data it compiled for the period 1995 through 2005 identifies the “top dates on which diagnoses were made or diagnosing reports were authored by [each of] the top 25” doctors who authored reports in support of asbestos claims submitted to the Manville Trust. See CRMC Response to Amended Notice of Deposition upon Written Questions at Ex. D, E, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875 (E.D. Pa. Mar. 2, 2006). The data shows that Dr. Harron issued a total of 3,069 “medical” reports on his “top ten” days, an average of 307 per “top ten” day, and ranging from a low of 232 reports issued on one day to a high of 515 reports. On that date, assuming a ten-hour day and no bathroom, food, or rest breaks, Dr. Harron read x-rays and diagnosed asbestosis at the rate of over fifty per hour. Note that this does not account for the approximately 30% of his x-ray readings that were negative.

³²² See *supra* note 292. Dr. Harron’s fraudulent x-ray reads and diagnoses of asbestosis and silicosis resulted in the revocation of his medical license in New York and the surrendering of his medical license in lieu of revocation in Mississippi and Texas. On April 13, 2007, the Texas Medical Board entered into an Agreed Order pursuant to which Dr. Harron agreed not to practice medicine for the remainder of time before his medical license expired and not to seek renewal of his license after it expired. Mandi Johnston, *34 Doctors Disciplined By the State*, NEWS RADIO 1200 WOAI, Apr. 18, 2007 (on file with author). The New York Department of Health Administrative Review Board for Professional Medical Conduct (ARB) issued a determination and order on June 23, 2009, revoking Dr. Harron’s license to practice medicine in New York and finding that he had engaged in an operation to find plaintiffs with silicosis whether or not the plaintiffs really had silicosis, had perpetrated a fraud on the courts, and had engaged in a course of conduct rather than a few aberrant acts. *In re Ray A. Harron*, No. BPMC 09-02, 2008 WL 5598209 (Dec. 30, 2008); see Expert Report of Lester Brickman, *CSX Transp., Inc. v. Peirce*, *supra* note 261 (July 17, 2012).

³²³ Rosenbaum, *supra* note 22, at 213–14.

The only plausible explanation for the firm's action is that claims supported only by diagnoses "manufactured for money" could not withstand the actual scrutiny of trial discovery which could have put the law firm at risk.

The CSX litigation illustrates how RICO can fall short of being an effective tool in responding to mass tort fraud. Had Judge Sweet presided over the CSX litigation, based upon his rulings in *G-I Holdings*, it is unlikely that he would have allowed the case to go to jury, as did Judge Stamp. Applying RICO requirements rigidly, Judge Sweet could easily have found that the Third Amended Complaint, coupled with CSX's acknowledgement that it could prove fraud in only eleven cases, fell well short of the requirements in Federal Rule Civil Procedure 9(b) that the allegation of fraud be pleaded with particularity, and therefore the pleadings did not adequately state a RICO claim. In the alternative, he could have allowed the case to go forward but trivialized damages by limiting them to the eleven fraudulent claims.

The fraud that the Peirce firm and Dr. Harron perpetrated was not done on a retail basis. CSX showed that Dr. Harron was a fraudster who manufactured x-ray reads and diagnoses for money; or in the words of Judge Jack, he found "evidence of the disease he was . . . being paid to find."³²⁴ The success of the fraudulent scheme depended on two strategies. First, inundating the West Virginia courts with thousands of asbestos claims, seeking to force the judges to resort to a wholesale resolution process such as a consolidation or a mass mediation with significant limits on CSX's rights to conduct discovery. Second, preventing CSX from using discovery to effectively contest the reliability of the plaintiffs' doctors' x-ray reads and diagnoses by limiting the defendants' ability to question Dr. Harron about the thousands of other diagnoses and x-rays reads he did for Peirce. If, as Rosenbaum contends, the RICO statute is to be interpreted to require that CSX show fraud in each or even just several handfuls of the thousands of individual claims that the Peirce firm filed, CSX could not then prevail. To be sure, in personal injury trials of individual cases, CSX could argue, contrary to the testimony of Dr. Harron or other litigation doctors acting in response to the same incentives, that the claim of injury had no medical

³²⁴ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 638 (S.D. Tex. 2005); see *supra* note 314.

basis. The outcome of this “battle of the experts” would be determined by juries that would lack knowledge of the scheme launched by Peirce and Dr. Harron to defraud CSX. Judge Stamp, on the other hand, having presided over a protracted proceeding in which the fraudulent scheme was exposed, came to fully understand how the scheme had been perpetrated. CSX’s inability to show individual cases of fraud, was, in Judge Stamp’s view, vastly outweighed by the evidence that CSX presented of the existence of an extensive and pervasive fraud and the judge ruled accordingly. Had Judge Stamp not done so, a small part of a massive mass tort fraud would have gone unsanctioned and not for the first time.

D. *The Garlock RICO Litigation*

On January 9, 2014, during the course of the *Garlock* bankruptcy proceeding (and one day before Judge Hodges issued his Estimation Order), Garlock filed RICO actions under seal,³²⁵ against four law firms that had frequently sued Garlock on behalf of mesothelioma claimants: the Shein Law Center,³²⁶ Waters & Kraus,³²⁷ Simon Greenstone Panatier Bartlett,³²⁸ and Belluck & Fox.³²⁹

³²⁵ The four RICO actions were filed under seal and were referred to the Bankruptcy Court. On July 23, 2014, the U.S. District Court issued an order withdrawing the reference to bankruptcy, based on a finding that these were non-core proceedings which could not be tried in bankruptcy court without the consent of all parties, which was not forthcoming, resulting in new case numbers being applied. Order, *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-116, 2015 WL 1013441 (W.D.N.C. Mar. 9, 2015). All the case numbers cited herein refer to District Court actions. So, some motions filed in the Bankruptcy Court were responded to after transfer to the District Court. Copies of the redacted complaints which are referred to in this Article became available when they were attached as exhibits to pleadings filed in January 2015.

³²⁶ Complaint, *Garlock Sealing Techs., LLC v. Shein Law Ctr., Ltd.*, No. 3:14-cv-137, 2015 WL 5155362 (W.D.N.C. Sep. 2, 2015).

³²⁷ Complaint, *Garlock Sealing Techs., LLC, v. Waters & Kraus, LLP*, No. 3:14-cv-00130, 2015 WL 1022291 (W.D.N.C. Mar. 9, 2015).

³²⁸ *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-00116, 2015 WL 5148732 (W.D.N.C., Sep. 2, 2015).

³²⁹ Complaint, *Garlock Sealing Techs., LLC v. Belluck & Fox, LLP*, No. 3:14-cv-118, 2015 WL 1022279 (W.D.N.C. Mar. 9, 2015).

In each of these actions, Garlock alleged that the defendant law firms and several of the principals had engaged in a deliberate and ongoing scheme to defraud Garlock by conspiring to conceal material evidence of their clients' exposures to asbestos products of companies that had gone bankrupt, which the defendants were obligated to disclose in response to interrogatories, CMOs, and testimony at depositions.³³⁰ The exposures to asbestos that were concealed were mostly to insulation products manufactured by Owens Corning, Armstrong World Industries, W.R. Grace, U.S. Gypsum, Babcock & Wilcox, Pittsburgh Corning, and others that went bankrupt in the early 2000s. The products of these companies, referred to as the "big dusties," surrounded pipe flanges and valves inside of which Garlock's gaskets were located. When the gaskets needed to be replaced, accessing the pipe flanges required first removing the asbestos insulation that covered the pipes. The insulation was usually caked and brittle from the high heat of the pipes, and often needed to be hammered off, causing a "snowstorm" of asbestos dust to fall on the workers replacing the gaskets.³³¹ The type of asbestos used in Garlock's gaskets was chrysotile, whereas amphibole asbestos was used in the insulation products. Judge Hodges noted that according to scientific literature, amphibole asbestos was 100 to 2000 times more toxic than chrysotile.³³²

Concealing the exposures to insulation products increased the value of the claims against Garlock by preventing Garlock from arguing—as it often successfully did prior to the bankruptcies—that its products were not a substantial factor in causing the plaintiffs' mesotheliomas.

In each of the four suits, Garlock presented evidence of what it alleged was perjurious testimony by plaintiffs in suits against Garlock denying exposures to the insulation products and that the plaintiffs' counsel had used that false testimony to argue that Garlock's products were the sole cause of plaintiffs' mesotheliomas.³³³

³³⁰ See e.g., Complaint, *Shein*, 2015 WL 5155362, *supra* note 326, at ¶¶ 2–3.

³³¹ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 78 (Bankr. W.D.N.C. 2014).

³³² *Id.* at 75.

³³³ For a discussion of these cases, see Future Claimants' Representative's Motion to Compel Responses to Discovery Directed to Motley Rice, LLC at 139, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Oct. 29, 2015), http://www.omnimgt.com/cmsvol2/pub_46825/555300_4940.pdf [<https://perma.cc/WK2Q-KJNG>] (Ex. E, RBH Memo) (summary of double dipping and

As an example of the scheme to defraud, Garlock described the case of Vincent Golini.³³⁴ On March 1, 2009, Golini was diagnosed with mesothelioma. Shortly thereafter, he hired the Shein Law Center and informed them that in the course of his employment, he frequently breathed asbestos dusts from pipe-covering products, identifying fourteen different asbestos-containing products with or around which he worked “frequently, regularly and in close proximity.”³³⁵ The products included asbestos pipe-covering made by Owens Corning, Fiberboard, Armstrong World Industries, and others, each of which had been reorganized under Chapter 11 and had funded § 524(g) trusts. The law firm prepared fourteen written statements, to be executed under penalty of perjury, setting forth Golini’s exposures to the pipe-covering products.³³⁶ Golini signed each of the fourteen written statements, certifying their truth “under penalty of perjury”; this occurred prior to the law firm’s filing an action against Garlock in Pennsylvania state court.”³³⁷

Despite Golini’s counsel being aware of his client’s exposures to the pipe-covering products, during discovery, Golini swore that he had no knowledge of exposure to any asbestos-containing products except those manufactured by Garlock.³³⁸

After Golini settled his claim with Garlock, using the written statements that Golini had signed before suit was brought, the Shein Law Center filed twenty trust claims for Golini.³³⁹ Each of these trust claims were based on exposures that the law firm had knowledge of but had concealed from Garlock after filing suit. Golini was thus able to gain multiple recoveries for his injury by lying about his exposures. And, as stated in the RICO complaint, “because the trusts’ governing documents

discovery abuse in cases studied by Garlock in its bankruptcy case) [hereinafter RBH Memo], responding to my request that Garlock’s counsel summarize the evidence that it had uncovered pertaining to discovery abuse in mesothelioma cases brought by plaintiffs against Garlock. The RBH Memo was incorporated by reference into Brickman, Garlock Expert Report, *supra* note 6 at ¶ 64 n.13.

³³⁴ Complaint, *Garlock Sealing Techs. v. Shein*, *supra* note 326, at ¶ 5.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.* ¶ 6.

³³⁹ *Id.* ¶ 7.

have confidentiality provisions [drafted by or for plaintiffs' counsel] that required them to preserve the secrecy of trust claims, Defendants had good reason to believe the perjury they had suborned in state court to inflate Golini's claims against Garlock would never be discovered."³⁴⁰

When defendant Benjamin P. Shein was deposed by Garlock during discovery authorized by Judge Hodges in the bankruptcy proceeding, Shein admitted that it was his regular practice to delay filing trust claims until after the personal injury cases he filed against Garlock and other solvent defendants were settled.³⁴¹ Shein stated that the purpose of delaying filing trust claims was to "maximize [plaintiffs'] recovery," which in turn maximized the defendants' contingency fees.³⁴² Indeed, Shein believed that he had a duty to do so. Judge Hodges described that as a "perverted" view of legal ethics.³⁴³

The RICO suit alleges that the fraudulent scheme illustrated by the Golini case was replicated in at least fifteen other cases that the Shein Law Center pursued against Garlock and other solvent defendants in Pennsylvania state court.³⁴⁴

In the RICO suits against the other law firms, Belluck & Fox, Simon Greenstone, and Waters & Kraus, each included specific presentations of instances of conflicting work histories and perjured testimony suborned by plaintiffs' counsel to conceal their clients' extensive exposures to the pipe-covering insulation produced by the reorganized companies that went bankrupt in the early 2000s.³⁴⁵

The lawyer defendants each moved to transfer venue from the North Carolina federal district court to courts in the jurisdictions where the law firms were located. All such motions were denied.³⁴⁶ The lawyer defendants argued that their actions in the litigation context could not,

³⁴⁰ *Id.*

³⁴¹ *In re* Garlock Sealing Techs., LLC, 504 B.R. 71, 84 (Bankr. W.D.N.C. 2014).

³⁴² Complaint, Garlock Sealing Techs. v. Shein, *supra* note 326, at ¶ 14.

³⁴³ *Garlock*, 504 B.R. at 84.

³⁴⁴ Complaint, Garlock Sealing Techs. v. Shein, *supra* note 326, at ¶ 14.

³⁴⁵ For a detailed discussion of these cases, see RBH Memo, *supra* note 333.

