HOW FRAUD AND ABUSE IN THE ASBESTOS COMPENSATION SYSTEM AFFECT VICTIMS, JOBS, THE ECONOMY, AND THE LEGAL SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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HOW FRAUD AND ABUSE IN THE ASBESTOS COMPENSATION SYSTEM AFFECT VICTIMS, JOBS, THE ECONOMY, AND THE LEGAL SYSTEM

FRIDAY, SEPTEMBER 9, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:06 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, Jordan, Nadler, and Scott.

Staff Present: (Majority) Zach Somers, Counsel; Sarah Vance, Clerk; (Minority) Jason Everett, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The subcommittee will come to order.

Good morning, and welcome to this Constitution Subcommittee hearing on how fraud and abuse in the asbestos compensation system affects victims, jobs, the economy and the legal system. For many Americans, asbestos litigation, like asbestos itself, may seem like a relic of the past. However, asbestos litigation, which has long been rife with fraud and abuse, continues to negatively affect asbestos victims, jobs for American workers, the economy and the legal system.

It has been about 5 years since Congress last conducted oversight into issues related to asbestos litigation. And although congressional hearings a half decade ago shed light on the asbestos bar's disturbing practices, I am concerned that the asbestos compensation system remains deeply troubled today.

When Congress last examined asbestos litigation, it was on the heels of the uncovering of a massive asbestos litigation fraud that ranks among the worst frauds perpetrated in American history. This massive fraud turned the worst occupational health disaster in U.S. history into one of the country's greatest scandals. Yet, despite this fraud and abuse being detected over half a decade ago, legal observers report that the worst abuses of the tort system continue to be central features of asbestos litigation today.

For instance, according to reports, a new generation of diagnosing doctors has emerged to provide questionable evaluations of asbestos claims, filling the void left as physicians subject to con-

gressional scrutiny in the mid-2000's shuttered their asbestos practices. Moreover, plaintiffs' firms continue to abuse State laws in order to bring cases in favorable forums; they are also aggressively pursuing novel legal theories well outside the bounds of traditional tort law in order to bring indications against solvent firms only tenuously connected to their clients; and the longstanding abuse of enhanced or creative product identification in which plaintiffs are coached to identify the products of solvent companies as those they remember being exposed to, continues unabated.

To make matters worse, it appears that fraudulent and abusive claims are now being filed against the ever-growing body of asbestos bankruptcy trusts. Indications are that claimants are attempting to double dip into both the tort and asbestos trust systems, often asserting contradictory claims against bankruptcy trusts and solvent companies. Falsified claims and duplicative recoveries unfairly reduce the amount of compensation available to deserving, present and future claimants.

Fraudulent and abusive claims also affect solvent companies, most of which only have a limited link to asbestos liability. Over 8,500 U.S. companies and over 90 percent of American industries have been sued for asbestos-related claims. Companies, many of whom never manufactured asbestos nor marketed it, are being sued by people who are not sick and may never be sick, and who, therefore, may not need compensation.

America's employers cannot create jobs and energize the economy when they are drained of tens of millions of dollars by abusive asbestos litigation in which their products were not even involved. Funds that could otherwise be used for research and development, facility construction and job creation are being lost to legal fees and the cost of fraudulent and abusive asbestos claims continues to drive otherwise viable employers into bankruptcy.

I hope that by once again shining light on the fraud and abuse in the asbestos compensation system, Congress can discourage bad actors and direct judicial attention to troublesome practices. Fraudulent and abusive practices hurt deserving, present and future asbestos victims, American employees and employers and the U.S. legal system.

With that, I would yield to the distinguished Ranking Member for his opening remarks.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, we are still living with the legacy of the careless use of asbestos and the widespread harm it caused to the health of still untold numbers of people. I hope that no one at today's hearing will seek to deny, as the industry did for too long, that asbestos causes serious, debilitating and fatal illnesses, that there is a widespread health crisis resulting from exposure to asbestos, or that those in industry whose actions caused people to become exposed and sick should bear the responsibility for their actions.

Just as with the tobacco industry, the days when the facts could credibly be denied are long over. What remains for us is to ensure that those who have genuinely been harmed are compensated and receive the care they need and deserve, and that the cost of that harm are borne by those responsible and not by the U.S. taxpayer

or by the victims. That we are, today in 2011, still trying to resolve this problem is unfortunate, to put it mildly.

The 1994 amendments to the Bankruptcy Code provided companies facing massive future claims with the ability to get out from under the significant liability overhang and continue in business. Following the court in the Manville bankruptcy case, the Code allows companies to resolve all asbestos claims, present and future, and shifts liability to a trust. Although there is a representative of the future claimants in the case, the actual future claimants are never heard. Their claims will have been sent to the trust long before they ever know that they are sick. The trusts are often underfunded and inadequate to the full cost of the harm.

While there has been much discussion and no shortage of suggestions as to how to improve the resolution of these claims, some of which merit careful consideration, I cannot help but express a certain amount of irritation at some companies who spent decades concealing the dangers, failing to protect their workers and fighting in the courts and Congress to avoid responsibility, who now complain about the trust system. It is a neat trick to be able to dispose of claims that have yet to arise involving people who never have the chance to be heard. I do not think anyone in the industry would suggest for a moment that we return to pre-Manville law and place these liabilities back on the companies' books where future claims could be paid out of future earnings.

Asbestos cases will continue to plague us for many years because people, unfortunately, continue to get sick and to suffer. As we consider the economic impact of these liabilities, I hope no one would suggest that the cost to the companies for these injuries should be shifted to the victims in order to improve the company's financial outlook. Whatever the cost to the industry, the cost to the victims has been far more significant.

There are some very serious issues, indeed, surrounding the administration of these trusts, the treatment of claims and the extent to which justice is being done. I hope we can remember to keep our eyes on the ball. Our chief mission must be to ensure that victims, those genuinely harmed by the asbestos industry, are aided, and that the wrongdoers, not the taxpayers foot the bill.

Thank you, Mr. Chairman. I yield back.

Mr. FRANKS. I thank the Ranking Member.

I understand that the Ranking Member of the full Committee, Mr. Conyers, is not available for an opening statement. So then without objection, other Members' opening statements will be made part of the record.

I want to welcome you all here to the Committee this morning. Our first witness, Lester Brickman, is a professor of law and former acting dean at the Benjamin N. Cardozo School of Law where he teaches contracts and legal ethics. He has written extensively and his writings have been widely cited in treatises, casebooks, scholarly journals and judicial opinions. Professor Brickman has been acknowledged by four Federal courts as an expert on the history of asbestos litigation, asbestos bankruptcy trusts, and the effect of tort reform on future asbestos claim generation.

Our second witness, Michael Carter, is president of Monroe Rubber & Gasket, a small, family-owned business that is

headquartered in Monroe, Louisiana. He served in the United States Navy from 1978 to 1981 and joined Monroe after leaving the Navy. Mr. Carter has been with Monroe for over 30 years.

Our third witness, Charles Siegel, is the head of appellate practices at Waters & Kraus LLP. Mr. Siegel has argued appeals in eight Federal appellate courts, six State supreme courts and numerous intermediate appellate courts around the country. He has served as an adjunct professor at the University of Houston Law Center and as a guest lecturer at several other law schools. Mr. Siegel has been recognized on the Texas super lawyers list every year since its inception in 2003.

Our fourth and final witness, James Stengel, is currently senior partner for litigation at Orrick, Herrington & Sutcliffe LLP and as such, manages the firm's global litigation practice. He primarily represents clients in large complex and multiparty class action litigation. He has handled significant actions involving the chemical, tobacco and medical device industries. Mr. Stengel has written and lectured on complex litigation and mass tort subjects at a variety of law schools and seminars.

Each of the witnesses' written statements will be entered into the record in its entirety, so I would ask that each witness summarize his testimony in 5 minutes or less. To help you stay within that time, there is a timing light only your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turn reds, it signals that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of this subcommittee that they be sworn in. So if you please stand.

[Witnesses sworn.]

Mr. NADLER. Mr. Chairman, could I be recognized for a moment, please?

Mr. FRANKS. Yes.

Mr. NADLER. I just want to take this opportunity to extend a special welcome to Professor Brickman who is a distinguished professor at Cardozo Law School, which is in my district, where he is very highly regarded.

Mr. FRANKS. Well, I am not going to ask him if he is a Republican here this morning.

I would now recognize our first witness, Professor Brickman, for 5 minutes.

TESTIMONY OF LESTER BRICKMAN, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Mr. BRICKMAN. Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to appear before you.

As you have stated, the tragedy of asbestos continues to——

Mr. FRANKS. Sir, could we get your microphone a little closer here. Is it turned on?

Mr. BRICKMAN. Asbestos has long been regarded as the "magic mineral" because of its unique qualities, but it has also caused the deaths of at least 200,000 occupationally exposed workers. Another 50,000 deaths from mesothelioma, a rare cancer caused by asbestos, are projected over the next 40 years.

The tragedy of asbestos, however, is compounded by its litigation history. This carcinogenic mineral has given rise to a malignant enterprise. In nine published articles on asbestos litigation, I have documented the existence of a massively fraudulent enterprise involving the creation of literally hundreds of thousands of bogus medical reports. These reports have been used to extract billions of dollars in settlements from defendants in the tort system, and more recently, from personal injury trusts which have been created to pay the claims against the companies that were bankrupted by asbestos litigation.

There has been a complete and total failure by State and Federal law enforcement agencies to prosecute the doctors who have received tens of millions of dollars for preparing these reports, let alone the lawyers who hired them.

The U.S. Attorney's Office for the Southern District of New York began an investigation in the summer of 2004. Though grand juries were convened and voluminous credible evidence of fraud has been amassed, this investigation, once again, languishes for want of someone to head it. The effect of this systemic neglect is to grant lawyers and the medical doctors they hire a special dispensation to commit fraud.

This failure, I suggest, should not be allowed to stand unchallenged. I, therefore, urge this subcommittee to request the Government Accounting Office to investigate this law enforcement failure and then exercise oversight over a Department of Justice that effectively condones manufacturing medical diagnoses for money on a massive scale.

The effects of this corrupt scheme have been devastating. Over 90 companies have gone bankrupt. Ten years ago, the Rand Institute for Civil Justice estimated that over 600,000 jobs were lost due to asbestos litigation. Undoubtedly, that total would be much higher today.

Though nonmalignant claim filings have declined precipitously starting in 2004, primarily because of State tort reforms, there has been a recent upsurge of such filings with the trusts. The impetus for this is the recent emergence of trusts with substantial assets that have significantly increased the value of nonmalignant claims in the trust system to as much as $40,000. Given the huge volume of filings, attorney fees can easily amount to over $100 million on an annual basis for filing these nonmalignant claims with the trusts.

Over $6.5 billion have been or will be set aside by the pending and confirmed trusts for unimpaired and moderately impaired nonmalignant asbestosis and pleural claims. Expedited filing procedures now allow lawyers to upload thousands of claims with a key stroke. This combination of efficiency, a nearly $7 billion fund waiting to be tapped and the magnitude of the attorney fees potentially available presents a compelling incentive for asbestos lawyers to resume the mass recruitment of claimants.

Trust claiming procedures are hidden from public view by the stealth sheathing that lawyers have constructed around the trusts. This system affords law enforcement and the public no transparency regarding the validity of claims filed with the trusts. Already, as the Chairman noted, there is evidence that a new genera-

tion of litigation doctors is emerging to replace the doctors that have been unmasked. Unless law enforcement withdraws the free pass it has extended to lawyers, and to the litigation doctors that they hire to manufacture diagnoses for money, in the words of U.S. district court judge Janis Jack, and to maladminister pulmonary function tests, mass recruitment of those occupationally exposed to asbestos can be expected to resume, and that will be a sad day indeed, sir.

Thank you for this opportunity.

Mr. FRANKS. Well, thank you, Professor Brickman.

[The prepared statement of Mr. Brickman follows:]

WRITTEN STATEMENT OF LESTER BRICKMAN
PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Hearing on: How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy and the Legal System

Before The Subcommittee On The Constitution Of The U.S. House Of Representatives Committee On The Judiciary

September 9, 2011

Asbestos was long regarded as the "magic mineral" because of its unique heat resistant properties. In World Word II, it was declared a "strategic and critical mineral" and was indispensable for the construction of military ships powered by steam. Industrial use mushroomed as new uses for asbestos were found.

Tragically, however, we came to learn in the 1960s that many World War II shipyard workers, in particular, insulators, were dying from their asbestos exposures. That was the beginning of realization of the harm, including fatal lung scarring (asbestosis) and deadly cancers (mesothelioma and lung cancer), faced by industrial workers using asbestos-containing products. There is no reasonably accurate count of the number of persons in the United States who have died from asbestos exposure over the past 50 years. A working estimate would put the number of deaths at at least 200,000.[1] Mesothelioma deaths are occurring at the rate of 1700-1900 per year and are projected (for males) to be in excess of 50,000 over the next 40 years.[2]

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[1] *See* STEPHEN CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT at 16, 47 (2002) (stating that more than 225,000 deaths due to asbestos would occur from 1985 to 2009 due to exposure occurring between 1940-1979) [hereinafter RAND REPORT 2002].

[2] Eun-Kee Park, Ken Takahashi, Tsutomu Hoshuyama, Tsun-Jen Cheng, Vanya Delgermaa, Giang Vinh Le, and Tom Sorahan; *Global Magnitude of Reported and Unreported Mesothelioma* 119 ENV. HEALTH PERSPECTIVES 514 (April, 2011).

The tragedy of asbestos is compounded by its litigation history. A carcinogenic mineral has given rise to a malignant enterprise. When in the distant future, we look back at asbestos litigation, we will surely include it among the great scandals in our history along with the Yazoo land frauds, Credit Mobilier, Teapot Dome, the Savings and Loan debacles, WorldCom, Enron and the vast Ponzi schemes that have recently unfolded.

In nine published articles on asbestos litigation,[3] I have documented the existence of a massively fraudulent enterprise involving the creation of literally hundreds of thousands of bogus medical reports. These reports have been used to extract billions of dollars in settlements from defendants in the tort system and from asbestos bankruptcy trusts ("trusts") which have been created with the assets of the companies that were bankrupted by asbestos litigation.

There has been a complete and total failure by state and federal law enforcement agencies to prosecute the doctors who have received tens of millions of dollars for preparing these reports, let alone the lawyers who hired them precisely because of their willingness to provide these diagnoses. This failure is not due to a lack of credible evidence.

In 2005, U.S. District Court Judge Janis Jack, presiding over a multi-district litigation (MDL) involving 10,000 claims of injury from exposure to silica dust, documented in great

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[3] *See The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221 (2008) [hereinafter, Brickman, *Litigation Screenings in Mass Torts*]; *Disparities Between Asbestosis and Silicosis Claims Generated By Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513 (2007) [hereafter, Brickman, *Disparities*]; *On The Applicability of the Silica MDL Proceeding To Asbestos Litigation*, 12 CONN. INS. L.J. 35 (2006) [hereinafter, Brickman, *Silica MDL*]; *An Analysis of the Financial Impact of S.852: The Fairness In Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991 (2005) [hereinafter, Brickman, *S.852*]; *Ethical Issues In Asbestos Litigation*, 33 HOFSTRA L. REV. 833-912 (2005) [hereinafter, Brickman, *Ethical Issues*]; *On The Theory Class's Theories Of Asbestos Litigation: The Disconnect Between Scholarship And Reality*, 31 PEPP. L. REV. 33 (2004) [hereinafter, Brickman, *Asbestos Litigation*]; *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243 (2001); *The Asbestos Claims Management Act of 1991: A Proposal To The United States Congress*, 13 CARDOZO L. REV. 1891 (1992); *The Asbestos Litigation Crisis: Is There a Need for An Administrative Alternative?*, 13 CARDOZO L. REV. 1819 (1992) [hereinafter, Brickman, *Asbestos Litigation Crisis*].

detail the existence of a fraudulent scheme to create bogus medical evidence, leading her to conclude that "it is apparent that truth and justice had very little to with these diagnoses . . . . [Indeed] it is clear that lawyers, doctors and screening companies were all willing participants" in a scheme to "manufacture. . . [diagnoses] for money."[4] She added that "each lawyer had to know that he or she was filing at least some claims that falsely alleged silicosis."[5] Judge Jack went on to conclude 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."[6] Indeed, the doctors, lawyers and screening companies that Judge Jack found had engaged in a scheme to "manufacture [diagnoses] for money" had engaged in the identical practices in generating claims of asbestosis.

Effectively, what law enforcement agencies have done by their inaction is grant lawyers and the medical personnel they hire a special dispensation to commit fraud on a massive scale in certain mass tort litigations (including the asbestos, silica, fen-phen, silicone breast implants and welding fume litigations.).[7] The office of the U.S. Attorney for the Southern District of New York began an investigation into fraudulent medical diagnoses in asbestos (and later silica litigation) in summer 2004. Though a grand jury was convened, for long periods of time, the investigation languished for want of someone to direct it. Despite having amassed voluminous evidence of fraudulent diagnosing and of deliberately falsified pulmonary function tests, the investigation once again languishes. In a 2007 op-ed in the Wall Street Journal,[8] I called

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[4] Order No. 29, *In re* Silica Prods. Liab. Litig. (MDL 1553), 398 F. Supp. 2d 563, 635 (S.D.Tex. 2005).

[5] *Id.* at 636.

[6] 398 F.Supp. 2d at 629; *see* Brickman, *Silica MDL, supra* note 3.

[7] *See Litigation Screenings in Mass Torts*, *supra* note 3.

[8] Lester Brickman, *DOJ's Free Pass for Tort Fraud,* WALL ST. J., Dec. 26, 2007 at A11.

attention to the free pass for mass tort fraud extended by the U.S. Attorney's office and its parent Department of Justice -- a free pass that evidence indicates also extends to lawyers' statements in court and testimony before Congress.

This failure of law enforcement and the resultant imprimatur given to the perpetration of mass tort fraud should not be allowed to stand unchallenged. I urge this Subcommittee to request that the Chairman of the House Judiciary Committee task the Government Accounting Office (GAO) with investigating this law enforcement failure and thus provide this Subcommittee with the necessary information to exercise oversight over a Department of Justice that effectively condones manufacturing medical diagnoses for money on a massive scale.

I. The Effect of the Bankruptcies Resulting from the Large Scale Recruitment of Nonmalignant Asbestos Litigants and Manufacturing of Diagnoses for Money on a Massive Scale

As detailed below, asbestos lawyers, doctors and screening companies have devised a scheme to recruit hundreds of thousands of workers occupationally exposed to asbestos and in the words of Judge Jack, to "manufacture [diagnoses] for money" in support of the nonmalignant claims generated by this scheme. Since each claimant typically has sued 20-50 (or more) different defendants, the total number of manufactured claims has probably exceeded 50 million.

This massive number of claims coupled with judicial responses to the litigation crisis,[9] have led to the bankruptcies of 96 companies as of March 2011.[10] No current estimate is available of the effect of these bankruptcies on jobs and workers' assets. A decade ago, RAND

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[9] *See* Brickman, *Asbestos Litigation Crisis*, *supra* note 3 at 1830-1884.

[10] *See* Lloyd Dixon and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, RAND Inst. for Civil Justice, 2011 at xi, xiii 2 [hereafter, RAND, *Trusts*].

estimated that "the number of jobs not created because asbestos defendants spent $10 billion less on investment up to the year 2000 would be approximately 128,000. Also, the number of jobs that defendants would have created if they had not had to reduce their capital investments by $33 billion is estimated to be 423,000."[11] This estimate predated the bankruptcies of Babcock & Wilcox, Pittsburgh Corning, Owens Corning, Owens Corning Fibreboard, E.J. Bartells, Armstrong World Industries, G-1 Holdings, W.R. Grace, USG and Federal Mogul -- all of which were filed in 2000-2001. In addition to loss of jobs, employees and shareholders of asbestos defendants that declared bankruptcy also suffered substantial financial losses. In 2002, a team of economists headed by Nobel Prize winner Joseph Stiglitz assessed the effects that 60 asbestos bankruptcies had on workers in those firms and concluded that 52,000-60,000 employees of these companies lost both their jobs and an average of 25% of the value of their 401(k) accounts and faced a future loss, on average, of approximately $25,000 to $50,000 in wages over his or her career.[12] In some instances, employees of asbestos defendants experienced even greater losses.[13] Shareholders have also been adversely affected by asbestos litigation and the ensuing bankruptcies. For example, after filing for bankruptcy at the turn of the millennium, the market

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[11] RAND REPORT 2002, *supra* note 1, at 74.

[12] *See* JOSEPH E. STIGLITZ ET AL., THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS (2002).

[13] For example, in 1998, Federal Mogul acquired a company with asbestos liability. *See* SENATE COMM. ON THE JUDICIARY, 108TH CONG., REPORT ON S.1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003 16 (2003) [hereinafter JUDICIARY COMM. ASBESTOS REPORT]; Federal Mogul, *at* http://www.federal-mogul.com/eda/content/front/0,2194, 2336_2903_4292,00.html (November 11, 2003) (discussing Federal Mogul's acquisition of companies in 1998 that manufactured asbestos products). By 2001, the parent company was threatened with bankruptcy as a result of multiple asbestos suits, and the value of the Federal Mogul stock in the accounts of its 22,000 employees declined more than $70 million. *See id.*; *see also* GRIFFIN B. BELL, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURT'S DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS 26 (2002) [hereinafter BELL, ASBESTOS LITIGATION]; JESSIE DAVID, THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES, U.S. CHAMBER OF COMMERCE (2003); AMERICAN BAR ASSOCIATION COMMISSION ON ASBESTOS LITIGATION, ABA REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION & RESOLUTION, 7 (2003) [hereinafter ABA REPORT].

capitalization of five major asbestos-producing companies fell dramatically.[14] In addition, "the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole."[15]

II. Entrepreneurial Claim Generation

In the traditional litigation model, a person who is injured by use of or ingestion of a product seeks medical attention and may, thereafter, seek legal counsel to file a claim for compensation. In the early 1980s, Richard "Dickie" Scruggs, perhaps best known for his role in initiating the suits by states' attorneys-general against the tobacco companies which netted him a reported one billion dollars[16] and for his guilty plea to conspiracy to bribe a judge,[17] saw an opportunity to improve upon the traditional litigation model. In place of this retail model, Scruggs created an entrepreneurial model to amass claims by the hundreds and later by the thousands. Instead of waiting for a sick person to seek legal assistance, he would mass recruit those with asbestos exposure by advertising that he was offering free X-rays and medical examinations to workers occupationally exposed to asbestos. In return for the opportunity to get

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[14] The market capitalization for Federal-Mogul declined 99% from $4 billion in January 1999 to $49 million after filing for bankruptcy in October 2001; Owens Corning's market capitalization fell from $1.8 billion to $75 million (96%); Armstrong World Industries fell from $1.01 billion to $204 million (80%); W.R. Grace's declined from $1.1 billion to $114 million (90%); and USG's fell from $2.5 billion to $185 million (92%). *See* Amicus Curiae Memorandum of the Babcock & Wilcox Company Regarding Allocation of Settlement Trust Funds for Asbestos Claimants, Findley v. Trustees (*In re* Joint East & South Dist. Asbestos Litigation), 237 F. Supp. 2d 297 (E.D.N.Y. 2001) (Nos. 82B 11656 (BRL) – 82B 11676 (BRL)) at 25.

[15] *See* JUDICIARY COMM. ASBESTOS REPORT, *supra* note 13.

[16] *See Frontline: Inside The Tobacco Deal* (PBS television broadcast) http://www.pbs.org/wgbh/pages/frontline/shows/settlement/interviews/scruggs.html (last visited Sept. 20, 2008) (interview with Richard Scruggs).

[17] *See* Brickman, *Litigation Screenings*, *supra* note 3 at 1296 n.395.

"free" money if they tested positive for an asbestos-related disease, they agreed to retain him.[18] For this system to work, he would not only need a large scale recruitment effort but also doctors willing to find asbestosis and impaired lung function irrespective of "truth and justice." Scruggs found that there was no shortage of doctors willing to "manufacture diagnoses for money." These doctors maintain that the persons whose X-rays they read or whom they physically examine and diagnose are not patients and that their services are solely for the purpose of creating evidence for use in litigation. I call them " litigation doctors." When the litigation doctors' X-ray readings, diagnoses and pulmonary function test results are subjected to independent medical analysis, their error rates, as noted below, are consistently 90% or higher.

Scruggs' entrepreneurial approach hit pay dirt and attracted large numbers of potential litigants who sought to claim a piece of the pie. Soon other lawyers began hiring screening companies which sprang up to meet the demand to mass produce litigants with nonmalignant asbestos disease claims. Indeed, in the 1988-2006 period, well over 90% of the approximately 585,000 nonmalignant claims for compensation filed with the Manville Trust[19] were generated by litigation screenings.[20]

A. Litigation Screenings

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[18] *See* Terry Carter, *Long Live The King of Torts?*, A.B.A. J. Apr. 2008 at 46.

[19] The Manville Personal Injury Settlement Trust ("Manville Trust") is the entity created as a consequence of the bankruptcy of the Johns-Manville Corp. in 1982 to which all claims against Johns-Manville relating to asbestos exposure are channeled. *See* Brickman, *Asbestos Litigation*, *supra* note 3 at 54, 128-29.

[20] *See* JUDICIARY COMM. ASBESTOS REPORT, *supra* note 15 at 86 (citing Letter from Steven Kazan to the Honorable Jack B. Weinstein which states that David Austern reported at a conference that "90% of the [Manville] Trust's last 200,000 claims have come from attorney-sponsored x-ray screening programs, and that 91% of all claims allege only non-malignant asbestos 'disease.'" Since about 10% of the claims were for malignancies, then the reference to 90% of claims generated by screenings is the equivalent of virtually 100% of the nonmalignant claims). *See also* Stephen Carroll, et al., ASBESTOS LITIGATION. RAND Institute for Civil Justice (2005) at 75; Brickman, *Ethical Issues In Asbestos Litigation*, *supra* note 3 at 834.

The core of the "entrepreneurial" model of nonmalignant asbestos litigation is an unprecedented-in-scale litigant recruitment effort: the litigation screening.[21] Entrepreneurial screening companies have been hired by lawyers to seek out persons with occupational exposure to dusts such as those containing crystalline silica or asbestos. Mobile X-ray vans are brought to local union halls, motels, or strip mall parking lots where X-rays are taken on an assembly line rate of one every five to ten minutes. In addition to the X-rays, most screening companies also administer pulmonary function tests (PFTs) to determine lung impairment for the sole purpose of generating evidence for litigation purposes.[22]

These litigation screenings should not be confused with medical screenings. Litigation screenings have no intended health benefits. The sole objective of these screenings is to identify potential litigants and to generate the medical reports needed to qualify litigants for compensation; in particular, to support claims of asbestosis, a scarring of the lung tissue caused by exposure to asbestos.[23]

To read the hundreds of thousands of chest X-rays and pulmonary function tests generated by the litigation screenings and to produce the massive numbers of medical reports needed to advance the scheme, plaintiffs' lawyers and the screening companies have hired a

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[21] *See* Brickman, *Asbestos Litigation, supra* note 3 at 62-83.

[22] *See* id. at 111 (describing pulmonary function tests); *see also infra* note 36.

[23] *See* generally Ken Donaldson & C. Lang Tran, *Inflammation Caused by Particles and Fibers*, 14 INHALATION TOXICOLOGY 5 (2002). When lung tissue in thus scarred, the condition is termed interstitial or parenchymal fibrosis. The International Labour Organization (ILO) uses the term pneumoconiosis to describe the reaction of lung tissue to the accumulation of dust in the lungs. If the fibrosis is the result of exposure to crystalline silica (sand dust, quartz, etc.), the condition is termed "silicosis"; if it is the result of exposure to asbestos, it is called "asbestosis." W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDER 285, 411 (3d ed. 1994). Fibroses caused by exposure to different dusts encountered in occupational settings, as well as by numerous other causes, may manifest differently on an X-ray. While the determination of the cause of a fibrosis may have a medical purpose, the principal reason for determining that the cause is asbestos exposure is a function of the compensation system. Whereas a diagnosis of another cause of fibrosis may yield no compensable claim, a diagnosis of asbestosis may enable the subject to be eligible for substantial compensation.

small number of doctors who share one common characteristic: their apparent willingness to enter into business transactions with lawyers and screening companies for the sale of tens of thousands of X-ray readings and diagnoses in exchange for the payment of millions of dollars.[24] These X-ray readers have been certified by NIOSH as B Readers which is an indication of special competence in reading chest X-rays and classifying them on the International Labour Organization (ILO) scale.[25] A small number of B Readers, perhaps 4-6% of all certified B Readers,[26] are most frequently selected by plaintiffs' lawyers to read most of the hundreds of thousands of X-ray films generated by screenings. These B Readers grade most of these X-rays as 1/0 on the ILO scale (which is the lowest grade of abnormality on the ILO 12 point scale) and describe their findings of radiographic evidence of fibrosis as "consistent with asbestosis." Along with a small number of other doctors, they diagnose the vast majority of litigants thus found to have lung profusions of 1/0 or greater as having mild asbestosis (or silicosis -- if that is the purpose of the screening, or both asbestos and silicosis.) These B Readers and other doctors, numbering approximately 25, have accounted for a dramatically disproportionate percentage of the total number of X-ray readings and medical reports that have been submitted as evidence in support of nonmalignant asbestos personal injury claims.[27] Indeed, the reliance on a small

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[24] For an explanation of how a newly hired X-ray reader is tested to see whether he measures up to the standard for selection, *see* Brickman, *Asbestos Litigation*, *supra* note 3 at n.174.

[25] The degree of fibrosis appearing on a chest X-ray is graded according to a classification system developed by the ILO. For an explanation of this classification, *see* Brickman, *Disparities*, *supra* note 3 at 520 n. 15.

[26] As of December 15, 2005, NIOSH listed 387 B Readers on its website; on July 22, 2003, it listed 431; on April 25, 2002, it listed 535; and on February 20, 1998, NIOSH listed 627 B Readers.

[27] A study of a stratified sample of claims submitted to Owens Corning before its bankruptcy filing indicated that just five B Readers (Drs. Raymond Harron, Jay Segarra, Richard Keubler, Philip H. Lucas and James W. Ballard) had read over eighty percent of the X-rays, with Dr. Harron alone accounting for forty-six percent of the X-ray readings. Report of Dr. Gary K. Friedman at 11, 18, 21, Owens Corning Impaired Nonmalignant Claim Submissions 1994-1999 (approx.), (circa 2002). The Manville Trust reported that of 199,533 claims it processed in the period January 1, 2002 to June 30,

number of B Readers and diagnosing doctors is a defining characteristic of the "entrepreneurial" model.[28]

As more fully discussed below, litigation screenings have been highly profitable for lawyers, litigation doctors and screening companies. In my opinion, based on extensive research, the majority of the hundreds of thousands of medical reports generated by these screenings are not the product of good faith medical practice; rather they are produced in the course of business transactions involving the sale of X-ray readings and diagnoses for tens of millions of dollars in fees. Further, that the vast majority of those diagnosed with asbestosis would not have been found to have an asbestos–related disease if they were examined in a clinical setting by doctors without a financial stake in the litigation.

ILO guidelines require that B Readers read all X-rays blind to "any information about the individuals other than the radiographs themselves." [29] This includes information about an individual's occupational and exposure history. Leaving nothing to chance, however, plaintiffs' lawyers routinely instruct B Readers that the purpose of reading the X-ray is to determine whether the individual has a claim for asbestosis or silicosis. As concluded by Judge Jack:

2004, just twenty B Readers accounted for sixty-two percent of the total B Readings. *See* Power Point Presentation at 8, David T. Austern, President, Claims Resolution Management Corporation, "2004 Asbestos Claim Filing Trends." The Trust further reported that as of December 31, 2005 of the many hundreds of B readers in its files, the top 25 who authored B reads in support of claims submitted to the Trust accounted for 66% (89,092) of the 135,235 B reads in its records. CRMC Response to Amended Notice of Deposition Upon Written Questions, *In re*: Asbestos Prods. Liab. Litig. (No. VI), (Arbuthnot, et al. v. Ford Motor Co., et al.), Civil Action No. MDL 875 (E.D. Pa.), March 2, 2006 at Exh. B. Of the thousands of doctors who submitted diagnoses, the top 25 who were identified in the Trust's records as the primary diagnosing doctor accounted for 46% (255,928) of the total of 552,045 claims that permitted such identification. *Id.* at Exh. C.

[28] In the silica MDL, Judge Jack noted that "the over 9,000 plaintiffs who submitted fact sheets were diagnosed with silicosis by only 12 doctors . . . affiliated with a handful of law firms and mobile X-ray screening companies." 398 F. Supp. 2d at 580.

[29] *Id.* at 626.

> [I]n the setting of mass screening and/or mass B-reading for litigation, the B-reader is acutely aware of the precise disease he is supposed to be finding on the X-rays. In these cases, the doctors repeatedly testified that they were told to look for silicosis, and the doctors did as they were told.[30]

B Readers' responsiveness to these directions from the lawyers that hired them is indeed impressive. As noted by Judge Jack.