³⁴⁶ *See, e.g.*, *Garlock Sealing Techs., LLC v. Waters & Kraus, LLP*, 2015 U.S. Dist. LEXIS 28465 (W.D.N.C. Mar. 9, 2015) (order denying motion to transfer venue); *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-116 2015 WL 5148732 (W.D.N.C. Sept. 2, 2015) (order denying motion to transfer venue).

as a matter of course, serve as predicate acts for RICO.³⁴⁷ Judge Mullen rejected this argument, citing to cases noting the nonexistence of “any federal case which holds that a party’s litigation conduct in a prior case is entitled to absolute immunity and cannot form the basis of a subsequent federal RICO claim.”³⁴⁸ Judge Mullen went on to state:

The Court also notes that Defendants’ conduct as alleged in the Complaint goes well past the kind of routine litigation activities that these courts have found inadequate to state a claim under RICO. Defendants are accused of committing rampant fraud over the course of several years and in numerous venues throughout the country. These allegations suffice to state a claim for civil RICO.³⁴⁹

The defendants were free, however, to reassert these arguments after further development of the facts, in the form of a motion for summary judgment.³⁵⁰

The lawyer defendants each filed Rule 12(b)(6) motions to dismiss the complaints.³⁵¹ In turn, Garlock filed its opposition to the defendants’ motions, arguing that: it alleged sufficient facts to state a claim for relief and in sufficient support of its RICO claims; the *Noerr-Pennington* doctrine did not immunize litigation tactics that are an abuse of the judicial process; and the record was not sufficiently developed to allow the court to rule in favor of any of the defendant’s motions.³⁵²

³⁴⁷ See, e.g., *Garlock Sealing Techs., LLC v. Shein*, No. 3:14-cv-137, 2015 WL 5155362, at *3 (W.D.N.C. Sept. 2, 2015) (order denying motion to dismiss).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ See, e.g., Defendants’ Memorandum of Law in Support of Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Garlock Sealing Techs., LLC v. Shein*, No. 3:14-cv-00137-GCM-DSC, 2014 WL 7664364 (W.D.N.C. Nov. 5, 2014); Reply Memorandum in Further Support of Motion of Defendants Shein Law Center, Ltd., Benjamin P. Shein, Esquire and Bethann Kagan, Esquire to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Garlock Sealing Techs., LLC v. Shein*, No. 3:14-cv-00137-MOC-DSC (W.D.N.C. Dec. 11, 2014), 2014 WL 7664359; Defendants’ Memorandum in Support of Motion to Strike and, Alternatively, to Dismiss, *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-00116 (W.D.N.C. Apr. 16, 2014).

³⁵² See Plaintiffs’ Memorandum in Opposition re Motion to Strike and, Alternatively to Dismiss for Failure to State a Claim, *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-116, (W.D.N.C. Nov. 20, 2014).

Agreeing with Garlock's argument that the record was insufficiently developed at that point for the court to rule dispositively on most of the defendants' motions, Judge Mullen denied all of the defendants' Rule 12(b)(6) motions, including motions to dismiss the actions as time-barred, that its litigation activities were immunized by state court privileges and immunities, the *Noerr-Pennington* doctrine, state litigation immunity privileges, and anti-SLAPP statutes.

The stage was thus set for Garlock to undertake discovery in the RICO actions. To that end, Garlock sent document requests to the defendants. In addition, it

issued subpoenas to twenty trusts and claims processing facilities seeking (1) documents and correspondence related to claims submitted by or on behalf of claimants represented by Defendants in actions against Plaintiffs from 2002 until Plaintiffs' bankruptcy in 2010 and (2) documents and correspondence relating to the requirements for trust claim submissions.³⁵³

The defendants sought "a protective order precluding discovery into these matters. . . . contend[ing] that these matters are irrelevant and that discovery would be costly and impractical."³⁵⁴ The Magistrate Judge "conclude[d] that the discovery sought is relevant to Plaintiffs' RICO claim" and denied the defendants' motion.³⁵⁵ The defendants appealed to the district court judge, who upheld the Magistrate's Order, explaining that "Plaintiffs in this case have brought claims under the Racketeer Influenced and Corrupt Organizations Act. . . . It is a necessary part of these claims that Plaintiffs establish a *pattern* of racketeering activity rather than isolated incidents of fraudulent conduct, which is precisely what Plaintiffs seek in these subpoenas."³⁵⁶

Presumably, had discovery continued, Garlock would have sought to depose those claimants represented by Belluck & Fox who had successfully sued Garlock, and who denied under oath that they had been exposed to the products of the companies bankrupted during the

³⁵³ Garlock Sealing Techs., LLC v. Belluck & Fox, LLP, No. 3:14-cv-118, 2015 WL 1022279, (W.D.N.C. Mar. 9, 2015) (order denying plaintiffs' opposition).

³⁵⁴ *Id.* at 1.

³⁵⁵ *Id.*

³⁵⁶ *Belluck & Fox*, 2015 WL 1022279 (order affirming magistrate judge).

bankruptcy wave in the early 2000s but had also filed trust claims in which they asserted under penalty of perjury that they had “meaningful and credible exposure” to those very same products. Belluck & Fox would undoubtedly have sought a protective order to prevent such discovery, arguing that it would violate the lawyer-client privilege. In turn, Garlock would then have invoked the crime-fraud exception to allow the discovery to proceed. This same scenario would have unfolded in the course of the other three RICO actions. Litigation over the discovery requests, however, did not proceed, as events transpiring in the bankruptcy proceedings took precedence and ultimately preempted that discovery.

1. The Settlement of Garlock’s Disputed Plans of Reorganization and Its Effect on the RICO Actions

As noted, on January 10, 2014, in a sixty-five-page opinion, the *Garlock* bankruptcy court, per bankruptcy law,³⁵⁷ estimated that the amount needed to satisfy the Debtors’ obligation for mesothelioma claims as of June 2010, when Garlock filed for bankruptcy, was \$125 million; \$25 million of this sum was for current claims and \$100 million for future claims.³⁵⁸ This estimate, however, would not necessarily be the final word. The actual amount to be paid by Garlock would be determined by negotiation between the parties or, if no consensual plan of reorganization was agreed upon, then by other means. In the ensuing negotiations, current claimants would be represented by plaintiff lawyers who were appointed to the Debtor’s Official Committee of Asbestos Personal Injury Claimants (ACC) because of their leading role in the bankruptcy and bankruptcy counsel for the ACC.³⁵⁹ Because asbestos-caused injuries can manifest in as many as forty and even fifty years after initial exposures of sufficient duration and intensity to cause

³⁵⁷ 11 U.S.C. § 502(c) (2018).

³⁵⁸ *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 97 (Bankr. W.D.N.C. 2014). The Garlock Official Committee of Asbestos Personal Injury Claimants (ACC) urged the court to estimate Garlock’s total mesothelioma liability at \$1.3 billion, a sum that would likely have stripped Garlock of all of its equity.

³⁵⁹ 11 U.S.C. § 1102(a)(1) (2018). Often, these lawyers serve on multiple ACCs. See Brickman, *Mesothelioma Litigation Fraud*, *supra* note 13, at 1098 n.110.

disease,³⁶⁰ unlike other product-related bankruptcies, provisions have to be made for the thousands of future claimants who will emerge after the plan of reorganization has been approved. Bankruptcy Code § 524(g) was enacted to deal with these unique circumstances. Its purpose is to protect the interests of future claimants. Nonetheless, current claimants are also benefitted by the fact that, in order for an asbestos Debtor to gain acceptance of its plan of reorganization and be the beneficiary of a channeling injunction that would direct all future asbestos claims against the Debtor, post-bankruptcy, to the bankruptcy trust set up under the plan, there would have to be a vote by asbestos claimants with supermajorities of 75% required for approval.³⁶¹ Since plaintiffs have ceded their voting rights to their counsel, this has empowered plaintiffs' counsel to exercise full control over the outcome of § 524(g) balloting. This control, as set out below, has been used to enrich plaintiffs' counsel at the expense of future claimants.

To protect future claimants, § 524(g) requires the appointment of a Future Claims Representative (FCR) to represent their interests by *inter alia* assuring that sufficient funds are preserved for these claimants so that both current and future claimants are treated equitably.³⁶²

Despite the statutory purpose for appointing FCRs and the fiduciary duty owed by the FCR to future claimants, the great majority of asbestos trusts have nonetheless had to significantly decrease the amounts of compensation paid to future claimants from the levels initially established for those with personal injury claims against the Debtor.³⁶³ This is a result of the fact that the actual number of initial

³⁶⁰ *Asbestos*, MINN. DEP'T HEALTH, <https://www.health.state.mn.us/communities/environment/asbestos> [https://perma.cc/HXH9-D86N] (last visited Apr. 25, 2019).

³⁶¹ 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2018). This provides that at least 75% of a separate class of claimants whose claims will be addressed by a trust must approve the plan. For analysis of the impact of the § 524(g) voting provision, see S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841.

³⁶² 11 U.S.C. § 524(g)(3)(B)(i) (2018). FCRs are usually paid their hourly rate for part-time work, first from the bankruptcy estate and later from the ensuing trusts.

³⁶³ In a study of publicly available data for thirty-two trusts for the period 2010 to 2013, Professor S. Todd Brown found that about two-thirds of the trusts had reduced payments to claimants as least once since 2010 and that twenty had reduced their payment percentages from 9% to 93% from the initial levels set when the trusts became operational and significant funds had been paid. S. Todd Brown, *How Long is Forever This Time? The Broken Promise of*

claimants when trusts commence operations virtually always far exceeds the number estimated by the trusts in their calculations of the levels of compensation to be paid to claimants (which will vary with severity, age, extent of exposure, etc.), which are usually based on pre-bankruptcy claiming history.

This is so because plaintiff law firms typically file thousands of creditor claims in asbestos bankruptcies for asbestos personal injury claimants that they have represented in the past even though they had not previously named the Debtor as a defendant in lawsuits brought on behalf of these clients prior to the Petition Date. These filings are done for two reasons: (1) to maintain voting control under § 524(g) by maximizing the number of filings of that law firm; and (2) because the overwhelming majority of these Post-Petition claims will be paid by the

Bankruptcy Trusts, 61 BUFF. L. REV. 537, 595 app. A (2013) [hereinafter Brown, *Broken Promise*]. He concluded that “although trusts are established on the premise to pay all current and future victims equitably, this promise has already been broken at all but a few trusts.” *Id.* at 538–39; see also U.S. CHAMBER INST. FOR LEGAL REFORM, DUBIOUS DISTRIBUTION: ASBESTOS BANKRUPTCY TRUST ASSETS AND COMPENSATION 5 (2018) (“There were 35 confirmed trusts as of the beginning of 2008. Of those 35 trusts, 21 are paying claimants less today than in 2008. If a claimant received payments from all 21 of these trusts today, he or she would receive only 60% what would have been paid in 2008. In fact, in 2014 the net recovery from the 21 trusts represented a 46% reduction compared to claim payments in 2008.”); Marc C. Scarcella & Peter R. Kelso., *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14 MEALEY’S ASBESTOS BANKR. REP. 1 (2015) (“Asbestos bankruptcy trust funds are intended to pay initial and future claims in a equitable manner decades into the future. However, due to the accelerated depletion of funds, many asbestos trust claimants receive only half as much today as compared to the amounts similarly six years ago.”).

The pattern of inundating trusts with dubious initial claims began with the Johns-Manville bankruptcy (filed in 1982, which was prior to the enactment of § 524(g)). The trust that was established started paying claims in 1988. The leading plaintiffs’ counsel who represented the largest numbers of claimants had rewarded themselves in drafting the terms of the trust by providing for a first in, first-out system with few safeguards requiring auditing of the accuracy of the claims, leading to a “gold rush” upon the opening of the trust. Payments so far exceeded projections by the trust that after two years, the run on the trust’s assets become so severe that the trust’s operations had to be suspended and its procedures reorganized. When the trust reopened, claimants were paid only 10% of the settlement values initially adopted for the trust, a severe drop from the 100% of settlement values paid at the outset. I estimated that the “early-bird” counsel’s fees in the Manville Trust were approximately \$5,000 per hour for what was essentially an administrative proceeding with little if any adversarial elements. See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1835 n.61 (1992). As reflected in Brown’s data, the Manville debacle was not to be a one-off.

trust even though there is, at best, little valid medical evidence of injury or of actual and substantial exposure to the Debtor's asbestos-containing products.

This is supported by empirical evidence. The vast majority of personal injury claims filed in courts more than five years before being filed as Pre-Petition claims in asbestos bankruptcies are rarely viable under most states' laws. In a study filed in a recent asbestos bankruptcy, Marc C. Scarcella, a leading expert in providing economic analysis in asbestos bankruptcies, determined that the overwhelming majority of claims filed against asbestos defendants historically in the tort system have resulted in dismissals without payment. In a study done for the *Garlock* bankruptcy, of more than 800 pending asbestos personal injury creditor claimants who were required to complete a questionnaire that included disclosures of total settlements received from solvent tort defendants, 776 respondents who had filed tort lawsuits naming an average of 55–65 defendant companies, ultimately received settlement payments from an average of only nine defendants. Thus, the vast majority of these claimants' suits were resolved without payments. Based on other data, Scarcella concluded that any asbestos Pre-Petition creditor claims pending on an active court docket more than five years prior to the Petition Date are unlikely to have compensable value but for the bankruptcy.³⁶⁴

The reason why, despite this data, there is nonetheless widely disparate treatment of current and future claimants may be gleaned from considering the reigning incentives. The trusts' operating procedures are set out in Trust Distribution Procedures (TDPs), which have become largely standardized and are effectively imposed by the leading plaintiffs' firms, which also effectively select the FCRs and the trustees who are virtually always nominated by the leading plaintiffs' firms who populate the ACCs and the Trust Advisory Committees (TACs),³⁶⁵ the other structural components of bankruptcy trusts. Put

³⁶⁴ See Pretrial Order Disclosure for Expert Witness Marc C. Scarcella, *In re Oakfabco, Inc.*, No. 15-27062 (Bankr. N.D. Ill. July 3, 2018).

³⁶⁵ The TACS are populated by the leading asbestos law firms that represented tens of thousands of asbestos claimants during the bankruptcy and which will be representing new claimants once the trust is established. A list of some of these firms and the number of TACs on which they served in 2018 includes: Kazan, McClain, Satterly & Greenwood, PLC (25); Cooney & Conway (23); Weitz & Luxenberg PC (21); Baron & Budd (20); and Motley Rice, LLC (16).

simply, the leading plaintiffs' firms create and run the trusts, and effectively appoint the FCRs and the trustees,³⁶⁶ to principally serve their

TAC members serve as advisors to the trustees, exercising a leading role in determining how trusts compensate claimants. Along with the FCR, they have veto power over any amendments to the TDPs or changes in policy. See Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trust: A 2013 Overview of Trusts Assets, Compensation & Governance*, 12 MEALEY'S ASBESTOS BANKR. REP. 1, 11 (2013).

³⁶⁶ See *supra* text accompanying notes 151–57. Asbestos bankruptcy trusts are administered by part-time trustees also appointed by the court upon the recommendation of a plaintiffs' counsel. They oversee the management of the trust and the claim distribution process. Appointments as trustee or co-trustee are highly coveted and extremely lucrative. The third season of the widely popular television show “Billions” may provide some tantalizing insights into why trustees effectively selected by leading plaintiffs' counsel, as is the case with many FCRs, do not take actions that are adverse to the interests of leading plaintiffs' counsel. Billions co-creator and script writer is Brian Koppelman. According to Dan Fisher, a senior editor and long-term commentator on the tort system for Forbes, now with Legal Newsline, Koppelman's father, Charles Koppelman, who is not a lawyer, “sits on five asbestos bankruptcy trusts that paid their trustees a combined \$4.2 million in 2017. Four of the five have three trustees and Koppelman is sole trustee at the Melex Asbestos Plaintiffs Trust, which paid him \$373,428 in fees and expenses last year.” Daniel Fisher, *Art Imitates Life: ‘Billions’ Describes Six-Figure, Part-Time Jobs on Asbestos Trusts*, FORBES (June 6, 2018, 8:56 AM), <https://www.forbes.com/sites/legalnewsline/2018/06/06/art-imitates-life-billions-describes-six-figure-part-time-jobs-on-asbestos-trusts/#60117b74301b> [<https://perma.cc/88YH-YRM6>]. In a powerful scene from Billions, Chuck Rhodes (Paul Giamatti), a federal prosecutor and the co-leading figure in the television series, tries to get Ira, another character, to hide some incriminating evidence about Chuck's participation in an IPO, which could torpedo Rhodes' run for governor, stating

I have an offer for you.

I have lined up a seat for you on the . . . asbestos trust, rubberstamping claims.

One meeting per quarter.

Your fee, 350k a year.

Now that'll lead to more similar seats once you impress people.

Billions (2016) s03e1 Episode Script: *Tie Goes to the Runner*, https://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=billions-2016&episode=s03e01 [<https://perma.cc/PRR3-LB7H>]. Fisher continues, “[t]he search for pliable trustees, critics say, leads to the same people serving on multiple trusts, earning hundreds of thousands of dollars for each assignment.” Fisher, *supra*. Fisher provides a vivid illustration of why asbestos bankruptcy trusts have had to significantly reduce payments to future claimants from the levels that the trusts initially paid out to the claimants mostly represented by the lawyers who set up and controlled the trusts:

One of the trusts Koppelman helps oversee illustrates the importance of appointing trustees who safeguard the interests of future claimants as well as those of the plaintiff lawyers representing current claimants. The T H Agriculture & Nutrition trust was established in 2008 by a unit of Philips Electronics with \$900 million in

interests.³⁶⁷ As indicated by one plaintiff's counsel, the trusts are designed to permit claimants, mostly represented by law firms that play a leading role in drafting the trusts' operating procedures, to withdraw as much money as possible from the trusts as quickly as possible.³⁶⁸ Proofs of claim filed by counsel on behalf of trusts' claimants, which appear to typically include fungible work histories that qualify claimants for payment from fifteen to twenty or more trusts, are virtually never subjected to credible audits to weed out claims with false and inconsistent work histories.³⁶⁹ In addition, the hundreds of thousands of

assets, a startling number given that THAN had been a peripheral player in asbestos litigation that never paid more than \$39 million in claims in a single year.

Once in business, the trust started paying claims at 100% of estimated value, quickly transferring \$325 million to current claimants and their lawyers, who typically collect 30% or more of any claim. Most of the claimants who were paid full value were among the more than 90,000 who voted for the plan and whose lawyers controlled the structure and management of the trust.

After the highest-value claims had been paid, the trust announced a 16-month halt, then readjusted its estimates to reduce the payout to 30%, citing the need to preserve assets for the future against a higher-than-expected \$2.5 billion in claims.

The THAN trust was dominated by frequent fliers on the asbestos bankruptcy scene including Koppelman and Wolin, as well as an expert witness who has testified on the value of asbestos claims in nearly every bankruptcy in the past decade or so. The Future Claims Representative was Samuel Issacharoff, a NYU Law School expert on class actions and civil procedure who swore that future claimants were well protected under the first plan of distribution.

Id.

³⁶⁷ See Brickman, *Mesothelioma Litigation Fraud*, *supra* note 13, at 1097, for further analysis of the control exercised by leading counsel on trust formation and operation. According to Professor Brown's data, there were three trusts that did *increase* their payment percentages during the study period; two were J.T. Thorpe Trusts and the third was the Western Asbestos Settlement Trust. See Brown, *Broken Promise*, *supra* note 363. The FCR in these trusts was the Honorable Charles B. Renfrew, former U.S. District Court judge and Deputy Attorney General of the United States.

³⁶⁸ See *supra* note 155.

³⁶⁹ See, e.g., Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, WALL ST. J. (Mar. 11, 2012, 5:55 AM), <https://www.wsj.com/articles/SB10001424127887323864304578318611662911912> [<https://perma.cc/TZ5W-UYXG>]; see also *Furthering Asbestos Claim Transparency (FACT) Act of 2015: Hearing on H.R. 526 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the U.S. House Comm. on the Judiciary, 114th Cong. 66–67 (2015)* (statement of Lester Brickman). Long before evidence of inconsistent trust claiming became available, I opined that asbestos counsel were submitting trust claims

medical reports submitted by litigation doctors on behalf of nonmalignant claimants were mostly unreliable.³⁷⁰

At the time when Garlock filed for bankruptcy, pending asbestos claims consisted of 4,000 mesothelioma claims, 2,000 other cancer claims, 6,500 lung cancer claims, and 83,000 nonmalignant and unknown disease claims.³⁷¹ The vast majority of the nonmalignant claims had been filed before Judge Janis Graham Jack's detailed analysis of nonmalignant asbestos and silicosis claims, and her conclusion that the thousands of claims had been generated as part of a scheme by "lawyers, doctors and screening companies . . . to manufacture [diagnoses] for money."³⁷² Despite the fact that the vast majority of the nonmalignant claims were based on invalid medical reports that were "manufactured for money," and the requisite proof of exposure was often satisfied merely by a statement by the claimant or on his behalf that the claimant worked at a specific listed site irrespective of whether the claimant was in or proximate to the building at that work site where asbestos was used, these claims would have, nonetheless, been deemed valid under the trust distribution procedures that were adopted and implemented in most previous asbestos bankruptcies.

The problem of predicting the number of asbestos claims that will be filed when trust operations commence is obviated in non-asbestos related bankruptcies in part because bankruptcy law provides for the establishment of a Bar Date by the court which requires all creditors to file a proof of claim prior to a set date or have their claims disallowed.³⁷³ In asbestos bankruptcies, however, because of the ten to forty year latency period before asbestos-caused diseases may manifest after initial exposures, establishing a Bar Date applicable for future claimants is problematic as a matter of due process (though this is not the case for

with inconsistent work histories in order to maximize their clients' and their contingency fees. See Brickman, *Asbestos Litigation*, *supra* note 80, at 74–76 n.120.

³⁷⁰ For discussion of the rampant fraud that has prevailed in nonmalignant asbestos litigation, see Brickman, *supra* note 86, at 514–77; Brickman, *Asbestos Litigation*, *supra* note 80, at 35–141; see also *supra* notes 308–22 and accompanying text.

³⁷¹ See Motion for an Asbestos Claims Bar Date and Related Relief, *In Re* Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. Nov. 26, 2014) (filed by Jonathan P. Guy on behalf of Future Asbestos Claimants) [hereafter Garlock FCR Bar Date Motion].

³⁷² See *supra* note 299.

³⁷³ Fed. R. Bankr. P. 3003(c)(2).

current claimants who know that they have been diagnosed with a disease). Moreover, plaintiffs' counsel, including those who serve on ACCs are opposed to adoption of Bar Dates³⁷⁴ in part because they commit the firms to make filings, as failure to do will bar those claims. Indeed, due to this opposition, Bar Dates appear to have been ordered in few asbestos bankruptcies. In recent years, however, bar dates have been set in several asbestos bankruptcies including those of USG Corp.,³⁷⁵ Babcock & Wilcox,³⁷⁶ and W.R. Grace & Co.³⁷⁷ More recently, a bankruptcy court has ordered a Bar Date in an asbestos bankruptcy that applies not only to current claimants but to future claimants as well.³⁷⁸

It is notable that in virtually every asbestos bankruptcy subsequent to the enactment of § 524(g) after the Manville bankruptcy, bankruptcy courts have appointed³⁷⁹ FCRs recommended to the court by the ACCs. In the *Garlock* bankruptcy, however, the Debtor recommended and the

³⁷⁴ See, e.g., Order Approving Disclosure Statement and Establishing Asbestos Claims Bar Date and Procedures for Solicitation, *In re Garlock Sealing Techs.*, No. 10-31607 (Bankr. W.D.N.C. Apr. 10, 2015) (Exhibit 5).

³⁷⁵ *In re USG Corp.*, 290 B.R. 223, 227 (Bankr. D. Del. 2003).

³⁷⁶ *Garlock FCR Bar Date Motion*, *supra* note 371, at 22.

³⁷⁷ *Id.*

³⁷⁸ In the *Specialty Products Holding Corporation* asbestos-related bankruptcy, the Debtor sought approval of a Bar Date for all claimant—both current and future. Debtors' Motion for Approval of Asbestos Bar Date Notice Plan, *In re Specialty Prods. Holding Corp.*, No. 10-11780 (Bankr. D. Del. Apr. 17, 2014). The ACC objected to the Debtors' motion. Supplemental Brief in Support of Objection of the Official Committee of Asbestos Personal Injury Claimants to the Debtors Certification of Counsel Regarding Order Establishing Bar Dates for Filing Proofs of Claim and Approving Related Relief, *In re Specialty Prods. Holding Corp.*, No. 10-11780, (Bankr. D. Del. Jan. 2, 2014). A major focus of the parties was the issue of notification not only to those with current claims but also those who had not yet manifested with an asbestos disease from being exposed to Specialty Products. The Debtor argued that its "Notice Plan" was designed to reach 90% of men fifty-five years or older who were most likely to allege exposure to Specialty Products asbestos-containing products, extending over a nine-week period, and would cost \$3.2 million. Heather Istringhausen Gvillo, *Bondex Requests Approval of Deadline Notice Plan in Bankruptcy Proceedings*, LEGAL NEWSLINE (Apr. 23, 2014), <https://legalnewsline.com/stories/510517436-bondex-requests-approval-of-deadline-notice-in-bankruptcy> [<https://perma.cc/24M7-WMJ8>]. The Delaware bankruptcy judge granted Specialty Products' motion for a Bar Date for both current and future claimants. Jamie Santo, *SPHC Claims Deadline Applies to All Creditors, Judge Says*, LAW360 (Feb. 5, 2014, 10:55 PM), <https://www.law360.com/articles/507492/sphc-claims-deadline-applies-to-all-creditors-judge-says> [<https://perma.cc/P5NE-HWE4>]; see Debtors' Motion for Approval of Asbestos Bar Date Notice Plan, *In re Specialty Prods. Holding Corp.*, No. 10-11780 (Bankr. D. Del. Apr. 17, 2014).

³⁷⁹ 11 U.S.C. § 524(g)(4)(B)(i) (2018).

bankruptcy court appointed a prominent Charlotte lawyer, Joseph W. Grier, III, as FCR. Mr. Grier had never been involved in an asbestos bankruptcy case and also had never represented an asbestos plaintiff in a personal injury action.³⁸⁰ Undoubtedly, both the FCR and Garlock were aware of the history of asbestos bankruptcy trusts being overwhelmed by the deluge of many thousands of dubious nonmalignant claims that nonetheless generated billions of dollars in payments by trusts, resulting in depriving future claimants of equitable compensation.³⁸¹ As an independent fiduciary for future claimants, the FCR, as revealed in his filings, also recognized that in seeking to assure fair treatment, he would necessarily be adverse to the ACC when seeking to prevent the unfair depletion of trust assets by current claimants at the expense of future claimants and would also be adverse to the Debtors in seeking to maximize funding for the trust.³⁸²

To attain the objective of obtaining reliable data as to the pool of existing current claimants by limiting the ability of plaintiffs' counsel to overwhelm the Garlock trust with claims that would not pass muster in the tort system, it appears that two strategies emerged for the FCR. First, to set a Bar Date for current claimants so that the ensuing asbestos trust would at least know the maximum possible number of current claims when setting payment values. Second, to adopt a plan of reorganization

³⁸⁰ Garlock FCR Bar Date Motion, *supra* note 371, at 8.