> "After December 31, 2000 (when N&M [a screening company] changed its focus from asbestos to silica litigation), Dr. Harron [working for N&M] found . . . [lung] opacities (consistent with silicosis) in 99.6% of the 6,350 B-reads he performed for MDL Plaintiffs. But prior to December 31, 2000 (when N&M focused on asbestos litigation), Dr. Harron performed B-reads on 1,807 of the same MDL Plaintiffs for asbestos litigation and he found . . . opacities (consistent with asbestosis but not silicosis) . . . 99.11% of the time."[31]

The "entrepreneurial" business plan for generating claims by use of screenings has been highly effective. My research leads me to conclude that the comparative handful of B Readers employed by screening companies and plaintiffs' lawyers mostly read 50%-90% of the X-rays generated by screenings as exhibiting radiographic changes graded as 1/0 or higher on the ILO scale which are "consistent with asbestosis." [32] A number of these B Readers have testified that their percentages of positive X-ray readings are 30% or below but the evidence I have examined indicates that their actual percentages are, on average, at least double that percentage. Indeed, in view of the medical literature on the prevalence of asbestosis, these litigation doctors have astonishingly high rates of reading X-rays as positive for radiographic changes that qualify the

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[30] *Id.* at 627. It was " the lawyers [who] determined first what disease. . . [the litigation doctors] would search for and then what criteria would be used for diagnosing that disease." *Id.* at 634-35.

[31] 398 F. Supp. 2d at 607-08 (footnote omitted).

[32] *See* Brickman, *Asbestos Litigation*, *supra* note 3 at 84-89 nn. 159-164 (concluding on the basis of the evidence that I had then examined that 60%-80% of the X-rays were being graded as 1/0 or higher). For a summary of some of the evidence that litigation doctors are finding astoundingly high rates of radiographic changes "consistent with asbestos," *see* Brickman, *Disparities, supra* note 3 at 526-529 n.35.

screened worker for compensation.[33] In addition, it would appear that these same B Readers and other doctors are diagnosing 80% or more of those whose X-rays have been read as indicating radiographic changes graded 1/0 or higher, with asbestosis "within a reasonable degree of medical certainty."[34] Based upon the data I have assembled, I conclude that there is a significant likelihood that each of these B Readers and diagnosing doctors as well as the screening companies that hire them, have predetermined "signature" percentages of positive X-ray readings and diagnoses that fall within the 50%–90% range. Indeed the "product" that these doctors appear to be selling to lawyers and screening companies are high *fixed* percentages of "positive" X-ray readings and diagnoses of silicosis and asbestosis.

B. Clinical Re-Readings of Litigation B Readers' Results

There is additional evidence to support the conclusion that the B Readers most frequently selected by plaintiffs' lawyers for litigation screenings are manufacturing B readings for money. In eight clinical studies or their equivalent, X-rays read by litigation doctors as 1/0 or higher and "consistent with asbestosis" were re-read by independent B Readers. These studies indicate that the litigation B Readers' error rates were mostly in the 90% range.[35]

C. Pulmonary Function Tests

Most screening companies also administer a battery of pulmonary function tests[36] ("PFTs") to determine whether there is any lung impairment and, if so, to what degree. A

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[33] *See* Brickman, *Disparities*, *supra* note 3 at 529 n.36.

[34] *Id.* at 529 n.37.

[35] *Id.* at 550-557; Brickman, *Litigation Screenings*, *supra* note 3 at 1237-1239.

[36] Pulmonary function is determined by a series of tests comparing an individual's measurements to a set of predicted values for that individual based on age and other physical characteristics. These tests include spirometry which measures the total expiratory volume of the lung and forced expiratory volume during the first second of expiration, total lung capacity and diffusing

finding of impairment materially increases the value of a nonmalignant claim often by a factor of 2.5 to 3 or more.[37] The screening companies that administer PFTs find that a substantial proportion of those tested, probably a majority, have lung impairment -- findings which are belied by medical science.[38] Indeed, the evidence that screening companies which administer PFTs, generate false findings of impairment by manipulating the testing equipment and failing to follow the proper procedures,[39] is at least as compelling as is the evidence that the X-ray readings and diagnoses of the litigation doctors are being "manufactured for money."[40]

D. The Refusal to Provide Screening Records as Evidence of Predetermined Percentages of Positive X-ray Readings and Diagnoses

As noted above, the B Readers, diagnosing doctors and screening companies involved in litigation screenings appear to have predetermined percentages of "positive" findings irrespective of the X-rays or files they are reviewing or PFT tests they are administering. Indeed, these "signature" percentages of positive X-ray readings and diagnosis appear to be the "product" they are selling to lawyers.[41] If such a determination were to be made, it could be "smoking gun" evidence of fraud that would not only subject these doctors' findings to challenge but also

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capacity of the lung. For more detail on PFTs, *see* Brickman, *Asbestos Litigation*, *supra* note 3, at 111-14.

[37] *See* Brickman, *Litigation Screenings*, *supra* note 3 at 1241 n.93.

[38] *See* Brickman, *Disparities*, *supra* note 3 at 574-577.

[39] *See* Brickman, *Asbestos Litigation*, *supra* note 3, at 117-128 describing a "scheme to generate false medical test results" that resulted in false PFT results; Brickman, *Disparities*, *supra* note 3, at 576-577 (analyzing the results of tens of thousands of PFTs administered by the N&M screening company).

[40] *See* Brickman, *Asbestos Litigation*, *supra* note 3 at 111-128.

[41] In an audit of claims filings undertaken by the Manville Trust, the failure rate of a given B Reader often varied significantly depending on which law firms were employing the B Reader. *See* Brickman, *Asbestos Litigation*, *supra* note 3 at 128. In fact, biostaticians from Pennsylvania State University and the University of Pennsylvania, who were commissioned by the Manville Trust to assist with the analysis of the audit data, concluded that the identity of the particular law firm that submitted any given claim was a "strikingly significant predictor" of whether that claim would fail the audit, and that those findings exhibited "huge levels of statistical significance." *Id.* at 134 nn. 354-55.

expose them and the screening companies to criminal prosecution. If astoundingly high "signature" percentages of fibrosis and asbestosis were the actual product that doctors and screening companies were selling to lawyers, we would expect that these doctors and screening companies would go to great lengths to avoid disclosing information that would enable computation of their "positive" rates, that is, their rates of finding radiographic evidence of fibrosis and diagnosing asbestosis. This may explain why, outside of the silica MDL, where Judge Jack utilized the full powers of her office to overcome resistance to the production of the subpoenaed records and MDL 875 where Judge James Giles allowed discovery of the records of Respiratory Testing Services, a screening company, B Readers and other doctors and screening company representatives who are deposed and subpoenaed to produce records of *all* of their X-ray readings, diagnoses, and PFT tests -- records which would enable a determination of their total percent "positives" -- move to quash subpoenas for these records and otherwise simply refuse to comply.[42] In addition, leading plaintiffs' law firms, understanding what is at stake, vigorously oppose efforts to subpoena the records of the litigation doctors that they have hired.[43] Some of the litigation doctors, when asked to certify before a congressional hearing or in a litigation context, that their diagnoses in the silica MDL were accurate and made pursuant to medical protocols, refused to answer and invoked the Fifth Amendment to the U.S. Constitution; in addition, two screening company principals have pled the Fifth Amendment as a basis for refusing to testify and produce records.[44] The implications of doctors refusing to testify about

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[42] For the extensive evidence I am relying on, *see* Brickman, *Disparities*, *supra* note 3 at 584-587.

[43] *Id.* at 586, n.255.

[44] Doctors Ray Harron, Andrew Harron and James Ballard, between them responsible for more than 4,000 diagnoses of silicosis, were subpoenaed to appear before the House Energy and Commerce Subcommittee on Oversight and Investigations; each invoked their Fifth Amendment rights in declining to respond to this question asked by Subcommittee Chairman Ed Whitfield: "Will you certify

their X-ray readings and diagnoses on the grounds that that testimony may tend to incriminate them notwithstanding, the Fifth Amendment protection does not generally extend to doctors' and screening company's records.[45]

III. The "Free Pass" Extends to Testimony Before Congress and Statements in Court: Dual Diagnoses and the Law Firm of O'Quinn, Laminack & Pirtle

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that each of these diagnoses and all others that you made in this litigation are accurate and made pursuant to all medical practices, standards and ethics?" Press Release, House Committee on Energy and Commerce, Doctors Refuse to Testify at Silicosis Hearing; Others Recount Diagnoses 'Manufactured for Money,' *available at* http://energycommerce.house.gov/108/News/03092006_1810.htm. In addition, Dr. Todd Coulter, who was responsible for 237 diagnoses in MDL 1553, all done for Occupational Diagnostics, a screening company, "took the Fifth" and declined to testify before the House subcommittee. *The Silicosis Story: Mass Tort Screening and the Public Health: Hearings Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 109th Cong.*, at 436 (2006) (testimony of Dr. H. Todd Coulter, 7/26/06) [hereinafter *Silica Hearings*]. *See also Silicosis Clam-Up*, WALL ST.J., Mar. 13, 2006, at A18. Dr. James W. Ballard also invoked his Fifth Amendment privilege and refused to answer a variety of questions about his medical opinions in a civil proceeding. *See* Deposition of James W. Ballard, Feb. 22, 2007, *In re* W.R. Grace et al., Civ. Action No. 01-1139 (Bankr. D. Del.); *see also* Brickman, *Disparities, supra* note 3 at 553 n.107. Charles Foster, the owner of Respiratory Testing Services, also "took the Fifth" before the House Subcommittee concerning the MDL 1553 silica cases. *Silica Hearings, id.* at 264 (testimony of Charles Foster 6/6/06), and did so again during the entirety of his deposition on asbestos claims, in the W.R. Grace bankruptcy. *See* Deposition of Charles Foster, Oct. 27, 2006, at pp. 8 et seq., In re W.R. Grace, et al., Civ. Action No. 01-1139 (Bankr. D. Del.). Health Mason, the co-owner of N&M, Inc., the screening company that accounted for the bulk of the silicosis claims that were included in the silica MDL, invoked his Fifth Amendment privilege against self-incrimination in response to each substantive question posed to him. *See* Deposition of Charlie Health Mason, Feb. 27, 2007, *In re* W.R. Grace et al., Civ. Action No.01-1139 (Bankr. D. Del).

[45] 98 C.J.S. Witnesses § 543. Production of Documents or Things. ("The privilege is to protect against compulsory incrimination through one's own testimony or personal records…." The privilege "may not be based on incrimination resulting from the contents or nature of the thing demanded." Moreover, records "normally kept or required to be maintained by law or under professional rules are not privileged." *Id.* (Updated 2006)). The U.S. Supreme Court has held that "[i]t is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating." Fisher v. United States, 96 S. Ct. 1569, 1579 (1976). *See also* U.S. v. Hubell, 530 U.S. 27, 120 S. Ct. 2037, 2043 (2000) (stating that a person cannot avoid producing subpoenaed documents merely because they contained incriminating evidence and defining communications that are "testimonial" in character and therefore are protected.). The issue of whether the Fifth Amendment protection against self-incrimination extends to records is complex and the very limited discussion in this footnote is not being offered as anything more than an introductory note.

The brazenness of the lawyers who operate or sponsor screening mills to generate bogus medical records is fully revealed by testimony before Judge Jack in the silica MDL and before Congress on the subject of dual diseases and diagnoses.

In the silica MDL, evidence was introduced that close to 70% of the 10,000 silicosis claimants had previously filed asbestosis claims[46]—a phenomenon that become known as "retreading."[47] While it is medically possible for a claimant to have the dual diseases of asbestosis and silicosis, it is a "clinical rarity" —a medical euphemism for "virtually never." Indeed, this dual disease phenomenon is so rare that experienced pulmonologists testifying before Judge Jack stated that they had never seen a single such case.[48] "Retreading" is done by having B Readers re-read X-rays previously read by litigation doctors as indicating radiographic evidence of fibrosis "consistent with asbestosis," and instead finding that they are "consistent with silicosis." In many cases, these B Readers are contradicting their own prior readings of the same X-ray.[49]

The Law Firm of O'Quinn, Laminack, & Pirtle ("O'Quinn") was Lead Plaintiffs' Counsel in the silica MDL and represented over 2,100 plaintiffs in the proceeding.[50] A defense

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[46] 398 F. Supp. 2d at 628.

[47] *See Asbestos: Mixed Dust and FELA Issues: Hearing on the Proposed FAIR Act and the Effect of Mass filings of Silicosis Claims before the S. Comm. on the Judiciary,* 109th Cong. (Feb. 2, 2005) (statement of Lester Brickman).

[48] 398 F. Supp. 2d at 594-96 (collecting doctors' testimony that, although it is theoretically possible, in their extensive pulmonary practice, none of them had ever seen such a case of dual disease).

[49] *See, e.g.*, 398 F. Supp. 2d at 609. These is widespread evidence of this phenomenon. *See also, supra* note 47. Silica MDL plaintiff Willie Jones was screened at least four times by Dr. Jay T. Segarra: (1) March 14, 2002; (2) September 9, 2002; (3) February 27, 2003; and (4) June 27, 2003. The first and third screenings resulted in silicosis diagnoses by Dr. Segarra, with, in Dr. Segarra's words, "no radiographic evidence for pulmonary asbestosis." The second and fourth screenings resulted in wholly inconsistent diagnoses of "mixed dust pneumoconiosis (silicosis and asbestosis)." Defendants' Motion for Production of Pulmonary Diagnoses and Evaluations at 4, *In re*: Texas State Silica Prods. Liab. Litig., Cause No. 2004-70000 (Tex. Dist. Ct. Apr. 3, 2007).

[50] STAFF OF H. COMM. ON ENERGY & COMMERCE, MEMORANDUM TO THE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS: 109TH CONG., OVERSIGHT AND INVESTIGATIONS HEARINGS: "THE

counsel stated during the proceedings that 73% of one group of O'Quinn's cases had previously filed asbestosis claims.[51] In an August 22, 2005 exchange with Judge Jack, Richard Laminack attempted to respond to the overwhelming evidence presented in the MDL that most, if not all, of the dual disease claims were specious and defend the integrity of his firm's silicosis claims. To justify the bona fides of his clients' silica claims, he argued that though many of his clients had previously filed asbestosis claims, "the explanation on a lot of the cases is the asbestosis diagnosis is wrong." [52] When pressed about the asbestosis claims, Mr. Laminack responded, " I doubt the numbers, and I doubt the diagnosis." [53] Thus, he was contending that his clients were not dual disease claimants because their prior filings of asbestosis claims were based on invalid diagnoses.[54]

Consistent with this position, Laminack further stated that the firm "never, never represented an asbestos claimant and then turned around and retread it as a silicosis claimant. We never, ever did that." [55] This is belied by the statement of two of the firm's clients.[56] Moreover, as set out below, at least some, if not most, of the asbestosis claims filings that were based upon

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SILICOSIS STORY: MASS TORT SCREENING AND THE PUBLIC HEALTH" FOURTH DAY OF HEARINGS (Comm. Print July 25, 2006). The Subcommittee on Oversight and Investigations had been investigating the issues presented by Judge Jack in *MDL 1553*, specifically examining doctors, screening companies, state regulators of radiological medicine, state medical boards, and law firms related to the *MDL 1553* litigation, as a case study, to determine the public health issues arising from the use of mass tort screenings to identify claimants for a lawsuit. *Id.* at 2-3.

[51] Transcript of Status Conference at 58, *MDL 1553*, 398 F. Supp. 2d 563 (S.D. Tex. Aug. 22, 2005).

[52] *Id.* at 62-63.

[53] *Id.* at 64; *see also, Jack The Ripper*, WALL ST. J., Aug. 31, 2005, at A8.

[54] *See* Editorial, *Case of the Vanishing X-rays*, WALL STREET JOURNAL, Aug. 31, 2005, at A8.

[55] Transcript of Status Conference, *supra* note 51, at 58-59.

[56] Two O'Quinn clients stated to the staff of the Subcommittee on Oversight and Investigations that they were first diagnosed with asbestosis and, some time later, received a letter from the firm telling them that they also had silicosis. MEMORANDUM *supra* note 50.

diagnoses that Mr. Laminack opined were "wrong" were done by or for an affiliated law firm acting in conjunction with the O'Quinn firm.

In testimony before the House Subcommittee on Oversight and Investigations, the O'Quinn firm repeated the assertion that it did not retread asbestos claims as silicosis claims and indeed "did not have an asbestos docket."[57] Joseph Gibson, an attorney with the O'Quinn firm, previously stated in an affidavit that he was "aware that some of our clients had Asbestosis diagnoses because during the time our plaintiffs were being tested for Silicosis, some plaintiffs were found to have X-ray findings that were consistent with Asbestosis." [58] He stated that this was the only exception to the O'Quinn firm's general rule that the "law firm did not have in its possession any records relating to Asbestosis claims that its Silica MDL plaintiffs may or may not have had." [59] When a firm-sponsored litigation screening generated diagnoses of both asbestosis and silicosis for the same litigant, the firm referred the asbestosis claim to the Foster Law Firm, formerly known as Foster & Harssema,[60] and shared in any fees generated by the asbestos case.[61]

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[57] Abel Manji, an attorney with the O'Quinn Law Firm who assumed responsibility for O'Quinn's silicosis cases after joining the firm in May 2005, was designated to be a witness at the Oversight and Investigations Hearing on July 26, 2006. He testified that the O'Quinn Firm did not "engage in the practice of retreading old asbestos cases into new silicosis cases, in fact, the O'Quinn Firm did not have an asbestos docket." *Silica Hearings*, *supra* note 44 at 384 (testimony of Abel Manji).

[58] Affidavit of Joseph Gibson, MDL 1553, March 9, 2005.

[59] *Id.*

[60] *Id.* Gibson further stated that the O'Quinn law firm had handled some asbestosis cases directly, but the vast majority were referred to Ryan Foster. *Id.*

[61] *Silica Hearings, supra* note 44 at 423-424 (testimony of Richard Laminack 7/26/06). Laminack testified that the O'Quinn firm and the Foster firm had a "referral arrangement," whereby the O'Quinn firm earned a referral fee for every successful asbestosis claim they sent to the Foster firm. *Id.*

The Foster Law Firm is located at 440 Louisiana, Suite 2100, Houston, Texas. The O'Quinn firm is located at 440 Louisiana, Suite 2300, Houston, Texas.[62] The O'Quinn firm had "initially financed the start-up of [the Foster] law firm" in 2001[63] and two O'Quinn partners, Mr. O'Quinn and Mr. Laminack, were elected managers of the Foster firm.[64] From 2002 to 2005, two of three managers and directors of the Foster firm were members of the O'Quinn firm, including variously Mr. Laminack, Mr. O'Quinn, and Mr. Pirtle.[65]

The relationship between the O'Quinn and Foster law firms is made manifest by the process the firms followed in generating litigants. For example, both the O'Quinn and Foster firms hired N&M, Inc.[66] to perform screenings. These screenings for the firms generated one X-

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[62] TEXAS FRANCHISE TAX, PUBLIC INFORMATION REPORT OF RYAN A. FOSTER & ASSOC., PLLC (2004) (copy on file with Cardozo Law Review) [hereinafter FOSTER TEXAS FRANCHISE TAX REPORT]. According to a 2001 Texas secretary of state document, Foster & Harssema and John M. O'Quinn & Associates had their offices in the same building in Houston. Mary Alice Robbins, *The Big Grill: Plaintiffs Lawyers Raked Over the Coals Regarding Silica Suits*, TEX. LAW., July 31, 2006, at 1.

[63] *Silica Hearings, supra* note 44 at 423-424 (testimony of Richard Laminack, 7/26/06).

[64] *Id.* In response to a question from Rep. Walden: "And, are you an officer, or director, or have you ever been, of the Foster Law Firm?," Laminack answered:

> Well, when it was originally set up, it was set up to have three managers, I was designated, along with Mr. O'Quinn, as a non-member manager—my understanding is, that was done primarily, to ensure, since Mr. O'Quinn had provided the money for the start-up of that firm, that Mr. Foster couldn't spend or borrow money without Mr. O'Quinn's approval, if you will, so, uh, I got elected to be one of the managers, to ensure that the vote was always 2 to 1.

Id.

[65] FOSTER TEXAS FRANCHISE TAX REPORT, *supra* note 62. Laminack disputed being a director in his testimony, saying that he was only a manager. *Silica Hearings, supra* note 44, at 424 (testimony of Richard Laminack).

[66] *See* Brickman, *Disparities, supra* note 3 at 526 n.35. Out of the 6,757 MDL plaintiffs for whom N&M generated a silicosis diagnosis, at least 4,031 had previously filed asbestosis claims with the Manville Trust. 398 F. Supp. 2d at 603. The Campbell Cherry law firm paid N&M $750 for each litigant screened who was diagnosed with silicosis and signed a retainer agreement. If the diagnosis was negative or the litigant did not sign up with the law firm, N&M was paid nothing by the firm. Transcript of *Daubert* Hearings at 301-03, 325, *MDL 1553*, 398 F. Supp. 2d 563 (Feb. 17, 2005). N&M was likely paid approximately $3,192,000 by Campbell Cherry, which represented approximately 4,256 plaintiffs in this MDL. *Id.* at 363. The O'Quinn law firm paid $335 per positive diagnosis, which included the X-ray, a physical examination, and a PFT, for each of the over 2,000 plaintiffs they represented and $35 for an

ray and one physical examination per litigant.[67] N&M hired Dr. Ray Harron[68] to read the X-rays and perform the diagnosing.[69] Dr. Harron's typical X-ray impression read "bilateral interstitial fibrosis consistent with asbestosis, silicosis and coal workers pneumoconiosis."[70] Under instructions from the O'Quinn firm, where there were dual diagnoses, Dr. Harron then prepared two separate letters, one stating a diagnosis of asbestosis and the other of silicosis.[71] The asbestosis diagnosis letter was sent to the Foster firm and the silicosis diagnosis letter was sent to the O'Quinn firm.[72] The record is plain. Two salient points bear repetition: (1) the O'Quinn firm shared in the fees generated by the asbestosis claim;[73] and (2) Laminack had testified that the

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X-ray that was read negative. *Id.* at 363-64. Heath Mason, the principal of N&M, testified that "a lot" of firms did not pay N&M for negatives. *Silica Hearings, supra* note 44, at 135-36 (testimony of Heath Mason). He has also testified that based on this fee structure, the emphasis was to generate positive diagnoses: "[F]rom a business standpoint of mine [sic], you had to do large numbers." *Id.* at 282.

[67] For an example, see N&M INVOICES (Mar. 13, 2002, Mar. 21, 2002, July 21, 2002, Jan. 15, 2003, Dec. 4, 2002) (on file with the author).

[68] *See* Brickman, *Disparities, supra* note 3 at 529 n.37, 578 n.216, 580 n.226 for a description of Dr. Harron's practices.

[69] All but six out of over 300 of O'Quinn's plaintiffs with concurrent claims for silicosis and asbestosis were diagnosed by Dr. Ray Harron. Affidavit of Joseph Gibson at Exh. B, *MDL 1553*, 398 F. Supp. 2d 563 (July 29, 2004).

[70] For an example of Dr. Harron's diagnosing letter filed in the MDL see Diagnosing Letter of Ray A. Harron, M.D., *MDL 1553*, 398 F. Supp. 2d 563, SHOW-001538 (S.D. Tex. 2006) (on file with author).

[71] *Silica Hearings, supra* note 44, at 423 (testimony of Richard Laminack). ("[Rep. Walden:] So, can you explain why the asbestos letters don't mention the silicosis and vice versa? Isn't that a fairly significant fact to leave out of a diagnoses letter? [Mr. Laminack:] Well, with all due respect congressman, what you are looking at is a partial document, the letter your looking at was attached to a package of four documents that included the exact findings from the B-read and the exact medical history, and in the case where there was a dual diagnosis, that information was clearly stated in the B-read information and in the medical history. So, if the implication is that somebody was trying to hide the fact, that's simply not true. That letter, the package contained all the details of the dual diagnosis."). Laminack stated that the O'Quinn Firm insisted that there be two letters separating the diagnoses because "our firm doesn't handle asbestos cases." *Id.*

[72] *Id.* Heath Mason explained that the same law firm "had two sets of lawyers . . . for this particular thing—one to handle their silica exposure, one to handle their asbestos exposure." Transcript of *Daubert* Hearings at 400, *MDL 1553*, 398 F. Supp. 2d 563 (Feb. 17, 2005).

[73] *See supra* note 61.

O'Quinn firm's silicosis claims were genuine even where there also had been a diagnosis of asbestosis for the same claimant because "the asbestosis diagnosis is wrong." [74]

IV. The Inapplicability of Ethics Rules to Litigation Screenings

The "free pass" extended by state and federal law enforcement agencies and, in particular, the U.S. Attorney's office for the Southern District of New York, to those perpetrating mass tort fraud, also extends to the lawyer disciplinary process. Two examples follow.

1) Rule 7.2(b) of the Model Rules of Professional Conduct, the lawyer disciplinary code that most states have adopted, provides that "A lawyer shall not give anything of value to a person for recommending the lawyer's services. . . ." This is exactly what lawyers have done when they hired screening agencies to drum up clients by the hundreds of thousands and paid them amounts approaching $100,000,000 for their efforts in securing litigants and hiring litigation doctors to generate the requisite medical evidence.[75] Nonetheless, though these screening companies have screened over 700,000 potential litigants, resulting in the generation of 450,000 to 500,000 nonmalignant claims, not a single lawyer has been disciplined for violation of Model Rule 7.2(b).[76]

2) Judge Janis Jack found that "each lawyer [in the silica MDL] had to know that he or she was filing at least some claims that falsely alleged silicosis."[77] Despite this finding, the few attempts to use Judge Jack's findings as the basis for disciplining the lawyers in the silica MDL, failed. For example, the Mississippi Supreme Court upheld a trial court's refusal to sanction the

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[74] *Supra* note 52.

[75] *See Litigation Screenings*, *supra* note 3 at 1228 n.26.

[76] *See* Brickman, *Ethical Issues*, *supra* note 3 at 843-844 for further discussion.

[77] 398 F. Supp. 2d at 635.

law firm of Campbell-Cherry-Harrison-David and Dave, P.C. (CCHDD) for bringing over 4,200 lawsuits that were part of the silica MDL against 131 unrelated defendants for alleged injuries caused by exposure to silica.[78] After Judge Jack remanded these cases to Mississippi state court, the defendants moved for sanctions alleging that CCHDD had filed frivolous suits because the firm did not have valid diagnoses to sustain their claims of silica-related disease. After reviewing the standard for finding a matter "frivolous," the Mississippi Supreme Court found that the cases were not frivolous because the plaintiffs had some hope of success when the claims were filed.[79]

From one perspective, the Mississippi Supreme Court's determination that the cases had some hope of success when they were filed, is supportable. Although Dr. Harron's medical reports that were the basis of the more than 4,200 silica claims in the MDL brought by CCHDD, were quintessentially "manufactured for money," they would likely have been successful but for the highly improbable intervention of U.S. District Court Judge Janis Jack.[80]

As discussed below, asbestos claims generated by screenings and supported by medical reports "manufactured for money" have proved immensely profitable. Hundreds of thousands of such claims have generated billions of dollars in settlements and contingency fees for lawyers. In the silica MDL, a lawyer in the O'Quinn firm made a demand for one billion dollars to settle the cases and pointed out that this represented a substantial discount from the actual settlement value of the cases in the tort system.[81] Thus, there was more than a mere hope that the scheme

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[78] *See* Choctow, Inc. et al. v. Campbell-Cherry-Harrison-David and Dave, No. 2006-CA-01621-SCT (Miss. Sup. Ct. Oct. 4, 2007).

[79] *Id.*

[80] *See* Brickman, *Silica MDL*, *supra* note 3, at 311-312 and Brickman, *Disparities*, *supra* note 3, at 516-517 n.4 for a discussion of the improbability of Judge Jack's action.

[81] *See* Letter from Quinn, Laminack & Pirtle to defense counsel, April 16, 2004 (on file with the author).

by the lawyers, doctors and screening companies who manufactured the silica claims would succeed. According to the Mississippi Supreme Court, irrespective of whether the medical diagnoses were "manufactured for money," the cases were not frivolous.[82]

V. The Profitability of Litigation Screenings And Its Effects on Claim Filings

In the 1988-2000 period, nonmalignant claim values mostly ranged from $60,000 to $100,000.[83] The cost to screen a litigant was approximately $500 to $1500 and law firm administrative costs for claim processing were, at most, another $1000. The potential value of each person found to be "positive" and diagnosed with asbestosis was approximately $80,000 to $100,000 in the early part of that period and declined to approximately $60,000 towards the end of that period.[84] While some asbestos lawyers charge 33⅓% contingency fees (and some trusts limit contingency fees to 25%), most asbestos lawyers charge 40%. Thus, in this time period, law firm profits from each screened case with a positive X-ray reading and diagnosis ranged from $15,000 to $35,000. Moreover, for each 1,000 individuals occupationally exposed to asbestos who were screened, approximately 500-650 were diagnosed as having asbestosis. Had these same individuals been examined in a clinical setting, my research indicates that fewer than 100 would have been diagnosed with asbestosis. Since approximately 700,000 occupationally

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[82] A second sanctions motion also met the same fate from this court. Though U.S. District Court Judge Janis Jack sanctioned the law firm of O'Quinn, Laminack & Pirtle for filing an original jurisdiction case in the silica MDL that Judge Jack concluded was groundless, the Mississippi Supreme Court agreed that Judge Jack's finding was not binding on the state court and refused to sanction the firm for this conduct. Clark Sales & Rental, Inc., et al. v. Braxton; consolidated with Clark Sales & Rental Inc., et al. v. McDuff, No. 2006-CA-01577-SCT (Miss. Sup. Ct.). *See* Court News, HarrisMartin-Silica, April 3, 2008.

[83] *See* Thomas Korosec, *Enough To Make You Sick*, DALLAS OBSERVER, Sept. 26, 2002 at 3 (hereafter, Korosec, *Enough To Make You Sick*); Brickman, *Ethical Issues*, *supra* note 3 at 841-42.

[84] *Id.*

exposed workers were screened, lawyers' profits from screenings in this time frame were enormous.

An epidemiological study prepared for litigation determined that of the 399,000 asbestosis claims generated virtually entirely by screenings in the 1989-2001 period, at most, 27,920 could have plausibly developed asbestosis.[85] Assuming, conservatively, that each claim generated approximately $50,000 in settlements, then over $18.5 billion was paid out for claims generated by litigation screenings and supported by diagnoses "manufactured for money." Data for the period 2002-2005 adds approximately $2.7 billion to this computation.[86] Billions more should be added to this total to account for payments from the trusts (discussed in section VII).

In the late 1990s and early 2000s, many of the companies with the highest monetary exposure to asbestos litigation entered bankruptcy.[87] As a consequence, the value of a nonmalignant claim in the tort system dropped precipitously. In addition, many asbestos lawyers believed that Congress was on the verge of enacting legislation to remove asbestos litigation from the tort system and create an administrative agency funded by asbestos defendants to which all asbestos claims would be channeled and where lawyers' fees would be limited to 10%.[88] This led law firms which sponsored asbestos screenings to diversify their portfolios by finding another platform for application of the "entrepreneurial" model. They chose to replicate the model in silica litigation by filing a deluge of approximately 20,000 silicosis claims -- mostly on behalf of their asbestos clients; this, in turn, led to the silica MDL. In 2005, however, Judge

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[85] *See generally* Rebuttal Report of Dr. Howard William Ory, M.D., M.S.C. to the Expert Reports of Laura Welch, M.D. and Mark A. Peterson, J.D., PH.D., *In re* W.R. Grace & Co., *et al.*, No. 01-1139 (JFK), (Bankr. D. Del.) (Sept. 25, 2007) [hereafter, "Ory Report"]. For a discussion of this Report, *see* Brickman, *Litigation Screenings, supra* note 3 at 1340.

[86] *See* Brickman, *Litigation Screenings, supra* note 3 at 1341.

[87] *See* Lloyd Dixon, Geoffrey McGovern, and Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure*, Appendix A, RAND (2010) [hereinafter, RAND, *Trust Overview*].

[88] For a discussion of the proposed legislation, *see* Brickman, S.852, *supra* note 3.

Jack, rejecting the idea that silicosis was rampant and of epidemic proportions in Mississippi and Texas, issued her report finding that virtually all of the diagnoses in the silica MDL were "manufactured for money" and that this extended to asbestos screenings as well.[89]

Finally, starting in 2004, several states including, Ohio,[90] Georgia[91] and Texas[92] enacted tort reforms that established medical criteria for nonmalignant asbestos claims and other provisions that had the intent and effect of excluding the vast majority of claims generated by litigation screenings. Judicial rulings in Mississippi also curbed screening-generated claims.

In addition, the spate of bankruptcies in the 2000-2003 period not only terminated the substantial payments by these companies into the tort system but also meant that there would be no payments from the ensuing trusts for at least several years while the reorganization worked its way through the bankruptcy process. As a consequence of these developments, nonmalignant claims generated by litigation screenings -- which are driven purely by profits -- peaked in 2003[93] and began a precipitous decline in 2004.

Companies which file for bankruptcy because of asbestos-related liability not only have current liabilities but because of the extended latency periods associated with asbestos-related diseases, also face future liability for injuries that have not yet manifested. To allow the companies in bankruptcy to emerge from the reorganization process without liability for future manifesting asbestos-related injuries, Congress enacted section 524(g) of the federal bankruptcy code to provide for the creation of personal injury settlement trusts to resolve current and future

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89 *See supra* notes 4 and 6.

90 OHIO REV. CODE §§ 2307.91 et seq. (Anderson 2005).

91 GA. CODE ANN. §§ 51-14-10.

92 TEXAS CIV. PRAC. & REMEDIES CODE §§ 90.001 et seq. (Vernon 2005).

93 The large increase in nonmalignant filings in 2003 was in part due to the rush to file claims before a new Trust Distribution Procedure which lowered the amounts to be paid for nonmalignant claims and raised the level of proof required, became effective at the Manville Trust.

claims.[94] A debtor's asbestos liabilities are channeled to the trust which is funded with the assets of the debtor.[95] Of the 96 companies with asbestos liabilities that have filed for reorganization under bankruptcy laws, as of the end of 2008, 54 have resulted in the creation of trusts with assets in being or anticipated that approximate $30 billion.[96] The trusts that have been confirmed in the past five years have radically altered the amounts payable to claimants. While some of the trusts pay only modest amounts for unimpaired nonmalignant claims,[97] as discussed in section VII, the aggregate amount available to a nonmalignant claimant with moderate lung impairment can range as high as $40,000 (including four trusts pending confirmation). Moreover, as discussed in section VIII, the magnitude of the attorney fees thus being generated and the ease with which mass numbers of trust claims can be filed provide a compelling incentive for law firms to again undertake large scale recruitment of nonmalignant claimants.

VI. The Current State of Nonmalignant Asbestos Claim Filings

Asbestos claimants routinely secure compensation for their injuries from two distinct channels: (1) claims filed in state and federal courts against solvent defendants; and (2) claims filed with the trusts. As noted, there was a precipitous fall in screening-generated nonmalignant claim filings both with the trusts and in the tort system in 2004 with some bounce back in subsequent years but only to levels far below the peak years. This drop in tort and trust filings followed the enactment of legislative and judicial tort reforms in multiple jurisdictions and heightened medical documentation requirements adopted by several trusts. In addition, Judge

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[94] 11 U.S.C. § 524(g).

[95] For an explanation of asbestos bankruptcy trusts, *see* Brickman, *Ethical Issues*, *supra* note 3 at 853-889; Brickman, *Litigation Screenings*, *supra* note 3 at 1335-1343; RAND, *Trust Overview*, *supra* note 87.

[96] *See supra* note 10 and *infra* section IX.

[97] *See* data on file with the author.

Jack's report in MDL 1553 raised the specter of criminal prosecution and contributed to the decline in screenings. More recently, however, there has been a clear divergence between nonmalignant filings in the tort system and filings with the trusts.

A. Tort System Filings

According to a report prepared by NERA, a economic consulting firm, based on analysis of Form 10-K filings with the SEC of more than 150 companies, average claim filings (including malignant filings) peaked in 2003 and then dropped steadily through 2007, declining by 85%. Since 2007, filings have been fairly stable, hovering about 20% of the 2001 level.[98] NERA concluded that the drop in filings mostly reflected a drop in non-malignant filings.[99]

B. Asbestos Bankruptcy Trusts

Information about nonmalignant claims filed with the 54 trusts is sparse at best. Most of the trusts do not publish detailed information about filings, or the nature of the diseases claimed. The Manville Trust did publish this information prior to mid-2007 but no longer does so.[100] It is important to understand that though trusts are created during a bankruptcy process presided over by a bankruptcy judge, the structure and procedures adopted by the trust and the selection of key personnel are under the control of a small number of plaintiffs' lawyers.[101] An example of this level of control occurred when defendants in the tort system sought to subpoena claim filings with the trusts by individuals who had sued in the tort system (to ferret out inconsistent work histories and to gain offsets against damage amounts awarded by juries). To counter these

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[98] Mary E. Stein, Lucy P. Allen and Adelina Halim, *Snapshot of Recent Trends in Asbestos Litigation, 2011 Update*, NERA, July 21, 2011 at 2.

[99] *Id.* at 2.

[100] I am informed that the Manville Trust's decision to no longer publish detailed information on trust filings or make its data base available for analysis is due to the demands of plaintiffs' lawyers.

[101] *See* Brickman, *Ethical Issues, supra* note 3 at 863-870.

subpoenas, the trusts enacted rules prohibiting the release of claim filing information (though some courts have mandated disclosure). This lack of transparency is not simply an inconvenience but a deliberate strategy by asbestos lawyers to use secrecy to increase the value of claims which are filed both in the tort system and with multiple trusts. As stated by RAND:

> [T]he key to determining how trusts affect compensation in asbestos lawsuits is whether evidence is developed about a plaintiff's exposure to the asbestos produced or used by the bankrupt companies. If this sort of information is developed, then a plaintiff's compensation will not be inflated and payments made by the solvent defendants will be adjusted to reflect compensation available from the trusts.
>
> When such information is not developed, plaintiffs in some circumstances can recover, in effect, once for their injuries in the tort system and then again from asbestos trusts. Under some circumstances, solvent defendants may be required to pay more than their share of the harm.[102]

Based upon sparse information released by the Manville Trust, there has been a substantial increase in nonmalignant claim filings beginning in 2007 and extending through mid-2011. New claim filings for 2007 were about 10,000, increased to 13,400 in 2008, 20,600 in 2009 and 28,400 in 2010; in the first half of 2011, new claim filings were approximately 20,900 compared to approximately 8900 in the first half of 2010. While these totals include both malignant and nonmalignant claims, there is information that indicates that the substantial increase is mostly due to an increase in nonmalignant filings.[103]

While there is no comparable data for the other trusts, based upon previous experience, it is likely that similar increases have been experienced by the other major trusts.

C. <u>The Disconnect Between Nonmalignant Claim Filings with Asbestos Bankruptcy Trusts and in the Tort System</u>

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[102] Press Release, RAND, Aug. 18, 2011. The effect of lack of transparency is especially pernicious with regard to malignant claims and may inflate the value of those claims by millions of dollars.

[103] *See* data on file with the author.

The most likely explanation for the disconnect between nonmalignant tort system filings and trust filings is twofold: First, as noted in the next section, the amount of compensation available from the trusts has increased manyfold in the past five years. Second, it would appear that lawyers for nonmalignant claimants who filed claims in states which have mandated medical criteria which most screening-generated claims cannot meet, are re-filing those claims with the trusts. These states, including Ohio, Texas, Mississippi and Georgia,[104] account for the largest number of re-filings of nonmalignant screening-generated tort claims with the trusts.

Hastening this re-filing process is the fact that most trusts, including more recently, the Manville Trust,[105] have adopted "statutes of limitation" which require that claims be filed within three years of receiving a diagnosis of an asbestos–related injury.

Despite the fact that the vast majority of the nonmalignant claims filed in Ohio, Texas, Mississippi and Georgia cannot meet the legislatively mandated heightened medical criteria, they can nonetheless be successfully filed with the trusts because the trusts have much lower standards of medical proof. Moreover, if the medical evidence in support of a tort claim has not been successfully challenged by a defendant, even though the claim cannot meet the heightened evidentiary standard, many trusts will presume the validity of the medical evidence and not inquire further.

Another source of trust filings are the pleural registries that several jurisdictions have adopted. In these jurisdictions, unimpaired nonmalignant pleural claims are removed to an inactive docket where the statute of limitations is suspended. The claims can be moved back to

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[104] *See* Exhibit B of the annual reports of the Manville Trust for both 2009 and 2010, available at http://www.mantrust.org/Trustee%27s%20Accounting/Accounting.HTM.

[105] http://www.claimsres.com/documents/MT/SOL%20Amendmt%20Announcemt.pdf.

the active docket if an asbestos-related injury or lung impairment develops. Nonmalignant claims relegated to inactive dockets, however, may be filed with trusts for current payment.

VII. The Value of a Nonmalignant Claim Filed with the Trusts

The recent emergence of several trusts with substantial assets has significantly altered the value of a nonmalignant claim. According to RAND, as of the end of 2008, 54 trusts had been created.[106] Twenty five of the trusts that have emerged from bankruptcy are funded from the assets of companies which produced or distributed asbestos-containing products on a national basis for industrial or commercial use.[107] Because of the national distribution, a substantial percentage of trust claimants can allege exposure to products of virtually all these of companies. In addition, there are four trusts pending confirmation which also have national industrial and/or commercial exposure profiles.[108] Finally, 13 trusts have been formed from the assets of companies which sold or distributed their products only regionally or where there are other limited exposure profiles.[109] Trust claimants who allege exposure to products associated with these companies may, in addition to all their other trust filings, also file with the trusts formed by the regional companies if they can show the requisite exposures.

Trust payments are determined by disease severity and exposure levels. Most trusts have established seven or eight levels of disease severity. In addition, some trusts provide a nominal

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[106] RAND, *Trusts*, *supra* note 10 at xi.

[107] AC&S, Amatex, Armstrong World Industries, ASARCO LLC, Babcock & Wilcox, Burns and Roe, Celotex, Combustion Engineering, DII Industries, LLC, Eagle-Picher Industries, Fibreboard, G-I, H. K. Porter, Kaiser Trust, Keene Corporation, Lummus, Manville, National Gypsum, Owens Corning, Plibrico, Raytech Corporation, Turner & Newall, UNR, US Gypsum, US Mineral Products.

[108] North American Refractories Company, Pittsburgh Corning, Quigley, W.R. Grace.

[109] A&I Corporation, A-Best, API, Inc., ARTRA, C. E. Thurston, EJ Bartells, J.T. Thorpe (CA), JT Thorpe (TX), Porter Hayden, Shook & Fletcher, T H Agriculture & Nutrition, LLC, Thorpe Insulation Company, Western Asbestos / MacArthur.

payment for unimpaired nonmalignant claims with minimal exposures. Typically, the first level of payment is for unimpaired claimants with a diagnosis of either asbestosis based upon X-rays graded 1/0 or higher on the ILO scale or pleural disease. The next level is for moderately impaired claimants with a TLC (Total Lung Capacity) of $\leq 80\%$ but $\geq 65\%$ of predicted value and diagnoses as per the prior level. The next level is for severely impaired claimants with TLCs of $\leq 65\%$ of predicted value and a diagnosis of asbestosis graded 2/1 or higher on the ILO scale. Severely impaired nonmalignant claimants are considered as malignant claimants by trusts for payment purposes.

According to data compiled by Peter Kelso and Marc Scarcella of Bates White LLC, an econometric consulting company which has done extensive analysis of the trusts, the aggregate value of a trust claim submitted to each of the 25 trusts with national industrial and/or commercial exposure profiles, alleging either bi-lateral interstitial fibrosis graded 1/0 on the ILO scale or pleural thickening or plaques but without any lung impairment, is $11,150. For the four pending trusts with national exposure profiles, the aggregate value is $4,100. For the 13 confirmed trusts with regional, or otherwise limited exposure profiles, the aggregate value is $27,000. For nonmalignant claims which also allege moderate lung impairment, the aggregate value from trusts formed from companies with national exposure profiles is $27,000. For the four trusts pending confirmation, the aggregate value is $14,500. For the 13 trusts with regional or limited exposure profiles, the aggregate value of a nonmalignant claim with moderate lung impairment is $82,000.

VIII. Attorney Fees Generated by Filing Nonmalignant Claims with the Trusts

Filing a claim with an asbestos bankruptcy trust is essentially an administrative act. Most law firms that file trust claims have mechanized the process so that it is virtually entirely performed by paralegals. Even scant lawyer time is rarely required. I estimate that law firms' administrative costs of preparing trust claims is, at most, $1000. Moreover, two claims processing facilities that process claims for 20 of the major trusts (Verus Claim Processing and Delaware Claims Processing) allow for a single claim filing with one trust to be filed with all of the trusts processed by that facility. Thus multiple trust filings are facilitated.

Because of the efficiency of claim processing, it is likely that unimpaired and moderately impaired nonmalignant claimants who file claims with the Manville Trust also file claims with all or substantially all of the 24 other trusts with national industrial and/or commercial exposure profiles. In the 3 year period extending from July 1, 2008 through June 30, 2011, there were a total of approximately 78,000 claims filed with the Manville Trust. I estimate that nonmalignant claims approximate 60% of this total.[110] Based on this estimate, there were approximately 47,000 nonmalignant claims filed in that period with the Manville Trust.

While many lawyers in asbestos litigation typically charge 40% contingency fees, some trusts cap attorney fees at 25%.[111] Using the 25% standard and assuming that the 47,000 nonmalignant Manville Trust claimants also filed with the other 24 trusts with national exposures, than for the 36 month period, attorney fees net of administrative expenses would

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[110] This estimate is based on Manville Trust data for 3rd quarter 2008 and the 1st and 2nd quarters of 2009.

[111] There is a little publicly disclosed information about attorney fee limits set by trusts. The information that is available is that 25% fee caps are maintained by the following trusts: Manville, JT Thorpe (CA), Western MacArthur, E.J. Bartells and Keene. Both the API and Skinner Engine trusts cap fees at one third and the A&I Trust cap is 10%.

amount to approximately $119 million. The same filings with the four pending trusts, assuming confirmation, would add approximately $37 million, for a total of $156 million in attorney fees.

Unimpaired nonmalignant claimants who also qualify for payment from one or more of the 13 trusts with regional or otherwise limited exposure profiles are eligible for higher payments -- in a few cases, substantially higher payments -- which yield commensurate increases in attorney fees.

As noted previously and by the data in section VII: (1) the value of a nonmalignant asbestos claim is increased by 2½ to 3 times if the claimant can demonstrate moderately impaired lung function; and (2) there is substantial evidence that tens of thousands of pulmonary function tests administered to screened claimants graded 1/0 on the ILO scale have been manipulated to generate false reports of moderate lung impairment.[112] Since law enforcement has given a "free pass" to this activity, and the trusts do not look behind the pulmonary function test results provided to determine whether the tests were properly administered, it is not unlikely that false reports continue to filed. Accordingly, calculations based on the submission of nonmalignant claims with moderate impairment may be a closer approximation of what is occurring than using the data for unimpaired nonmalignant trust filings.

Assuming for the purpose of illustration that all of the nonmalignant claims in the 36 month period also listed moderate lung impairment and were filed with each of the 25 trusts with national industrial and/or commercial exposure profiles, then attorney fees would have amounted to $316 million. For filings with the four pending trusts, post-confirmation, additional fees of $159 million would be generated. Once again, those claimants who also qualified for payment

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[112] *See supra* section III.C.

from any of the 13 trusts with regional or otherwise limited exposure profiles would be eligible for higher payments and thus higher attorney fees would be generated.

While I make no claim that these amounts were actually paid or will be paid to the attorneys filing claims with the trusts, I believe my calculations provide insight into the potential magnitude of the attorney fees being generated or available to be generated by trust filings.

IX. The Significance of the Attorney Fees Generated by the Substantial Value of Nonmalignant Claims Filed with The Trusts

According to data compiled by Bates White, LLC, as of December 31, 2010, there was approximately $19.5 billion in confirmed bankruptcy trust assets with approximately $9.5 billion in additional trust assets pending appeal or confirmation of bankruptcy reorganization plans. Of the $19.5 billion in confirmed assets, over $4 billion has been earmarked for unimpaired and moderately impaired nonmalignant asbestosis and pleural claims with approximately $2.5 billion in additional funds earmarked for these claims by trusts pending confirmation.

As of December 31, 2010, of the $19.5 billion in confirmed bankruptcy assets, nearly $16 billion flow through either the Delaware Claims Processing Facility or the Verus Claim Processing Facility. As noted, the multi-trust claim processing facilities provide an efficient system that allows law firms the ability to file against multiple trusts in an expedited manner. Furthermore, both of these facilities, as well as others, also expedite the process of filing claims in bulk by providing electronic filing procedures that allow for uploads of thousands of claims at once from a single law firm.

This combination of efficiency, a nearly $7 billion fund waiting to be tapped and the magnitude of the attorney fees potentially available presents a strong if not compelling incentive

for asbestos lawyers to resume the mass recruitment of claimants. But unlike the recruitment of nonmalignant claims and the "red flags of fraud" observed by Judge Jack as she pried open the process of claim generation in the silica MDL, the new trust payment procedures operate in a "black box" through a system set up by plaintiff lawyers who control the trusts. Hidden from public view by the stealth sheathing that lawyers have constructed around the trusts, this system offers law enforcement and the public no transparency regarding the validity of claims filed with the trusts. Already, there is evidence that a new generation of litigation doctors is emerging to replace the doctors who have had to close their lucrative asbestos practices because they have been exposed as "manufacturing diagnoses for money."

Unless law enforcement withdraws the "free pass" it has extended to litigation doctors who "manufacture diagnoses for money" and mal-administer pulmonary function tests, and to the lawyers who hire them, mass recruitment of those occupationally exposed to asbestos can be expected to resume.

Mr. FRANKS. I now recognize Mr. Carter for 5 minutes.

TESTIMONY OF MICHAEL CARTER,
MONROE RUBBER & GASKET COMPANY

Mr. CARTER. Thank you.

Mr. FRANKS. Mr. Carter, can you pull your microphone to you. We should probably turn those on in the Committee ahead of time because it happens constantly.

Mr. CARTER. Chairman Franks, Ranking Member Nadler and Members of the Subcommittee, thank you for inviting me to testify today. My name is Mike Carter and I am with Monroe Rubber & Gasket.

Mr. NADLER. I can't hear you.

Mr. CARTER. My name is Mike Carter and I am with Monroe Rubber & Gasket Company in Monroe, Louisiana, the president of the company.

Just to give you a little history, we were incorporated in 1975, and over the course of about 35 years, we have managed to employ about 25 people. We started with a handful, we worked hard, and we have got to where we are today by hard work. Unfortunately, I need probably four to six more people, maybe more than that, but I am not in a position to hire these people because I am inundated with lawsuits.

Unfortunately, I was pulled into this back starting around March of 2002 and I received my first lawsuit which would become 104 separate lawsuits with about 2,200 plaintiffs, and my office has got a designated corner now where it is just stacked full with asbestos lawsuits.

Let me say, first of all, I am very sympathetic to those individuals that are sick. I think it was a horrible crime that was committed by the people that kept this quiet for so long. But I say let's go after the people that we need to go after and not just anybody in the tier.

But with these lawsuits, I have spent many, many hours and a lot of time on a grassroots effort in Louisiana, been here in Washington several times pleading my case, but to this point, to no avail.

I have got a situation here where it just seems that we have got a very broken system. I can't hire people that I need to hire in an economy that unemployment is high, and I can't grow a business not knowing what tomorrow might bring for me. I feel like that at this point we are in a broken system caught up in a feeding frenzy of trial attorneys out for their own agenda, and it threatens to destroy small business across our country. And I just feel like it is time for our elected officials to step up to the plate and help small businesses like myself.

I have been able to get out of some of these cases summary judgment, but unfortunately, my attorney is telling me now that some of these cases are probably going to trial. I am a small company in a small town that worked hard to get where I am at today in a country that we can call our America based on our dreams and hard work to become and be what we want to be here. Unfortunately, that can be taken away from me with nothing to do with it.

Again, I need more people. I can't hire them. I won't hire them. I am not going to grow this company, this second company any farther, based on the fact that I don't know what tomorrow is going to bring.

I can't tell you the number of times I have been here and pleaded my case in front of so many people. But I just can't tell you enough how much I need help. And I am just a small voice for a lot of people across America, small business. We are the backbone of Amer-

ica. But it is just an unfair thing that is happening right now, and I surely need somebody to step up and help us.

I don't know how long it is going to be that I can come here and do this. This could be my last trip here. If I go to trial and I am hit with a verdict and I have to pay a certain percentage of that, I am probably going to be locking my doors and sending my people home, and I just hope there is somebody that is going to be able to tell me how to tell my people why they are going home.

It is unfortunate that we live in this kind of economy that this kind of stuff can happen to people like myself.

But in wrapping this up, I only hope that—I am just a small fish in a lot of big water here, but I hope that somebody will hear me and they will come to bat and help me with this. I just don't know how much time I have left. Like I say, if I get hit with any kind of verdict, I can't afford $3 million or $4 million. I will close my doors and go home. But I would love to hire some more people, but at this point that is just not able to happen.

Thank you for your time.

Mr. FRANKS. Thank you, Mr. Carter.

[The prepared statement of Mr. Carter follows:]

Prepared Statement of Michael Carter

Monroe Rubber & Gasket Co., Inc.
Telephone (318)388-4114 - Fax (318)323-9366 - 1100 Louisville Ave. - PO Box 3285 Monroe, Louisiana 71201

Chairman Franks, Ranking Member Nadler and Members of the Subcommittee, thank you for inviting me to testify today. My name is Mike Carter, and I'm the President of Monroe Rubber & Gasket Co.

Monroe Rubber & Gasket is a small family business founded in 1975. As our name suggests, we handle rubber products, hose, and gaskets. The largest buyers of our products are end users, including paper mills and chemical plants. We have two facilities, one in Monroe, Louisiana and a second in El Dorado, Arkansas. Combined, these two locations employ twenty five people.

Although the economic downturn has certainly impacted our business, we've been generally fortunate and are in a position where we desperately need to hire four to six new employees. Maybe more. I can't bring new staff on, though, until I'm certain that my company's future is secure. We're currently facing hundreds of asbestos claims, and asbestos litigation may force us to close our doors.

Before talking about the asbestos claims against Monroe Rubber & Gasket, I'd like to say that I have deep sympathy for the victims of asbestos related diseases. These conditions are real, painful, and sometimes fatal. Those who are genuinely responsible for the injustice that's been done to so many workers and their families throughout the country deserve to pay for the sickness they've caused, even though dollars alone probably won't ever make their victims whole. I firmly believe, though, that the claims against Monroe Rubber & Gasket are without merit.

I received the first of what would soon become a staggering number of asbestos lawsuits in March, 2002. Suits came in over the next six years or so, and by 2008 I had a thick stack of them in my office. All told, there were 104 separate suits that named a total of 2,223 individual plaintiffs. I was shocked. I was overwhelmed. How could Monroe Rubber & Gasket be named in so many suits even though we ***never*** manufactured any kind of asbestos product?

I'd like to repeat that: Monroe Rubber & Gasket never manufactured an asbestos product. I did order an asbestos-containing product from its manufacturer after a customer requested it by name, and I resold it to that customer along with other Monroe Rubber & Gasket products that did not contain asbestos. It was a sheet material that included encapsulated asbestos, and it came into my shop as a finished product. We sometimes cut gaskets from that finished product, but I had the air quality in our shop tested for our own safety. We found that there was no harmful dust in the air, and it's worth noting that not a single one of the Monroe Rubber & Gasket employees who dealt with that product has filed a lawsuit or for worker's compensation as a result. Monroe participates in a buying co-operative with about 60 other small rubber and gasket

companies, some of whom also bought and re-sold sheets with encapsulated asbestos. To the best of my knowledge, their situation is the same as ours, which is to say that none of their workers has ever alleged an asbestos injury.

It was awhile before why this was all happening dawned on me, but I eventually figured it out. Most of the lawsuits that name Monroe Rubber & Gasket have been filed by or on behalf of individuals who worked in paper mills that bought our products. I'm a rubber guy, but I know that parts of the paper making process involve extremely high heat. And I've learned that paper plants, especially older paper plants, sometimes contained asbestos that was used as an insulator or in machinery.

As the major manufacturers of asbestos and the most dangerous asbestos products went bankrupt and became impossible to sue, Johns Manville and similar companies, the lawyers started looking for new businesses to target. I'm a small business, but the trial attorneys came after me when there was no one else left to suck money from.

Today, many of the lawsuits filed against Monroe Rubber & Gasket have been dismissed, but 29 are pending. I fear that more could come at any time. All told, we're still facing over 500 asbestos claims. Many of the remaining plaintiffs were paper mill maintenance workers who were exposed to asbestos insulation and asbestos in machinery. Their lawyers don't care what damage they do to businesses like mine that didn't make asbestos products and, I believe, didn't injure their clients. They just care about finding someone to sue now that they can't go after the bankrupt companies. And a lot of the claims against us have been dismissed after plaintiffs acknowledged during depositions that they never worked with our gaskets. Again, I don't think the gaskets we sold hurt anyone, ever, but why would someone who never touched a gasket sue us? Why would a lawyer put our name on a complaint knowing their client never worked with our products? I can only assume that they were looking for quick settlements, and that's sickening.

Once I realized how unjust the suits against us are, I started making trips to Baton Rouge and Washington, DC to raise awareness of abusive asbestos litigation. Our story is compelling, and unfortunately it's not unique. Elected officials I've met and testified before said that they want to do something about bad asbestos lawsuits. But as I appear before you today, not one thing has been done to help Monroe Rubber & Gasket.

I have no idea what will happen down the road, but this may be my last opportunity to come before you and plead Monroe Rubber & Gasket's case. I recently spoke with the attorney who is handling our suits, and there will be a status conference at the end of the month. He expects that a few claims will be set for trial. While I sincerely believe that no one is suffering from an asbestos disease caused by my company, trials are a risk and there's a chance that we'll lose. If that happens, both of our locations will probably have to shut down. We have insurance, of course, but it's not enough to pay a big trial award.

What I do know, after dealing with asbestos litigation for nearly a decade, is that our litigation system is terribly broken. Somewhere along the way, asbestos suits stopped

being about holding the businesses most responsible for asbestos diseases accountable and turned into a corrupt feeding frenzy. It's a mess that sucks in and threatens to destroy small businesses like mine.

The economy is slow, unemployment is high, and I think it's time for our elected officials to step up and help small businesses across American do away with abusive lawsuits. If you refuse to act, my employees may lose their jobs. Even if Monroe Rubber and Gasket survives these lawsuits, other businesses unfairly caught up in asbestos litigation won't. If Monroe Rubber & Gasket is bankrupted, you can be sure that the trial bar will find someone to sue in my place.

I sincerely hope you'll act in any way you can to protect the victims of lawsuit abuse.

Mr. FRANKS. As some of you saw, we have been called to the floor for votes, and that has actually happened before, and we are going to go ahead and let Mr. Siegel testify. And then, Mr. Stengel, we

will have to come back after the votes and reconvene. I apologize to you, sir.

Mr. Siegel, you are recognized for 5 minutes.

TESTIMONY OF CHARLES S. SIEGEL, PARTNER, WATERS & KRAUS LLP

Mr. SIEGEL. Thank you. I would like to thank the subcommittee for the opportunity to testify on the State of asbestos litigation today. My name is Charles Siegel and I am a partner in the firm of Waters & Kraus, and for 25 years, I have had the privilege of representing people seriously injured by exposure to asbestos or their survivors.

I am proud to represent people such as Mark Smith from San Antonio who was a constituent of Chairman Smith of this Committee. He was exposed to asbestos through his father who worked as a contractor installing siding and roofing materials that contained asbestos.

Mr. Smith's father would come home with asbestos on his clothes that young Mark would breathe. Mark Smith died at the age of 50, leaving a wife and a 12-year-old son.

But the Smith case is only one example out of hundreds of thousands. Asbestos is widely agreed to be the greatest public health disaster of the 20th century, and it continues unabated in this century. Even today, seven or eight persons die of mesothelioma alone every day in this country, and thousands more get sick with lung cancer and asbestosis. Asbestosis is a chronic progressive inflammation of the lungs. Mesothelioma is a rare cancer of the lining of the lungs known only to be caused by asbestos.

We are here today because these deaths have a cause. Litigation was necessary because there was fault. Juries and judges hearing these cases in State courts around the country for the last 40 years have consistently heard evidence of corporate concealment of the dangers of asbestos exposure.

A corporate official for Bendix Company, for example, wrote to Johns Manville in 1966 saying, "If you have enjoyed the good life while working with asbestos, why not die from it?" Another example is provided by the conduct of Union Carbide Corporation, which actually mined and marketed raw asbestos. It touted its own asbestos as being safe somehow, while questioning the safety of other forms of the mineral.

This corporate conduct and the vast legacy of death and disease that resulted have led to litigation. The overwhelming majority of this litigation has occurred in State courts and continues to occur there. State law provides that a claimant may recover from each party found by the jury to have been responsible for the exposure and to have behaved negligently or to have supplied an unreasonably dangerous product. In nearly all the jurisdictions with any significant number of cases, there is no joint and several liability, so the jury simply assigns a percentage of responsibility to each company it finds to be liable.

When an asbestos defendant files for bankruptcy protection, there is a popular perception that company offices are closed and employees lose their jobs and the factories are padlocked. This is emphatically not true in the asbestos context. Section 524(g) of the

bankruptcy code exists precisely so that companies facing substantial asbestos claims can compensate victims while continuing normal operations. Almost every company to have sought bankruptcy protection under this provision due to asbestos liabilities has been able to continue its economic health while also compensating victims of asbestos disease.

In recent years, defendants have argued that lawsuits constitute double-dipping since claimants may potentially recover both from defendants in the State court system and from bankruptcy trusts. The claim is false and reflects a basic fundamental misunderstanding of the way the bankruptcy system and State court lawsuits work.

First, trust payments are minimal. There a scheduled value of a particular disease claim, but then there is also a payment percentage for all claims. So, for example, while a certain trust may officially value a mesothelioma claim at perhaps $100,000, the payment percentage may be 15 percent, resulting in an actual payment of $15,000. The median payment percentage across the trust is roughly 25 percent, but some trusts pay as low as 0.8 percent of the value of a claim.

Second, there is no "fair share" for a defendant in asbestos litigation, there is only what percentage of causal responsibility is assigned by a jury in a particular case and each case, of course, turns on its facts. In all 50 States, the fact that other parties may share responsibility for causing an injury is not a ground for any one defendant to avoid liability. Defendants routinely and vigorously assert their rights to discover materials submitted by plaintiffs to bankruptcy trusts, and defendants are, of course, free to conduct and do conduct their own unilateral investigation into the plaintiff's claims as well.

Even in States with joint and several liability, plaintiffs do not obtain a double recovery. Under the one satisfaction rule, a plaintiff is entitled to one recovery, and so after a verdict is entered, the defendant's share will be offset against all settlements, including any settlements with trusts. State law provides a remedy to these families and asbestos victims should not have to apologize for seeking compensation for their injuries.

Thank you.

Mr. FRANKS. Thank you, Mr. Siegel.

[The prepared statement of Mr. Siegel follows:]

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Hearing: September 9, 2011
"How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System"

I would like to thank the Subcommittee for the opportunity to testify on the state of asbestos litigation today. My name is Charles Siegel. I live in Dallas and I am a lifelong resident of Texas. I am a partner in the firm of Waters and Kraus, and for 25 years I have had the privilege of representing persons seriously injured by exposure to asbestos, or their survivors.

The Tragedy of Asbestos Disease

I am proud to represent people such as Dudley Pounders and his wife Vicki. The Pounders live in Mesa, Arizona, and they are constituents of Chairman Franks. Mr. Pounders died of mesothelioma at age 63 after a career as a welder at Arizona Public Service. The doctor conducting the autopsy diagnosed both asbestosis and mesothelioma. Asbestosis is a chronic, progressive inflammation of the lungs which makes it difficult to breathe and may result in death. Mesothelioma is a rare cancer of the lining of the chest, known only to be caused by asbestos. His widow was left with over $300,000 in medical expenses.

Another client we were proud to represent was Mark Smith, from Chairman Lamar Smith's district. Mr. Smith lived in San Antonio. He was exposed to asbestos through his father, who worked as a contactor installing siding and roofing materials that contained asbestos. Mr. Smith's father would come home with asbestos on his clothes that young Mark would breathe. Mark Smith died at the age of 50, leaving a wife and a twelve-year-old son.

Our firm also represented Terry McCann. Terry was a gold medalist in wrestling at the Rome Olympics in 1960. He served on the boards of numerous charities and sports clubs, and belonged to five Halls of Fame. He was an Executive Director of Toastmasters International. He died at age 72 of mesothelioma.

Tommie Williams was another of our clients. He grew up the son of a Mississippi sharecropper. He lost the use of one hand as a child; after an accident, his parents couldn't afford to take him to a doctor. Nonetheless, he moved to Los Angeles and worked for decades in the shipyards there despite only having the use of one hand. He died of mesothelioma at the age of 62.

Barbara Navarro died of mesothelioma at 55. She was exposed to asbestos as a child, while volunteering at church projects.

Richard Ontiveros died of mesothelioma at 32. His only exposure was through his father, who would come home with asbestos dust on his work clothes; as a baby, Ontiveros breathed in this dust.

Yet another of our clients, Katherine Lopez, is dying of mesothelioma at the age of 48. She has perhaps six months to live.

These stories, from just my law firm, are very poignant, but they are merely a few of many hundreds of thousands of similar stories. Asbestos is widely agreed to be the greatest public health disaster of the 20th century, and it continues unabated in the 21st century. Hundreds of thousands, perhaps millions, of persons have died of asbestosis, lung cancer and

mesothelioma in the last several decades. Even today, seven or eight persons die of mesothelioma alone every day of the year in the United States, and these deaths are projected to continue at a slowly decreasing rate for 40 to 50 more years. Professor Brickman has described mesothelioma as a "particularly virulent cancer, which is gruesome to behold and always results in death." Many other victims also continue to die and will continue to die of lung cancer and other cancers.

According to the National Institute for Occupational Safety and Health, the leading occupations for deaths due to asbestos exposures are plumbers, pipefitters and steamfitters.[1] Many were exposed while serving in the U.S. military. Others were exposed as a result of working in an industry in which asbestos was utilized. Examples of such industries are construction, shipbuilding, asbestos mining and processing, chemical manufacturing and metalworking. Because the latency period between the first exposure to asbestos and clinical disease is typically 20 to 40 years, many are not yet identified.

There is an international consensus that asbestos causes mesothelioma (a cancer of the lining of the lung), lung cancer, and asbestosis, and is associated with an increased risk of other cancers, including stomach, colon, and esophageal cancer.[2] Victims of mesothelioma typically only live for 4 to 18 months after their diagnosis.[3] The Occupational Safety and Health Administration ("OSHA") first regulated asbestos exposures in 1972.[4] EPA adopted a regulation, later overturned in Court, banning asbestos use. Almost two decades ago, OSHA observed that "it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed. Reg. 22,615 (1986).