³⁸¹ The near routine failure of many FCRs to effectively protect the interests of future claimants—a failure which redounds to the interests of plaintiffs' counsel (who selected these FCRs) has come to the attention of the United States Department of Justice (DOJ). On September 26, 2018, the DOJ objected to the appointment of Lawrence Fitzpatrick as an FCR in an asbestos bankruptcy, stating that he had potential conflicts of interest from close relationships with plaintiff attorneys in asbestos litigation that may compromise his independence as FCR. See John Sammon, *Dept. of Justice Objects to Appointment of Asbestos Trust Fund Protector, Calls for Greater Scrutiny*, LEGAL NEWSLINE (Sept. 27, 2018), <https://legalnewsline.com/stories/511582362-dept-of-justice-objects-to-appointment-of-asbestos-trust-fund-protector-calls-for-greater-scrutiny> [<https://perma.cc/DE8Y-322S>]. A month later, a New Jersey bankruptcy Judge, Michael B. Kaplan, overruled the DOJ's objections, calling challenges over Fitzpatrick's disinterestedness “nonsense” and a “nonstarter” and Kaplan “took the objectors to task for questioning whether Fitzpatrick can effectively represent future claimants, saying the term ‘effective’ does not appear in the definition of ‘disinterested. . . .’” Alex Wolf, *Asbestos Trust Rep Beats DOJ Objection In Duro Dyne Ch. 11*, LAW360 (Oct. 16, 2018, 11:01 PM), <https://www.law360.com/articles/1092955/asbestos-trust-rep-beats-doj-objection-in-duro-dyne-ch-11> [<https://perma.cc/WL37-HRJG>].

³⁸² Garlock FCR Bar Date Motion, *supra* note 371, at 10.

that would reject the usual TDPs and instead create procedures that would require reliable medical evidence of disease and of substantial exposure to Garlock products.

Following the appointment of the FCR and the court's Estimation Order, the Debtors filed their First Amended Plan of Reorganization on May 29, 2014, providing \$245 million for a trust that was to "pay claimants who [were] willing to accept settled values proposed by the Debtor."³⁸³ The plan set forth far more stringent requirements than in previous asbestos bankruptcies regarding production of medical evidence and evidence of actual and substantial exposure to its products.

On two occasions, the Debtor in the *Garlock* bankruptcy sought to have the court issue a Bar Date as to current claimants. Both motions were rejected by the court as being premature.³⁸⁴ The FCR, however, later moved to set a Bar Date for current claims that would require current claimants to provide medical certification of their disease and evidence of their exposure. The motion to establish a Bar Date was approved by the Bankruptcy Court on April 10, 2015.³⁸⁵

During the negotiations that followed on adopting a consensual plan of reorganization, the FCR met frequently with the ACC, but these efforts were unsuccessful.³⁸⁶ Thereafter, the FCR did reach agreement with the Debtors to adopt the Second Amended Plan of Reorganization, even though they expected that the ACC would reject the Second Amended Plan. Indeed, thereafter, plaintiffs' counsel on the ACC overwhelmingly rejected the plan.³⁸⁷

In addition to rejecting the ACC's position, in a further departure from all previous asbestos bankruptcies, the Garlock FCR advanced a novel argument that he and not plaintiffs' counsel had voting control over approval of the plan because his clients, both in number when compared to legitimate current claims and in dollar value, far exceeded

³⁸³ *Id.* at 16.

³⁸⁴ *Id.* at 1.

³⁸⁵ Order Approving Disclosure Statement and Establishing Asbestos Claims Bar Date and Procedure for Solicitation, *In re Garlock Sealing Techs., LLC*, No. 10-31607, (Bankr. W.D.N.C. Apr. 10, 2015).

³⁸⁶ See Statement of Joseph W. Grier, III, The Future Claimants' Representative, In Support of the Debtors' Second Amended Plan of Reorganization at 2, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Apr. 10, 2015) [hereinafter FCR 4/10/15].

³⁸⁷ *Id.* at 2.

that of current claimants. After discounting the number and value of the nonmalignant claims, the FCR stated that from 2008 until 2010 when Garlock filed for bankruptcy, 85–87% of all payments to asbestos plaintiffs were for mesothelioma.³⁸⁸ Further, the FCR claimed that the parties' experts largely agreed that asbestos claims against Garlock would continue "for the next 35 years or so"³⁸⁹ and that "the [future] FCR's clients represent more than 75% of all mesothelioma claims."³⁹⁰ Indeed, he contended that future asbestos claimants, as a group, were "by far the largest creditor constituency in the case."³⁹¹ Because future claimants were not yet known, he argued that the FCR "must vote on their behalf to protect their interests, *whether* it be a regular Chapter 11 plan or a 524(g) plan."³⁹²

The plan the FCR accepted as "fair and reasonable," embodied in the Debtors' Second Amended Plan of Reorganization (the Second Plan), was filed on January 14, 2015.³⁹³ Using his pivotal position, the FCR was able to raise the Debtors' payment to \$327.5 million for the asbestos settlement trust plus \$30 million for an asbestos litigation fund, with a further \$132 million guaranteed over the life of that fund if needed, along with the Debtor's agreement to pay allowed pre-petition settlement claims, projected to be \$10 million for a total package of \$499.5 million. Both the Debtors and the FCR agreed to provisions, including many that had been set out in the First Amended Plan designed to prevent or at least minimize inundation of the trust by thousands of claims that had no valid medical support or adequate proof of exposure. To that end, the FCR and Garlock agreed to abandon the standard Trust Distribution Procedures (TDPs) and to set terms limiting trust payments to only those who could produce evidence of actual exposure, and credible diagnoses of disease, in a document titled the Settlement Facility Claims Resolution Procedures (CRP).

The Debtors and the FCR argued that the plan was not being advanced under § 524(g), and therefore no channeling injunction was

³⁸⁸ Garlock FCR Bar Date Motion, *supra* note 371, at 6–7.

³⁸⁹ *Id.* at 9.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 10 (emphasis added). The issue of whether an asbestos bankruptcy can proceed under Chapter 11 and not under § 524(g) is discussed *infra*.

³⁹³ FCR 4/10/15, *supra* note 386, at 2.

being sought, but rather under standard bankruptcy law and moved for partial summary judgment on the grounds

that section 524(g) of the Bankruptcy Code is not exclusive in this bankruptcy case and does not preclude Debtors from relying on separate sources of authority under the Bankruptcy Code to obtain the [channeling] injunction sought in the Second Amended Plan of Reorganization . . . and . . . that the FCR appointed to “represent the interest of, appear on behalf of, and be a fiduciary to” future claimants has authority to cast a ballot on behalf of those future claimants.³⁹⁴

Future claimants would then be recognized as a class of creditors, separate from the class of current asbestos claimants who had rejected the proposed plan of reorganization, thus setting up a possible “cramdown” contest in which the court could order the confirmation of the plan over the objection of the class of current claimants.³⁹⁵

The ACC, in turn, cross-moved the court for “Summary Judgment Denying Confirmation [of the Second Amended Plan] Based on Plan’s Failure to Comply with Bankruptcy Code § 524(g).”³⁹⁶ The ACC argued that the proposed plan would provide inadequate settlement amounts while Garlock’s “equity retains hundreds of millions in value”³⁹⁷— results that it argued Garlock could not achieve under § 524(g) because any such plan would be rejected by claimants.³⁹⁸ The ACC’s core argument was that the plan was “an audacious attempt to circumvent § 524(g) and remake the legal regime that has governed asbestos reorganization since that statute was enacted in 1994. *Section 524(g) is*

³⁹⁴ See Debtors’ and FCR’s Brief in Support of Motion for Partial Summary Judgment that Section 524(g) is Not Exclusive and FCR Has Authority to Vote at 2, *In re* Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. Nov. 25, 2015). As for the channeling injunction, Garlock and the FCR argued that it could be issued as had been done pre-§ 524(g) in the Johns-Manville bankruptcy. *In re* Johns-Manville Corp., 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986), *aff’d*, 78 B.R. 407 (S.D.N.Y. 1987), *aff’d sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

³⁹⁵ 11 USC § 1129(b) (2018).

³⁹⁶ Motion of the Official Committee of Asbestos Personal Injury Claimants for Summary Judgment Denying Confirmation Based on Plans Failure to Comply with Bankruptcy Code § 524(g), *In re* Garlock Sealing Techs., LLC, No. 10-13607 (Bankr. W.D.N.C. Nov. 20, 2015).

³⁹⁷ *Id.* at 1.

³⁹⁸ *Id.* at 2.

the only remedy available for effectively dealing with mass-tort claims in a Chapter 11 setting."³⁹⁹ Therefore, "the Plan is unconfirmable as a matter of law because Debtors can reorganize and exit bankruptcy only by means of section 524(g) and because there is nothing in the Bankruptcy Code that authorizes the FCR to vote the 'potential claim' of persons not yet identified."⁴⁰⁰

Both sets of parties responded to their adversaries' motions in mid-December 2015.⁴⁰¹ If the ACC prevailed and no agreement on a plan was forthcoming for an extended period of time, the ACC would be able to propose its own plan but could not force the Debtors to contribute to such a plan, resulting in a stalemate and possible dismissal of the bankruptcy back to the tort system, a problematic dismissal for the debtors. But the stakes for the ACC and the asbestos plaintiffs' bar may have been even higher. A ruling in favor of the FCR's authority to vote on behalf of the estimated number of future malignant claimants or in favor of the argument that § 524(g) was not the exclusive route to a plan of reorganization in an asbestos bankruptcy could have broken the asbestos bar's ironclad grip on plans of reorganization in future asbestos bankruptcies. On the day before the hearing on the motions for partial summary judgment set for January 6, 2016, the Debtors, ACC, and the FCR jointly asked the bankruptcy court to stay proceedings in order to accommodate negotiations on a fully consensual plan of reorganization.⁴⁰² All proceedings were then stayed pending further negotiation by the parties.

In the negotiation of the Third Amended Plan of Reorganization (Third Plan), later modified and in final form, identified as the

³⁹⁹ *Id.* at 8–9 (emphasis supplied).

⁴⁰⁰ Motion of the Official Committee of Asbestos Personal Injury Claimants for Partial Summary Judgment that Class 4 Claims are Impaired and the FCR Has No Authority to Vote on the Plan, *In re* Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. Nov. 20, 2015).

⁴⁰¹ See Debtors' and FCR's Opposition to Committee Motions for Summary Judgment on 524(g) and FCR Authority to Vote, *In re* Garlock Sealing Techs. LLC, No. 10-31607 (Bankr. W.D.N.C. Dec. 18, 2015); Opposition of the Official Committee of Asbestos Personal Injury Claimants to the Debtors and Future Claims Representative's Motions for Partial Summary Judgment, *In re* Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. Dec. 18, 2015).

⁴⁰² Disclosure Statement for Modified Joint Plan of Reorganization of Garlock Sealing Technologies LLC, et al. and Oldlco, LLC, Proposed Successor by Merger to Coltec Industries Inc at 41–42, *In re* Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. July 29, 2016) [hereinafter Disclosure Statement 7/29/16].

“Modified Joint Plan of Reorganization,” which was to be a standard § 524(g) trust with no litigation option, the agreement reached provided for Garlock to pay \$370 million and for Garlock’s parent, Coltec,⁴⁰³ to pay an additional \$110 million for a total of \$480 million.⁴⁰⁴ The Third Plan did not include a litigation component; the trust component was exclusive. By comparison, including the Debtors’ agreement to pay for certain settled claims, the Debtor/FCR’s Second Amended Plan, which had both a trust option and a litigation option, totaled \$500 million. (After the inclusion of Coltec in the settlement, the ACC was superseded by the Claimants Advisory Committee (CAC), consisting of counsel representing the interests of holders of present Coltec asbestos claims and holders of present Garlock asbestos claims.)

After agreeing to the amount to be transferred to the trust, Garlock was no longer actively involved, and the remaining negotiations were between the FCR and the ACC concerning the provisions of the CRP—with the ACC seeking to adopt the standard TDP and the FCR seeking approval of the CRP attached to Debtor/FCR’s Second Amended Plan that was designed to limit to the maximum extent possible the deluge of illegitimate claims that inundated trusts after the standard TDP was included in the final plan of reorganization.⁴⁰⁵ The resulting CRP was a victory for the FCR as critical, protective provisions in the CRP negotiated with Garlock were included in the final version of the CRP.⁴⁰⁶

⁴⁰³ Coltec had been named as a defendant in suits against Garlock but never paid out any sums. As part of the grand settlement, Coltec was put into bankruptcy so it could benefit from the channeling injunction.

⁴⁰⁴ Amended Chapter 11 Plan Modified Joint Plan of Reorganization of Garlock Sealing Technologies LLC, et al. and OldCo, LLC, Proposed Successor by Merger to Coltec Industries Inc, *In re* Garlock Sealing Techs., LLC, No. 10-31607 (Bankr. W.D.N.C. July 29, 2016). The Debtor also agreed to pay certain settlement and judgment claims bringing the total in excess of \$500 million.

⁴⁰⁵ Notably, the three trusts that increased their payment percentages, *see* Brown, *Broken Promise*, *supra* note 363, had “[trust] distribution procedures that departed significantly from the standard trust distribution procedures.” Garlock FCR Bar Date Motion, *supra* note 371, at 19.

⁴⁰⁶ The CRP that was adopted differs from standard TDPs in a variety of significant ways. While standard TDPs do not impose any filing fees, the CRP requires payment of filing fees—\$100 for mesothelioma claims, \$75 for lung cancers, and \$50 for other cancer claims and asbestosis claims—which are refundable when a claimant receives and accepts an offer from the trust. Amended Chapter 11 Plan, *supra* note 404, at 11–13, 32 (Exhibit B) [hereinafter CRP]. The objective presumably is to deter plaintiffs’ counsel from inundating the trust with their

inventories of thousands of asbestos claimants that lack valid evidence of exposure to a debtor's products and of a nonmalignant disease which usually takes place once plans of reorganization are confirmed.