The states with the highest number of mesothelioma cancer victims (> 500) between 1999-2005 are: California, Pennsylvania, Florida, New Jersey, New York, Texas, Illinois, Virginia, Ohio, Massachusetts, Washington, and Michigan.[5] During 1999-2005 the national rate of mesothelioma deaths was about 11.5 per million population per year, but more than half the states had higher rates. The states with the highest rate of mesothelioma deaths are: Maine, New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Louisiana, Wisconsin, Minnesota, Utah, Wyoming, Montana, Idaho, Alaska, Washington, and Oregon.[6] In addition, asbestosis was a contributing cause in over 1400 deaths between 2000-2005, a sharp rise from the rate of death in 1998.[7]

The Asbestos Tragedy was Caused by Corporate Misconduct

We are here because these deaths have a cause. The courts and Congress have wrestled with asbestos litigation for decades because litigation was necessary, and litigation was necessary because there was fault. Juries and judges hearing these cases in state courts around the country for the last 40 years have consistently heard evidence of corporate concealment of the dangers of asbestos exposure. A corporate official for Bendix Co., for example, wrote to Johns-Manville in 1966 that "if you have enjoyed a good life while working with asbestos products why not die from it? There's got to be some cause."

Another example is provided by the conduct of Union Carbide Corporation, the client of Mr. Stengel, one of the witnesses in today's hearing. Union Carbide actually mined and marketed raw asbestos. It touted its own asbestos as being safe while questioning the safety of other forms of the mineral.

This corporate conduct, and the vast legacy of death and disease that resulted, have led to decades of litigation. The overwhelming majority of this litigation has occurred in state courts, and continues to occur there. As we move further away in time from the years of the most heavy asbestos exposure, the number of cases is fortunately decreasing, and the federal court in Philadelphia that presides over all federal asbestos litigation has announced plans to dissolve the federal court asbestos consolidation later this year or early next year.

As a result, all except a handful of cases will be heard in state court. This continues a trend that has prevailed for the last 20 years, in which the vast majority of asbestos cases have been resolved in state court, under state substantive law and state procedural rules.

The substantial majority of these state-court cases involve mesothelioma and lung cancer. Victims were exposed in a variety of ways, but each case typically involves claims against companies that made asbestos-containing products or machinery, or premises owners or contractors responsible for a worker's exposure. State law provides that a claimant may recover from each party found by the jury to have been responsible for exposure, and to have behaved negligently or to have supplied an unreasonably dangerous product. In New York, Pennsylvania, for the most part in Texas and California, and in nearly all the jurisdictions with any significant number of cases, there is no joint and several liability, and so the jury simply assigns a percentage of responsibility to each company it finds to be liable.

The Asbestos Bankruptcy Trust System

In addition to claims made against defendants in state courts, plaintiffs also can make claims against bankruptcy trusts. These trusts have been set up to pay claims against companies that declared bankruptcy at some point in the past. Since many companies have used this device to avoid defending asbestos lawsuits, a word about asbestos bankruptcies is in order.

In 1994, Congress amended the Bankruptcy Code to create Section 524(g) to specifically address asbestos-related bankruptcies. Among other things, the provision allows a bankruptcy court to bind future asbestos injury claimants to a plan of reorganization through the appointment of a futures representative to represent their interest in the negotiation of the plan. Because of the long latency period between exposure to asbestos and manifestation of a disease, Congress recognized that provisions must be made for the compensation of future asbestos victims and determined that a trust would be the best vehicle for handling claims against a bankrupt defendant. Section 524(g) basically codified the approach to dealing with asbestos claims that the court had approved in the Johns-Manville bankruptcy.

A trust that is created pursuant to Section 524(g) assumes the asbestos-related liabilities of the debtor company and must use all of its assets and income to pay qualifying asbestos

claims. The trust must treat future claimants substantially the same as present claimants, and at least 75 percent of present asbestos claimants must vote to accept the plan. If all of the requirements of Section 524(g) are met, the bankruptcy courts will issue a channeling injunction directing that asbestos claims may be brought only against the trust. In addition to creating Section 524(g), Congress also amended the Bankruptcy Code to add section 524(h), a provision that allows certain injunctions that existed on the date of the enactment of Section 524(g) to be treated as Section 524(g) injunctions.

When a company files for bankruptcy protection, there is a popular perception that the factories and company offices are closed, the plants are padlocked and all the employees lose their jobs. This is not true in the asbestos context. Almost every company to have sought bankruptcy protection due to asbestos liabilities has been able to recover their economic health while also compensating victims of asbestos disease.[8] The asbestos trust system acts to preserve the assets of the company, compensates present and future claimants, and allows the company to resume economic activity.

524(g) of the Bankruptcy Code exists precisely so that companies facing substantial asbestos claims can compensate victims while continuing normal operations. The trusts are set up by the companies after a period of negotiation and, if necessary, litigation of certain issues in bankruptcy courts. They are approved by federal bankruptcy judges, with a right of appeal by any interested party. Interested parties may include solvent co-defendants, insurers, victims, and other commercial and financial creditors.

Trusts are governed by one or more independent trustees, many of whom are retired judges. These trustees have the authority, and the responsibility, to manage the trusts in accordance with the terms of the trust documents. These documents were, of course, approved during the course of the bankruptcy case by the bankruptcy courts and federal district and appellate courts. Plaintiffs' lawyers have no involvement in the trusts' determinations of whether to pay any particular claim, nor do they have any control over trustees' decisions. If plaintiffs' lawyers are opposed to a particular decision by trustees, the question may be submitted to arbitrators, and eventually to the federal court which oversaw the particular bankruptcy proceeding. It is ultimately that court which resolves any disputes between trustees and claimants' lawyers.

Asbestos Victims are not Fully Compensated by Asbestos Trusts

In recent years, defendants have argued that asbestos lawsuits have come to constitute "double dipping," since claimants may potentially recover both from defendants in the state court system and from bankruptcy trusts. The claim is false and reflects a basic, fundamental misunderstanding of the way both the bankruptcy system and state court lawsuits operate. If any court anywhere—any state or federal, trial or appellate court hearing asbestos cases, or any bankruptcy court—had found any merit in this contention, it might have credibility, but no court ever has.

The assertion is that large amounts of money are recoverable from bankruptcy trusts, and that plaintiffs routinely game the system so that they receive a full recovery in the bankruptcy

system, and then a second, "double" recovery in the tort system. Neither premise is correct: there is no windfall of money available to mesothelioma claimants, and plaintiffs cannot and do not "game the system" such that solvent tort defendants pay the liability shares of bankrupt companies.

The proponents of this assertion describe an imaginary asbestos bankruptcy trust system awash in cash, in which mesothelioma victims need only file a few forms to recover a million dollars or more. But as for the lavish payments these trusts are supposedly doling out, it must be emphasized that there is a "scheduled value" of a particular disease claim, and then a "payment percentage" for all claims. So, for example, while a certain trust may officially "value" a mesothelioma claim at, say, $100,000, the payment percentage may be 15%, resulting in an actual payment of only $15,000. RAND finds that "[m]ost trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered." The median payment percentage is 25 percent, but some trusts pay as low as 1.1 percent of the value of a claim.[9[i]]

It must also be borne in mind that no claimant would ever qualify for payment from all, or even close to all, of the trusts. For example, a Navy seaman might well have worked around a Babcock & Wilcox boiler, but would not have worked with U.S. Gypsum joint compound. A plasterer, conversely, would have used joint compound but would not have worked on marine boilers. It is certainly true that a number of bankruptcy trusts exist, and that a typical qualifying claimant might receive significant compensation from them. But the description of the bankruptcy system as simply churning out bags of money to claimants is an outright lie.

The Existence of Asbestos Bankruptcy Trusts does not Disadvantage Solvent Defendants

A related argument is that in asbestos trials today, defendants are paying an unfair share of the damages awarded to plaintiffs. This is supposedly because solvent defendants are prevented from learning the true facts about a plaintiff's asbestos exposure, since plaintiffs are also filing bankruptcy claims, but in secret. This argument betrays a hopeless lack of awareness about how asbestos cases are actually litigated.

First, of course, there is no "fair share" for a defendant in asbestos litigation; there is only whatever percentage of causal responsibility is assigned by a jury in any particular case, and each case turns on its own facts. Moreover, the fact that other parties may share responsibility for causing injury is not a ground for avoiding liability. To quote a California case, "[E]ach tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury." *American Motorcycle Ass'n v. Superior Court* (1978) 20 Cal.3d 578, 582. The fact that others may also have been negligent or at fault for the injury, is no defense. "A tortfeasor may not escape this responsibility simply because another act, either an 'innocent' occurrence such as an 'act of God' or other negligent conduct, may also have been a cause of the injury." (*Id.* at 586.) It is further immaterial that others that may have contributed to causing the injury are bankrupt or immune from suit. "When independent negligent actions or a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a single recovery for his injuries; the fact that one

of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused." (*Id.* at 587.). This is a California case, but the same rule holds in all 50 states.

Defendants routinely and vigorously assert their rights to place other responsible parties on the verdict form that is filled out by jury, including bankrupt entities. The critics of state courts' handling of asbestos cases are apparently unaware that defendants in civil lawsuits can conduct discovery to vindicate these rights. Such discovery includes interrogatories and requests for production of documents and admissions to the plaintiff, and depositions of the plaintiff, his family members and any co-workers. Materials submitted by plaintiffs to bankruptcy trusts are discoverable. See e.g. *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481. Defendants obviously conduct their own unilateral investigation into plaintiffs' claims as well.

Does this discovery work, or have plaintiffs so gamed the system that the solvent asbestos defendants are routinely paying the bankrupt companies' "fair share"? In jurisdictions with several liability, defendants are liable only for the proportional harm they caused. The results in trials show that solvent defendants are not being disadvantaged by the asbestos trusts. Less than two months ago, in a case tried by our firm, a jury allocated 5% responsibility to the trial defendant, and a total of 34% to four different bankruptcy companies.[10] In another, a recent case tried to verdict by our firm, the jury evaluated the alleged fault of the trial defendant, Kaiser Gypsum, as well as 32 other entities, and five additional generic categories of products (e.g. "pipe covering" or "asbestos felt"). Of the 32 entities, at least 20 had bankruptcy trusts at the time of trial, and of these 20 entities, the jury determined that 18 of them were at fault. These 17 entities were assigned percentages of responsibility ranging from 1.5% to 8%. The trial defendant itself was assigned a 4% share, with the trust entities cumulatively receiving 61%.[11]

In another recent trial, the jury was presented with evidence to evaluate the liability of several entities and assessed a .5% share to Crane, an 85% share to the Navy, a .5% share to the bankrupt entity Babcock & Wilcox, and a 10% share to "Insulation Manufacturers," which includes trust entities such as Johns-Manville. In other words, presented with evidence of all of the plaintiff's exposures, the jury allotted 21 times the responsibility to trust entities as it did to the trial defendant Crane Co.[12]

In another California case that went to verdict in July 2006, the jury was also able to evaluate evidence against trial defendants and numerous third-party entities, assigning 8% responsibility to each of the two trial defendants, 8% responsibility to the bankrupt entity USG, 8% responsibility to the bankrupt entity National Gypsum Company, and *44%* responsibility to Johns-Manville Corporation. Again, each of the trial defendants was assessed 8% of the liability, while the bankrupt entities were assessed more than seven times that amount—60% of the liability.[13]

A pair of recent trials in Wisconsin demonstrate the same thing. In a case tried last year in Milwaukee, 72% of the responsibility was allocated to bankrupt entities. In another case tried in Milwaukee in 2006, 66% of the responsibility was allocated to bankruptcy companies.[14] It is

thus absurd to suggest that defendants are somehow handcuffed in defending themselves in these cases, or that the results unfairly burden them.

Nor do plaintiffs in states with joint and several liability obtain a "double recovery" when they are compensated both in the tort system and from the trusts. Under the "one satisfaction" rule, a plaintiff is entitled to only one recovery for a particular injury. Thus, after a verdict is entered, the non-settling defendants are entitled to discover the amount of settlements after the verdict is entered, and will be given a set-off equal to the settlements – including any settlements with trusts. Further, if the plaintiff did not obtain a settlement from the defendant's co-tortfeasor, the defendant can seek contribution directly from that co-tortfeasor or the asbestos trust that has assumed its responsibilities. In a pure several liability jurisdiction, of course, neither set-offs nor contributions are necessary, as the verdict will reflect only the defendant's portion of the liability.

Finally, a word about nonmalignant claims. The large number of nonmalignant claims that were brought in prior years are a thing of the past. Heavy criticism was leveled at "mass screenings" which yielded large number of "non-injured" claimants. Leaving aside the issue of whether such persons really had no injury, or whether any member of this panel would trade his lungs for those of a person who had worked with asbestos, such claims simply are not brought in any measurable numbers. Even six years ago, Professor Brickman noted a "substantial decline in nonmalignant asbestos claiming that began in the second half of 2003."[15] Those filings have, in the years since, declined virtually to nothing.

As noted, we are moving further in time away from the years of heavy asbestos exposure, and so the good news is that disease rates are gradually, if slowly, decreasing. Litigation is thus decreasing as well.

Conclusion

Almost two decades ago, OSHA observed that "it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed. Reg. 22,615 (1986). Asbestos was a preventable tragedy that poisoned hundreds of thousands of workers and their families. Many were poisoned while serving our country in the military. They have suffered painful, debilitating injuries and deaths, their families have suffered grievous losses. State law provides a remedy to these families and asbestos victims should not have to apologize for seeking compensation for their injuries.

Ever since the asbestos tragedy first came to light, the companies that are responsible for this tragedy have tried to avoid paying for the harm they caused and have tried to shift blame to other parties and to the victims and their families. The complaints about the lack of transparency in the system are, in reality, just the latest tactic in a decades-long effort to delay and avoid compensating victims of asbestos disease.

[1] National Institute for Occupational Safety and Health, Division of Respiratory Disease Studies, *Work-Related Lung Disease Surveillance Report 2002*, page 9 (May 2003); Available at: http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf.

[2] National Institute of Occupational Safety and Health, Division of Standards Development and Technology Transfer, *Occupational Health and Safety Guideline for Asbestos: Potential Human Carcinogen* (1988); available athttp://www.cdc.gov/niosh/docs/81-123/pdfs/0041.pdf

[3] Mesothelioma Applied Research Foundation, *Mesothelioma Information: Disease Development and Progression*, available at: http://www.curemeso.org/site/c.kkLUJ7MPKtH/b.4023387/k.643A/Mesothelioma_Information.htm#whatismesothelioma

[4] *Building and Construction Trades Dept. v. Brock*, 838 F.2d 1258, 1262 (D.C. Cir. 1988)

[5] National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System *Table 7-4. Malignant mesothelioma: Number of deaths by state, U.S. residents age 15 and over, 1999-2005*, (March 2009); available at http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=894&GroupRefNumber=T07-04.

[6] National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System *Table 7-5. Malignant mesothelioma: Number of deaths, death rates (per million population), and years of potential life lost (YPLL) by state, U.S. residents age 15 and over, 1999-2005* (March 2009); charts available at: http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=895&GroupRefNumber=T07-05.

[7] National Institute of Occupational Safety and Health, Work-Related Lung Disease (WoRLD) Surveillance System Table 1-4. Asbestosis: Number of deaths by state, U.S. residents age 15 and over, 1996-2005 (March 2009) available at: http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=493&GroupRefNumber=T01-04.

[8] These include Johns-Manville, United States Gypsum, Owens-Corning Fiberglas, Pittsburgh-Corning, W. R. Grace, Halliburton, Armstrong World Industries, Federal Mogul Corp., McDermott Industries (Babcock & Wilcox), and National Gypsum.

[9] *Supra*, Dixon, RAND INSTITUTE FOR CIVIL JUSTICE at page xv (2010).

[10] See verdict form in *Mansir v. Air & Liquid Systems Corp., et al*, No. 37-2010-00104112-CU-AS-CTL (San Diego County, Superior Court), exhibit 1.

[11] See attached excerpts from the verdict form in *Silvestro v. AC&S, Inc., et al.* (Aug. 3, 2010) Case No. BC 253974, Los Angeles County Superior Court, exhibit 2.

[12] See attached excerpts from the verdict form in *Woodard v. Crane Co. and Sepco Corporation* (Feb. 2, 2009) Case No. BC 387774, Los Angeles County Superior Court, exhibit 3.

[13] See attached excerpts from the verdict form in *Hall v. Bondex Int'l. Inc.* (Jul. 10, 2006) Case No. BC 340466, Los Angeles County Superior Court, exhibit 4.

[14] See verdict forms in *Gosz v. Building Service Industrial Sales Co.*, No. 05-CV-9218 (Milwaukee County Circuit Court) and *Eske v. Fleming Materials Co.*, No. 07-CV-10206 (Milwaukee County Circuit Court, attached as exhibit 5.

[15] Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 Cardozo L. Rev. 991, 1011 n.93 (2005).

EXHIBIT 1

—ORIGINAL—

FILED
Clerk of the Superior Court
JUL 20 2011
By: , Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

WILLIAM W. MANSIR and TERI M. MANSIR, Plaintiffs, vs. AIR & LIQUID SYSTEMS CORPORATION (*sued individually and as successor by merger* to BUFFALO PUMPS, INC., *et al.*, Defendants.	Case No.: 37-2010-00104112-CU-AS-CTL **SPECIAL VERDICT**

We, the jury in the above entitled action, answer the questions submitted to us as follows:

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STRICT PRODUCTS LIABILITY

(Design Defect – Consumer Expectations Test)

Question No. 1: Were John Crane Inc. Gaskets and/or Packing misused after they left John Crane Inc.'s possession in a way that was not reasonably foreseeable to John Crane Inc.?

	Yes	No
Answer	___	✓

If you answered "no", then answer Question No. 3.

If you answered "yes", then answer Question No. 2.

Question No. 2: Was the misuse the sole cause of William Mansir's harm?

	Yes	No
Answer	___	___

If you answered "no", then answer Question 3.

If you answered "yes", then answer Question No. 6.

Question No. 3: Did John Crane Inc. Gaskets and/or Packing fail to perform as safely as an ordinary consumer would have expected?

	Yes	No
Answer	✓	___

If you answered "yes", then answer Question No. 4.

If you answered "no", then answer Question No. 6.

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Question No. 4: Were John Crane Inc. Gaskets and/or Packing used in a way that was reasonably foreseeable to John Crane Inc.?

	Yes	No
Answer	✓	

If you answered "yes", then answer Question No. 5.

If you answered "no", then answer Question No. 6.

Question No. 5: Was the failure of John Crane Inc. Gaskets and/or Packing to perform as safely as an ordinary consumer would have expected a substantial factor in causing harm to William Mansir?

	Yes	No
Answer	✓	

Answer Question No. 6.

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STRICT PRODUCTS LIABILITY

(Failure to Warn)

Question No. 6: Did John Crane Inc. Gaskets and/or Packing have potential risks that were known or knowable to John Crane Inc. through the use of scientific knowledge available at the time of manufacture, distribution or sale?

	Yes	No
Answer	✓	

If you answered "yes", then answer Question No. 7.

If you answered "no", then answer Question No. 12.

Question No. 7: Did the potential risks present a substantial danger to users of John Crane Inc. Gaskets and/or Packing?

	Yes	No
Answer	✓	

If you answered "yes", then answer Question No. 8.

If you answered "no", then answer Question No. 12.

Question No. 8: Would ordinary consumers have recognized the potential risks?

	Yes	No
Answer		✓

If you answered "no", then answer Question No. 9.

If you answered "yes", then answer Question No. 12.

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Question No. 9: Did John Crane Inc. fail to adequately warn of the potential risks?

	Yes	No
Answer	✓	

If you answered "yes", then answer Question No. 10.

If you answered "no", then answer Question No. 12.

Question No. 10: Were John Crane Inc. Gaskets and/or Packing used in a way that was reasonably foreseeable to John Crane Inc.?

	Yes	No
Answer	✓	

If you answered "yes", then answer Question No. 11.

If you answered "no", then answer Question No. 12.

Question No. 11: Was the lack of sufficient warnings a substantial factor in causing harm to William Mansir?

	Yes	No
Answer	✓	

Answer Question No. 12.

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NEGLIGENCE

Question No. 12: Was John Crane Inc. negligent in manufacturing, designing or supplying Gaskets and/or Packing?

	Yes	No
Answer	___	✓

If you answered "yes", then answer Question No. 13.

If you answered "no" but you answered "yes" to Question 5 and/or Question 11, then answer Question No. 14.

If you answered "no" and you answered "no" to or did not answer both Question 5 and Question 11, then sign and return this verdict.

Question No. 13: Was John Crane Inc.'s negligence a substantial factor in causing harm to William Mansir?

	Yes	No
Answer	___	___

If you answered "yes", then Answer Question 14.

If you answered "no" but you answered "yes" to Question 5 and/or Question 11, then answer Question No. 14.

If you answered "no" and you answered "no" to or did not answer both Question 5 and Question 11, then sign and return this verdict.

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Question No. 14: What are William Mansir's damages?

PAST ECONOMIC LOSS

Medical Expenses: 152,000 $ ~~[illegible]~~

Loss of Household Services: $ 13,761

FUTURE ECONOMIC LOSS

Loss of Pension and Social Security Benefits: $ 217,200

Loss of Household Services: $ 69,000

Medical expenses: $ 99,000

PAST NONECONOMIC LOSS

For physical pain and mental suffering: $ 350,000

FUTURE NONECONOMIC LOSS

For physical pain and mental suffering: $ 1,000,000

Answer Question No. 15

Question No. 15: Was Tari Mansir harmed by the injury to her husband, William Mansir?

	Yes	No
Answer	✓	

If you answered "yes", then answer Question No. 16.

If you answered "no", then answer Question No. 17.

Question No. 16: What are Plaintiff Teri Mansir's damages?

PAST NONECONOMIC LOSS

For the loss of her husband's love, companionship, comfort, care, assistance, protection, affection, society, moral support, and enjoyment of sexual relations: $ 150,000

FUTURE NONECONOMIC LOSS

For the loss of her husband's love, companionship, comfort, care, assistance, protection, affection, society, moral support, and enjoyment of sexual relations: $ 300,000

Answer Question No. 17.

Question No. 17: If 100% represents the total fault that was the cause of William and Teri Mansir's injuries, what percentage of this 100% was due to the fault of John Crane Inc. and the others listed below?

John Crane Inc.	5 %
William Mansir	1 %
U.S. Navy	13 %
Raybestos-Manhattan	5 %
Garlock	3 %

Anchor Packing	5 %
Owens-Illinois	22 %
Unibestos	22 %
Crane Co.	1 %
IMO Industries	1 %
Ingersoll Rand	1 %
Warren Pumps	1 %
Yarway Corp.	1 %
Foster Wheeler	1 %
Babcock & Wilcox	1 %
Kelly-Moore	3 %
Georgia Pacific	3 %
Kaiser Gypsum	3 %
Union Carbide Corporation	3 %
Certainteed	3 %
TOTAL	**100%**

DATED: July 28, 2011

Foreperson (Sign & Print Name)
William H. Carpenter

EXHIBIT 2

FILED
LOS ANGELES SUPERIOR COURT
AUG 03 2010
JOHN A. CLARKE, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

DORIS SILVESTRO, et al., Plaintiffs, v. AC&S, INC., et al., Defendants.	CASE NO.: BC 253974 Assigned for all Purposes to the Hon. Mary Ann Murphy; Dept. 25) **SPECIAL VERDICT FORM**

We, the jury in the above-entitled action, find the following Special Verdict on the questions submitted to us:

Question No. 1:

Were any of the entities listed below negligent or otherwise at fault?

Answer "Yes" or "No" after the name of each entity.

Answer:

JOINT COMPOUND:

BONDEX INTERNATIONAL, INC.	Yes
FLINTKOTE COMPANY	Yes
GEORGIA-PACIFIC CORP.	Yes
KELLY-MOORE PAINT COMPANY	Yes
PROKO INDUSTRIES	Yes
SYNKOLOID COMPANY	Yes
TRIKO	Yes

////

DEFENDANT KAISER GYPSUM COMPANY, INC.	4 %
JOINT COMPOUND:	
BONDEX INTERNATIONAL, INC.	1.5 %
FLINTKOTE COMPANY	1.5 %
GEORGIA-PACIFIC CORP.	1.5 %
KELLY-MOORE PAINT COMPANY	1.5 %
PROKO INDUSTRIES	1.5 %
SYNKOLOID COMPANY	1.5 %
TRIKO	1.5 %
PLASTER/TEXTURES:	
CERTAINTEED CORP. (KALITE)	0 %
TEX A LITE	0 %
PIPE COVERING/BLOCK INSULATION:	
ARMSTRONG, INC.	4 %
JOHNS MANVILLE	2 %
OWENS-ILLINOIS	3.5 %
OWENS-CORNING FIBERGLAS	3.5 %
PITTSBURGH CORNING	7 %
UNARCO	7 %
REFRACTORIES/CASTABLES:	
AP GREEN	4 %
HARBISON & WALKER	4 %
KAISER ALUMINUM & CHEMICAL CO.(V BLOCK)	4 %
QUIGLEY COMPANY, INC.	6 %
GASKETS:	
FLEXITALLIC	1 %
GARLOCK	2.5 %

ASBESTOS CLOTH:

ASBESTON, INC. 4 %

ASBESTOS GLOVES:

GUARD-LINE 2 %

BOILERS:

BABCOCK & WILCOX 0 %

COMBUSTION ENGINEERING 3 %

FOSTER WHEELER 0 %

FRASER'S BOILER SERVICE, INC. 0 %

OTHER:

CAPE ASBESTOS (AMOSITE SUPPLIER) 8 %

FRANKLIN MACHINE (EMPLOYER) 3.5 %

SERVICE ENGINEERING (EMPLOYER) 3.5 %

JT THORPE & SON, INC. (INSULATION CONTRACTOR) 0 %

METALCLAD INSULATION CORP. (INSULATION CONTRACTOR) 0 %

PIPE COVERING 3 %

BLOCK INSULATION 3 %

ASBESTOS PADS 3 %

ASBESTOS FELT 3 %

RAW ASBESTOS 1 %

TOTAL: 100%

DATED 8-3-, 2010

Jury Foreperson

EXHIBIT 3

56

FILED
LOS ANGELES SUPERIOR COURT
FEB 0 2 2009
JOHN A. CLARKE, EXECUTIVE OFFICER
BY CAROL WRIGHT, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DENNIS H. WOODARD and MYRA J. WOODARD, Plaintiffs, vs. CRANE CO. and SEPCO CORPORATION, Defendants.	Case No. BC 387 774	SPECIAL VERDICT

WE, THE JURY in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was there a defect in the design of the defendant's product in that it failed to perform as safely as an ordinary user would expect?

Answer "yes" or "no" after the name of each defendant.	Yes	No
Defendant Crane Co.	2	10
Defendant Sepco Corporation	0	12

If you answered "no" as to both defendants in Question No. 1, then proceed to Question No. 4. If you answered "yes" to Question No. 1 for either defendant, then answer Question No. 2 as to that defendant only.

QUESTION NO. 10: If 100% represents the total fault that was the cause of plaintiffs' injury, what percentage of this 100% was due to the fault of the defendants and others listed below?

Crane Co.	.5 %
Sepco Corporation	0 %
U.S. Navy	85 %
Babcock and Wilcox	.5 %
Cutler Hammer	.5 %
Garlock	.5 %
General Electric	.5 %
Georgia Pacific	.5 %
Elliott Company	.5 %
IMO Industries	.5 %
Insulation Manufacturers	10 %
Warren Pumps	.5 %
Westinghouse	.5 %
TOTAL:	100%

Dated: 2/2/2009

FOREPERSON

EXHIBIT 4

COPY

RECEIVED
JUN 14 2006
Dept. 316

ORIGINAL FILED
JUL 10 2006
LOS ANGELES
SUPERIOR COURT

C. ANDREW WATERS, CA Bar No. 147259
MICHAEL L. ARMITAGE, CA Bar No. 152740
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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

By Fax

HENRY HALL and LAURA MARIE HALL, Plaintiffs, vs. BONDEX INTERNATIONAL, INC., et al., Defendants.	Case No. BC 340 466 JUDGMENT ON SPECIAL VERDICTS Time: 9:30 a.m. Dept: 316 Trial Date: April 24, 2006 Action Filed: September 27, 2006

This action came on regularly for trial on May 1, 2006, in Department 316 of the above entitled court, the Honorable Ricardo Torres, judge presiding. The plaintiffs, HENRY HALL and LAURA MARIE HALL, appeared by and through their attorneys of record Waters & Kraus. Defendant Kelly-Moore Paint Company, Inc. appeared by and through its attorneys of record Foley & Mansfield. Defendant Kaiser Gypsum Company, Inc. appear by and through its attorneys of record Jackson & Wallace, LLP.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified.

QUESTION NO. 13: What do you find to be the total amount of damages, including economic and non-economic damages, if any, suffered by the Plaintiff HENRY HALL?

ANSWER: Economic Damages $ 26,886.52

ANSWER: Non-Economic Damages $ 2,500,000.00

TOTAL: $ 2,526,886.52

QUESTION NO. 14: What is the total amount of non-economic damages, if any, sustained by Plaintiff LAURA MARIE HALL as a result of HENRY HALL's malignant mesothelioma?

ANSWER: $ 800,000.00

QUESTION NO. 15: If 100% represents the total fault that was the cause of plaintiffs' injury, what percentage of this 100% was due to the fault of the defendants and others listed below?

ANSWER:

To Defendant KAISER GYPSUM COMPANY, INC.	8%
To Defendant KELLY-MOORE PAINT COMPANY, INC	8%
To BONDEX INTERNATIONAL, INC./ RPM, INC	8%
To DOWMAN PRODUCTS, INC	8%
To GEORGIA-PACIFIC CORPORATION	8%
To UNITED STATES GYPSUM COMPANY	8%
To JOHNS-MANVILLE CORPORATION	44%
To NATIONAL GYPSUM COMPANY	8%
TOTAL:	100%

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EXHIBIT 5

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

HELEN GOSZ,

Plaintiff,

v. Case No. 05-CV-9218

BUILDING SERVICE INDUSTRIAL SALES COMPANY,

Defendant.

FILED
NOV 12 2008
JOHN BARRETT
CLERK OF CIRCUIT COURT

VERDICT

QUESTION 1: CAUSE OF DISEASE

1. Was Clarence Gosz' malignant mesothelioma caused by significant occupational exposure to asbestos fibers?

Yes X No ____

If you answered question 1 "no," go to question 6. If you answered question 1 "yes," then go to question 2.

QUESTIONS 2, 3 & 4: CELOTEX PRODUCTS

2. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Celotex asbestos-containing pipe cover?

Yes X No ____

If you answered question 2 "yes," go to question 3. If you answered "no," then go to question 5.

3. If Clarence Gosz had significant occupational exposure to asbestos fibers from Celotex asbestos-containing pipe cover, was that product unreasonably dangerous and defective?

Yes X No ____

If you answered question 3 "yes," then go to question 4. If you answered "no," then go to question 5.

4. Was the defective and unreasonably dangerous condition of Celotex asbestos-containing pipe cover a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

11/18/2008 11:26 414--272-5329 FEDEX KINKO'S 8131 PAGE 01

QUESTIONS 5, 6 & 7: FOSTER WHEELER ASBESTOS-CONTAINING INSULATED BOILERS

5. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Foster Wheeler asbestos-containing insulated boilers?

Yes X No ____

If you answered question 5 "yes," go to question 6. If you answered "no," then go to question 8.

6. If Clarence Gosz had significant occupational exposure to asbestos fibers from Foster Wheeler asbestos-containing insulated boilers, was that product unreasonably dangerous and defective?

Yes X No ____

If you answered question 6 "yes," then go to question 7. If you answered "no," then go to question 8.

7. Was the defective and unreasonably dangerous condition of Foster Wheeler asbestos-containing insulated boilers a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

QUESTIONS 8, 9 & 10: COMBUSTION ENGINEERING ASBESTOS-CONTAINING INSULATED BOILERS

8. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Combustion Engineering asbestos-containing insulated boilers?

Yes X No ____

If you answered question 8 "yes," go to question 9. If you answered "no," then go to question 11.

9. If Clarence Gosz had significant occupational exposure to asbestos fibers from Combustion Engineering asbestos-containing insulated boilers, was that product unreasonably dangerous and defective?

Yes X No ____

If you answered question 9 "yes," then go to question 10. If you answered "no," then go to question 11.

10. Was the defective and unreasonably dangerous condition of Combustion Engineering asbestos-containing insulated boilers a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

11/18/2008 11:26 414-222-5329 FEDEX KINKO'S 0421 PAGE 02

QUESTIONS 11, 12 & 13: JOHNS MANVILLE ASBESTOS-CONTAINING PIPE COVERS

11. Did Clarence Gosz have significant occupational exposure to asbestos fibers from Johns Manville asbestos-containing pipecover?

Yes X No ____

If you answered question 11 "yes," go to question 12. If you answered "no," then go to question 14.

12. If Clarence Gosz had significant occupational exposure to asbestos fibers from Johns Manville asbestos-containing pipecover, was that product unreasonably dangerous and defective?

Yes X No ____

If you answered question 12 "yes," then go to question 13. If you answered "no," then go to question 14.

13. Was the defective and unreasonably dangerous condition of Johns Manville asbestos-containing pipecover a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

QUESTIONS 14, 15 & 16: PRODUCTS DISTRIBUTED BY BUILDING SERVICE INDUSTRIAL SALES (BSIS) INCLUDING ASBESTOS-CONTAINING CEMENT OR OWENS-CORNING FIBERGLASS INC. KAYLO ASBESTOS-CONTAINING PIPECOVER

14. Did Clarence Gosz have significant occupational exposure to asbestos fibers from pipecover products distributed by Building Service Industrial Sales (BSIS), including cement or Owens-Corning Fiberglass, Inc. Kaylo?

Yes ____ No X

If you answered question 14 "yes," go to question 15. If you answered "no," then go to question 17.

15. If Clarence Gosz had significant occupational exposure to asbestos fibers from pipecover distributed by Building Service Industrial Sales was that product unreasonably dangerous and defective?

Yes ____ No ____

If you answered question 15 "yes," then go to question 16. If you answered "no," then go to question 17.

16. Was the defective and unreasonably dangerous condition of pipecover products distributed by Building Service Industrial Sales a cause of Clarence Gosz' malignant mesothelioma?

Yes ____ No ____

11/18/2008 11:36 414-272-5329 FLEX KINGS 6431 PAGE 83

Questions 17 & 18: American Can Company

17. Did American Can Company fail to provide Clarence Gosz with employment as safe as the nature of his employment would reasonably permit?

Yes X No ____

If you answered question 17 "yes," go to question 18. If you answered "no," then go to question 19.

18. Was the failure of American Can Company to provide a safe place of employment for Clarence Gosz a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

Questions 19 & 20: Thilmany Paper Company

19. Did Thilmany Paper Company fail to provide Clarence Gosz with employment as safe as the nature of his employment would reasonably permit?

Yes X No ____

If you answered question 19 "yes," go to question 20. If you answered "no," then go to question 21.

20. Was the failure of Thilmany Paper Company to provide a safe place of employment for Clarence Gosz a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

Questions 21 & 22: Employer R.G. Miron

21. Did employer R.G. Miron fail to provide Clarence Gosz with employment as safe as the nature of his employment would reasonably permit?

Yes X No ____

If you answered question 21 "yes," go to question 22. If you answered "no," then go to question 23.

22. Was the failure of R.G. Miron to provide a safe place of employment for Clarence Gosz a cause of Clarence Gosz' malignant mesothelioma?

Yes X No ____

11/18/2008 11:26 414- 272-5229 FTRCK KINGS 0431 PAGE 04

QUESTION 23: COMPARISON OF FAULT

Now you must assign a percentage of the fault of each company which contributed to Mr. Gosz' disease.

Answer this question only for each company corresponding to any "yes" answers you gave to questions 4, 7, 10, 13, 16, 18, 20 or 22.

For all the to which you gave a "yes" answer on questions 4, 7, 10, 13, 16, 18, 20 or 22, assign a percentage of responsibility for the disease of Mr. Gosz. This question asks for the percentage of responsibility of each such company to reach a total of 100%. The total of your numbers must equal 100.

23. Taking 100% of the total, what percentage of the total cause of fault for Clarence Gosz' asbestos exposure do you attribute to each of the following?

A. Delnex asbestos-containing pipe cover 22%

B. Foster Wheeler asbestos-containing insulated boilers 22%

C. Combustion Engineering asbestos containing insulated boilers 22%

D. Johns Manville asbestos-containing pipe covers 22%

E. Products distributed by Building Service Industrial Sales, including asbestos-containing reinforcement and Owens-Corning Fiberglass, Inc. Kaylo asbestos-containing pipecover 0

F. American Cast Company 4%

G. Thomas W. Raper Company 4%

H. PPG Minop Company 4%

0398

11/18/2008 11:26 414-272-6329 FEDEX KINKO'S 0431 PAGE 05

Question 24: Damages

Regardless of how you answered any of the other questions, you must answer each subpart of this question.

24. What sum of money will fairly and reasonably compensate Helen Gosz and the Estate of Clarence Gosz for the following?

A. Past pain and suffering $50,000

B. Loss of society and companionship $75,000

Total: $125,000

Foreperson

November, 12, 2008

Dissenters

Barbara Montgomery-Armour

Verdict question(s) to which dissented:

#17, #19, #23 (F+G)

#21

12/18/2008 11:56 414-272-6321 INDEX KIMMO'S 8431 PAGE 06

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

MARILYN ESKE, and ESTATE OF WILBUR ESKE

Plaintiffs,

v.

FLEMING MATERIALS COMPANY and GEORGIA PACIFIC CORPORATION,

Defendants.

VERDICT

Case No. 07-CV-10206

Questions 1-5: Fleming Materials Company

1. Did Wilbur Eske have occupational exposure to asbestos fibers from asbestos-containing joint compound supplied by Fleming Materials Company?

Yes _____ No X

If you answered question 1 "yes," then answer this question 2. If you answered "no," then skip to question 6.

2. Was Fleming Materials Company negligent in supplying asbestos-containing joint compound before July 1, 1973?

Yes _____ No _____

If you answered question 2 "yes," then answer this question 3. If you answered "no," then skip to question 4.

3. Was the negligence of Fleming Materials Company a cause of Wilbur Eske's malignant mesothelioma?

Yes _____ No _____

If you answered question 3 "yes," or "no" answer this question 4.

4. If Wilbur Eske had occupational exposure to asbestos fibers from asbestos-containing joint compound supplied by Fleming Materials Company, was that product unreasonably dangerous and defective?

Yes _____ No _____

If you answered question 4 "yes," then answer this question 5. If you answered "no," then skip to question 6.

5. Was the defective and unreasonably dangerous condition of asbestos-containing joint compound supplied by Fleming Materials Company a cause of Wilbur Eske's malignant mesothelioma?

Yes _____ No _____

Questions 11-13: Building Service, Inc.

11. Did Wilbur Eske have occupational exposure to asbestos while on the job working for Building Service, Inc. (BSI)?

Yes X No ____

If you answered question 11 "yes," then answer this question 12. If you answered "no," then skip to question 14.

12. Was BSI negligent in providing a safe place of employment for Wilbur Eske?

Yes ____ No X

If you answered question 12 "yes," then answer this question 13. If you answered "no," then skip to question 14.

13. Was the negligence of BSI a cause of Wilbur Eske's malignant mesothelioma?

Yes ____ No ____

Questions 14 - 15: Wilbur Eske

14. Was Wilbur Eske negligent with respect to his own safety?

Yes ____ No X

If you answered question 14 "yes," then answer this question 15. If you answered "no," then skip to question 16.

15. Was the negligence of Wilbur Eske a cause of his malignant mesothelioma?

Yes ____ No ____

Question 16: Comparisons of Products

16. Taking 100% as the total, what percentage of the total causes for Wilbur Eske' asbestos exposure do you attribute to each of the following?

A. Armstrong ceiling tile	0 %
B. Boiler cement and insulation other than Kewanee and Clever-Brooks boilers	0 %
C. Bondex joint compounds	2 %
D. Building Services Inc.	0 %
E. Celotex ceiling tile	14 %
F. Clever-Brooks boiler cement and insulation	5 %
G. Duct covering containing asbestos	7 %
H. Wilbur Eske	0 %
I. Joint compounds supplied by Fleming Materials	0 %
J. Floor tiles	1 %
K. Georgia Pacific joint compounds	0 %
L. Johns Manville ceiling tile	11 %
M. Kaylo asbestos pipe covering supplied by companies other than Sprinkmann	8 %
N. Kewaunee boiler cement and insulation	5 %
O. Mortar tile cement	0 %
P. National Gypsum (Gold Bond) joint compounds supplied by others than Fleming	2 %
Q. Plaster products	1 %
R. Sprinkmann supplied pipe covering materials	9 %
S. Spray-on fireproofing	25 %
T. United States Gypsum joint compounds supplied by others than Fleming	10 %
U. Wisconsin Drywall supplied joint compounds	0 %
	100 %

Questions 17: Damages

Regardless of how you answered any of the other questions, you must answer each subpart of this question:

A. What sum of money will fairly and reasonably compensate the Estate of Wilbur Eske for Wilbur Eske's past pain and suffering? $ 50,000.00

B. What sum of money will fairly and reasonably compensate Marilyn Eske for her loss of society and companionship from the time Wilbur Eske was diagnosed with malignant mesothelioma until his death? $ 40,000.00

C. What sum of money will fairly and reasonably compensate Marilyn Eske for loss of society and companionship resulting from Mr. Eske's death? $ 65,000.00

Total: $ 155,000.00

Dated this 5th day of May, 2010 at Milwaukee, Wisconsin.

Wade Avinger
Foreperson

Dissenter(s)	Verdict question(s) to which dissented:
Orlando Johnson	# 1, 12
Michael E Bates	12

Mr. FRANKS. Mr. Stengel, if it is all right, we are going to go ahead and try to get your testimony in and then return for questions at the end of the vote series, which I will try to get a timing on that as soon as we finish here.

Could we get you to turn your microphone on. You are recognized for 5 minutes.

TESTIMONY OF JAMES L. STENGEL, ESQ., ORRICK, HERRINGTON & SUTCLIFFE LLP

Mr. STENGEL. Chairman Franks, Ranking Member Nadler, my name is Jim Stengel. I appreciate the opportunity to come here and

talk to the subcommittee about these issues, particularly the question posed by the Committee, which is the impact of fraud and abuse in the compensation system for asbestos on victims and defendants.

Thank you for the recital of my background. There is one additional fact which may be relevant for this subcommittee. My first experience in asbestos litigation was spending 10 years as outside litigation counsel for the Manville trust, so I am reasonably familiar with what trusts do and how they operate. Since then, I have represented a number of defendants in the civil litigation system and distressed defendants in the asbestos litigation system, so I am familiar with both sides of the street, so-to-speak, in this context.

What I would like to address here this morning is the somewhat narrower but very important issue of how the operation of the trusts impacts the tort litigation system. Now, this is of critical importance, because the independent research group RAND has determined that the trusts have north of $30 billion available for the compensation of asbestos victims going forward. The most recent statistics we have on annual compensation was that the asbestos trusts disbursed some $3.3 billion in 2008, so we are talking about very substantial amounts of compensation from the trusts.

Now, to allay a misperception perhaps, I don't think anyone here today takes issue with the fact that the asbestos health crisis is real, there are injured people, and those people deserve to be compensated. What I think you are hearing from most of us is we want a level playing field.

We want a system that awards compensation based on actual fact and actual evidence. And what has happened in the trust environment is, particularly with the most recent wave of bankruptcy trust filings starting in 2000, a wave of bankruptcies which was, in part, occasioned by the fraud that Professor Brickman talked about, the unimpaired claims overwhelming corporate defendants in a way that gave them no option but to declare bankruptcy, we saw the disappearance of first- and second-line defendants in the asbestos scheme and a vast number of new defendants were introduced to litigation, and I think there was an expectation that those companies would necessarily bear the burden of the missing bankrupt entities, at least during the reorganization process.

That is not what happened. The process has been sticky. It has ratcheted in one direction and the new defendants, like Monroe Rubber, are continuing to bear the burden of the departed bankrupt entities. And now that these very substantial amounts of assets are available from the trusts to provide compensation, there is no reason why the trust system and the tort system on the other side should be split the way they are now. The trusts operate in a way that is siloed, separate and opaque from the litigation system.

What we want is transparency in terms of a limited but critically important piece of information or evidence. That is, what assertions of exposure are being made by claimants who are also plaintiffs in the tort system about who is responsible for their injury. It is unfair and distorts the system for a claimant to do, as they can, under the current rules, litigate their case against 20 or 30 solvent defendants in the tort system, resolve that case, and we resolve meso-

thelioma cases in 12 to 18 months, and before even the very rare statute of limitations in a trust of 3 years comes into play, have the opportunity then to go back and reassert those claims.

The one thing that the 50 years of experience that we have had in asbestos litigation has proven to us is, one, the system is very, very sensitive to economic incentives, and by putting billions of dollars available in a secondary compensation system that doesn't have to be reflected in the tort system, we can expect that bad things will happen.

The second as we have seen is the system is remarkably bad at self-policing. It simply will not fix these problems.

All we ask at this point, frankly, is transparency, and we believe full disclosure and airing of what is happening on the trust side of the ledger as well as the tort side of the ledger will improve the system for claimants, certainly and admittedly for solvent defendants, and for all others.

My written testimony is more extensive and provides some concrete examples of misconduct we have discovered, concrete situations where plaintiffs have taken different positions in court and with the trusts. We have knowledge as to what I suspect is the mere tip of the iceberg. But even those stark examples I think provide this Committee with the evidence they need to look at this issue and look at it seriously.

Thank you very much.

Mr. FRANKS. Thank you, Mr. Stengel.

[The prepared statement of Mr. Stengel follows:]

WRITTEN STATEMENT OF JAMES L. STENGEL, ESQ.

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HEARING ON ASBESTOS LITIGATION FRAUD AND ABUSE

HOUSE JUDICIARY COMMITTEE:
SUBCOMMITTEE ON THE CONSTITUTION

SEPTEMBER 9, 2011

**WRITTEN STATEMENT OF JAMES L. STENGEL -
ASBESTOS BANKRUPTCY TRUST TRANSPARENCY**

Chairman Franks, Ranking Member Nadler and members of the subcommittee, today's hearing asks an important question: how fraud and abuse in the asbestos compensation system affects victims, jobs, the economy and the legal system. I intend to specifically address that question in the context of how the operation of the asbestos bankruptcy trusts impacts the tort system, and conclude that, as structured and operated, the absence of transparency as to the actions of the trusts has led to a misallocation of liability to solvent defendants in the tort system, a related risk of double recovery on the part of claimants gaming the system, and created an environment ripe for fraud and abuse. This has, in turn, had a negative impact on solvent defendants and, particularly, current and future asbestos victims.

I am James L. Stengel, Senior Partner for Litigation in the law firm of Orrick, Herrington & Sutcliffe LLP, and a member of the New York Bar. My asbestos-related experience arises from two roles. I served as outside counsel to the Manville Personal Injury Settlement Trust from 1992 to 2001, and have represented defendants in the asbestos civil litigation system since 2001. The views offered here are mine alone and are not those of any other firm, entity or organization.

Introduction

We are on the threshold of the fifth decade of asbestos personal injury litigation. This has been the largest and longest running mass tort litigation in our history. Asbestos litigation had, as of 2002, processed the claims of almost 750,000 individuals and consumed $49 billion in compensation and expenses.[1] While triggered in the first instance by legitimate claims of injury

[1] Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, at xi (RAND Corporation 2011)[hereinafter RAND 2011 Report].

resulting from exposure to asbestos, the litigation has few admirers, having been variously described as an "Elephantine Mass,"[2] or a "festering wound."[3] The litigation has resulted in 96 bankruptcies so far. The process is woefully inefficient, with almost two-thirds of the total expenditures going to lawyers and other expenses.[4] Historically, it has produced irrational results such as the compensation to the tune of billions of dollars of huge numbers of unimpaired claims.[5]

Over time, the growth in the number of bankruptcies filed by asbestos defendants has had a dramatic impact on the litigation. This presentation is intended to highlight the serious problems that reside in the intersection of the operation of the personal injury settlement trusts formed out of these bankruptcies and litigation involving active, solvent defendants in the tort system. These problems are rooted in the history of the asbestos trusts. Over time, the asbestos trust system has become separated and untethered from the tort system. That structural change has had profound effects on both solvent defendants and claimants within the respective systems. The separation of trust and tort system results in the potential for misallocations of fault to current tort system defendants and the attendant overpayment to claimants who are made whole in the tort system and then obtain additional recovery from the trusts. This opacity and lack of information flow between and among the trusts and the tort system creates fertile ground for fraud and abuse.

Through this presentation I seek consideration of actions that would create more transparency in the business that is the asbestos trust system. Is there any valid reason to object

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2 Ortiz v. Fibreboard, 527 U.S. 815, 821 (1999).

3 *In re* Joint E. & S.D.N.Y. Asbestos Litig., 237 F. Supp.2d 297, 300 (E. & S.D.N.Y. 2002).

4 Stephen J. Carroll, et al. *Asbestos Litigation* (RAND Corporation 2005), note 7 at 95 [hereinafter RAND 2005 Report].

5 Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality,* 31 Pepp. L. Rev. 33, 133 (2004).

to greater transparency? No. The tort system, the bankruptcy trusts, plaintiffs (particularly those whose claims will arise in the future) and defendant companies will all benefit by transparency, and the corresponding burdens are minimal.

As noted, a fuller understanding of the importance of the trusts to the asbestos litigation process requires a brief recital of history. Before 1982, there was a single litigation system for the resolution of asbestos claims. Then, as now, a plaintiff or claimant has a single injury related to his or her exposure to asbestos.[6] Prior to 1982, that injury was compensated exclusively, apart from Workmen's Compensation, via the tort system. In 1982, the Johns-Manville Corporation, the largest manufacturer and seller of asbestos-containing products in the world and the holder of a substantial liability share in the asbestos litigation system, declared bankruptcy. The declaration of bankruptcy came largely, if not exclusively, because of the threat of future rather than current asbestos claims – claims that are still being processed in the tort system today. At the time Manville filed for bankruptcy, the anticipated structure to address future claims, that is, claims of individuals who had not as of yet manifested asbestos-related illness, was that the trust created in the bankruptcy, the Johns-Manville Personal Injury Settlement Trust, would stand in the shoes of the Johns-Manville Corporation, the debtor corporation, for all purposes in the tort system. That model proved flawed in that the Johns-Manville Personal Injury Settlement Trust was soon overwhelmed by tort litigation and became insolvent itself shortly after commencing operations.[7] As a result, the Johns-Manville Trust was restructured and what was a purely litigation-oriented process became more explicitly administrative in character. But it is

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[6] In some cases, plaintiffs will have more than one claim for asbestos, for example, and then a subsequent developing malignancy, but a sole satisfaction rule would apply to either. *See generally In re* Joint E. & S. Dist. Asbestos Litig., 1991 U.S. Dist. LEXIS 7527, 90 (D.N.Y. 1991).

[7] Findley v. Falise (*In re* Joint E. & S. Dists. Asbestos Litig.), 878 F. Supp. 473, 485-86 (E. & S.D.N.Y. 1995).

important to note, the Johns-Manville Personal Injury Settlement Trust was not at that time, or thereafter, removed from the asbestos litigation system.[8]

Since 1982, there have been successive waves of asbestos-related bankruptcies. Before 2000 they came with some regularity but typically involved the first line asbestos defendants, those that were centrally involved in manufacturing the majority of the asbestos-containing materials which gave rise to asbestos-related health claims. At the end of the 1990s and in the early 2000s, waves of new claims emerged; and, as a result of that tsunami of asbestos claims, other corporations joined Manville in availing themselves of the bankruptcy process to address their liability for asbestos health claims. The 90-plus companies that have now reorganized themselves via the bankruptcy process have availed themselves of a special provision of the Bankruptcy Code called Section 524(g). Section 524(g) allows a bankrupt entity to channel its asbestos liability currently and in the future to a trust if certain conditions are met in the reorganization. Over time this has resulted in the creation, by 2010, of 54 asbestos settlement trusts.[9] Each trust operates independently and without consideration to what other trusts are doing, and as the administrative process in the trust has gained prominence, the relationship with the civil litigation system has become more attenuated. Following the lead of the Manville Trust, virtually all of the trusts have similar structures and function in a similar way.[10] The trusts create a schedule of payments, by diseases, claimants can elect scheduled value, individual evaluation or a "quick pay," minimal documentation option. The "rules of the road" for the trusts are reflected in "Trust Distribution Processes" ("TDP's") regulated in the bankruptcy

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8 *In re* Joint E. & S.D.N.Y. Asbestos Litig., 237 F. Supp.2d at 303.

9 Lloyd Dixon, Geoffrey McGovern & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 29 (RAND Corporation 2010)[hereinafter RAND 2010 Report].

10 Frances E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. Ann. Sur. Am. L. 163 (2006).

process. However, the structure of the TDPs is largely determined by the involved plaintiffs counsel – once debtors have reached agreement as to the funding requirements necessary to "settle" the tort claims in the aggregate in bankruptcy, they have minimal, if any, interest in how the funds are disbursed.[11] The dominance of the plaintiffs' bar continues to the subsequent operation of the trusts. They sit on Claimants Advisory Committees or similar structures and have a powerful voice in the selection of trustees.[12] They are also actively engaged in soliciting trusts claims. At the same time, the essentially guaranteed recoveries from the trusts have funded an active "harvesting" of claims. The fact that plaintiffs' counsel can afford to spend $84.02 per click for "mesothelioma" on Google provides evidence of the money available.[13] Perhaps even more incredibly, there are television advertisements soliciting lung cancer victims to retain lawyers to obtain payment from what are described as "compensation trusts" with more than $30 billion in assets – clearly the asbestos trusts. The ads counsel that smoking history will not preclude recovery; but, amazingly, despite the fact that these claims are being solicited for assertion against the asbestos trusts, the word asbestos is never mentioned in the solicitations.[14]

After 2000 with the influx of additional bankruptcies of very substantial corporate defendants, this separation became a larger and larger issue for solvent defendants. As of 2008, the RAND Corporation estimated that the trusts had assets in excess of $30 billion available to compensate claims. But as this system of trusts became separate, siloed and opaque, the ability of anyone to ascertain what was happening within the trusts became very limited, particularly as

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[11] This is an important distinction between the trusts on one hand and solvent defendants. What the trusts have available for payment and what they will pay for a particular claim is typically well known. The "settlement" occurred as part of the bankruptcy process. What a solvent defendant will pay to resolve a given tort claim, however, is typically confidential.

[12] *See* RAND 2010 Report, *supra* note 9.

[13] The seven most expensive keywords on Google relate to asbestos.

[14] *See. e.g.*, http://www.calldavid.com/janice-McQueen.html.

it related to defendants in the tort system. More specifically, despite the very substantial amounts of compensation flowing from the trusts, it has been difficult, if not impossible, for defendants to obtain information as to evidence of exposure to the products or premises of the bankrupt entities represented by the trusts, information as to what claims had been or in the future would be asserted against the trusts, and the payment that plaintiffs would recover from the trusts. Both plaintiffs and trusts have resisted making this information available.[15]

The Problems

The specific problems[16] flowing from a lack of transparency in the asbestos bankruptcy trust system are:

1) The civil litigation process cannot accurately assess the responsibilities of all the parties that may be responsible for a given plaintiff's allegedly asbestos-related disease. To the extent that accurate evidence of exposure to the products or premises of bankrupt entities is withheld, fault will be disproportionately allocated to solvent and, at this time, increasingly peripheral defendants. The economic effect of this disproportionate allocation will vary depending upon the nature of the allocation regime, if any, which varies from state to state. But in a system which sees more than $7.0 billion spent per year, this misallocation likely drives a substantial economic

[15] Volkswagen of America, Inc. v. Sup. Ct. of S. F., 43 Cal. Rptr. 3d (Cal. Ct. App. 1st Dist. 2006); Negrepont v. A.C.&S., Inc., No. 120894/01 (NY Sup. Ct., Dec. 11, 2003); *In re*: Motors Liquidation Co., et al., No. 09-50026, S.D.N.Y. Bkcy).

[16] The fact that a broad consensus has developed around the issues created by the interaction of trust and tort system is demonstrated by the very similar framing provided by an independent research organization, RAND, in its 2011 report:

"... [B]oth plaintiffs and solvent defendants have a great deal at stake with regard to how trusts enter into the determination of tort awards. At issue is whether a lack of coordination between the trusts and the tort system allows plaintiffs to, in effect, recover once again in the tort system and then again from the trusts. Similarly at issue is whether the payments by solvent defendants are being properly adjusted to account for the compensation available from the trusts. Higher trust payments to current plaintiffs mean fewer trust resources for future plaintiffs, so also of concern is whether a lack of coordination between trusts and the tort system advantages today's plaintiffs relative to future plaintiffs." RAND 2011 Report, *supra* note 1.

effect. More asbestos bankruptcies and more baseless economic hits to solvent companies mean more job loss which this country and your constituents can ill afford.

2) The Trusts themselves have either by initial design or by subsequent change in operating policy have become resistant to discovery and disclosure. When the Manville Trust first opened its doors, it was generally cooperative with those seeking discovery. That has changed. More recently created Trusts, which is virtually all of them, have restrictive TDP provisions which preclude or substantially limit trust cooperation with the tort system.

3) In the absence of effective statutes of limitation or other time limitations in the trusts,[17] it is possible, indeed preferable from the plaintiffs' point of view to defer preparation and submission of trust claims until such time as the tort system litigation has been concluded.

4) The trusts themselves are irrationally separate and independent. The trusts are generally indifferent as to which claims of exposure and causation are being made as to other trusts or solvent defendants. As a result, there is no mechanism to expose inconsistent or false claiming against the trusts. This apparent mania for separation has also resulted in the creation of 46 distinct and separate trusts, all performing a similar task with a concomitant, but needless, multiplication of costs.

5) When discovery regarding trust claims and relevant material is sought from plaintiffs, they have attempted to assert a number of legal objections, such as settlement privilege, work product protection or relevance. These efforts have generally failed,

[17] To the extent that there are time limits, they are easily tolled; and, in any event, tort system mesothelioma cases are typically resolved within a time span shorter than the most limited time period.

but they have added substantially to delay and increased costs to defendants in the tort system.[18]

These problems create a number of negative outcomes:

1) Overpayment by solvent defendants because of a disproportionate allocation of fault.
2) A risk of overpayment to plaintiffs because of "double dipping," where a plaintiff receives full value in the tort system and then, subsequently, proceeds to obtain trust compensation.
3) The creation of an environment which is not merely conducive of fraud, but which may actively encourage it.

While the first outcome affects primarily solvent defendants, the latter two impact asbestos claimants as well. And not just current claimants, as virtually all trusts pay only a percentage of claim value, so every dollar which goes to compensate a fraudulent claim is gone for purposes of increasing the percentage payout as well as being unavailable in the future for later manifesting claims.

The Historical Sources

Perhaps the most significant developments in the recent history of asbestos litigation have been the explosion in claims in the first half of this decade and the simultaneous departure of many of the then leading defendants from the scene via bankruptcy filings. As a result of those filings, the bankrupt entities were, in turn, protected from making any contribution to the compensation of asbestos claimants who were forced to find new funding sources among the population of peripheral defendants. These new defendants, to the extent able, were forced to bear the costs which would otherwise have been attributable to the bankrupts. To be sure, the

[18] *See, e.g.*, Volkswagen of America, Inc. v. Sup. Ct. of S.F., 43 Cal. Rptr. 3d 723 (Cal. Ct. App. 1st Dist. 2006).

trusts formed in prior generations of asbestos bankruptcies were on the scene during this period; but, given the relatively modest payments they are capable of making, their overall economic impact has been modest. The recently formed trusts, together with the trusts created in prior asbestos bankruptcies (*e.g.*, Johns-Manville's Manville Personal Injury Settlement Trust), represent virtually all of the primary asbestos defendants with an historical liability share of more than 95%. By virtue of both products produced (*i.e.*, asbestos-containing thermal insulation) and corporate conduct, these entities were the primary defendants in asbestos personal injury litigation until their bankruptcy facilitated exit.

There is a huge and growing disconnect between responsibility and payment, however, with peripheral defendants – "solvent bystanders" – being forced to bear more and more of the asbestos liability burden, despite tenuous claims of causation or culpability.[19] In the 2000's, as a large number of asbestos defendants disappeared into bankruptcy, minor, peripheral defendants and altogether new defendants were drawn more deeply into the litigation. These peripheral players were named in increasingly large numbers of cases and were forced to pay claims at levels without historical precedent. These defendants understood that they were being forced to bear the share of the missing defendants, those in pending bankruptcy cases, which, because of the bankruptcy stays, could not be brought into court to be assessed their fair share of liability. It was anticipated that this would be a temporary and transitory state of affairs. As these bankruptcy cases were resolved and as new trusts were created with billions in assets available, the burden on the solvent defendants would diminish. The emergence has clearly occurred. In 2008, the trusts, with many of the largest new trusts in process, but not yet operational, disbursed over $3.3 billion.[20] This has not, in the view of the solvent defendants, lead to a concomitant

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[19] James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Sur. of Am. L. 223, 236-37.

[20] RAND 2011 Report, *supra* note 1.

reduction in their payment burden. This phenomenon has been cited as a deciding factor in two recent and substantial bankruptcy judgments: Garlock[21] and Specialty Materials. Plaintiffs began to systematically reduce the numbers of other asbestos exposures they had by neglecting to attribute causation to the companies then in bankruptcy. Id., at ¶ 21.

Not only has it been difficult to impossible for defendants to avoid being forced to absorb liability properly attributed to the bankrupts, it has been difficult to obtain appropriate credit even when payments have been made by the trusts to claimants. However, the economic significance of the asbestos trusts and, hopefully, their role in the asbestos litigation system is in the process of dramatic change. The current generation of asbestos bankruptcies is being resolved with the result that new trusts are being created. Unlike prior generations (*e.g.*, Manville) where the trust's available assets were small compared to their projected liabilities, these trusts will have very substantial assets available.

The value of a mesothelioma claim upon payment of all responsible parties, the so-called "whole claim" value, has been a matter of vigorous debate. In 2005 RAND estimated that this

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[21] The position of Garlock and the causal link between the burgeoning asbestos bankruptcy wave and its own filing is outlined in an affidavit of Paul A. Grant, filed in its bankruptcy case. That linkage is described as follows:

1. Before 2000, Garlock successfully defended asbestos litigation, winning the vast majority of jury verdicts in case trials against it. Grant Aff. at ¶ 11.
2. That situation changed materially as a result of the wave of bankruptcy filings of asbestos defendants between 2000 and 2004.
3. The departure of the bankruptcies increased the joint and several liability risks for Garlock at trial and, as a result, diminished its negotiating leverage regarding settlement. Id., at ¶ 19.
4. Plaintiffs began to systematically reduce the numbers of other asbestos exposures they had by neglecting to attribute causation to the companies then in bankruptcy. Id., at ¶ 21. This sea change substantially undermined Garlock's defense which was dependent upon alternative causation arguments. Id., at ¶ 21.
5. At the same time, plaintiff's counsel were already involved in the wave of bankruptcy cases as counsel for many of the same plaintiffs. As Garlock concluded in a recent filing: "This position of the firms and Asbestos Claimant's Committees in the bankruptcy cases was wholly inconsistent with the representations being made to Garlock at the same time in the tort system. The inconsistency raises a strong inference that plaintiff's firms were concealing their clients' exposures to bankruptcies' products in order to inflate the plaintiffs' significant values against Garlock. Brief at ¶ 10.
6. As a consequence, Garlock filed for bankruptcy.

value was in the range of $900,000.[22] Certain plaintiffs' counsel have opined that the whole-claim value is closer to $6.0 million, a number which appears to exceed average trial verdicts, let alone the substantially more common settled claims. Bates/White has provided an estimate of $1.3 million, which is broadly consistent with the earlier RAND projection. The precise number is not critical, however, as the relevant point is that with the substantial amounts currently or soon to be available for the trusts, we are entering a world where a substantial amount of the value of a claim can be satisfied from the trust assets.[23] There seems to be little dispute that the total assets available from these trusts will be in excess, perhaps substantially, of $30 billion.[24] History has demonstrated that by virtue of a combination of a lack of transparency about these payments, the operation of state contribution and indemnity as well as joint and several liability regimes, and gaming and/or misconduct by plaintiffs' lawyers, it has been difficult or impossible for defendants to obtain and effectively utilize information and receive any of the appropriate credit regarding asbestos bankruptcy trust claims and payments.

Why does this matter? Isn't the additional funding an unalloyed benefit for both claimants and co-defendants who will no longer be forced to pick up the shares of the absent bankrupts? The answer to those questions is, "it depends." If, as appears unfortunately likely at this time because of a lack of transparency and manipulation of claim filing timing, the compensation by the trusts proceeds in a parallel universe not fully integrated with the tort system, distortion, waste and unfairness will continue to be the most accurate descriptors of the system. The lack of transparency will result in some claimants being overpaid, some finding that

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[22] RAND 2005 Report, *supra* note 4.

[23] Bates/White has determined that a typical mesothelioma claim could obtain as much as $1.3 million from the trusts in operation by early 2009 and that this number could grow to about $2.0 million when the pending trusts go online. Charles E. Bates, Charles H. Mullin, *The Naming Game*, 24 Mealey's Litigation Report: Asbestos, 1 (Sept. 2, 2009).

[24] C. Bates and C. Mullin, *Having Your Tort and Eating It Too*, 6 Mealey's Asbestos Bankruptcy Report 1 (Nov. 2006, #4).

their most appropriate funding sources are inadequate or gone altogether, and a continual shift, in this case unnecessarily, of the funding burden to solvent defendants. However, there is a solution: by merely allowing defendants to know whether there are or will be trust claims and to utilize that evidence in their cases, and conversely, providing the same sort of information to the trustees about claims and payments in the tort system, the entire compensation scheme can be rationalized. The goal is to bring the trust and tort systems together so that claimants can receive 100% of the value of their claims, not 200% or 10% depending upon the luck of the draw. Further, the solution or solutions to this very significant problem imposes minimal burdens on claimants. They need only to make clear their intentions to claim against the trusts and the basis for those claims, things that they would have to do, of necessity, as a predicate to advancing those claims.

Transparency regarding claims of asbestos exposure, the entitlement to payments from bankruptcy trusts and tort system defendants and the amounts of payments actually received will benefit not only defendants in the tort system, but the trusts and those claimants whose access to limited funds would be diminished as a result of double recovery by competing claimants. While the asbestos trusts do not typically have explicit set-off or credit rules which would allow them to reduce their payments to a particular claimant because of the payments the claimant has received in the tort system, they all[25] require proof of exposure to a particular set of products or premises[26] and they all have explicit and implicit prohibitions on fraud with respect to claimant materials.

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[25] With the possible exception of the Manville Trust.

[26] *See, e.g.*, William P. Shelley, Jacob C. Cohn & Joseph A. Arnold, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, Norton J. Bankr. L. & Practice 257, 262 (2008); McGovern, *Evolution*, *supra* note 10, at 170.