The plan slightly enlarged the disease categories that would merit payment, including adding coverage for those “alleging certain cancers other than mesothelioma, lung and laryngeal cancer and . . . [for] claimants alleging any one of three degrees of asbestosis (severe asbestosis, disabling asbestosis and non-disabling asbestosis).” Disclosure Statement 7/29/16, *supra* note 402, at iii. This was offset by the Claims Payment Ratio limiting total payments annually for nonmalignant claims and “other cancers” to 5% of the annual payouts. The bulk of payments were reserved for mesothelioma claimants with a maximum of 85% annual payments and lung cancers with a maximum of 10%. CRP, *supra*, at 11–12. This is one of the highest percentages for mesothelioma claims for any trust, reflecting, in part, the low dose levels associated with the Debtors’ products, which could potentially cause mesothelioma but not necessarily other diseases which may require higher exposures. Claims of asbestosis were further limited by requiring that diagnoses of asbestosis would have to be made by “(i) a board-certified pathologist, who personally reviewed the Injured Party’s pathology, or (ii) a board-certified internist, pulmonologist, radiologist, or occupational medicine physician who actually examined the Injured Party or reviewed and listed relevant medical records with findings contained in a narrative report. . . . A finding by a physician that a Claimant’s disease is ‘consistent with’ or ‘compatible with’ asbestosis shall not alone be treated by the Settlement Facility as diagnosis.” CRP, *supra*, at 23.

These provisions are presumably intended to bar plaintiffs’ counsel’s use of litigation doctors who have provided hundreds of thousands of “diagnoses manufactured for money” in support of nonmalignant trust claims. Indeed, were these provisions included in the TDPs of the last thirty bankruptcy trusts’ plans of reorganization, billions of dollars in payments for claims supported by “diagnoses manufactured for money” could have been avoided.

Another critical difference between the standard TDP and the CRP is that the former does not require claimants to identify other exposures they claimed in personal injury litigation or trust claims—indeed, standard TDPs have provisions intended to facilitate suppression of such information so as to facilitate the type of fraudulent claiming that was documented in the Garlock bankruptcy proceeding. *See supra* notes 1–9. The CRP, however, requires that “Extraordinary Review” claimants Qualifying for Extraordinary Review allows settlement offers five times greater than Expedited Review—the only other category must demonstrate a history of extraordinary exposure to Garlock products with little or no exposure to any other companies’ products. This requirement will severely limit the number of claimants able to seek Extraordinary Review. Most claimants will be seeking Expedited Review, *see* CRP, *supra* (Appendix I, Expedited Claims Review), and will have to go well beyond the requirements set forth in standard TDPs to prove exposure. It will be insufficient to merely show that a claimant worked with or near an asbestos product. *See* CRP, *supra*, at 27. Instead, the CRP requires that a claimant during his employment, must show that he was regularly exposed to asbestos fibers that were released by grinding, scraping or wire brushing gaskets to remove them or cutting gaskets from asbestos sheet material or cutting or removing asbestos packing. *Id.* at 3, 25–27. Under the standard TDP, it is sufficient for a claimant to qualify for payment by stating that he worked at a plant site named in the TDP where a debtor’s products were in use. The CRP specifically states that this is insufficient to demonstrate the exposure required to qualify for

In light of the history of asbestos bankruptcies, it appears unlikely that the *Garlock* bankruptcy could have been resolved in the manner that it was had the appointment of the FCR followed the well-worn path taken in previous asbestos bankruptcies.

After the conclusion of the negotiation of the financial details of the plan of reorganization, the CAC notified Garlock that as a condition for a consensual plan of reorganization, Garlock would have to dismiss its four RICO actions.⁴⁰⁷ With the Modified Joint Plan of Reorganization (Modified Plan) preserving sufficient equity for Garlock to emerge as a viable company, Garlock agreed and the parties filed a

payment. Instead, Garlock claimants will have to provide highly detailed product exposure evidence. *Id.* at 28.

One set of provisions in the CRP, perhaps more than any other, appears to take direct aim at the fraudulent practices revealed in the Garlock bankruptcy proceeding and is a direct counter to the standard TDP provisions seeking to facilitate suppression of evidence of a tort claimants' exposures to the products of reorganized companies. These provisions require that a Garlock trust claimant must credibly demonstrate and document exposure to Garlock products for at least certain stated periods of time. *See id.* at 27–28. All Garlock trust claimants must identify all other asbestos-related claims that the claimant has asserted including copies of any documents submitted or served upon another bankruptcy trust or in a litigation. *Id.* at 28.

The Claimant shall also certify that, to the best of his knowledge at that time, with the exception of the Other Claims that been expressly disclosed and identified by the Claimant, no other Entity is known to the Claimant to be potentially responsible for the alleged injuries that are the basis for the claims.

Id. at 28. In addition, claimants seeking Extraordinary Claim Review are required to identify a complete set of information about all other claims made by the claimant that “relate in any way to the alleged injuries for which the Claimant seeks compensation” including lawsuits and other trust claims. *Id.* at 27. The Garlock trust claimant must also provide copies of all documents that were submitted to trusts or used in litigation in support of such claims. *Id.* at 28. Additionally, the Garlock trust claimant seeking Extraordinary Claim Review must also execute a release of information in favor of the Garlock Settlement Facility authorizing all asbestos bankruptcy trusts against which the claimant has also filed a claim, to release all information submitted to that trust and the status of any such claim and the amount and date of any payment. *Id.*

Finally, standard TDPs authorize trustees to develop audit programs to deter fraudulent claims. Simply authorizing audits, however, has proven to be remarkably effective in trustees' determinations that they are unaware of any fraudulent claims. The CRP provides that trustees “shall develop methods for auditing the claims process” in consultation with plaintiffs' counsel on the CAC and the FCR. *See CRP, supra*, at 39.

⁴⁰⁷ Three of the four RICO defendants, Belluck & Fox, Simon Greenstone, and Waters & Krause were on the CAC. It is plausible to conjecture that at least in part, the settlement with Garlock had as a purpose the securing of the dismissal of the four RICO suits.

joint motion to stay the RICO cases pending confirmation of the Consensual Plan of reorganization by the bankruptcy court.⁴⁰⁸ The motion provides that the four RICO actions “will be dismissed with prejudice” and that “the settlement of these [four RICO] Actions was necessary for the Consensual Plan to be confirmed”⁴⁰⁹ The Modified Plan was approved by the court on June 12, 2017.⁴¹⁰

E. *The John Crane RICO Litigation*

In June 2016, a leading asbestos defendant, John Crane, Inc. (JCI), a major seller of gaskets and a competitor to Garlock (but not a gasket manufacturer as was Garlock) whose products, as with Garlock’s, also contained encapsulated chrysotile asbestos, filed fraud and RICO claims against the Shein Law Center, Benjamin P. Shein,⁴¹¹ and the Simon Greenstone Panatier Bartlett law firm.⁴¹² JCI’s RICO suits largely track the RICO actions filed by Garlock. Both complaints are substantially similar in their statements of the nature of the action, parties, and jurisdiction and venue, and list identical counts and prayers for relief. The Simon Greenstone complaint provides a more detailed analysis of elements of the alleged fraudulent scheme and more exemplar cases.⁴¹³

⁴⁰⁸ Joint Motion to Stay of All Proceedings Pending Approval and Consummation of Settlement in Connection with Consensual Plan, *Garlock Sealing Techs., LLC v. Shein Law Ctr., Ltd.*, No. 3:14-cv-00137 (W.D.N.C. Mar. 21, 2016); see also Jessica Karmasek, *Federal Judge Agrees to Stay RICO Cases against Asbestos Plaintiffs Firms*, LEGAL NEWSLINE (Mar. 29, 2016), <https://legalnewsline.com/stories/510704392-federal-judge-agrees-to-stay-rico-cases-against-asbestos-plaintiffs-firms> [<https://perma.cc/7QR6-LNXC>].

⁴⁰⁹ Joint Motion For Stay, *supra* note 408, at 2.

⁴¹⁰ See Order (A) Confirming the Modified Joint Plan of Reorganization Of Garlock Sealing Technologies LLC, et al. and OldCo, LLC, Successor by Merger to Coltec Industries Inc., (B) Adopting the Bankruptcy Court’s Proposed Findings of Fact and Conclusions of Law, and (C) Issuing Asbestos Channeling Injunction, *In re Garlock Sealing Techs. LLC*, No. 3:17-cv-00275-GCM, 2017 WL 2539412, at *23–24 (W.D.N.C. June 12, 2017).

⁴¹¹ Complaint at 1–2, 4, 12, *John Crane, Inc. v. Shein Law Ctr., Ltd.*, No. 1:16-cv-5913 (N.D. Ill. June 6, 2016), 2016 WL 3251230.

⁴¹² Complaint, *John Crane, Inc. v. Simon Greenstone Panatier Barlett*, No. 1:16-cv-5918 (N.D. Ill. June 6, 2016), 2016 WL 3251232.

⁴¹³ The Simon Greenstone complaint consists of 378 numbered paragraphs, whereas the Shein complaint numbered 276 paragraphs.

In the Simon Greenstone complaint, JCI alleges that the defendants implemented a scheme to defraud JCI by “fabricat[ing] false asbestos ‘exposure histories’ for their clients in asbestos litigation against JCI and others and systematically concealed evidence of their clients’ exposure to other sources of asbestos.”⁴¹⁴ Tracking much of the Garlock RICO complaints and the evidence produced in the bankruptcy proceeding, JCI alleged that defendants

systematically and falsely denied that their clients were exposed to numerous other asbestos-containing products in litigation against JCI, and then once that litigation was complete, filed claims with asbestos bankruptcy trusts . . . based on claimed exposures that were explicitly denied and fraudulently concealed in the litigation against JCI.⁴¹⁵

As was the case in the CSX RICO litigation, JCI alleged fraud in only a small number of asbestos cases—seven that were prosecuted in California, Texas, and Pennsylvania—but further alleged that the defendants’ misconduct encompassed “substantially all of the mesothelioma cases” filled by the firm against JCI.⁴¹⁶

Simon Greenstone moved to strike or dismiss JCI’s claims, advancing multiple arguments.⁴¹⁷ JCI responded, filing its opposition to

⁴¹⁴ Complaint, *Simon Greenstone*, *supra* note 412, at ¶ 2

⁴¹⁵ *Id.* ¶ 3. The complaint further alleged that the lawyer defendants “gave false asbestos exposure histories in written discovery and counseled their clients to testify falsely to the same effect so as to fraudulently obtain and inflate verdicts and settlements against JCI . . .” *Id.* ¶ 5. Tellingly, JCI acknowledged that it had only “limited information concerning the entirety of the fraudulent scheme . . . [and] the full extent of that scheme . . . remain[ed] to be discovered.” *Id.* ¶ 9. JCI claimed that the fraudulent conduct violated federal mail and wire fraud statutes, federal obstruction of justice and witness tampering statutes, and RICO, and constituted common law fraud and conspiracy. *Id.* ¶ 10.

⁴¹⁶ Complaint, *Simon Greenstone*, *supra* note 412, at ¶¶ 109, 111–287. In paragraphs 111–287 of its complaint, JCI specifically enumerated and described the “acts of misconduct in specifically identified exemplar asbestos cases against JCI and others” *id.* at 9, just as Garlock did in its bankruptcy proceeding in a memo that was appended to and a part of my expert report. *See supra* note 333. Also, just as in the *Garlock* bankruptcy, JCI stated that despite the scheme to prevent JCI from discovering the plaintiffs’ actual work histories, when it was able to present evidence showing full exposure histories, it often succeeded, as had Garlock, in getting defense verdicts or having juries attribute a relatively low percentage of fault to JCI. Complaint, *Simon Greenstone*, *supra* note 412, at ¶ 107.

⁴¹⁷ *See* Memorandum by Defendants in Support of Motion to Dismiss for Lack of Personal Jurisdiction and Venue, *John Crane v. Simon Greenstone Panatier Barlett*, No. 1:16-cv-05918

the motions to dismiss and subsequent rebuttal.⁴¹⁸ The court did not rule dispositively on the *Rooker-Feldman* issue.

The RICO suit against the Shein Law Center, though alleging different underlying facts, replicated many of the same allegations and causes of action as the Simon Greenstone complaint⁴¹⁹ and generated similar rebuttal and counter argument from JCI.⁴²⁰ The Shein defendants also relied heavily on *Rooker-Feldman* in its motions to dismiss.⁴²¹ A core part of the Shein defendants' argument was that "[f]ederal courts that have considered the issue are unanimous in holding that service of litigation-related documents is not a predicate act under RICO."⁴²²

(N.D. Ill. Sept. 7, 2016); Memorandum by Defendants in Support of Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Failure to State a Claim, *John Crane v. Simon Greenstone Panatier Barlett*, No. 1:16-cv-05918 (N.D. Ill. Sept. 7, 2016); Memorandum by Defendants in Support of Motion to Strike, Motion for Relief Anti-SLAPP Special to Strike or Dismiss, *John Crane v. Simon Greenstone Panatier Barlett*, No. 1:16-cv-05918 (N.D. Ill. Sept. 7, 2016) [hereinafter *Simon Greenstone Motion to Strike, 9/7/16*]; Reply by Defendants in Support of Their Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Failure to State a Claim, *John Crane v. Simon Greenstone Panatier Barlett*, No. 1:16-cv-05918 (N.D. Ill. Dec. 2, 2016). The arguments advanced included that the firm's suits against JCI were petitioning activity protected by the First Amendment and that the RICO action ran afoul of the anti-SLAPP statutes of California, Texas, and Illinois; attorneys are absolutely immune from civil liability to non-clients under the laws of California, Texas, Pennsylvania, and Illinois for their litigation conduct; the federal litigation privilege and *Noerr-Pennington* doctrine immunize Simon Greenstone from liability under federal law for actions taken in connection with litigation; lack of subject matter jurisdiction; lack of personal jurisdiction; failure to state a claim; and that the *Rooker-Feldman* doctrine immunized defendants from suit.

⁴¹⁸ Response by John Crane Inc. in Opposition to Motion to Dismiss for Failure to State a Claim and Lack of Subject-Matter Jurisdiction, *John Crane Inc. v. Simon Greenstone et al.*, No. 1:16-cv-05918 (N.D. Ill. Nov. 10, 2016); Sur-Reply by Plaintiff John Crane Inc. to Motion to Dismiss for Failure to State of Claim, *John Crane Inc. v. Simon Greenstone et al.* No. 1:16-cv-05918 (N.D. Ill. Dec. 13, 2016).