Limitations on Discovery

Many of the trusts' TDPs or other practices reflect an affirmative effort to limit or preclude disclosure.[27] For example, the [Babcock and Wilcox] TDP provides:

> 6.5 **Confidentiality of Claimants' Submissions.** All submissions to the PI Trust by a holder of a PI Trust Claim of a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the PI Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including but not limited to those directly applicable to settlement discussions. The PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only in response to a valid subpoena of such materials issued by the Bankruptcy Court. The PI Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privileges before the Bankruptcy Court and before those courts having appellate jurisdiction related thereto.[28]

In addition, even those trusts that have historically been cooperative and willing to provide information, such as the Manville Trust, have reversed course in recent years.[29]

Courts have recognized the propriety of discovery of trust materials over the vociferous objections of the plaintiffs' bar. In New York, the presiding Court ordered production of claims materials, reasoning:

> [W]hile the proofs of claim are partially settlement documents, they are also presumably accurate statements of the facts concerning asbestos exposure of the plaintiffs. While they may be filed by the attorneys, the attorneys do stand in the shoes of the plaintiffs and an attorney's statement is an admission under New York law. Therefore, any factual statements made in the proofs of claim about alleged asbestos exposure of the plaintiff to one of the

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[27] Shelley, *supra* note 26.

[28] The Babcock & Wilcox Company, Asbestos Personal Injury Settlement Trust Distribution Procedures, Exhibit B to Plan of Reorganization, at 47-48.

[29] Shelley, *supra* note 26, at 276.

> bankrupt's products should be made available to the defendants who are still in the case.[30]

Lax Standards

The trust tort intersection is amenable to manipulation in two ways. First, the trust standards are less than demanding. As one commentator has observed:

> Predictably, when asbestos claimants and their attorneys write their own compensation rules; the results are TDPs containing lax medical and experience criteria that pay claims that would not be compensable in the tort system, such as those brought by asymptomatics who likely will never become sick and those whose claims would otherwise be barred by the statute of limitations. Notably absent from the TDPs is any regimen for obtaining or sharing claims information with other trusts or the defendants in the tort system. Of course, such lowered qualifications for payment and medical scrutiny of claims also invites fraudulent 'double dipping' and other abuses.[31]

Second, without transparency between the two systems incentives are created to take inconsistent or conflicting positions. Abuse of this process and the potential impact on both defendants and bankruptcy trusts was demonstrated starkly in the case: Kananian, et al., v. Lorillard Tobacco Company (Case No. CV 442750, Cuyahoga Cty., Ohio) (January 18, 2007). In that case, the defendant in an asbestos personal injury action sought discovery of the plaintiff's claims against various trusts. After extensive litigation and substantial effort by plaintiffs' counsel to avoid discovery, clear efforts to manipulate claims to recover from the trusts was revealed – all of which was focused on maintaining the ability to proceed against defendants in the tort system without any diminution in claim values. In Kananian, the plaintiff had received substantial recoveries from the Manville and Celotex trusts predicated on exposure to those companies' products. The plaintiff then attempted to either avoid acknowledging that

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[30] Negrepont v. A.C.&S., Inc., No. 120894/01 (NY Sup. Ct., Dec. 11, 2003).

[31] Shelley, *supra* note 26, at 262.

inconvenient fact, or, in the alternative, to modify the claim forms so as to diminish their power as proof of alternative causation. No effort was made to inform the trusts of this substantial modification or to return the funds received.[32] If, as appears to be the case, the Manville Trust paid for injuries properly attributed to another defendant based on a claim form which plaintiffs' own counsel described as being inaccurate and which "were just used to pry money out of a bankrupt" (Exhibit 1 to Lorillard Tobacco Company's Motion to Dismiss, dated 11/13/06, filed in Kananian v. Lorillard) and that "[T]he client has accepted monies from entities to which he was not exposed." (Id., at Ex. 3), funds were diverted from underfunded trusts and deserving claimants by fraud. In Kananian,[33] the defendant Lorillard pressed for discovery of Mr. Kananian's trust submissions; and his lawyers resisted strenuously, going so far as to urge the Celotex trust to resist discovery while at the same time asserting cooperation before the Court. When the trust materials were finally produced, they revealed not only evidence inconsistent with the plaintiff's positions in the Lorillard case, but that there were clear and material factual inconsistencies between and among Kananian's claim submissions to various trusts.[34] For example, in order to qualify under the different exposure criteria of two of the trusts, Kananian's lawyers provided mutually exclusive recitals of his military service record.[35] As an alternative explanation, they belittled the submissions as "mere" trust filings despite the fact that they had been made under oath and resulted in compensation. In the astonishingly modest rebuke that

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[32] Kananian v. Lorillard Tobacco Co., No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga Cty, January 18, 2007)(order) at 5.

[33] Kananian, at 5.

[34] *Id.* at 6.

[35] *Id.* at 19-23.

followed, revocation of plaintiff's counsel's right to appear in this case, the Judge later observed: "I never expected to see lawyers lie like this . . . it was lies upon lies upon lies."[36]

That this is not an isolated episode is evidenced by recent events in Baltimore. In Warfield,[37] defendants pursued an aggressive strategy of discovery regarding trust claims, but were forced to engage in motions to compel, despite the fact that prior rulings made it clear that such materials must be produced.[38] At a hearing on the matter, plaintiff's counsel explained that he had been slow in producing the trust materials because he had disagreed with the Court's prior ruling, some two years previously, and went on to complain that in ordering this disclosure the Court had "opened Pandora's Box."[39] When production was finally made, on the literal eve of trial, the reasons for counsel's reluctance to produce the trust materials were made clear. There were substantial and inexplicable discrepancies between the positions taken in Court and the trust claims. Despite specific and explicit requests, plaintiff had failed to disclose nine trust claims that had been made. As revealed in the claim forms, the period of exposure alleged in the litigation versus that alleged in the trust submissions was materially different. In Court, Warfield claimed, under oath, that his asbestos exposure took place exclusively between 1965 and the mid-70s, focusing on the products of the solvent defendants and avoiding the application of a Maryland statutory damage cap that would apply to later exposures. In contrast, the trust claim materials claimed exposure from 1947 to 1991, both different in scope, but also clearly triggering

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[36] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm From Court Over Deceit*, Clev. Plain Dealer, Jan. 25, 2007, at B1.

[37] *See, e.g.*, Warfield v. ACS, Inc., Case No. 24X06000460, Consolidated Case No. 24X09000163, January 11, 2011 Mesothelioma Trial Group (M 112).

[38] Defendant Union Carbide's Emergency Motion for Sanctions and/or Related Relief and to Shorten Time for Response, filed January 10, 2011, in Warfield, Case No. 24X06000460. *See also* April 14, 2009 transcript of hearing in Smith, Consolidated Case No. 24X08000004, at 65:8 – 77:10 (finding that bankruptcy forms and the information contained therein was "clearly" discoverable and relevant to the case).

[39] January 11, 2011 transcript of hearing in Warfield, at 66:5 – 109.8.

the damage cap. Of note, eight of the trust forms had been submitted before Warfield testified in Court.[40]

At nearly the same time, in another Baltimore case, Edwards,[41] the plaintiff had, prior to trial, failed to disclose whether or not he had filed any claims with bankruptcy trusts.[42] In addition, as trial drew near, plaintiff amended his discovery responses to assert that the only asbestos-containing material to which he had been exposed was that of the only remaining solvent defendant. However, two weeks prior to trial, plaintiff produced claims materials relating to 16 trusts.[43] Again, there was a clear inconsistency in the alleged exposure. Significantly, most of the trust forms had been filed in 2008, before the initial discovery responses.

These cases suggest the pressing need for transparency, both in the interests of the solvent defendants and of the trusts themselves. The lack of transparency creates conditions which make it very difficult if not impossible to discover fraud or inconsistent claiming. The propensity of the asbestos litigation system to both provide economic incentives for misconduct and a conducive environment for that misconduct is demonstrated by the experience of the screened claims. As a result of what Professor McGovern has called the "Field of Dreams" effect – if you create a system capable of processing huge numbers of relative low return claims – you will get these claims.[44] The power of transparency in this context was demonstrated by the actions of Judge Janis Jack in the Silica MDL. When Judge Jack was successful in finally

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[40] *See id.*

[41] Edwards, Case No. 24X08000351

[42] Plaintiff's Supplemental and Amended Answers to Defendants' Joint Interrogatories, filed on August 6, 2010, in Edwards.

[43] Union Carbide's Motion to Compel and related exhibits, filed on November 9, 2011, in Edwards.

[44] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595 (1997).

obtaining the information which made the screening process transparent, she effectively shut that system down.[45]

The ability of Judge Jack to ascertain the level of specious diagnostic and medical evidence which was being advanced to support the Silica claims was a direct function of the discovery she had ordered.[46] That discovery created transparency as to the collected "evidence" and allowed the Court to identify that as to the vast bulk of the proffered medical evidence that ". . . these diagnoses were driven by neither health or justice: they were manufactured for money."[47] Given that we currently lack that level of transparency as to the interaction of tort and trust and the potential for fraud and abuse, we are forced to rely upon anecdotal evidence.

Transparency will diminish the opportunities for this behavior and enable the trusts and defendants to assess claims based on accurate and reliable exposure information. This conduct occurred in the context of trusts which pay mere cents on the dollar. With the potential availability of hundreds of thousands of dollars to a given claimant for from the new trusts, the urge to manipulate will likely prove irresistible.

In contrast, the burden on claimants is non-existent. All that is sought is information and the ability to utilize that information in a meaningful way to avoid duplicate recoveries.

As a threshold matter, it may seem counter-intuitive that this information is not already available through discovery. As rational as that supposition might be, it is not the case. There are several reasons. First, the trusts' operational documents, which have been negotiated with the same plaintiffs' lawyers who represent the bulk of plaintiffs in the tort system, erect a thicket of claims of privacy and privilege.

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[45] *In re* Silica Products Liab. Litig., 398 F. Supp.2d 563, 635 (S.D. Tex 2005) (MDL No. 1553).

[46] Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 Conn. Ins. L. J. 289, 313-14 n.95 (2005-2006); *see generally In re* Silica Products Liab. Litig., 398 F. Supp.2d 563.

[47] *In re* Silica Products Liab. Litig., at 635.

Second, as entities which are to a lesser or greater extent beholden to the plaintiffs' bar, the trusts have little incentive to assist defendants. Third, plaintiffs' counsel actively encourages resistance. In Kananian, while claiming to be fully cooperative with defendant's trust discovery efforts, plaintiffs' counsel had, in fact, instructed one of his assistants to "urge Celotex [the Trust] to resist" discovery and stated in private correspondence that "I would love if Celotex gave these (expletive deleted) a hard time." Kananian at 10. Fourth, discovery is expensive and time-consuming, even in the best of circumstances, and as this recital demonstrates, that is hardly what obtains here. Finally, even if claims have been made and not deferred for tactical reasons, once discovery is obtained, courts may or may not honor the various privilege assertions recited in the TDPs, meaning that the ability to actually use those materials in court may be substantially limited.

Why is the disposition of claims with the trusts at all relevant to a solvent defendant that finds itself in the tort system? For a variety of reasons. First, in certain jurisdictions where fault can be allocated to all responsible parties, it is in the interest of a solvent defendant to be able to identify all trusts whose predecessor corporations have had some share of responsibility for the alleged asbestos-related disease of a given plaintiff. That process of placing an entity on the verdict form, proving shares of liability and having the jury or the judge allocate that liability is of critical importance to assure fairness in the system to assure that no defendant pays more than its fair share of the liability. Second, in many jurisdictions, depending on the regime of joint and several liability, credits for settlements and/or verdicts are available. In that context, the ability to ascertain what monies will be received or have been received from the trusts is directly relevant to what a judgment obligation will be as to a particular defendant who has taken a case to verdict. Third, and perhaps most importantly, even in those jurisdictions where the absence of

an allocation process precludes putting trusts on the verdict form for purposes of allocation, reliable exposure evidence will allow the solvent defendant to attempt to prove alternative liability or alternative causation by the asbestos-containing products of those now bankrupt entities.

What sorts of evidence are relevant here? Let me dispel one red herring. Many of the objections to transparency in this context are made in the context of an accusation that the solvent defendants are preoccupied with what the trusts are paying or may pay claimants. The payment amounts, absent a verdict and molding of that verdict post-verdict, are not relevant nor particularly important to the solvent defendants. What is important and critically so to the solvent defendants is access to the evidence of alleged exposure to the products or premises of the bankrupt entities. This information is what is relevant and necessary to reunify the tort and trust systems so that one compensation award in total can be realized by a claimant and the share of every responsible party be fairly derived.

The objections to transparency, leaving aside the false issue of money, of dollar amounts, focus on burden, privacy or the notion that this is information that the defendants can more properly obtain for themselves through discovery. These objections fail to recognize how claims are actually developed and made in a tort and trust system. Today an individual who suffers the extraordinarily unhappy fate of being diagnosed with mesothelioma will likely not know against whom or he or she may have a claim or a case. In fact, one of the primary contributions the plaintiffs' trial bar makes to the asbestos claimant population is they have the intellectual property of knowledge of who may be responsible for a given individual's exposure, given work history, occupation, timing, etc. That intellectual property is typically developed in consultation between the plaintiff and the law firm. Where the system runs off the rails in the context of the

separation of trust and tort is that, as claimants will have no knowledge or recollection of which entities as to which they may have claims, the current system allows counsel to selectively refresh recollection on the part of the plaintiffs to focus on solvent defendants. Having done so, particularly in jurisdictions where there are extreme limitations on the amount of time that can be spent in discovery of plaintiffs, it is not realistic to expect that the discovery process on its own will lead to full disclosure of trust claims because what plaintiffs' lawyers will do is assert claims in the tort system, settle or try the case in that venue, and once that is resolved then, and only then, undertake the process of refreshing recollections sufficient for claimants to make claims against the relevant trust. This is possible, of course, because very few, if any, of the trusts have effective statutes of limitation. In terms of burden, there is virtually no additional burden on the plaintiff or claimant. The vast majority of the trusts utilize an electronic filing process, sometimes known as e-filing, the materials to be submitted to each trust are similar with the exception of the exposure allegations, which are particularly relevant to this dispute, but the electronic filings when they are prepared can be easily made available to solvent defendants.

The last objection relates to privacy. Obviously, to the extent an individual has brought suit in the tort system alleging a personal injury they can fairly anticipate that there will be some invasion of their privacy as to their health claims and the source of their alleged illness. There is frankly no basis for a privacy-based claim in this context. Now, to be more specific, a secondary concern for the system and for solvent defendants is to make sure not only that solvent defendants receive credit for trust payments where the relevant state regime allows and receive or obtain full disclosure of any and all exposure evidence relating to trust claims. An additional concern arises in the context of inconsistent claims as between the tort system and the trusts. While it is a material disadvantage for the solvent defendants to be unaware of other exposures

relating to the bankrupt entities, it is an even greater concern where there are inconsistent claims of exposure being made as to the trusts. This is not a hypothetical or theoretical risk. Two concrete examples will illustrate this problem.

That raises two issues: first, it creates a potential for misrepresentations and fraud directed to the solvent defendants. To the extent their misrepresentations as to exposure to their products is in aid of recovery, it is obviously against the interests of the system in general. Second, to the extent false claims are being made against the trusts, the trusts are paying money to claimants who are undeserving and as they are for the most part, if not entirely, underfunded and have less by way of assets than they believe they need to pay claimants. By making payments based on fallacious evidentiary submissions, they are reducing the funds available to pay future claimants against those entities.

This leads to another evil of the opacity of the trust process: the trusts stand alone. Each operates in isolation in its own silo. The claims process makes inquiry as to a particular claimant's experience with the product of the predecessor bankrupt entity's operations. The trusts do not communicate; they do not compare notes as to who has made which claims as to what allegations of exposure have been made. Nor do they attend to what allegations are being made in the court system. As a result, the minimal policing of the accuracy of exposure allegations made to the trusts is an isolated or *de minimus* problem. Likely not.

Any assurance or faith in the ability of the trusts to self-police is belied by the experience of the trusts with fallacious or suspect medical evidence for unimpaired claims. As early as 1990, concerns were raised as to the validity of diagnostic conclusions being reached by certain doctors based on the examination of X-rays. In 1995, the trustees of the Manville Trust became sufficiently concerned about the quality of evidence by certain doctors being submitted by

certain plaintiffs' law firms that they sought permission to conduct both a medical audit and to disqualify certain claims. The Manville Trust raised concerns about the quality of the purported medical evidence supporting claims against it. The efforts of the Trustees to conduct an audit of the medical evidence were largely abandoned in the face of overt judicial hostility.[48] Unfortunately, this may have led to the Manville Trusts' payment of more than $190 million for negligence or mesothelioma claims between 1995 and 2001.[49] These are huge numbers, and they illustrate the magnitude of the risks of fraudulent or defective claims in the asbestos context.[50] Reflecting a somewhat bitter irony, the trust began rejecting much of this medical "evidence" following Judge Jack's ruling in the Silica MDL.[51] As a result, finally, the trusts began to reject the medical evidence provided by a number of identified doctors, but that rejection did not begin to occur until 2007 and 2008. As a consequence, it is likely that hundreds of billions of dollars, if not more, was disbursed based on faulty, indeed outright fraudulent, medical evidence. That experience underscores the fallacy of relying on the trusts to self-police in the absence of full disclosure.

Solutions

What would I suggest be done? Transparency can be achieved through a variety of mechanisms. As a threshold matter, however, impediments to transparency need to be removed. Some states, such as West Virginia, have implemented case management orders which are an effective first step towards trust transparency. More effective would be a recognition that this information should be available, with whatever reasonable limitations are imposed, to the

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[48] Judge Weinstein's views on this issue are described in Brickman, *On the Theory Class*, *supra*, at 134-35.

[49] *Id.*, citing Roger Parloff, *Mass Tort Medicine Men*, The American Lawyer, Jan. 3, 2003 at 98.

[50] Professor Brickman calculated that the system-wide cost of payment of these specious claims during the same time period as $28.5 billion.

[51] Brickman, *Silica*, *supra* note 46, at 313.

litigants in the asbestos tort system, as well as the trusts *inter se*. What we need to achieve is a return to the idea and the reality of a single asbestos-related injury being compensated once and being compensated in a fair proportion by all of the responsible parties, whether they are solvent defendants actively engaged in the tort system or asbestos settlement trusts.

Mr. FRANKS. With that, our meeting will be adjourned until the sound of the gavel, which will be as close to 11:30 as possible. Immediately following votes, approximately 11:30. Thank you.

[Recess.]

Mr. FRANKS. The meeting will resume. I apologize to you profoundly for it taking longer on the floor than we thought it would. It seems like that is a proverb, but I do apologize to all of you.

Mr. Nadler, the Ranking Member, would have been back, but, unfortunately, because of the delay on the floor, he was called to a special briefing on terrorist threats. His district encompasses the World Trade Center, and he is there on behalf of his constituents. So we will have to plod on. Again, I appreciate you all being here. I also am grateful for Mr. Scott being here to allow us to continue.

If I may, I will recognize myself for 5 minutes to begin the questioning here. Mr. Carter, I would like, if I could, to start with you, sir.

From what I can tell, your business had essentially very little involvement with asbestos in general, maybe you can enlighten me, and I certainly hope that you survive the lawsuits that you are facing at this time.

Can you give us just sort of a recap of your story related to what the involvement of your company was or was not with asbestos and what the lawsuits mean to you and how they affect your company going forward? You did quite well in your testimony, but I am wondering if you would just recap that for us.

Mr. CARTER. Yes, thank you. Well, in the 104 separate lawsuits with 2,200 plaintiffs, first and foremost, I have never manufactured any asbestos. All I ever did was buy a product from a manufacturer and resell it to the end user who asked for it by name. I didn't make anybody sick. I mean, in all of the 36 years I have been in business, not one person that has ever been affiliated with my company has ever contracted any type of asbestos-related disease. Nobody.

I am just one of the next people in the next tier of companies that the trial attorneys are going after, and it is going to break us. We are a small business. We are trying to—we are supposed to be the backbone of America, and, unfortunately, we have been caught up in this vacuum and I don't see an end to it. We have never manufactured it. We have never made anybody sick. I do have the utmost compassion for those individuals that are sick, but let's go after the ones that did all of this.

So, to make a long story short, we never manufactured asbestos. We just bought a product, like I say, sold it to the end user who asked for it by name, and for some reason or another, we are brought into this as somebody that is responsible. And if this trend continues, you will see a lot of small business across America do the same thing we are going to do if we get brought into any type of trial, and that is to close our doors.

Mr. FRANKS. Well, thank you, sir, very much.

Professor Brickman, if I could ask you briefly, in your written testimony you stated that law enforcement officials have essentially given a free pass to lawyers and doctors involved in asbestos litigation fraud. How you do you think the failure to hold those individuals accountable affects the asbestos compensation system as

well as those who might rightfully have a claim that might be affected by overlooking the fraud that seems evident, at least according to your testimony?

Mr. BRICKMAN. Mr. Franks, I think that the enormous amounts of money that have been paid out to bogus claims, easily $25, $30 billion and perhaps more, has deprived claimants who have actually been injured by exposure to asbestos from the level of compensation that could have been accorded them had these billions and billions of dollars not been paid out in verdicts and settlements to persons, to hundreds of thousands of persons who could not legitimately show any injury from exposure to asbestos.

Going forward, what I foresee is the distinct possibility that litigation screenings that generated this entire fraudulent scheme will resume because of the enormous amounts of money. As I have put forth in my oral and written statements, there is upwards of $6.5 billion set aside for nonmalignant claims, and the only way that lawyers will be able to tap into this is to resume screenings, and I fear that is what will happen. And the fact that law enforcement is just sitting back and doing nothing despite the enormous volume of credible evidence of fraud is only encouraging this potentiality.

Mr. FRANKS. Thank you, sir.

Mr. Stengel, if you had seen Mr. Siegel's written testimony, he seems to indicate a picture in which only truly sick and deserving plaintiffs sue responsible companies for their injuries, and those companies are forced to pay only their fair share of the damages, and claimants do not file fraudulent claims or double-dip the asbestos bankruptcy trust.

I just want to give you the opportunity to respond. Do you think that that fits with your understanding of the facts?

Mr. STENGEL. It does not fit with my understanding of the facts, Chairman Frank. We have uncovered specific instances where claimants as plaintiffs in the tort system have taken one position as to when they were exposed and what products they were can exposed to, in some cases, insisting the only asbestos they have been exposed to was that of a client of mine, where at the same time, through discovery, we have learned they made 16 or more bankruptcy trust claim filings. I can't tell you as I sit here today which of those is not correct, but clearly somebody is not being told the truth somewhere in the system.

The history that Professor Brickman has recited I think makes it very clear that there is always room for misconduct in this system given the amount of money at stake and the flux of the system, and at present, bad things will happen, and we have evidence of that.

Mr. FRANKS. Well, thank you, sir.

I now yield to Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I think we need to put a little bit of this in perspective to begin with, because we are here because of decisions made that exposed plaintiffs to asbestos, and in the Johns-Manville case, Fisher versus Johns-Manville Corporation, the judge found that the jury was justified in concluding that both defendants, fully appreciating the nature, extent and gravity of the risk, nevertheless made a conscious and cold-blooded business decision in utter

and flagrant disregard of the rights of others to take no protective or remedial action and pointed out that that is exactly the kind of behavior that ought to subject people to punitive damages.

Now, Mr. Brickman, you talk about bogus claims. Are you talking about claims where people have indications of exposure to asbestos but no symptoms?

Mr. BRICKMAN. Congressman, the bogus claims I am referring to are the claims generated by litigation screenings, by the screening companies hired by law firms that brought mobile X-ray vans and then hired litigation doctors who read the x-rays as positive for exposure to asbestos, although their error rates when subjected to testing by doctors who had no participation in the litigation were in the high 90 percent range. Those are the bogus claims that I am referring to.

Mr. SCOTT. Well, if you do something about those, what about the people who have valid claims. Do you have a problem with the valid claims?

Mr. BRICKMAN. Of course not.

Mr. SCOTT. Are you counting nonsymptomatic as a valid or a bogus claim?

Mr. BRICKMAN. Nonsymptomatic, in and of itself, is not indicative in either way.

Mr. SCOTT. If you have pleural thickening of the lungs, is that a valid claim or not?

Mr. BRICKMAN. It depends on the nature of the thickening, but in many States, it is a valid claim. In some States, it is not. That is an area of law I am not going to comment on because of the technicalities.

Mr. SCOTT. So if lawyers are trying to find people that have been victims of this conscious and cold-blooded business decision, is that anything inherently bad about that?

Mr. BRICKMAN. Well, let me just respond by talking about the cold-blooded business decision. You need to make a distinction or a distinction should be made between mining asbestos and companies that used raw asbestos like Johns-Manville to incorporate into products. The companies that sold asbestos-containing products did not know, had no reason to know at the time they were manufacturing these products that when the production were used in the workplace, they would result in injury to workers.

That knowledge did not come out until Dr. Selikoff did his studies in the early mid-1960's. It was then and only then that knowledge became available to the industry that products containing asbestos could also injure workers.

Mr. SCOTT. So the information in the 1930's and 1940's that subjected people to the kinds of injuries that they are suffering today, that doesn't count?

Mr. BRICKMAN. That counts with regard to mining companies and it counts with regard to companies that used raw asbestos in their plants to manufacture the materials. What it doesn't count for is the sale of products and the use of these products in the workplace. That is a separate area in terms of knowledge of the potential harm. As I said——

Mr. SCOTT. So should the victim, depending on who the defendant ought to be, is the defendant not entitled to full recovery, in-

cluding punitive damages for being subjected to this kind of conscious and cold-blooded business decision. Isn't the plaintiff entitled to recover?

Mr. BRICKMAN. Plaintiffs are entitled total recovery for injuries sustained——

Mr. SCOTT. And punitive damages?

Mr. BRICKMAN. Punitive damages are very complex, because if you have multiple punitive damage awards, arguably that violates the 14th Amendment to the Constitution with regard to due process of law. I have written about the subject. I don't think you can give a simple yes-no answer. It is a complex issue, and one that I think the courts have basically mishandled, although by and large today, courts do not permit punitive damages in many of these cases.

Mr. SCOTT. Mr. Siegel, did you want to comment?

Mr. SIEGEL. Thank you, Congressman Scott. Yes. What Professor Brickman says is exactly wrong, and I think is due to the fact that perhaps he is an academic and has not spent time trying these cases.

Juries have consistently found that companies that took the raw asbestos that was mined and put it in their products and sold those products in the marketplace, in other words, companies that didn't mine it and take it out of the ground but that bought it from the mining companies, put it in their products, sold those products, juries have consistently found for 30 or 40 years that those companies were negligent and grossly negligent.

And I used the example in my statement of Bendix, which was a company that sold breaks that had asbestos in them. There is that infamous Bendix document in which the corporate officials said, "Well, if you made a nice living working with asbestos, you might as well die from it." Or to take another example, National Gypsum, whose official in 1958, 1958, said, "There is no question that if you work with asbestos and you inhale it, you are going to get asbestosis."

Now, did that compel them to stop selling their product? No. Did that compel them to put a warning on their product? No. So that is simply a conclusion and a statement that is divorced entirely from the results of trials. And I would be happy to supply the subcommittee with a very, very long list of punitive damages verdicts upheld by appellate courts against companies that sold asbestos-containing products.

Mr. SCOTT. Thank you.

Mr. FRANKS. Thank you, Mr. Scott. You folks have been so patient and you were so kind to come back, if it is all right with you, we are going to go ahead and do a second round, give you a little better opportunity to develop any other thoughts that you have.

Mr. Stengel, I might begin with you, sir. About 8,500 companies representing about 90 percent of all of the U.S. industries have been sued in cases related to asbestos. What percentage of those companies would you estimate were involved in the actual production of asbestos or the hiding of the harmful effects of asbestos?

Mr. STENGEL. Well, Chairman Franks, the best way to answer that is probably to go back to where the litigation was when Manville was still a viable defendant in the early eighties. There were

probably at that time, and Professor Brickman can correct me, I think a roster of around 20-25 defendants that were routinely viewed as the first rank, both miners, millers and producers most importantly of asbestos insulating material, because those were viewed and that was the subject matter of the Selikoff study. So you ended up with a fairly small population.

When Manville went into bankruptcy, that circle expanded somewhat to get secondary players, but it was still fairly well constricted to people who had some material role in the production of either raw asbestos or asbestos-containing materials or had premises that had asbestos present.

What has happened in the period really from the late 1990's forward has been this explosion in the number of entities and individuals named as defendants where you get from secondary to tertiary to peripheral defendants, and it is really a search for a solvent bystander, and companies like Monroe Gasket and other small companies are being brought into this, or even large companies with very little participation in the asbestos production process. So you get increasingly tangential connection with the production of the material.

Now, as to the evidence of a conspiracy among the major asbestos producers includes Johns-Manville, that was a very small group of companies and that emerged in the 1930's, 1940's and 1950's, conduct which no one here is going to defend. But that is again a smaller concentric circle of involved people.

And if I could, and I don't want to take your time, Chairman Franks, but to respond in part to Mr. Scott's question, I don't think anyone here is suggesting that an individual plaintiff shouldn't be allowed to bring suit against defendants and seek punitive damages if they can prove their case, both as to the conduct or responsibility of the defendants they name, and they can show, and this is where the transparency with the trust becomes critically important, if they can show an actual connection between the products, premises or actions of a given defendant and their illness.

If you look at a roster, and I believe now the number is north of $10,000, or 10,000 claimants, I think that is what Towers-Perrin's most recent estimate is, when you get to those peripheral levels of players, is there really a material substantive legally sufficient causal link between whatever those defendants were alleged to do and the illness of those people?

Again, we are not saying that asbestos plaintiffs shouldn't have their day in court. We think a day in court is a wonderful thing, if we have a single day in court where all the evidence is available and we can allocate fault and have the jury make the decisions that are appropriate.

Mr. FRANKS. All right. Professor Brickman, I might ask you another question. Not to pick on Mr. Siegel, but in his written testimony, he asserts that the large number of nonmalignant claims are a thing of the past essentially. And in your opinion, do nonmalignant claims still exist, either in the court system or as claimants to the asbestos bankruptcy trust?

That is a sincere question. I assume your asbestos will probably be yes, but enlighten me if you can.

Mr. BRICKMAN. Yes, sir. There has been a huge increase in nonmalignant claims put to trusts beginning around 2007, almost a doubling every year. The trusts don't publish this information. They don't make it available. The trusts are opaque. They are the model of non-transparency. They are run by plaintiffs' lawyers. All decisions of the trusts are made by people that are appointed by plaintiff lawyers. So this information is very hard to come by.

But my research shows it has been a huge increase in trust filings, and that most of these trust filings are re-filings of claims that were made in States like Ohio, Georgia, Mississippi, States which have enacted tort reforms, which basically preclude these screening-generated claims. So what the lawyers are doing is refiling them with the trusts, and now the significant difference is they can get serious money from the trusts, I said up to $40,000 for a nonmalignant claim. And my concern is that because law enforcement has given a free pass to lawyers and doctors to perpetrate this fraud, that lawyers will not be content, given almost $7 billion available for nonmalignant claims, lawyers will not be content with simply refiling claims they have already brought in the tort system, but will again reinstitute screenings because that money, it is a pot of gold sitting there waiting for them to harvest it.

Mr. FRANKS. Thank you, Professor. I will now recognize Mr. Scott for 5 more minutes.

Mr. SCOTT. Thank you.

Mr. Siegel, questions of double-dipping have been brought up. You referred to this in your testimony. Is it possible to get compensated twice for the same injury?

Mr. SIEGEL. No.

Mr. SCOTT. Why not?

Mr. SIEGEL. Because when a person has a claim against the various companies that caused his injury, in other words, the various companies that made the products to which he was exposed, he will pursue those claims either in the court system or in the trust system. And the notion that the one is hidden from the other or that the one should pay and the other shouldn't pay and therefore the other paying is a double-dip is just—it is completely wrong.

Mr. SCOTT. Can the defendant figure out that through discovery?

Mr. SIEGEL. Absolutely. And the way we know this again is through the results of actual trials. In my written statement, I provided several recent examples of California trials, and I know Mr. Stengel is familiar with these cases because his client was in some of them, not in the trials, but was in some of the cases earlier in which the jury hears all the evidence, the defendant puts on evidence of other products to which the plaintiff was exposed, and the jury allocated significant shares of responsibility, usually much more than was allocated to the solvent defendants, significant shares of responsibility to the bankrupt defendants. That way we know that the defendants in the tort system are not handcuffed, are not being shielded from the truth, because they have the evidence that is necessary to convince the jury of alternate exposures.

There is sort of pervading all of this is a very elitist notion that the jury will never get it right and the jury can't understand anything between, for the smoke screen that is being erected in front

of it, but we know that that's not true. And we know that the results of actual trials show they are perfectly capable of seeing the exposure to bankrupt companies, perfectly capable of deciding who is liable and who isn't because we certainly lose our share of trials as well.

Mr. SCOTT. Now speaking of transparency, when you settle a case, is there any pressure put upon you to keep the settlement confidential?

Mr. SIEGEL. Yes, there is. I guarantee you Mr. Stengel would not pay us a cent in any case without an ironclad confidentiality agreement. That is an absolute condition of defense agreements in the tort system all the time. And what there—it is sort of a violation of the first rule in law school in the case of *Goose v. Gander*. They want complete confidentiality in the tort system, and they want complete so-called transparency, i.e., no confidentiality at all otherwise.

Mr. SCOTT. Now, a lot has been made about the idea, and you have kind of referred to it, about the connection of present defendants to the asbestos liability. Some of them are saying they didn't have anything to do with it. What is your response to that?

Mr. SIEGEL. Again, we trust juries in State courts to decide these things. And for any—just like I think my clients are always right, it has been my experience that most lawyers for defendants think their clients are always right and never committed any negligence whatsoever. And that's why we have juries. Juries hear the evidence, they decide if a company was negligent, they decide if a company knew or should have known the hazards of its products. And what we are facing and what these defendants frankly are facing are the verdict of juries. That is how we operate these things in the United States, we trust them to State court juries.

Mr. SCOTT. Now victims of this conscious and cold-blooded business decision activity that creates nonmalignant situations, what is the—is there any damage—what kind of damages would occur if someone has nonmalignant——

Mr. SIEGEL. Right, we have to remember exactly what nonmalignant means, people who are being castigated for having the temerity to seek compensation for a non malignant condition. That includes severe disabling, fatal asbestosis. That includes pleural thickening. That includes an entire spectrum of lung function or lack of decrease in pulmonary function, all of which comes under the heading of nonmalignancy. As we know, the first massive wave of asbestos deaths in this country was the massive wave of asbestosis deaths, and there are continuing cases of asbestosis even today. And to suggest that $40,000 for asbestosis is some kind of windfall to these people is frankly offensive. I know it would be offensive to my clients.

Mr. FRANKS. Well, I am glad we settled the issue today. And I think thank you all for being here and without objection, all Members will have 5 legislative days to submit to the chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that the answers may be made a part of the record.

Without objection all Members will have 5 legislative days with which to submit any additional materials for inclusion in the

record. And with that, I sincerely thank all of the witnesses again, I thank the Members and observers and this meeting is now adjourned.

[Whereupon, at 12:16 p.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

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September 27, 2011

Committee on the Judiciary
H2-362 Ford House Office Building
Washington, DC 20515
Attention: Sarah Vance

Dear Ms. Vance:

Enclosed are my responses to Questions for the Record from Chairman Trent Franks and from Congressman Nadler.

Sincerely yours,

Lester Brickman
Professor of Law

LB:lc

JACOB BURNS INSTITUTE FOR ADVANCED LEGAL STUDIES
BROOKDALE CENTER • 55 FIFTH AVENUE • NEW YORK, NY 10003-4391

Response to Questions for the Record from Chairman Trent Franks

1. As I noted in my Written Statement, there is evidence that certain litigation doctors are continuing to "manufacture . . . diagnoses for money" -- a phrase coined by U.S. District Court Judge Janis Jack in MDL 1553 ("silica MDL"). In addition, a new generation of litigation doctors appears to be emerging to replace the doctors who have had to close their lucrative asbestos practices after having been discredited.

A). I am appending several litigation documents focusing on the activities of Dr. Christopher John. Dr. John has produced several thousand medical reports for use in asbestos litigation and his reports are now being used as a substitute for the reports of several litigation doctors who were discredited by Judge Jack in the silica MDL.

a). Defendant General Electric Company's Motion to Compel Production of Documents by Dr. Christopher John, filed May 9, 2011 in *Batterton, et al. v. Chesterton. Co., et al.*, Circuit Court of Saline County, Arkansas, Case No. CV-20105173.

b). Exhibit 1 to GE's Motion to Compel, which is an excerpt of Dr. Christopher John's testimony in an Arkansas case (*Holloway*).

c). Exhibit 2 to GE's Motion to Compel, which is an excerpt of Dr. Christopher John's testimony in a Tennessee case (*Farmer*).

B). Dr. Donald Breyer is a litigation doctor who has re-read numerous X-rays read by discredited doctors and who is continuing to provide medical reports in support of claims of asbestosis. A sample of Dr. Breyer's B-reads was recently evaluated by a panel of B-readers in a blind study led by Dr. Daniel Henry, a prominent thoracric radiologist. Dr. Breyer found that 64 of the sample of 65 chest X-rays (98.5%) showed interstitial fibrosis. The neutral panel read the

same X-rays and found that only one of the 65 (1.5%) showed evidence of fibrosis. I enclose a copy of Dr. Henry's report labeled Exhibit J.

2. As noted, I have recommended that the Subcommittee task the GAO or other appropriate entity with investigating the failure of state and federal law enforcement agencies, including the Office of the U.S. Attorney for the Southern District of New York, to prosecute the doctors who have received tens of millions of dollars for "manufacturing diagnoses for money."

A). In addition, I now urge the Subcommittee to propose legislation that would establish a federal depository or registry which would collect information on all claims filed with the asbestos bankruptcy trusts created under section §524(g) of the Bankruptcy Code and with the Manville Trusts. The legislation would mandate that these trusts submit copies of the claims filed with the trusts to the registry in an electronic form that would enable a comparison of the work histories submitted by each claimant to the trusts with the work histories that they provided if they have filed claims in the tort system. This information is to be made available to law enforcement agencies. In addition, information about specific claimants is to be made available to defendants in the tort system who are being sued by those claimants. To defray the cost of the registry, a fee could be charged to each defendant in the tort system which seeks trust filing data.

B). On August 2, 2005, the House Committee on Energy and Commerce subpoenaed all of Dr. Jay T. Segarra's records relating to his diagnoses of silicosis and to his work for screening companies. Dr. Segarra is one of the most prolific B readers and diagnosing doctors in asbestos litigation. Dr. Segarra failed to produce the requested records. Instead, he provided only his own statistical analysis of what he alleges his records contain -- not the actual underlying records, and only for the period January 2003 through June 2005, and only for x-ray impressions and diagnoses. Dr. Segarra has confirmed that he did not produce the requested records. *See*

Deposition of Dr. Jay T. Segarra at Exh. No. 28, Ragsdale v. Able Supply Co., No. 2005-76615 (Tex. Dist. Ct. June 29, 2006).

I have argued that the concerted refusals by Dr. Segarra on this and other occasions and by other litigation doctors to produce their records of X-ray readings and diagnoses for use in asbestos and silica litigation, is because these records could provide "smoking gun" evidence of fraud. *See* Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated By Litigation Screenings and Clinical Studies,* 29 CARDOZO L. REV. 513 584-587 (2007).

I urge the Subcommittee to reissue the subpoena to Dr. Segarra and make certain that Dr. Segarra produces his actual records and not simply his analysis of his records.

3. As I set forth in my Written Statement, access to Manville Trust data by certain defendants in the silica MDL (1553) enabled them to show that close to 70% of the 10,000 claimants in the MDL had previously filed asbestosis claims. This retreading was "smoking gun" evidence of fraud and was highly instrumental in the process that led Judge Jack to conduct a *Daubert* hearing on the reliability of the doctors' diagnoses that supported the approximately 10,000 claims of silicosis. That proceeding, in turn, led Judge Jack to conclude that the diagnoses had been "manufactured for money."

Had the Manville Trust data not been available, the plaintiffs' lawyers in the silica MDL may well have succeeded in perpetrating a billion dollar fraud.

In my opinion, the refusal of the Manville Trust and the §524(g) trusts to disclose information about the claims they process is an attempt to preclude the kind of inquiry that Judge Jack conducted.

Response To Questions for the Record from Mr. Nadler

1. Yes.

2. LESTER BRICKMAN, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 550-555 (2007); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1239, 1333 (2008).

3. I lack expertise with regard to asbestos sheet gaskets.

IN THE CIRCUIT COURT OF SALINE COUNTY, ARKANSAS

STEVE BATTERTON, ET AL.	PLAINTIFFS
VS.	CASE NO. CV-20105173
CHESTERTON, CO., ET AL.	DEFENDANTS

DEFENDANT GENERAL ELECTRIC COMPANY'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY DR. CHRISTOPHER JOHN AND GENERAL ELECTRIC COMPANY'S RESPONSE TO DR. CHRISTOPHER JOHN'S AND PLAINTIFFS' JOINT MOTION TO QUASH AND FOR PROTECTIVE ORDER

COMES NOW, Defendant General Electric Company ("GE") and files this Motion to Compel and Response to Dr. Christopher John's and Plaintiffs' Motion to Quash.

Introduction

In 2001, plaintiffs' counsel first recruited Dr. John to screen plaintiffs for litigation claims. Since then, courts have excluded and discredited some of the more prolific and notorious litigation doctors and numerous asbestos bankruptcy trusts have banned them. Now, they either assert their Fifth Amendment privileges or have abandoned the litigation altogether. Dr. John ramped up his litigation screenings to fill the void that created. Dr. John has evaluated at least 5,000 plaintiffs, diagnosed over 3,600 Arkansas plaintiffs, diagnosed over 1,400 plaintiffs in federal cases, and diagnosed 37 of the 42 plaintiffs in this case. He has also performed mass litigation screenings with a screening company operating in at least Oklahoma and Texas.

Defendants are entitled to evaluate Dr. John's litigation screening records as a whole body of work because they are highly relevant to determine the reliability of his opinions. GE

subpoenaed Dr. John's litigation screening records – not his healthcare provider records – because they are needed to evaluate the reliability of his methodology. This includes his positive rates, overall volume, volumes done per day, associations with or reliance on discredited litigation screeners, and his compensation for litigation work.

These litigation screening records are not privileged because Dr. John evaluated these individuals for litigation purposes and they are not his patients, he is not an attorney, and plaintiffs' relied on his reports to file their cases. The subpoena is not unduly burdensome because Dr. John maintains his litigation records apart from his private practice records; GE will facilitate, staff, and manage the production; and GE will pay all reasonable fees and expenses for the production. The production will not be harassing or unreasonable because Dr. John generated these records, GE can only get them from Dr. John and they are highly relevant to evaluate the reliability of his medical opinions in this case. Finally, the subpoena is not vague or ambiguous. It specifically enumerates the categories of litigation documents GE needs to evaluate Dr. John's methodology. Therefore, GE requests this court order Dr. John to produce his litigation screening records in compliance with GE's subpoena.

I. Dr. John is a high-volume screener who helps fill the void left by Fifth Amendment and discredited doctors

Plaintiffs' counsel and Dr. John allege that he is not a "screener." But, Dr. John's prior testimony tells a different story:

- Dr. John was recruited by, and has worked exclusively for, plaintiffs' attorneys.[1] In 2001, plaintiffs' counsel in this case – attorney Ed Moody – first recruited Dr. John to diagnose asbestos plaintiffs.[2] A few years later, after many B-readers who did asbestos and silica litigation screening were exposed as unreliable, and in some cases

[1] Dr. Christopher John Dep., *Holloway, et al. v. Lion Oil Co., et al.*, No. CV-2007-0396-6, Cir. Ct. Union County, Ark. 111:8-12 ("*Holloway* Dep."), Exhibit 1.

[2] Dr. Christopher John Dep., *Farmer, et al. v. Ill. Cent. R.R. Co., et al.*, No. CT-001881-07, Cir. Ct. Tenn., 106:15-19 ("*Farmer* Dep."), Exhibit 2.

as frauds, Mr. Moody asked Dr. John to take the NIOSH[3] B-reader examination because Mr. Moody was "having a problem getting B-readers at the time."[4] Dr. John passed the exam in 2007[5] and Mr. Moody began sending x-rays to Dr. John "probably the week [he] got back" from getting his B-read certification.[6] As of January, 2010, Dr. John estimated that two-thirds of his litigation work was for Mr. Moody.[7]

- Dr. John is a high-volume screening litigation doctor. Since 2001, Dr. John has generated reports for 37 of the 42 plaintiffs in this lawsuit, diagnosed at least 3,600 Arkansas plaintiffs, and diagnosed over 1,400 federal plaintiffs. Further, he estimates he has created between 3,000 and 5,000 litigation reports (diagnoses and x-ray reports).[8]

- Dr. John re-screens people who were diagnosed by Fifth Amendment Doctor Ray Harron.[9] He gets "a lot" of B-reads by Dr. Harron and he "rereads a lot of x-rays that have been previously read."[10] Dr. John is even aware of Dr. Harron's history. "I mean, [he] got himself into a lot of bother and I guess his name was not very well thought of and so I end up rereading a lot of x-rays that have previously been read."[11]

- Plaintiffs' counsel also hired Dr. John to re-package diagnoses by other doctors – possibly doctors who now assert the Fifth Amendment or are discredited. As Dr. John testified, "If they had an x-ray three months ago or six months ago, then I probably just got the B-read sheet. But more likely, it's something they had several years ago, in which case they'll have a new x-ray and I do the B-read on that x-ray."[12]

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[3] A "B-reading" is a doctor's report of reading a person's x-ray. The information is entered on a standardized form and doctors use a classification system that the International Labour Office ("ILO") developed. NIOSH issues "B-reader" certifications for physicians in the United States. To be a "B-reader" a doctor has to pass a test that NIOSH administers. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 581 n.28 (S.D. Tex. 2005), Exhibit 3. These reports, called "B-reads" or "ILOs," are commonly used in asbestos litigation throughout the country.

[4] *Farmer* Dep. at 18:18 to 19:15, Exhibit 2.

[5] *Holloway* Dep. at 87:17-18, Exhibit 1.

[6] *Farmer* Dep. at 73:17 to 74:1, Exhibit 2.

[7] *Farmer* Dep. at 36:3-13, Exhibit 2.

[8] *Farmer* Dep. at 26:5-9, 36:3-13, (began in 2001), 38:14-17 (this number includes examinations and B-reads), 36:3-13 (total is 3,000 to 5,000 and two thirds were with attorney Ed Moody), Exhibit 2.

[9] Dr. Harron has authored at least 88,258 reports and is the primary diagnosing doctor for at least 51,048 asbestos claimants. CRMC Response to Amended Notice of Deposition Upon Written Questions, Mar. 2, 2006, at Questions 13, 14(a), 14(c), Exhibit 4.

Dr. Ray Harron has repeatedly asserted his Fifth Amendment privilege in asbestos and silica litigation instead of defending his methodology or his diagnoses. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 607 (S.D. Tex. 2005); Oct. 21, 2005 Response of Dr. Ray A. Harron to Subpoena Duces Tecum, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL No. 875 (E.D. Pa.); Nov. 18, 2005 Motion to Reargue Dr. Ray A. Harron's Fifth Amendment Claim Against Production of Documents, *In re Silica Prods. Liab. Litig.*, MDL No. 1553 (S.D. Tex.); Dec. 15, 2005 Deposition of Dr. Ray A. Harron, *In re W.R. Grace & Co., et al.*, No. 01-1139 (Bankr. D. Del.); Mar. 8, 2006 Testimony of Dr. Ray A. Harron, M.D., *The Silicosis Story: Mass Tort Screening and the Public Health: Hearing Before the Subcomm. on Oversight and Investigations*, 109th Cong. (Mar. 8, 2006) (Videotape of Testimony of Dr. Ray A. Harron.)

[10] *Holloway* Dep. at 96:18 to 97:3, Exhibit 1.

[11] *Holloway* Dep. at 96:19-25, Exhibit 1.

[12] *Farmer* Dep. at 41:7-11, Exhibit 2.

- Dr. John participates in screenings in other states. He has testified that he has participated in multiple screenings with Mike Chesnutt.[13] "I've done two in Oklahoma. I've done three or four in Texas."[14]

- Dr. John has been part of an ongoing pipeline of cases for plaintiff attorneys moving through his practice. He testified that from 2007 through 2009 he read approximately 100 x-rays per month (3,600 x-rays) for litigants.[15]

- "10% or less" of his patients in his private practice have asbestos-related illnesses.[16]

Dr. John's recruitment into screening litigation in 2001 and the dramatic increase in his volume since 2007 is directly connected to the demise of doctors and companies who came before him. For decades, litigation physicians like Dr. Ray Harron and Dr. James Ballard worked with screening litigation companies such as like Respiratory Testing Services, Inc. and N&M, Inc. to create scores of asbestos cases that plagued the courts. Litigation screenings involved massive recruitment programs to find plaintiffs for the real clients: the lawyers. These

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[13] *Holloway* Dep. at 92:9-23, Exhibit 1. Mike Chesnutt is from the screener Consultants in Pulmonary & Occupational Medicine, P.A. In 2007, MDL 875 ordered this company to produce all of its litigation records. In that order, the court cites a case that addresses the scope of production by a litigation doctor. The court ordered production of:

> "any and all" medical records, billing records, reports, statements, and scheduling books pertaining to or in connection with any forensic independent medical evaluations performed by Dr. Bromberg [the physician whose alleged bad faith was at issue] or his associates in connection with any civil litigation or on behalf of any insurance company, agency or law firm.

In that case, the plaintiff alleged that the defendant-doctor issued unfavorable and biased opinions that allowed insurance companies to improperly terminate policy-holders' benefits. *Id.* The Court ruled:

> "[T]he precise boundaries of the Rule 26 relevance standard depend[s] on the context of the particular action . . . [and] Plaintiff's bad faith claim puts [the defendant doctor's] bias and evaluation practices directly at issue. Thus, to preclude the discovery of such information would hinder Plaintiff's ability to prove his claim."

Id. at *1, 4. The Court specifically noted that the doctor generated the records "for the preparation of civil litigation" and ordered the doctor to produce "any and all" medical records he created for insurance companies because, though it was broad, the document were relevant. *Id.* at *3. (Attached as part of Exhibit 5.)

[14] *Farmer* Dep. at 40:6-12, Exhibit 2.

[15] *Farmer* Dep. at 158:23 to 159:2, Exhibit 2.

[16] *Holloway* Dep. at 105:10 to 106:6, Exhibit 1.

lawyer-financed screenings repeatedly produced large volumes of litigation "*diagnoses*" at rates far in excess of the rates at which asbestos related disease is expected and has been found to occur in numerous scientific studies of asbestos-exposed workers.[17] In fact, out of over 730,000 asbestos plaintiffs' claims filed in the past thirty years, over 500,000 were filed after the formation of screening companies in the early 1990s.[18] Numerous legal commentators,[19] the American Bar Association,[20] the Association of Occupational and Environmental Clinics,[21] and researchers have written copious articles about the screening issues and the need for discovery of those practices. Nonetheless, doctors and screeners continue to screen plaintiffs because of the powerful financial incentives – namely seventy billion dollars which was spent on asbestos litigation through 2002[22] and commentators predict an additional $130 to $195 billion which will be spent thereafter.[23]

The vast majority of non-malignant asbestos plaintiffs' cases appear after an attorney sponsors an "asbestos screening" (ranging from 20 plaintiffs to 100s and ranging in location from mobile vans and motel rooms to doctors' offices) where potential plaintiffs are "evaluated" for evidence of disease to generate claims. For years, plaintiffs' attorneys successfully obtained orders to limit defense discovery of these experts' records to only small groups of cases in crowded dockets. This insulated screening litigation doctors and their records from seeing much light from broader discovery and defendants did not have access to the complete picture of

[17] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 35, 35 n.3, 62 n. 85 (2004), Exhibit 6.

[18] Stephen Carroll et al., *Asbestos Litigation*, RAND Institute for Civil Justice at 72-73 (2005), Exhibit 7.

[19] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 35, 35 n.3, 62 n. 85 (2004), Exhibit 6.

[20] Am. Bar Ass'n Comm'n on Asbestos Litig., ABA Report to the House of Delegates, Recommendation and Resolution, at 8 (2003), Exhibit 8.

[21] Association of Occupational and Environmental Clinics Guidance Document, at 1 (2000), Exhibit 9.

[22] Stephen Carroll et al., *Asbestos Litigation*, RAND Institute for Civil Justice (2005), at 92, Exhibit 7.

[23] *Id.* at 106.

evidence needed (evidence of massive improper and inaccurate diagnoses) to expose bogus diagnoses for what they were.[24]

The potential for widespread litigation screening corruption was confirmed in June 2005, when the silica federal multi-district litigation court ("MDL 1553") required disclosure of diagnostic information and production of screening records for thousands of cases. The court then conducted extensive in-court depositions of the screening doctors and uncovered egregious conduct and the nature of mass tort screenings. U.S. District Court Judge Janis Jack presided over Silica MDL 1553 and admonished:

> This is assembly line diagnosing. And it is an ingenious method of grossly inflating the number of positive diagnoses. . . .
>
> [T]hese diagnoses were about litigation rather than health care. . . . [T]hese diagnoses were driven by neither health nor justice: they were manufactured for money.[25]

The pervasiveness of this phenomenon in asbestos litigation is the subject of extensive comment and analysis.[26] As a result, courts now authorize broader discovery to uncover the suspect practices of doctors and screeners. When some were asked about their practices, they have chosen to assert their Fifth Amendment privileges (for example, Dr. Ray Harron[27] and Dr. James

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[24] Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1315, 1350 (2008), Exhibit 10.

[25] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 634-35 (S.D. Tex. 2005) (emphasis added), Exhibit 3.

[26] Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1315, 1350 (2008) ("The evidence considered in this Article leads to the inevitable conclusion that mass tort litigation screenings almost invariably involve the mass production of medical reports which are manufactured for money and are not the product of good faith medical practice. These practices flourish because (1) they are very lucrative; (2) the courts insulate the litigation doctors and their records form the extensive discovery that Judge Jack allowed; and (3) bankruptcy courts allow the testimony of professional experts to substitute for proof of causation in estimation proceedings. Litigation screenings have flourished because of the failures of the civil and criminal justice systems to allow detection of specious, if not fraudulent, claim generation, let alone to sanction this conduct. Instead, these institutions have effectively granted litigation doctors immunity from prosecution no matter how blatant their practices. Unless judges and legislatures change practices, rulings, and statutes, the wholesale manufacture of claims in litigation screenings will continue to flourish."), Exhibit 10.

[27] Dr. Ray Harron asserts his Fifth Amendment Privileges. Please see footnote 9, above.

W. Ballard[28]). Others have been withdrawn as experts to defend their diagnoses (for example, Dr. Jay T. Segarra, discussed below). This departure of many of those doctors who began their screening work in the 1990s created a void after 2005 for new screening doctors to fill. GE is moving to compel the production of Dr. John's screening records because his prior testimony and the few records GE has collected to date indicate that he might employ similar unreliable methodologies to diagnose plaintiffs as those screeners and doctors who have been discredited.

II. The Court can accurately evaluate Dr. John's diagnoses only if they are placed into context in his entire body of litigation work

The parties and this Court no longer have to rely solely on a doctor's testimony and the language in a few reports to attempt to ascertain whether a doctor's methodology is reliable. Individual reports no longer have to be evaluated simply on a case-by-case basis. One report can now be cross referenced with numerous other reports created that same day and the vast number of other reports created in conjunction with the same doctor, screening company, or law firm.

A diagnostic report can appear on its face to represent a legitimate physical examination, collection of a work history, evaluation of exposure, and a differential diagnosis. However, appearances are often deceiving. Volume and positive rate are key elements to unlock the legitimacy of screening doctors' methodology and practices. For example, when a doctor's entire litigation work for a day is examined, it often turns out that far too many potential plaintiffs were purportedly seen by a screening doctor that day. When this happens, it means there were too many people "seen" for the doctor to have done any sort of meaningful physical examination or made a thoughtful diagnosis. The parties and the Court then immediately know

[28] Dr. James Ballard also asserts his Fifth Amendment privileges. *The Silicosis Story: Mass Tort Screening and the Public Health: Hearing Before the Subcomm. on Oversight and Investigations*, 109th Cong. (Mar. 8, 2006) (Videotape of Testimony of Dr. James W. Ballard); Dep. of Dr. James Ballard, *In re W.R. Grace & Co., et al.*, No. 01-1139 (Bankr. D. Del.).

that the diagnoses based upon that doctors' opinions should be considered suspect and merit further review. For example, Dr. Michael Kelly was responsible for thousands of diagnoses in Michigan asbestos litigation. Because defendants analyzed records on over 2,000 cases (not just the cases pending in a small trial group), they were able to show that Dr. Kelly's diagnoses were unreliable. The court completely excluded his opinions and testimony.[29] Here, as in Michigan, defendants can only evaluate Dr. John's methodology once he produces his complete litigation screening records.

III. Dr. John's litigation records are relevant to pending cases

Relevancy determines whether a court should order discovery. *Marrow v. State Farm Ins. Co.*, 570 S.W.2d 607, 612 (Ark. 1978). "Relevancy is not limited to the question of whether the documents themselves constitute evidence, if they may reasonably be expected to lead to the discovery of evidence." *Id.* at 613. Moreover, where information requested by a party is in the sole custody of the opposing party, the litigant should be permitted to obtain whatever information he may need to prepare adequately for issues that may develop. *Id.* Dr. John's screening litigation documents are "relevant to the issues in the pending action," Ark. R. Civ. P. 26(b)(1), because they reveal whether his methodology and the practices undertaken are reliable. Ark. R. Evid. 702, 703.

Dr. John's medical, correspondence, billing, payment, and advertising records on the 37 plaintiffs he diagnosed in this case are relevant because his evaluations for plaintiffs' counsel provide the very basis for the claims of 37 plaintiffs in this litigation. So, they are "reasonably calculated to lead to the discovery of admissible evidence." Ark. R. Civ. P. 26(b)(1).

[29] Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. Cooley Law Rev. 721, 738-41 (2009), Exhibit 11.

Dr. John's additional asbestos and silica litigation generated records (but not any of the records from his private healthcare provider medical practice) are highly relevant because these documents reveal his methodology to evaluate x-rays and diagnose claimants. Dr. John may claim to be objective and reliable but GE is entitled to his body of litigation screening records to determine if that is the case and available documentation bears that out. So, his litigation screening, correspondence, billing, payment, and advertising records for his litigation screening work for lawyers and those in the screening business are "reasonably calculated to lead to the discovery of admissible evidence." Ark. R. Civ. P. 26(b)(1).

The Inventory Analysis Chart that plaintiffs' counsel provided in this Arkansas asbestos litigation also demonstrates GE's need for these documents.[30] This chart identifies the date Dr. John conducted physical exams on some of the plaintiffs in counsel's total Arkansas "inventory." On June 30, 2007, Dr. John conducted physical exams on at least 21 plaintiffs.[31] Standard medical practice requires that a physician spend at least 30 minutes "taking the person's occupation, medical and smoking histories, and performing the physical exam."[32] Dr. John agrees. He has testified, "It could be as quick as five minutes if we find nothing to 30 minutes if it's – you know – a more complex problem."[33] To properly evaluate and diagnose 21 plaintiffs, John had to work a non-stop 10.5 hour day.[34] In evaluating Dr. John's methodology, GE is entitled to evidence of how many other individuals Dr. John also saw that day, and whether he

[30] Plaintiffs' Counsel's Inventory Analysis Chart, Exhibit 12.

[31] Dr. John is the listed doctor for the following 21 plaintiffs with a "PE" (physical exam) date of June 30, 2007: (1) Elmish Smith, (2) Jerry Walker, (3) Emma Jean Trimble-Waddy, (4) Sylvester Smith, (5) Richard McKeever, (6) Chester Shutes, (7) Arthur W. Tate, (8) Earl L. Taylor (9) Alice M. Jointer, (10) Thomas J Mattingly, (11) Eugene Kelly, (12) Andrew Lee Pree, (13) Albert Peterson, Jr., (14) Ed W. Sisson, (15) Rosie Bee Summons, (16) Mamie Lee Watkins, (17)Verline Pittman, (18) Adell Reed, (19) Percy White, (20) Johnnie s. Jiles, and (21) Samuel David Hughes. Plaintiffs' Counsel's Inventory Analysis Chart, Exhibit 12.

[32] *In Re Silica Prods. Liab. Litig.*, No. MDL 1553, 398 F. Supp. 2d 563, 594 (S.D. Tex. 2005), Exhibit 3.

[33] *Holloway* Dep. at 60:18-24, Exhibit 1.

[34] Under the accepted medical standards Dr. John should have spent at least 30 minutes with each of the 21 individual plaintiffs, totaling 10.5 hours. Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screening Companies and Clinical Studies*, 29 CARDOZO L. REV. 513, 541 (2007), Exhibit 13.

diagnosed nearly all of them as positive with an asbestos related disease. His records for that day will be telling on just those two issues.

Medical literature establishes that the average positive rate for x-ray evidence of asbestosis in an exposed population is approximately 12%.[35] Litigation screening physicians, however, typically generate positive rates many times that amount. If Dr. John's positive rate comported with scientific studies of numerous asbestos-exposed workers with an average rate of about 12%, then he would have seen about 210 people on June 30, 2007. This means he would have spent an impossible seven minutes (over a 24 hour day) conducting a physical exam of each person. If it was done over only twelve hours, then he spent less than four minutes per person on average. Evidence of the number of people Dr. John evaluated in a given day and the number he diagnosed as positive, and evidence about the number of x-rays he reviewed and the number he found positive, as well as how many days he did so, is relevant and discoverable. Dr. John's litigation screening records should shed light on the methodologies employed to evaluate x-rays and diagnose claimants for an asbestos related condition. Therefore, Dr. John should be compelled to produce these relevant records.

IV. The scope of appropriate discovery is broader because defendants must defend plaintiffs' diagnoses through documents Dr. John keeps

"A motion for production of documents must be considered in the light of the particular circumstances which give rise to it, and the need of the movant for the information requested." *Marrow*, 570 S.W.2d at 237 (finding that the trial court abused its discretion in denying a motion for production of documents in possession of insurance company). Where here, as in *Marrow*, a

[35] Professor Lester Brickman reviewed fifty-eight studies of occupationally exposed workers and determined that "of a total of 78,219 exposed workers' X-rays, 9,042 (11.56%) were found to have fibroses graded as 1/0 or higher on the ILO scale." Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screening Companies and Clinical Studies*, 29 CARDOZO L. REV. 513, 541 (2007), Exhibit 13.

party has to prove his claim by documents, papers, and letters kept by the opposing party, "the scope of discovery permitted should be broader than otherwise," and that party should be permitted to inspect any writing which might lead to discoverable evidence. *Id.* The Arkansas Supreme Court considers this factor to decide whether there has been an abuse of discretion in denying a discovery request. *Id.* The goal of discovery is to "permit a litigant to obtain whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary." *Id.*

Here, the defendants must defend plaintiff's allegations by disproving the purported diagnoses of Dr. John that support plaintiffs' claims. Without all of Dr. John's litigation screening records, there is a lack of relevant evidence to evaluate the reliability of his diagnoses. Broad access to all of the litigation records of Dr. John is therefore necessary and proper. "[R]elevancy is not limited to the question whether the documents themselves constitute evidence, if they may reasonably be expected to lead to the discovery of evidence." *Id.* at 236.

V. The Court should deny the Motion to Quash's broad, unsubstantiated allegations of harm

The Motion to Quash alleges that the subpoena seeks information protected by privileges and that it is vague or ambiguous, overbroad, unduly burdensome, and harassing. The Court should reject these arguments as invalid.

A. Dr. John's records are not privileged

1. Doctor-patient privilege does not apply

The doctor-patient privilege does not apply because Dr. John does not have a doctor-patient relationship with the individuals he screens for litigation. Most importantly, Dr. John has testified, "I don't consider them my patients, no."[36] Also, he has testified:

[36] *Farmer* Dep. at 30:18-22, Exhibit 2.

Q: Do you obtain from any of their treating or family physicians any medical records?
A: No.
Q: Do you engage in any consultations with any of the physicians for any of those persons?
A: No.[37]

Additionally, he does not provide traditional physician follow-up care or instructions[38] and he only interacts with potential plaintiffs when he evaluates them for lawyers for litigation.[39] At no time is Dr. John in a doctor-patient relationship. Therefore, the doctor-patient privilege simply fails to apply.

2. Attorney-client privilege and work-product doctrine do not apply

The attorney-client privilege also does not apply because Dr. John is not an attorney. This privilege applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Ark. R. Evid. 502(b). Dr. John did not render legal services and his reports are not "confidential communications." They are the basis for plaintiffs' claims. Therefore, this privilege does not apply.

Similarly, the work product doctrine protects the mental impressions of attorneys. Dr. John is not an attorney and his litigation records are not "mental impressions" of counsel. His litigation records reveal numerous medical facts and information about the purported medical conditions of the plaintiffs when he saw them. Therefore, this privilege does not apply.

Finally, even if the work product doctrine was somehow applicable – which it is not – an exception applies where the "information sought is not otherwise available to the party making the request." *Marrow*, 570 S.W.2d at 236. Dr. John generates and maintains his litigation

[37] *Holloway* Dep. at 80:1-6, Exhibit 1.
[38] *Holloway* Dep. at 80:10-16, 20-25, Exhibit 1.
[39] *Holloway* Dep. at 80:10-16, 20-25, Exhibit 1.

records (and they are kept apart from his patient files).[40] GE can only access them if Dr. John produces them under subpoena.

3. The consulting expert privilege does not apply

Plaintiffs argue that Dr. John's litigation records are privileged as documents and materials of a retained consulting presumably non-testifying expert. These privileges do not apply to Dr. John's litigation records since he must be a testifying expert. The subpoenaed records reveal the basis of plaintiffs' claims by a testifying expert – Dr. John. As shown in the chart that plaintiffs' counsel forwarded to GE's counsel and attached to the motion to quash as Exhibit D,[41] Dr. John's records form the very basis of plaintiffs' claims. Evidence of Dr. John's practices and methodology used in his evaluations for litigation is fundamental to evaluating the reliability of those reports. These records will expose these practices and his methodology.