⁴¹⁹ Complaint, *John Crane, Inc. v. Shein Law Ctr., Ltd.*, *supra* note 411.

⁴²⁰ See, e.g., Reply Memorandum in Further Support of Motion of Defendants Shein Law Center, Ltd. and Benjamin P. Shein to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b), *John Crane Inc. v. Shein Law Ctr., Ltd.*, No. 1:16-cv-05913 (N.D. Ill. Dec. 16, 2016); *John Crane Inc.'s Opposition to Defendants' Motion to Dismiss*, *John Crane Inc. v. Shein Law Ctr., Ltd.*, 2017 WL 1105490 (N.D. Ill. Mar. 23, 2017), *aff'd*, 891 F.3d 692 (7th Cir. 2018) (No. 1:16-CV-05913).

⁴²¹ See, e.g., Reply Memorandum in Further Support of Motion of Defendants Shein Law Ctr., Ltd. and Benjamin P. Shein to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b), *supra* note 420, at 11–14.

⁴²² *Id.* at 11.

JCI countered that the *Rooker-Feldman* defense could not apply to four of the seven underlying cases because they did not involve state court judgments,⁴²³ and in any event, JCI was not trying to overturn state court litigation results but rather was seeking compensation for losses suffered as result of defendants' pattern of fraud.⁴²⁴ The court concurred, finding that

Shein's reliance on the *Rooker-Feldman* doctrine to challenge the Court's subject matter jurisdiction is misplaced. . . . [Noting that the doctrine bars state court losers from seeking federal court review and rejection of state court decision], the court found [t]hat this is not what JCI is seeking here. JCI seeks not to overturn the state court judgments but to advance a claim (Shein defrauded us by concealing information) that is independent of the claims asserted in the state court litigation by Shein's clients (JCI injured plaintiffs by exposing them to asbestos).⁴²⁵

Both district courts dismissed JCI's RICO suits on the basis of lack of personal jurisdiction.⁴²⁶ JCI filed appeals to the Seventh Circuit, which consolidated the appeals for review.⁴²⁷ In June 2018, the Seventh Circuit denied JCI's appeal, affirming the district courts' holdings that it lacked personal jurisdiction and therefore deeming it unnecessary to consider whether the district court also lacked subject matter jurisdiction.⁴²⁸ The circuit court added an unusual and telling comment at the end of its affirmance of dismissal:

Nothing in this opinion is meant to weigh on the merits of JCI's allegations. The claims JCI levied are serious and ought to be

⁴²³ See John Crane Inc.'s Opposition to Defendants' Motions to Dismiss, *supra* note 420, at 22.

⁴²⁴ See *id.* at 2.

⁴²⁵ John Crane Inc. v. Shein Law Ctr., Ltd., No. 16-CV-05913, 2017 WL 1105490, at *3 (N.D. Ill. Mar. 23, 2017), *aff'd*, 891 F.3d 692 (7th Cir. 2018).

⁴²⁶ *Id.* at *1; John Crane v. Simon Greenstone Panatier, No. 16-CV-05918, 2017 WL 1093150 (N.D. Ill. Mar. 23, 2017).

⁴²⁷ See Notice of Appeal by John Crane Inc., John Crane Inc. v. Shein Law Ctr., Ltd., No. 1:16-cv-05913 (N.D. Ill. Apr. 18, 2017). Shein cross-appealed "to the extent the district court concluded there is subject matter jurisdiction over the claims by Plaintiff John Crane, Inc. notwithstanding the *Rooker-Feldman* doctrine." Notice of Cross Appeal by Schein Law Ctr., Ltd., John Crane Inc. v. Shein Law Ctr., Ltd., No. 1:16-CV-05913 (N.D. Ill. May 2, 2017).

⁴²⁸ John Crane, Inc. v. Shein Law Ctr., 891 F.3d 692 (7th Cir. 2018).

examined. The Northern District of Illinois is simply the wrong jurisdiction. For this reason, we AFFIRM the dismissal of the cases.⁴²⁹

To avoid any statute of limitation issue during the course of the appeal, on May 15, 2017, JCI filed a new complaint against the Shein Law Center and Benjamin P. Shein in Pennsylvania where the law firm is located.⁴³⁰ The complaint largely replicated the original action brought by JCI against the firm.⁴³¹

On July 22, 2018, the parties “agreed in principle to a settlement”⁴³² and on September 10, 2018, the court, having been notified of a settlement, ordered the lawsuit to be dismissed with prejudice.⁴³³ While the terms of the settlement have not been disclosed, three factors suggest that the settlement is more likely to have favored Crane than Shein. First, in the prior RICO action against Shein, prior to dismissing the case on jurisdictional grounds, the court rejected Shein’s argument that the action be dismissed because *Rooker-Feldman* applied.⁴³⁴ Second, the Seventh Circuit, while denying JCI’s appeal of the jurisdictional dismissals, felt motivated to add a rarely stated message presumably intended for the trial court that would preside over the substantive litigation, stating that “[n]othing in this opinion is meant to weigh on the merits of JCI’s allegations” and that “[t]he claims JCI levied are serious and ought to be examined.”⁴³⁵ Third, JCI, like Garlock, a seller of gaskets, was named a defendant in several of the same litigations as Garlock. Indeed, JCI’s complaint against Shein alleged similar facts and made many of the same arguments as did Garlock in the estimation proceeding before Judge Hodges. Judge Mullen presiding over the *Garlock* RICO suits, stated that the Garlock allegations of fraud in its

⁴²⁹ *Id.*

⁴³⁰ Complaint, John Crane Inc., v. Shein Law Ctr., Ltd., No. 2:17-CV-02210-TJS, 2017 WL 2135558 (E.D. Pa. May 15, 2017).

⁴³¹ *Id.*

⁴³² See Lizzy McLellan, *Settlement Expected in Case Over Shein Law Asbestos Suits*, LEGAL INTELLIGENCER (July 30, 2018, 2:19 PM), <https://www.law.com/thelegalintelligencer/2018/07/30/settlement-expected-in-case-over-shein-law-asbestos-suits> [<https://perma.cc/H4BW-RSH2>].

⁴³³ Order that This Action is Dismissed with Prejudice Pursuant to Local Rule 41.1(b), John Crane Inc. v. Shein Law Ctr., Ltd., No. 2:17-CV-02210 (E.D. Pa. Sept. 10, 2018).

⁴³⁴ See *supra* note 425.

⁴³⁵ See *supra* note 428.

RICO suits mirrored Judge Hodges findings in the bankruptcy proceeding.⁴³⁶

VI. THE FAILURE OF THE CIVIL JUSTICE SYSTEM TO DETER, IF NOT TO ACTUALLY FACILITATE, FRAUDULENT TESTIMONY BY DOCTORS IN MASS TORT LITIGATION

A. *The “Expert” Status of Litigation Doctors and Their Effective Immunity to Challenge*

Since doctors are licensed professionals, when testifying on specific causation⁴³⁷ and rendering diagnoses in their specialty, they are, by definition, medical experts and therefore qualified to wear the mantle of “expert” when they testify.⁴³⁸ In theory, a doctor’s expert status may be challenged on the grounds of lack of reliability by a motion in limine in a *Daubert* proceeding.⁴³⁹ In mass tort litigations, however, even though a comparative handful of litigation doctors can each account for tens of thousands of medical reports that are “manufactured for money” and generated during the course of litigation screenings,⁴⁴⁰ defendants lack an effective means of challenging those doctors’ reliability because discovery is limited to only those medical reports of the plaintiffs in that litigation. Precluding defendants from discovering all of the records of the doctors’ diagnoses in that mass tort effectively prevents them from determining the doctors’ total number of positive and negative medical

⁴³⁶ See *supra* note 11.

⁴³⁷ For discussion of “specific causation” and “general causation,” see Brickman, *Mass Tort Fraud*, *supra* note 16, at 1224.

⁴³⁸ A degree and license in medicine clearly meets the standard of the Federal Rules of Evidence, which requires an expert to be qualified by “knowledge, skill, experience, training, or education.” FED. R. EVID. 702. The standard is liberally applied. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 753–74 (3d Cir. 1994) (finding abuse of discretion for precluding a trained internist, now primarily occupied as a litigation consultant who is well-versed in medical literature, despite her lack of board certification in internal medicine or toxicology); see generally 4 MARK S. BRODIN, WEINSTEIN’S FEDERAL EVIDENCE § 702.04 (2018).

⁴³⁹ See Brickman, *supra* note 86, at 515–16 n.3.

⁴⁴⁰ See Brickman, *Asbestos Litigation*, *supra* note 80, at 91–92, nn.173–75.

reports.⁴⁴¹ The percentage of positive x-ray reads or diagnoses is a critical factor if the reliability of a litigation doctor's diagnoses is to be placed at issue.⁴⁴² Nonetheless, this critical access is precisely what defendants are denied in the civil justice system.⁴⁴³ As a consequence, litigation doctors are insulated from discovery that could, if allowed, uncover evidence that these doctors manufactured thousands of similar diagnoses for money rather than engaging in good faith medical practice. Litigation doctors as well as the lawyers who hire them refused to provide this information when requested in order to limit the ability of defendants to challenge the doctor's reliability. To be sure, during a trial, defendants can put on their own medical experts to testify that the litigant does not have the disease alleged or that exposure to the defendant's product was not a substantial factor in causing the disease—a traditional "battle of the experts." But the effectiveness of this "retail" case-by-case response pales in comparison to the effect of the "wholesale" production of thousands of medical reports by a handful of doctors to support claims generated by litigation screenings. The strategy of massing large numbers of claims, in the thousands, generated by screenings has been effective in compelling defendants to enter into large-scale settlements of claims that plaintiffs' counsel would virtually never take to trial were they to be individually litigated because the

⁴⁴¹ By positive medical report, I mean in the context of asbestos litigation that the litigation doctor has either read an x-ray as indicating fibrosis using the ILO scale, or has made a diagnosis of asbestosis or both. By negative medical report, I mean that the x-ray was either not read as indicating fibrosis or the litigant was not diagnosed with a disease caused by exposure to asbestos. See Brickman, *Silica MDL*, *supra* note 15, at 302, for a discussion of the "smoking gun" significance of being able to determine the percentage of those screened that the litigation doctor found positive for disease.

⁴⁴² *Id.* The reason why defendants in the silica MDL were able to *Daubert*-ize the doctors who provided the thousands of bogus diagnoses is because all 10,000 or so cases were before the court and so these medical experts could have their medical opinions challenged using the totality of their silica diagnoses. To be able to have done so, several of the silica defendants, over the objection of other silica defendants, laid a trap for plaintiffs' counsel, who, believing that the MDL would enable them to use the aggregation to their advantage, eagerly walked into it.

⁴⁴³ See Response and Brief in Support of Response of Jay Segarra, M.D., to Defendant's Combined Motion and Brief in Support of Motion of Jay Segarra, M.D., to Quash or, in the Alternative, Modify Subpoena to Jay Segarra, M.D., *In re Asbestos Prods. Liab. Litig.* (No. VI) (J.P.M.L. 1991) (MDL No. 875). "The one thing that the defendants do not have are [sic] copies of Dr. Segarra's negative reports . . ." *Id.* at 4.

medical evidence in support lacked credibility.⁴⁴⁴ This strategy of mass filings of bogus claims has been successful, at least in part, because plaintiffs' counsel have succeeded in effectively precluding a *Daubert* challenge to litigation doctors' testimony because courts limit discovery to only the cases before the court. This explains why the practice of using a comparative handful of complaint doctors to generate literally thousands of medical reports has become standard in certain mass tort litigations.⁴⁴⁵

B. *The Role of Bankruptcy Courts in Legitimizing Litigation Screenings*

Another failure of the civil justice system to deter mass tort fraud, if not to instead facilitate it, occurs in the course of the often-ineluctable bankruptcies of most of those asbestos companies sued by the hundreds of thousands of claimants generated by litigation screenings. However unintentional, bankruptcy courts have, in a variety of ways, effectively legitimated the use of litigation screenings designed to generate tens of thousands of medical reports “manufactured for money.” For example, bankruptcy courts have refused to permit or order a formal review of a sample of the medical records of pending claimants that would be needed to show that the medical reports were unreliable and had been “manufactured for money.”

A related issue is the reluctance of bankruptcy courts to allow the debtor, at the outset of the bankruptcy proceeding, to contest general causation where the civil justice system has simply gone off the tracks, as occurred in the silicone breast implant litigation, which was based on claims that the implants caused autoimmune disease—a scientifically discredited contention.⁴⁴⁶ After a \$4.2 billion class action settlement was

⁴⁴⁴ As noted by Judge Jack in the silica MDL proceeding, the use of litigation screenings as an “entrepreneurial” means of claim generation is a strategy that seeks “to inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system. This is apparently done in hopes of extracting mass nuisance-value settlements because [they] are financially incapable of examining the merits of each individual claim in the usual manner.” *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 676 (S.D. Tex. 2005). This was the strategy being pursued by Peirce and Dr. Harron in creating and bringing “mass actions” against CSX. See *supra* text accompanying notes 271–91.

⁴⁴⁵ See Brickman, *Mass Tort Fraud*, *supra* note 16, at 1233, 1258–61, 1287.

⁴⁴⁶ See *id.* at 1266–67.

reached,⁴⁴⁷ lawyers instituted a large-scale campaign to recruit hundreds of thousands of additional claimants that ballooned the number of claimants from 40,000 to 440,000.⁴⁴⁸ With the settlement about to implode, Dow Corning filed for bankruptcy with the apparent hope that the bankruptcy proceeding would enable it to get a quick up-or-down ruling on the issue of general causation based on epidemiological data that had been developed indicating that silicone breast implants did not cause autoimmune disease.⁴⁴⁹ The bankruptcy court, however, declined to permit such a general causation trial.⁴⁵⁰ Had it done so, it could then have approved appointment of an independent panel of experts under Rule 706 of the Federal Rules of Evidence to advise the court on the scientific validity of the plaintiffs' experts' theories on general causation. This is essentially what U.S. District Court Judge Robert E. Jones did in dismissing an aggregated silicone breast implant litigation after excluding plaintiffs' experts in a *Daubert* proceeding because the theories they advanced constituted "junk science" and lacked scientific credibility.⁴⁵¹ Were that to have been done, Dow Corning would have almost certainly prevailed. Instead, the outcome enriched the plaintiffs' lawyers who undertook the screenings by tens of millions of dollars, in addition to the millions of dollars they received from the other settling defendants.

In an asbestos bankruptcy, pending and future claims are transferred to a trust set up under § 524(g) of the Bankruptcy Code from which the claims are to be paid.⁴⁵² The amount set by the bankruptcy court that will need to be transferred to the trust is determined in the

⁴⁴⁷ *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994).

⁴⁴⁸ *In re Dow Corning Corp.*, 86 F.3d 482, 485, 486 n.4 (6th Cir. 1996).

⁴⁴⁹ See NAGAREDA, *supra* note 303, at 35–36.

⁴⁵⁰ *In re Dow Corning Corp.*, 86 F.3d at 485; see also Brickman, *Mass Tort Fraud*, *supra* note 16, at 1335.

⁴⁵¹ *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392–93 n.8 (D. Or. 1996). "To keep the advisors independent of any ongoing proceedings," Judge Jones "appointed them under FRE 104, not FRE 706, which requires court-appointed experts, in effect, to act as additional witnesses subject to depositions and testifying at trial. Although certain plaintiffs (in Group 3) moved to invoke Rule 706 procedures (in No. 93–589, dkt. Nos. 31 and 36)," Judge Jones "denied those motions." *Id.*

⁴⁵² See Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 862–63 (2005).

course of an estimation proceeding,⁴⁵³ largely on the basis of testimony by a small coterie of professional experts who regularly appear in asbestos bankruptcies and provide “cookie cutter” reports and testimony on behalf of the current and future asbestos tort claimants. These experts use pre-bankruptcy settlement values as dispositive evidence of the value of debtor’s liability for pending and future claims. Bankruptcy courts have largely approved this method by which the liability of the debtor for pending and future claims is simply assumed based on historical settlement practices, sometimes with some adjustments, rather than requiring that the estimation be based on the degree of toxicity of the debtor’s products, the levels of exposure of users of the product, and other criteria related to disease causation.⁴⁵⁴ This method allows the professional experts and the court to essentially dispense with the issue of causation, including whether: pending claimants were actually exposed to the debtor’s products; the products contained a respirable form of asbestos; the exposures were of sufficient density and duration to have caused the claimed disease; the claimants’ diseases were diagnosed by doctors using reliable methods; and the occupational and medical histories relied on by the diagnosing doctors were taken by the diagnosing doctor or by medically trained persons who were not in the direct or indirect employ of the lawyers. Instead, this widely-used estimation procedure simply assumes for purposes of valuing pending and future claims, that if a pre-bankruptcy claim had been settled, then that indicates that there was causation irrespective of whether (1) the elements of causation, as listed above, were present; (2) a substantial portion of settled claims were infected by fraudulent practices; and (3) thousands of the medical reports to support these claims were generated by litigation doctors who routinely produced thousands of diagnoses “manufactured for money.” Notably, several of

⁴⁵³ “If contingent claims are to be treated and discharged in bankruptcy, somehow their value must be estimated and they must be included in and provided for in the bankruptcy plan.” 3 DAVID G. EPSTEIN ET AL., *BANKRUPTCY* § 11-5 (1993). Section 502(c) of the Bankruptcy Code allows the Court to estimate “for purpose of allowance . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case” 11 U.S.C. § 502(c) (2018).

⁴⁵⁴ See, e.g., *In re Armstrong World Indus*, 348 B.R. 111, 124 (Bankr. D. Del. 2006); *In re Federal-Mogul Global, Inc.*, 330 B.R. 133, 134–35 (Bankr. D. Del. 2005); *Owens Corning v. Credit Suisse First Bos.*, 322 B.R. 719, 721–22 (Bankr. D. Del. 2005).

these litigation doctors, along with some screening company principals, had refused to testify about how their diagnoses were produced, citing their Fifth Amendment rights against self-incrimination.⁴⁵⁵

By validating the use of experts' reliance on past settlements rather than any assessment of disease and causation to establish both liability and the value of claims, bankruptcy courts have effectively endorsed the reliability of litigation screenings though they have no medical purpose and have been used solely to generate virtually all of the nonmalignant claims,⁴⁵⁶ despite the considerable evidence that a large majority of the claims of nonmalignant asbestos disease have not been supported by medically reliable evidence and instead are the product of a scheme to "manufacture diagnoses for money."

This reliance on settlement history was rejected in the *Garlock* bankruptcy.⁴⁵⁷ In my expert report and testimony on behalf of the Debtor,⁴⁵⁸ I opined that the settlement values had been infected by fraudulent practices, in particular, plaintiffs' counsel's intentionally concealing evidence of their clients' exposures to the products of other asbestos manufacturers—most especially the products of the leading defendants that had filed for bankruptcy in 2000–2001—for the purpose of inflating the settlement values of mesothelioma cases against Garlock, while simultaneously or somewhat later, after the tort cases were concluded, filing claims with the bankruptcy trusts created with the assets of these other manufacturers. This concealment took the form of sworn denials of exposure to these other products in interrogatories, responses to standard case management orders, depositions, and trial testimony, while simultaneously or subsequently stating "under penalty of perjury" that their clients had "meaningful and credible exposure" to these very same products.⁴⁵⁹ Judge Hodges concurred, finding that Garlock's prior mesothelioma settlements were not a reliable predictor of liability because they had been "infected by the manipulation of

⁴⁵⁵ See Brickman, *supra* note 86, at 586 n.256.

⁴⁵⁶ See Brickman, *Asbestos Litigation*, *supra* note 80, at 65.

⁴⁵⁷ *In re Garlock Sealing Techs, LLC*, 504 B.R. 71, 94 (Bankr. W.D. N.C. 2014).

⁴⁵⁸ See Brickman, *Garlock Expert Report*, *supra* note 6; Brickman, *Garlock Testimony*, *supra* note 6.

⁴⁵⁹ Brickman, *Garlock Testimony*, *supra* note 6; see Brickman, *Garlock Expert Report*, *supra* note 6, at ¶ 3.

exposure evidence by plaintiffs and their lawyers.”⁴⁶⁰ “[I]n 15 settled cases, the court permitted Garlock to have full discovery, Garlock demonstrated that exposure evidence was withheld in *each and every one of them*.”⁴⁶¹

[T]he fact that each and every one of . . . [the fifteen settled cases for which Garlock was allowed to conduct discovery] contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock’s settlement practices and results.⁴⁶²

Judge Hodges went on to describe the plaintiff counsel’s conduct as forming a “startling pattern of misrepresentation.”⁴⁶³ As noted, Judge Graham C. Mullen, presiding over four RICO cases brought by Garlock against plaintiffs’ counsel, characterized Judge Hodges finding as concluding that plaintiffs’ counsel in the fifteen cases that Garlock had focused on, had committed fraud⁴⁶⁴

VII. WHY THE CURRENT TOOLS CITED FAIL TO DETER MASS TORT FRAUD

Rosenbaum and Engstrom have veriously advanced remedies to curtail mass tort fraud. Several of those remedies are discussed below.

A. *Abuse of Process*

Abuse of process occurs where a party employs some legal process in a manner perverse to the intended purpose of the law.⁴⁶⁵ It is defined

⁴⁶⁰ *In re* Garlock, 504 B.R. at 82.

⁴⁶¹ *Id.* at 84 (emphasis in original).

⁴⁶² *Id.* at 85.

⁴⁶³ *Id.* at 86.

⁴⁶⁴ See *supra* note 13; *Garlock Sealing Techs., LLC v. Schein*, No. 3:14-cv-137, 2015 WL 5155362, at *3 (W.D.N.C. Sept. 2, 2015).

⁴⁶⁵ MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS 7 (1892); see also RESTATEMENT (SECOND) OF TORTS § 682 (1977) (“One who uses a legal process, whether criminal or civil, against

as “the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope.”⁴⁶⁶

For abuse of process to be alleged, there must be an immediate use of the process that is other than the law’s intended use.⁴⁶⁷ Incidental motive, even with malice, does not suffice.⁴⁶⁸ The party bringing an abuse of process allegation need only have a legally protected interest that has been damaged, and the allegation does not need to be brought by a party to the proceeding so long as the harm was done to the plaintiff.⁴⁶⁹

Application of abuse of process to fraudulent asbestos litigation is problematic. Every state has their own statute of limitations, but they tend to stretch from one to six years from the time when the right to maintain a legal action arose.⁴⁷⁰ Asbestos litigation fraud on a grand scale can take years to discover let alone to document, thus barring defendants from any realistic opportunity to bring an abuse of process claim. Seeking to apply abuse of process in such a context is akin to using a fly swatter to try to down a missile. Moreover, abuse of process’s applicability is essentially limited to “retail” litigation, whereas fraudulent asbestos litigation of the type described in this Article takes place on a large and even massive scale. Further, the burden of proof rests with the party bringing the action, and plaintiffs and their counsel

another primarily to accomplish a purpose for which it is not designed is subject to liability to the other for harm caused by the abuse of process.”).

⁴⁶⁶ *Abuse of Process*, BLACK’S LAW DICTIONARY 12 (10th ed. 2014).

⁴⁶⁷ RESTATEMENT (SECOND) OF TORTS § 682, cmt. b (1977) (“For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended.”).

⁴⁶⁸ *Id.* (“[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.”).

⁴⁶⁹ 33 CAUSES OF ACTION § 23 (2d ed., 2019) (“An action for abuse of process ordinarily may be brought by any person who has a legally protected interest that has been damaged, and the plaintiff is not necessarily required to have been a party to the underlying suit so long as the plaintiff is harmed by its results.”).

⁴⁷⁰ *Id.* § 27 (“The time for filing an action for common law abuse of process may be specifically prescribed by statute, or a more general statute of limitations may apply. Applicable limitations periods vary and may be for as little as one year or as much as six years. In general, a cause of action accrues so as to start the running of the period when the right to maintain a legal action arises.”).

will likely be unwilling to hand over proof of fraudulent acts.⁴⁷¹ At best, abuse of process, which has not played a significant role in asbestos or other mass tort litigations, offers little if any recourse against the kind of fraudulent practices used in these litigations.

B. *Malicious Prosecution*

Malicious prosecution refers to the “initiation of vexatious civil proceedings known to be groundless.”⁴⁷² The plaintiff in a malicious prosecution case must show that (1) defendant brought or continued a lawsuit; (2) there was no probable cause for defendant’s lawsuit; (3) the defendant brought the suit with malice; and (4) the original lawsuit ended in favor of the party now bringing the malicious prosecution charge.⁴⁷³ Importantly, the action can only be brought after the litigation has concluded. Furthermore, specific restrictions are placed on these prosecutions, and many states impose extra restrictions to curtail overzealous suits by disappointed defendants.⁴⁷⁴

Here too, malicious prosecution has played no role in addressing fraudulent mass tort litigation, including asbestos litigation. Moreover, many courts disfavor malicious prosecution as a remedy, believing that it stymies litigation and forces underprivileged plaintiffs out of court.⁴⁷⁵

⁴⁷¹ *Id.* § 31. For example, in the case of *Garlock Sealing Technologies*, the plaintiffs’ firm was alleged to have “hid evidence of their client’s exposure to asbestos from other manufacturer’s products in order to reap more money from the company.” Greg Ryan, *Garlock Sues 5 Law Firms for Asbestos Fraud*, LAW 360 (Jan. 13, 2014, 6:46 PM), <https://www.law360.com/articles/500707/garlock-sues-5-law-firms-for-asbestos-fraud> [<https://perma.cc/J9B2-4LG6>].

⁴⁷² Sonja Larsen, *Malicious Prosecution* § 3, 52 AM. JUR. 2d (2d ed. 2019). “The distinction between an action for malicious prosecution and an action for abuse of process is that malicious prosecution is defined as maliciously causing process to be issued, while abuse of process concerns the improper use of process after it has been issued.” *Id.*

⁴⁷³ “The tort [of malicious prosecution] requires . . . favorable termination of the original lawsuit.” RESTATEMENT (SECOND) OF TORTS §§ 674–81B (1977); see also Lyle Kossis, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 VA. L. REV. 1635, 1638 (2013).

⁴⁷⁴ Engstrom, *supra* note 22, at 685 (“[A] large minority of states impose a fifth prerequisite—namely, that the defendant (now seeking relief via the tort system) must show he suffered some special injury as a result of the initial proceeding, beyond the fact that the suit’s defense was costly or burdensome.”).

⁴⁷⁵ Though Rosenbaum relies on malicious prosecution as obviating the need for use of RICO to combat massive tort fraud, she then acknowledges that “courts have disfavored

Furthermore, a defendant in a fraudulent litigation can only utilize malicious prosecution when he has nonetheless prevailed.⁴⁷⁶ Fraudulent asbestos litigation, on a grand scale, with rare exception, has succeeded in compelling settlements and thus realistically eliminates malicious prosecution as a recourse.

C. *FRCP Rule 11*

Rule 11 of the Federal Rules of Civil Procedure covers nearly all filings made in federal court. When an attorney files a document with the court, Rule 11 dictates that the attorney has certified

that the filing: (1) “is not being presented for any improper purpose,” (2) contains factual contentions that have evidentiary support (or, if specifically identified, are likely to have evidentiary support upon further investigation), and (3) contains claims and contentions that “are warranted by existing law or by a nonfrivolous argument” for the law’s extension, modification, or reversal.⁴⁷⁷

Thus, if it comes out in court that the filing was improperly made, or if there are any factual contentions without support, or frivolous or fraudulent claims contained in a filing, the attorney can be sanctioned.

Rule 11, like malicious prosecution, is offered as an alternative solution to “garden variety fraud” found in the courtroom.⁴⁷⁸ After it was amended in 1983, Rule 11 provided for sanctions, regardless of whether either party motioned for it, creating more freedom for parties to seek redress upon discovery of frivolous conduct.⁴⁷⁹ This created incentives for collateral litigation claiming Rule 11 violations. Moreover, concerns have been expressed with Rule 11’s potential effect of chilling pleadings-based litigation. These concerns are rooted in the view that “proper representation would be impeded by chilling attorneys’

malicious prosecution actions because they discourage litigation.” Rosenbaum, *supra* note 22, at 175–76.

⁴⁷⁶ See Engstrom, *supra* note 22, at 685.

⁴⁷⁷ *Id.* at 681.

⁴⁷⁸ Rosenbaum, *supra* note 22, at 169.

⁴⁷⁹ GEORGENE M. VAIRO, RULE 11 SANCTIONS § 1.05 (2004).

enthusiasm for bringing claims involving novel legal theories.”⁴⁸⁰ In a 1993 amendment to Rule 11, sanctions were made discretionary, and a “safe harbor” provision was enacted requiring a party to give the adverse side notice and opportunity to withdraw the objectionable papers.⁴⁸¹ This has reduced the volume of Rule 11 filings. Scholars have also found that, despite its strong presence in academic writing, Rule 11 is going out of mode with judges.⁴⁸² A recent study examined over one thousand securities class actions to see if judges complied with their Rule 11 obligations.⁴⁸³ Despite there being a statutory obligation to conduct a Rule 11 inquiry during every securities class action, only 14% conducted such inquiries.⁴⁸⁴

For aggregate litigation in areas like asbestos, Rule 11’s reach and depth are problematic. The sanctions provided by Rule 11 provide little solace for those who have paid out hundreds of millions of dollars as a result of fraudulent litigation.⁴⁸⁵ Here, too, Rule 11 offers little, if any, deterrence to large scale fraudulent asbestos litigation because evidence of such fraud is not usually detected until long after the litigation has concluded, if even then.

⁴⁸⁰ *Id.* § 1.07; see also Engstrom, *supra* note 22, at 694 (“Of the various unintended consequences, the 1983 rule’s ‘chilling effect’ was of particular concern. Namely, despite reformers’ clear intent that the amended Rule 11 not ‘chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories,’ some evidence suggests that the amendment did just that.”).

⁴⁸¹ Charles S. Fax, *Does the Proposed Congressional Amendment to Rule 11 Solve a Problem or Create One?*, AM. BAR ASS’N (July 11, 2011), <https://www.americanbar.org/groups/litigation/publications/litigation-news/civil-procedure/does-the-proposed-congressional-amendment-to-rule11-solve-a-problem-or-create-one> [<https://perma.cc/USR5-V4TA>].

⁴⁸² Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61 (2016) (“Many judges may not be aware of their obligation to conduct a Rule 11 inquiry in securities class actions. . . . and even judges who know about their Rule 11 obligations . . . may not want to prolong the case.”).

⁴⁸³ See generally M. Todd Henderson & William H. J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. 87 (2015).

⁴⁸⁴ *Id.* at 90; see Erickson, *supra* note 482, at 105.

⁴⁸⁵ See VICTOR E. SCHWARTZ & CARY SILVERMAN, U.S. CHAMBER INST. FOR LEGAL REFORM, *LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS AND PLAYERS* 117 (2014), <https://www.instituteforlegalreform.com/uploads/sites/1/evolving.pdf> [<https://perma.cc/P6P7-SYTP>].

D. *Rule 60*

Engstrom puts forward Rule 60(b) of the Federal Rules of Civil Procedure as yet another alternative for combatting fraudulent litigation that can limit the need for resort to RICO.⁴⁸⁶ The rule allows a losing party to gain relief from a final judgment, order, or proceeding, if one of a list of circumstances occurs:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged but is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.⁴⁸⁷

Note that for any of these six options, the action must be brought within one year of the final judgment.⁴⁸⁸ The purpose of this Section is to make sure that *res judicata* is balanced by “the court’s interest in seeing that justice is done in light of all the facts.”⁴⁸⁹ As for the burden of proof, most courts hold the moving party must show by clear and convincing evidence that the judgment was obtained via fraud.⁴⁹⁰

⁴⁸⁶ Engstrom, *supra* note 22, at 681–82.

⁴⁸⁷ FED. R. CIV. P. §60(b). Note, however, that section (b)(4) has been called into question by the Western District of Pennsylvania, which ruled in *Smalis v. Huntington Bank* that

Void judgments are nullities; no passage of time can transmute a nullity into a binding judgment, and hence there is no time limit to make a motion under Federal Rule of Civil Procedure 60(b)(4). This is so despite the text of the rule dictat[ing] that the motion will be made within ‘a reasonable time.

Smalis v. Huntington Bank, 565 B.R. 328, 335 (Bankr. W.D. Pa. 2017) (internal citations omitted). Furthermore, the United States Supreme Court has limited 60(b)(6) to “extraordinary circumstances.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

⁴⁸⁸ FED. R. CIV. P. § 60(c)(1).

⁴⁸⁹ ROBERT E. JONES ET AL., *RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE* ch. 20-E (2018).

⁴⁹⁰ See *Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004); *De Sracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). *But see* *Venture Indus. Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322, 1332 (7th Cir. 2006).

If a district court grants a Rule 60 motion, all it can do is relieve a party from the judgment.⁴⁹¹ If a party wishes for anything more than equitable relief, it will need separate grounds.⁴⁹² Rule 60 is discretionary, not a matter of right, but courts have favored granting the motion when it is timely made and a defendant has a meritorious defense.⁴⁹³ Reaching the threshold of timely and meritorious is a high bar however, and courts have found this rule to be an extraordinary remedy granted only when there are exceptional circumstances.⁴⁹⁴

Losing defendants in asbestos litigation, to prevail, would have to show they had meritorious defenses and that fraudulent behavior inhibited their ability to fully present their case.⁴⁹⁵ This is precisely what Garlock was able to prove before the bankruptcy judge.⁴⁹⁶ However, attempting to relitigate a state personal injury case in federal court would run into a formidable barrier: *Rooker-Feldman*. Even if this were somehow repulsed, effectively transposing the *Garlock* bankruptcy proceeding into a personal injury litigation would be a too tall order. Defendants in a personal injury litigation would have to show, in a timely fashion, that plaintiffs' counsel suppressed critical information about plaintiffs' extensive exposures to the asbestos-containing thermal insulation and refractory products of the "big dusties" that went bankrupt in 2000–2001 by use of false testimony by the plaintiffs denying exposures to those products while their counsel filed proofs of claim with multiple trusts, stating under penalty of perjury that the plaintiff had "meaningful and credible exposure" to these very same products. If a defendant had access to that evidence at the time of the litigation, he would no doubt have used it. It is the plaintiffs' counsel's fraud that prevents the defendants from accessing that evidence. That is why Rule 60 has no realistic applicability to the fraud that permeates mesothelioma litigation. What Garlock's bankruptcy counsel discovered came in the course of intensive discovery that required several years as

⁴⁹¹ Charter Twp. of Muskegon v. City of Muskegon, 303 F.3d 755, 762–63 (2002).

⁴⁹² See JONES ET AL., *supra* note 489 .

⁴⁹³ *Id.* at 762.

⁴⁹⁴ Sellers v. Mineta, 350 F.3d 706, 716 (8th Cir. 2003) ("Rule 60(b) provides extraordinary relief in exceptional circumstances."); ClearOne Commc'ns, Inc. v. Bowers, 643 F.3d 735, 754 (10th Cir. 2011).

⁴⁹⁵ See JONES ET AL., *supra* note 489.

⁴⁹⁶ See text accompanying *supra* notes 1–8.

well as extensive litigation to compel asbestos bankruptcy trusts to turn over proofs of claim filed by plaintiffs' counsel in which plaintiffs and their counsel falsely denied exposures. Trusts' TDPs, authored by plaintiffs' counsel to at least impede if not prevent defendants' learning of plaintiffs' perjury with regard to exposures, require that trustees resist all attempts to obtain proofs of claim until ordered to do so by the bankruptcy court.⁴⁹⁷ Moreover, even if a defendant was able to overcome these intended difficulties, the relief would be limited to that litigation, leaving the multitude of other suits against the defendant to proceed. It should therefore be obvious why Rule 60 cannot carry any of the load in substitution for RICO.⁴⁹⁸

CONCLUSION

On the basis of the evidence presented, RICO is an imperfect vehicle for countering fraudulent mass tort litigation after the fact. Judges have a wide range of discretion as to whether to approve application of RICO to mass tort fraud. Those judges unwilling to subject asbestos litigation to close scrutiny that would potentially uncover a massive fraud perpetrated in the course of litigation, as was demonstrated in the silica MDL proceeding before Judge Jack and in the *Garlock* bankruptcy, can easily dismiss a RICO claim, as Judge Sweet did in the *G-I Holdings* litigation.⁴⁹⁹ Or, if sufficiently compelling evidence of an extensive fraudulent scheme is presented, judges can instead focus on the broader picture and find that that is sufficient to meet the requirements of RICO, as did Judge Stamp in the CSX litigation.⁵⁰⁰ Or they can allow asbestos defendants and debtors in bankruptcy to

⁴⁹⁷ See Brickman, *Mesothelioma Litigation Fraud*, *supra* note 13, at 1097–1107.

⁴⁹⁸ At a recent conference on asbestos litigation attended by asbestos defense counsel, I asked why, given the evidence that the *Garlock* bankruptcy uncovered and unleashed, these counsel had not moved to reopen personal injury litigations where they could use evidence uncovered by *Garlock* and their own investigations to show that settlements that their clients had entered into were fraudulently obtained. Their response was unanimous: it would be a serious error to do so because such motions would not only be rejected by judges out of hand but would be harmful to counsel's future dealings with those judges.

⁴⁹⁹ See *supra* note 249 and accompanying text.

⁵⁰⁰ CSX Transp., Inc. v. Gilkison, No. 5:05CV202, 2012 U.S. Dist. LEXIS 61719, at *40–47 (N.D. W. Va. May 3, 2012); see also *supra* text accompanying note 290.

continue conducting discovery of plaintiffs' counsel's actions by rejecting motions to dismiss the RICO claims as untimely, putting off decisions about whether the suits complied with the requirements for stating RICO claims, as did Judge Mullen in the *Garlock* RICO litigations.

The decision whether to permit a mass tort RICO claim to proceed is as much a reflection of a judge's disposition to open a Pandora's Box as it is an application of the requirements to state a valid RICO claim. Had *Garlock's* RICO claims not been dismissed as demanded by the CAC as part of the price for obtaining agreement to the plan of reorganization that was approved, *Garlock* would likely have sought to depose personal injury plaintiffs represented by the RICO defendants that had prevailed in trials or with whom *Garlock* had settled claims, about their interrogatory answers, deposition, and trial testimony denying exposure to asbestos-containing insulation and refractory products of bankrupted companies, even while some had previously signed trust claim forms attesting to exposure to these very same products, and even though counsel had filed or would later file proofs of claims with trusts stating under "penalty of perjury" that their clients had "meaningful and credible exposure" to those very same products. Plaintiffs' counsel would no doubt assert the lawyer-client privilege to bar such discovery (as did *Baron & Budd* in the *G-I Holdings* RICO litigation when *G-I Holdings* sought to depose clients of *Baron & Budd* that had sued *GAF*),⁵⁰¹ but *Garlock* would then have sought to invoke the crime-fraud exception to the lawyer-client privilege to allow such questioning. In light of the holdings by Judges Hodges and Mullen, it appears likely that Judge Mullen would have denied motions for protective orders and continued to allow discovery to go forward. This potential scenario would then have posed a significant threat to the asbestos plaintiffs' bar.

The alarm bell sounded by some scholars that "RICO is coming, RICO is coming,"⁵⁰² rings hollow when examined in the light of the

⁵⁰¹ See *supra* notes 268–74.

⁵⁰² Rosenbaum states that two cases, the *CSX* and *Garlock* RICO suits, "represent a new trend . . . by defendants in aggregate litigation to 'punish' aggregate litigation abuse . . ." Rosenbaum, *supra* note 22, at 198. Engstrom contends that "courts ought to continue to exhibit," Engstrom, *supra* note 22, at 647, restraint when authorizing retaliatory RICO actions

compelling evidence of massive fraud in a variety of mass tort litigations and the paucity of use of RICO in these litigations. Indeed, today, the possible filing of a RICO action does not appear to be a deterrent to counsel engaging in fraudulent practices in mass torts. Even when RICO actions were brought by Garlock based on evidence of fraudulent practices as so characterized by a federal judge, the lawyer defendants, armed with section 524(g) of the Bankruptcy Code, were in a position to quash that effort and did so. Much more needs to be done to limit the rampant fraud that has prevailed in certain mass tort litigations. An enhanced RICO is undoubtedly part of any response but so too are changes in the civil justice system. At the top of the list is removing the immunity effectively granted by federal and state prosecutors to doctors selected by plaintiffs' lawyers because of their propensity to "manufacture[] . . . [diagnoses] for money" and "find[] evidence of the disease . . . [they were] currently being paid to find."⁵⁰³

because "unbridled use of retaliatory RICO carries substantial danger for . . . the civil justice system writ large," *id.* at 706, but does not present any empirical basis justifying such fear. *Id.*

⁵⁰³ See *supra* notes 17, 314 and accompanying text.