Since 2007, clients of plaintiffs' counsel Ed Moody and LeBlanc & Conway have relied on Dr. John to file at least 685 cases in Union and Saline Counties.[42] But, in conflict, the text of their motion states, "Plaintiffs have not produced nor disclosed that they relied upon the opinions of Dr. John as the basis for the Plaintiffs' claims." Judge Jack, the federal silica MDL judge, ruled on this precise issue:

> Plaintiffs cannot have it both ways: they cannot present these doctors as the sole physicians diagnosing the injuries that form the bases of these suits while simultaneously claiming that they are merely non-testifying experts. . . . [S]o long as Plaintiffs are proffering the doctors and their diagnosis . . . to produce diagnoses of silica-related disease, Plaintiffs cannot claim the doctors are non-testifying.[43]

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[40] *Holloway* Dep. at 67:17 to 68:3, 70:2-11, Exhibit 1; *Farmer* Dep. at 48:7 to 49:23, Exhibit 2.

[41] Attached to this filing as part of Exhibit 12.

[42] Plaintiff Inventory Analysis Chart and Exhibit D to Plaintiffs' Motion to Quash ("Batterton Group"), collectively attached as Exhibit 12.

[43] *Id.*

The federal asbestos MDL 875 has also addressed this question and concluded the privilege does not apply because litigation doctors like Dr. John were hired by "various screening companies and law firms to screen and/or diagnose individuals with pneumoconiosis for litigation rather than medical purposes."[44] That court has also ruled the privilege does not apply when there is no evidence as to the scope and nature of the expert's work:

> Where there is no evidence of the scope and nature of the expert's services as pertaining to the litigation or work done unrelated to litigation, an individual will likely not be considered a non-testifying litigation consultant and the consulting privilege will not attach. . . . By producing and relying upon the opinion of the Doctors, the Plaintiffs have, de facto, designated the Doctors as expert witnesses in this case. Plaintiffs, having produced and relied upon the opinions of Doctors Segarra and Rao in this litigation, cannot now claim that Doctors Segarra and Rao are non-testifying experts entitled to the consulting expert privilege under Rule 26(b)(4)(B).[45]

B. The proposed production will not be unduly burdensome

The argument that the production will be unduly burdensome is contrary to the evidence. The production will move quickly because Dr. John maintains all of his litigation records (including both positive and negative diagnoses) in a separate set of filing cabinets[46] in his office and in storage.

GE will pay the reasonable costs associated with the production. Also, GE will facilitate, staff, and manage the production at a time chosen by, and convenient to, Dr. John. GE will also

---

[44] *In Re: Asbestos Products Liability Litigation (No. VI)*, Order (E.D. Pa., Feb. 17, 2006) (Dr. Krainson); Order for Production by Dr. Robert Springer, Dr. Harvey M. Richey, and screener Consultants in Pulmonary & Occupational Medicine, *In Re: Asbestos Products Liability Litigation (No. VI)*, MDL Docket No. MDL 875 (E.D. Pa., Feb. 12, 2007) (attached as part of Exhibit 5).

[45] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, Order (E.D. Pa. Feb. 24, 2009), p. 12-13, Exhibit 14.

[46] *Holloway* Dep. at 67:17 to 68:3, 70:2-11, Exhibit 1; *Farmer* Dep. at 48:7 to 49:23, Exhibit 2. On March 17, 2009, counsel for GE spoke with Dr. John's office manager who upon inquiry indicated Dr. John was not represented by counsel and readily indicated that the litigation documents responsive to the subpoena are located in a separate set of thirteen filing cabinets within Dr. John's office.

pay reasonable expenses for a representative of Dr. John to be present to ensure the production does not compromise the integrity of his files.

Dr. John maintains all of his litigation records in a separate filing system at his office and in storage, and GE will make every effort to structure the production to minimize its impact on Dr. John's regular medical practice. For example, before, during, or after regular business hours, GE can bring copiers to Dr. John's office and copy documents on-site or, alternatively, GE can hire a third-party copy service to remove the filing cabinets and copy the records. This objection has no merit as his concerns can be easily addressed.

C. The production will not be harassing or unreasonable

There is no verifiable showing that the subpoena is harassing or unreasonable as required by Rule 45(b). *Marrow v. State Farm Ins. Co.* holds:

> The goal of all discovery is to permit a litigant to obtain whatever information he may need to *prepare adequately for issues that may develop* without imposing an onerous burden on his adversary. A motion for production . . . must be considered in the light of the particular circumstances . . . and the need of the movant for the information . . . . *That the information sought is not otherwise available* . . . and that evidence pertaining to the issue . . . would likely be in the files . . . are very pertinent circumstances.

570 S.W.2d at 613 (internal citations removed) (emphasis added). "[W]hen proof of a party's case depends largely on testimony of his adversary and documents kept by his adversary, the scope of discovery permitted should be broader than otherwise and . . . (the seeking party) . . . should be permitted to inspect any writing in the files . . . (of the adversary) . . . which might lead to admissible evidence." *Id.* (internal quotations and citations omitted).

Dr. John generated these litigation screening documents. He is the person most knowledgeable about them and he has never produced them. GE can only get them from Dr.

John, and they are highly relevant to GE's defense of plaintiffs' claims. Therefore, GE submits that its subpoena is neither harassing nor unreasonable.

D. The subpoena is not vague or ambiguous

The Motion to Quash states that the subpoena is vague and ambiguous and then lists a sample of items from the subpoena. But, the motion fails to make specific allegations regarding these objections. The subpoena enumerates specific categories of ligation documents that are part and parcel of Dr. John's work as a litigation doctor. The subpoena covers these – and only these – litigation records. The size of the production is driven by the volume of Dr. John's screening litigation practice and not due to vaguely drafted categories in the subpoena.

VI. MDL 875 Orders support this Court ordering Dr. John to produce all of his litigation records

A. MDL 875 ruled that all litigation records are "related to" pending cases

On February 24, 2009, U.S. District Court Judge Eduardo Robreno ordered Dr. Segarra to produce his litigation records and he instructed that:

> The subpoenas will be enforced [and] . . . The court will limit the scope of the subpoenas to include only the documents named in the subpoena that relate to diagnoses and diagnosing reports of patients who have filed claims now included in MDL 875.[47]

plaintiffs promptly dismissed that group of cases to avoid the production. So, defendants served the subpoena in the next cases the court activated. Plaintiffs moved to quash, cited Judge Robreno's 2009 order, and argued – just as plaintiffs' counsel argues before this Court – that Dr. Segarra only had to produce records of pending MDL 875 plaintiffs. Magistrate Judge Strawbridge's June 26, 2009 order corrected counsel's incorrect interpretation:

> We consider [this] . . . within the confines of MDL 875 Judge Robreno's February 24, 2009 . . . Order . . . . [where the court] directed that Dr. Segarra produce all "documents *related to*

[47] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 256 F.R.D. 151 (E.D. Pa. Feb. 24, 2009), Exhibit 14.

> diagnoses of asbestos related conditions relied upon by Plaintiffs in MDL 875." . . .
>
> [T]he question effectively before us at this time is the extent to which the documents in the possession or under the control of Dr. Segarra can be said to be "related to diagnoses of asbestos related conditions relied upon by Plaintiffs in MDL 875."
>
> We do not read Judge Robreno's Order in the limiting manner suggested by Plaintiffs. . . . This reading [in this June 26, 2009 Order] is consistent with the view taken by the Court in prior stages of this litigation in ordering production of all screening/litigation records of the challenged doctor.[48]

The court cites Webster's Dictionary, The American Heritage Dictionary, case law, and five MDL 875 orders to show the breadth of "related records." GE submits that an order instructing Dr. John to produce all of his litigation records is consistent with MDL 875 orders.

B. MDL 875's order about Dr. Tannen's records does not apply because Dr. John has a much more extensive litigation practice than Dr. Tannen

Plaintiffs and Dr. John rely on the MDL 875 ruling that Dr. Richard Tannen did not have to produce his records.[49] This reliance is misplaced because Dr. John is more like Dr. Segarra (a high volume litigation doctor) rather than Dr. Tannen. Dr. Tannen's litigation work was quite different. Dr. Tannen was hired by one Texas law firm and diagnosed 246 plaintiffs. The clients were all oilfield workers who used a limited set of asbestos-containing drilling mud additives. Dr. John, on the other hand, estimates he diagnosed between 3,000 and 5,000 people, he screens at his office, he screens in Texas and Oklahoma,[50] and he has worked with multiple law firms and screeners to do so, including:

- Ed Moody[51]
- Hissey, Kientz, and Herron[52]

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[48] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, Order (E.D. Pa. June 26, 2009), Exhibit 15.
[49] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, Order (E.D. Pa. July 8, 2009), Exhibit 16.
[50] *Holloway* Dep. at 92:22-23, Exhibit 1.
[51] *Holloway* Dep. at 100:21, Exhibit 1.
[52] *Holloway* Dep. at 93:11-18, Exhibit 1.

- Brent Coon[53]
- Mike Chesnutt[54] also known as Chesnutt Medical Services.

The key factors the MDL 875 court identified include (1) overall total volume, (2) daily volume, and (3) positive rates. MDL 875 was aware of only 246 of Dr. Tannen's diagnoses and there was no evidence of his daily volume, positive rate, or associations with screeners. That is not Dr. John's situation. These factors support the production of Dr. John's records.

1. Dr. John is a high-volume screener

Dr. John testified that he has evaluated 3,000 to 5,000 plaintiffs, GE confirmed he diagnosed over 3,600 Arkansas plaintiffs, and GE confirmed he diagnosed at least 1,400 federal plaintiffs. Undoubtedly, Dr. John's 5,000 estimate is low and GE does not have all of his positive reports. Nonetheless, the volume GE confirmed and the volume Dr. John testified about is many times that of Dr. Tannen (who only had 246 reports). Dr. John is a high-volume screening doctor and his work justifies broad-based discovery.

2. Dr. John has high daily rates

As discussed above, on June 30, 2007, Dr. John conducted physical exams on 21 plaintiffs in Arkansas litigation. Dr. John also testified that on screening days with physical exams he sees "fifteen . . . to twenty-five in a day. On a two day trip . . . thirty-six to forty."[55] On screening days with only B-reads, he "may read anywhere from eighty to a hundred and thirty . . . over a two day trip."[56]

These numbers suggest at least suspect practices. For example, if on June 30, 2007, Dr. John only examined 21 people, then his positive rate is 100%. This suggests that he might be rubber-stamping prior B-read diagnoses by other (Fifth Amendment or suspect) doctors. And, he

[53] *Holloway* Dep. at 100:3-5, Exhibit 1.
[54] *Holloway* Dep. at 92:9-25, Exhibit 1.
[55] *Holloway* Dep. at 94:11-18, Exhibit 1.
[56] *Holloway* Dep. at 94:11-18, Exhibit 1.

has already testified that he gets "a lot" of B-reads from Fifth Amendment Dr. Ray Harron and that he "rereads a lot of x-rays that have been previously read."[57] If Dr. John saw more than 21 people on June 30, 2007, then his positive rate is lower. However, how many negatives were found is the question only his documents can answer. But, the diagnoses are still suspect because he may not have spent the necessary 30 minutes[58] with each person.

When MDL 875 entered the order on Dr. Tannen, there was no evidence whatsoever that he had ever had a high-volume day. Here, plaintiffs' counsel and Dr. John have provided information that shows Dr. John has high daily rates and without his complete records – both positive and negative reports, billing records, and payment records – GE cannot evaluate whether the diagnoses he created on those days are reliable or not.

3. Dr. John has a high positive rate

Dr. John testified multiple times about his positive rate:

- When he does the B-read himself or a B-read and a physical examination he has a "15 to 20 percent positive result."[59]
- If he is doing a second assessment, and another doctor has already issued a positive B-read, then his positive rate is "70%."[60] But, in other testimony, Dr. John stated his positive rate is 90% and he acknowledged, "I would say [I disagree with the prior B-read] maybe 10 percent. And I may be way off there."[61]
- For individuals who have never had a litigation doctor read their x-ray, Dr. John estimates his positive rate is "thirty to fifty" percent.[62]

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[57] *Holloway* Dep. at 96:18 to 97:3, Exhibit 1.

[58] Standard medical practice requires that a physician spend at least 30 minutes "taking the person's occupation, medical and smoking histories, and performing the physical exam." *In Re Silica Prods. Liab. Litig.*, No. MDL 1553, 398 F. Supp. 2d 563, 594 (S.D. Tex. 2005) Exhibit 3. Dr. John agrees. *Holloway* Dep. at 60:18-24, Exhibit 1.

[59] *Farmer* Dep. at 45:16 to 46:1-5, 54:3-6, Exhibit 2.

[60] *Holloway* Dep. at 99:5-9, Exhibit 1.

[61] *Farmer* Dep. 41:25 to 42:24, Exhibit 2.

[62] *Holloway* Dep. at 99:9-19, Exhibit 1.

Medical literature establishes that the average positive rate for asbestosis in an exposed population is approximately 10-20%.[63] Dr. John's positive rate is a key factor to evaluate the reliability of his diagnoses and GE is entitled to discover his records to determine this fact.[64]

The MDL 875 court has ordered nine[65] doctors and screeners to produce their complete litigation screening records:

1. Dr. Alvin Schonfeld
2. Dr. Jay T. Segarra
3. Dr. Robert Springer
4. Dr. Harvey M. Richey, III
5. Dr. Dr. Laximinaraya Rao
6. Dr. Richard Bernstein
7. Consultants in Pulmonary & Occupational Resources, Inc. (This is Mike Chesnutt's company. Dr. John testified that he has screened with Mr. Chesnutt.)
8. Holland Bieber & Associates, Inc.
9. Occupational Medical Resources, Inc.

The MDL 875 court has a long history with the work of litigation doctors and screeners:

- In 1999, Judge Charles Weiner ordered that "further discovery is warranted as to litigation screening companies and the physicians they employ."[66]
- In 2002, Judge Weiner found that the "filing of mass screening cases is tantamount to a race to the courthouse."[67]
- In 2009, Judge Robreno determined that "many mass screenings lack reliability and accountability and [therefore] . . . create an inherent suspicion as to their reliability."[68]

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[63] Professor Lester Brickman has reviewed fifty-eight studies of occupationally exposed workers and determined that "of a total of 78,219 exposed workers' X-rays, 9,042 (11.56%) were found to have fibroses graded as 1/0 or higher on the ILO scale." Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screening Companies and Clinical Studies*, 29 CARDOZO L. REV. 513, 541 (2007), Exhibit 13.

[64] When the MDL 875 magistrate judge decided not to order Dr. Tannen to produce his records there was no evidence of a positive rate. Dr. John works for plaintiffs' attorneys and diagnoses plaintiffs at screenings in his office and out-of-state. His testimony shows that his positive rates for this work are most likely outside of the rates established in scientific literature. GE should not have to trust Dr. John's estimates. GE is entitled to production of Dr. John's litigation screening records that he maintains that will allow GE to determine his actual positive rates.

[65] MDL 875 has ordered nine doctors and screeners to produce their complete litigation records (collectively attached as Exhibit 4).

[66] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, Order (E.D. Pa. Mar. 23, 1999), Exhibit 17.

[67] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, Order (E.D. Pa. Jan. 15, 2002), Exhibit 18.

[68] *In re: Asbestos Prods. Liab. Litig. (No. VI)*, Order (E.D. Pa. Sept. 3, 2009), Exhibit 19.

Dr. John screens at his office and out-of-state, he works exclusively with plaintiffs' attorneys, and his own testimony reveals he has high daily positive rates and overall volume. This brings him into line with the types of suspect practices that are on the MDL 875 court's radar.

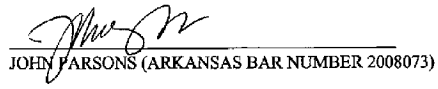
Additionally, though the MDL 875 court considers a doctor's total volume to be a key factor, the number of pending plaintiffs is not. For example, when Judge Strawbridge ordered Dr. Segarra to produce again on June 26, 2009, there were only 124 Segarra plaintiffs in the group of cases at issue. The MDL 875 magistrate judge had to enter another order on July 7, 2009 and in response, counsel dismissed the remaining seven cases to avoid Dr. Segarra's production. That court awarded defendants $34,215 in sanctions for plaintiffs' counsel's procedural wrangling. When the court ordered production and awarded the sanctions, there were only seven Segarra plaintiffs pending and eventually these were dismissed to avoid the production of his records.

Therefore, for this Court to order Dr. John to produce his litigation records is entirely consistent with the MDL 875 court's prior production orders because Dr. John is a high-volume litigation screener who has evaluated thousands of plaintiffs, he maintains exhaustive screening litigation records, and Dr. John diagnosed 37 plaintiffs pending in this case.

WHEREFORE, PREMISES CONSIDERED, GE respectfully requests this Court deny the objections by Dr. John and plaintiffs' counsel and order Dr. John to produce his litigation documents responsive to GE's subpoena.

Respectfully submitted, this the 9th day of May, 2011.

FORMAN PERRY WATKINS KRUTZ & TARDY LLP



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CERTIFICATE OF SERVICE

I, the undersigned attorney, on behalf of General Electric Company, do hereby certify that I have served by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to Plaintiffs' counsel of record and have provided notice of same to all defense counsel of record.

This the 9th day of May, 2011.

JOHN PARSONS

Exhibit 1

A-(b)

1 IN THE CIRCUIT COURT OF UNION COUNTY, ARKANSAS
CIVIL DIVISION
2
BILLY HOLLOWAY, ET AL PLAINTIFFS
3
V. NO. CV-2007-0396-6
4
LION OIL COMPANY, ET AL DEFENDANTS
5
6 DEPOSITION OF CHRISTOPHER L. JOHN, M.D.
MARCH 19, 2010
7
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15 COURT REPORTER:
16 Ms. Melanie Miller, CCR

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7 Exhibit No. Twenty.....32
8 Exhibit No. Twenty One.....32
9 Exhibit No. Twenty Two.....33
10 Exhibit No. Twenty Three.....33
11 Exhibit No. Twenty Four 33
12 Exhibit No. Twenty Five 34
13 Exhibit No. Twenty Six.....34
14 Exhibit No. Twenty Seven.....35
15 Exhibit No. Twenty Eight 35
16 Exhibit No. Twenty Nine 125
17

1 DR. CHRISTOPHER L. JOHN, M.D.
2 PRODUCED, SWORN, AND EXAMINED, with attorneys and
3 court reporter present, at the offices of Dr.
4 Christopher L. John, M.D., 11321 Interstate 30, Suite
5 306, Little Rock, AR, beginning at 1:00 p.m. on March
6 19, 2010, the above-entitled cause now pending before
7 the Circuit Court of Union County, Arkansas, said
8 deposition being taken pursuant to the terms and
9 provision of the Rules of Civil Procedure, at the
10 instance of counsel for Defendant.
11 **********
12 IT IS STIPULATED AND AGREED by and between the
13 parties, through their respective counsel, that the
14 deposition of Dr. Christopher L. John, M.D., may be
15 taken for any and all purposes, for use as permitted in
16 the case styled above, before Melanie Miller, Certified
17 Court Reporter and Notary Public, and shall be
18 transcribed by her. The attorneys reserve the right to
19 object to the testimony of the witness on the grounds
20 of competency, relevancy, and materiality. These
21 objections may be asserted at the time of the trial
22 without the necessity of noting the objection at the
23 taking of this deposition.
24

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1 Q Has this been an ongoing average of your patient
2 inventory, or load, or population if you will, since
3 you've been practicing here in Arkansas?
4 A I would think it's a fair average. I mean, if it's
5 a quite period we may be down around thirty patients.
6 If it's, for whatever reason, extremely busy, I can't
7 remember it really going over fifty and -- you know --
8 that was just too many people. So, on average, it
9 would be between thirty five and forty.
10 Q When you perform a physical exam on a -- let's
11 assume I'm a ordinary, regular patient of your's and I
12 call to make an appointment to get -- to come in and
13 get a physical examination, the elements of which would
14 be the same I'm asking for that you might do for one of
15 these Plaintiffs that you saw. About how long would I
16 anticipate being here with you, personally, first of
17 all, if I were to have such an examination?
18 A Now, bear in mind I don't do yearly physicals,
19 which what may be what you're thinking so, most of my
20 patients are referred by other physicians and I would
21 say probably ninety percent of my patients are by
22 consultation and so, typically, they're more complex
23 patients than you would see if you're visiting your
24 family Doctor to have blood pressure checked, or your
25 yearly physical. And so, I would spend probably in the

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1 region -- well, really, I spend as long as it takes and
2 --
3 Q Of course.
4 A -- so, it can vary. If it's a very simple problem
5 I may not be in there that long, or if it's a more
6 complex one, I would. But I would say that initially,
7 when the patient comes, I would be in the room for
8 thirty to thirty five minutes taking the history, this
9 is on a new patient, taking the history and doing
10 physical exam. Then I would, normally, come out, give
11 my Nursing Assistant the sheet where we mark what I
12 want done on it and depending on that may be an EKG,
13 maybe spirometry, various tests that we do here in the
14 office, they would get that done, which could take
15 anywhere between another fifteen to forty minutes, and
16 then I go through those results and then go back into
17 the room and talk to the patient again, explain what
18 the results are, explain what I believe the diagnosis
19 is, and what treatments we need to offer or whether we
20 need to do further testing.
21 Q Typically, again, realizing there's individual
22 variances here and also, depending on how many patients
23 you're seeing that day, it might alter but in the
24 typical thirty, thirty five to forty or so patients,
25 from the time -- given that patient that you just

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1 described -- that I walked in until I left, typically,
2 what's the length of time I'd be here?
3 A They would be in the office between an hour and a
4 half and two hours.
5 Q Compare that, if you will then, to -- let's assume
6 that Mr. McEnaney sends me in, or asks me, or suggests,
7 or I hear that I ought to come in and see you because I
8 might have an asbestos related condition, if you were
9 also asked to do the physical examination aspect, and
10 it's not just taking and reading an X-ray --
11 A Right.
12 Q -- but PFTs, X-ray, as well as a physical exam,
13 about how long would I be, start to finish, in the
14 office?
15 A Probably around about the same time.
16 Q Okay. When you go back in to discuss with either,
17 then -- either person that you're visiting with here in
18 your Clinic, about how long does it take when you go
19 back in and realizing there's variances, to go over the
20 results of whatever tests were administered, whether
21 it's X-rays, PFTS?
22 A It could be as quick as five minutes if we find
23 nothing to thirty minutes if it's -- you know -- more
24 complex problem or if somebody has a malignancy -- you
25 know -- they obviously have more questions after one

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1 than the other.
2 Q Typically, how long will it take to do a PFT
3 examination as those are administered for these three
4 Plaintiffs.
5 A Upon average, I would say forty to fifty minutes.
6 Q How many individuals are you able to -- are your
7 Technicians able to administer PFT evaluations to at
8 one time?
9 A Well we have two complete pulmonary function
10 laboratories so we could, if we need to, do two
11 patients at any one time.
12 Q Does that happen with some degree of frequency?
13 A No, not very often.
14 Q Typically, it's one?
15 A Typically, it's one.
16 Q Okay. Other than the intake sheet, or form --
17 A Uh-huh.
18 Q -- are there any other documents or information
19 preservation or information communication documents or
20 modalities that you give to the patient or have the
21 patient use when they come to see you, either in your
22 regular clinical practice or for one of those persons
23 whose coming in, in connection with a potential
24 asbestos lawsuit?
25 A Well, the people that are coming in as a regular

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1 that's taken by the occupational Nurse that would be
2 there.
3 Q The occupational Nurse would be one that's
4 provided by the lawyers or someone else, not you,
5 right?
6 A No, not me, right.
7 Q Okay. Now, did you do any site assessment for any
8 of the three Plaintiffs that we're here about today?
9 A No.
10 Q Did Mr. McEnaney, or anyone associated with him or
11 his firm, provide you with any site assessment
12 information?
13 A No.
14 Q So, today as we sit here, what you know about
15 where they worked is encapsulated in those reports
16 there in front of you now; is that right?
17 A To the best of my knowledge.
18 Q I noticed, for example, there's no information
19 about the size of a building if they worked indoors, or
20 in fact, if they worked indoors, the heights of the
21 ceilings, for example?
22 A Right.
23 Q There's no information about air exchanges or
24 ventilation, that sort of thing?
25 A No, and many of the patients don't usually know

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1 that information.
2 Q Okay. And that information was not provided to
3 you in some other format or by some other source?
4 A No.
5 Q Is that correct?
6 A Correct, in these three cases.
7 Q And specifically as to these three --
8 A Yes.
9 Q -- that's correct? Okay. This envelope that that
10 chart or file, file we'll call it, goes in if it's
11 someone coming to be evaluated, for instance, for
12 asbestos related condition, if the records are kept,
13 are they kept in that envelope or am I giving more
14 substance to the envelope description than I should?
15 A You mean the record, the original record?
16 Q Yes.
17 A They're kept in a file and, of course, the files
18 are in the filing cabinets and then, if the cabinet
19 becomes full or we run out of space for whatever reason
20 then, typically, the oldest files will go into storage.
21 Q Okay. So, unless these three individuals' files
22 were discarded, they will be -- whatever may be within
23 them -- here in your office or storage?
24 A The files won't have been discarded. What I'm not
25 sure about is that form the patient fills out. But the

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1 original file with the original -- you know -- notes,
2 obviously, that's never sent away. That's kept in a
3 file either here or in storage.
4 Q That was my next question is, within the file
5 would be these reports that we've discussed. Would
6 there be notes -- well, if it had been discarded, the
7 intake form would be there --
8 A Yes.
9 Q -- and then as you're discussing with the patient
10 in your regular practice or if you are discussing with
11 the person that's come in with an asbestos related
12 evaluation, their answers to your questions, as you're
13 going over the form, do you take notes?
14 A I do to a certain degree and -- but I've done this
15 for so many years that the forms are imprinted on my
16 mind, and I will occasionally, particularly with dates
17 -- you know -- put that down, and it's a sheet about
18 this size (indicating) that has various boxes on it
19 that I can tic, and that can expedite my memory in that
20 area. And that, again, I'd have to check. It may be
21 in the original file or it may be discarded once
22 they've typed up the report because it's really not
23 something that would make much sense to anybody else
24 unless they knew the way I was thinking, if you know
25 what I mean.

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1 Q Did you, or did you have someone else, look for
2 the actual files for these three to see if there's more
3 than just the documents that are before us in the
4 files?
5 A Well, Christy set this file up for me and provided
6 me with the information and now, whether there was
7 something, one of those rough notes in the file, that I
8 can't tell you but I can certainly find that out, and
9 if it's there, obviously, provide you with a copy of
10 it.
11 Q Sure. We would want copies --
12 A Right.
13 Q -- of everything in the file.
14 A And that's why I'm thinking that they weren't in
15 there because normally, she puts everything that's in
16 the file.
17 Q You do not have either for persons coming for
18 asbestos related evaluations or for your patients, you
19 do not have a document destruction policy such that
20 after so many years, and if they don't come, they're
21 destroyed, they're maintained in perpetuity, are they
22 not?
23 A Well, I think it depends on the State. Now,
24 Texas, I believe, has a seven year and so, when we came
25 from Texas, we had the records and we kept them for

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1 about ten years and then, we liquidated those files.
2 And we have not destroyed any files since we've been in
3 Arkansas. You know, eventually, we may get to that
4 point because I know our storage is filling up but we
5 haven't done that as yet.
6 Q Has anyone explored with you this -- I'll call it
7 the possible need -- the possible need not to destroy
8 any records if they may be in the future or in the
9 present involved in litigation?
10 A Oh, well, we don't destroy any of these legal
11 cases. I'm talking of patients --
12 Q Yeah.
13 A -- regular patients.
14 Q I understand. I'm sorry. I misunderstood. All
15 right.
16 MR. McENANEY: Do you mind if we take a quick
17 break?
18 MR. HARRISON: Not at all.
19 (WHEREUPON, an off the record break was
20 taken at 2:45 p.m.)
21 (WHEREUPON, back on the record after break
22 at 2:58 p.m.)
23 DIRECT EXAMINATION - (Continuing)
24 BY MR. HARRISON:
25 Q Doctor, we're back from the break. Let me go back

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1 and kind of recap. again just to get us geographically
2 in your facility at this point, with your person who
3 comes here for an evaluation, they come in -- the
4 appointments made, they come in, they fill out the
5 intake form, you've described what happens to that,
6 you've described your meeting with them and the
7 testing, if that's appropriate, the follow up meeting
8 while they're here for that visit, and you've talked
9 about the times and the kinds of things that are done.
10 Once that's completed, we all know, of course, since
11 we've gone over them but there are certain reports that
12 are generated, both test result reports and
13 interpretative reports --
14 A Uh-huh.
15 Q -- the dictated reports that you do, it appears,
16 in two basic formats: One, to the interpret the X-rays
17 in addition to the ILO chart, and we have the physical
18 exam report. Do you, for these three first, did you do
19 their physical exam and report of it before the B-reads
20 or afterwards?
21 A No. The way it works is the patient has the chest
22 X-ray and pulmonary function and then they are put in
23 the chart, and the chart's put in one of those slots on
24 the door. Then I go in and take the history and do the
25 physical exam and then, I come out and I go through the

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1 pulmonary function and look at the X-ray and dictate a
2 report on the X-ray and then dictate the complete
3 record so I've always got the X-ray and the pulmonary
4 function to look at before I dictate the report and the
5 report is dictated, basically, immediately after my
6 seeing the patient.
7 Q That's one of my questions and thank you for
8 anticipating that. Do you look at the X-ray and
9 complete the ILO chart, record, before you see the
10 patient and before you see the PFT?
11 A Gosh, I can't really answer that with any
12 certainty. I may have seen the PFT but normally, I
13 think I would see the patient before I do the B-read.
14 Now, I can't promise that there aren't occasions where
15 it's the other way around but normally, I like to see
16 the patient and then look at the results and then
17 dictate my report.
18 Q Okay. How long, on the physical exam report, and
19 let's -- we'll stay with the ones that we have in these
20 specific cases, how long would it take you to dictate
21 this physical exam report, typically?
22 A Oh, five to ten minutes, I guess.
23 Q Do you dictate every word there or do you use some
24 form or template?
25 A No, I dictate each one.

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1 Q Are all of the words in each of these three
2 individuals' dictated reports, whichever one it is --
3 A Uh-huh.
4 Q -- whether it's the X-ray interpreted report or
5 the physical exam report, so only you're words are in
6 there, in terms of the dictation of it?
7 A Yes. I mean, I go through in my head -- you know -
8 - a template, I guess is what to say, but my girls at
9 the front don't have a template they just fill in. So,
10 I dictate it based on my mental template and go through
11 it in a similar manner for each one, obviously,
12 altering what goes into it depending on the patient's
13 history.
14 Q And for these who come in for evaluations, if
15 you're seeing multiple persons in a given day, you
16 still do dictate those reports immediately following
17 seeing that person?
18 A I do that for every patient, whether they're legal
19 cases or not.
20 Q Okay. Did I see on of your Assistants bringing in
21 one of those forms?
22 MR. HARRISON: We'll take a break for just a
23 moment and let me look, please.
24 (WHEREUPON, an off the record break was
25 taken at 3:03 p.m.)

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1 Q Would say raised?
2 A -- raised, they were raised on a farm but nothing
3 since. If, let's say, they were brought up on a farm
4 and they were -- they kept horses then there would be
5 an 'H' there or if it was cows there would be a 'C'
6 there. They're really just very quick shorthand
7 version of taking the history or physical so that I can
8 remember all those things without actually writing them
9 out longhand.
10 Q And what is the next 'H'?
11 A Hobbies.
12 Q Hobbies.
13 A So, I inquire do they have any history of exposure
14 to wood dust, ceramics, that kinds of stuff.
15 Q And 'Ind'?
16 A Industrial exposure other than asbestos.
17 Q Okay. And all of this historical information
18 comes straight from the patient?
19 A That's correct.
20 Q So, if I went down, for example, to respiratory
21 block --
22 A Uh-huh.
23 Q -- listed under that is TB, asthma, bronchitis,
24 emphysema, cough, sputum, a number of items there and
25 there's a line drawn vertically through the block and

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1 then there's a zero with a slash that happens to be
2 beside industrial exposure but that may not mean
3 anything -- what does that mean?
4 A The zero with the slash at the bottom means no
5 sleep apnea and see there's a --
6 Q That is above the industrial exposure?
7 A Yes.
8 Q Okay. And the vertical line drawn through?
9 A That's, basically, there was nothing additional
10 that wasn't covered in the part above.
11 Q So, would you always ask the person being
12 evaluated whether they experienced wheezes?
13 A Yes.
14 Q And obviously, if you were talking to them and
15 observed that you would record it --
16 A Right.
17 Q You ask about smoking always?
18 A Yes. See on the top part, you'll see cigs., the
19 top right hand, right, just there.
20 Q You're kidding, that's cigs? Your's is worse than
21 mine. Okay. Well, that let's us know how you do this
22 and that's really what I was looking for. Do you -- so
23 these are two more pieces of the file that come
24 together. Do you obtain any of the -- when those
25 persons are coming in for asbestos related complaints,

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1 or litigation, do you obtain from any of their treating
2 or family physicians any medical records?
3 A No.
4 Q Do you engage in any consultations with any of
5 those physicians for any of those persons?
6 A No.
7 Q Again, I'm talking about the asbestos --
8 A Right.
9 Q -- litigation related.
10 A If there in the history or physical exam I pick up
11 something that I feel is important that is unrelated to
12 the asbestos then I will usually tell the patient that
13 -- you know -- you will receive a copy of this physical
14 and you should take it to your Doctor and show him
15 what's on it so that he can then check that out for
16 you. So, for instances, frequently these people have
17 murmurs or they have (inaudible) and I'll ask them have
18 they ever been told that before and if they haven't,
19 then I'll say, then you need to go and check that out
20 with your regular Doctor. And if, when you're doing a
21 B-read -- you know -- there's a mass in the X-ray then
22 really I make sure the attorneys' know that this person
23 needs to have follow up for that and he needs to go to
24 his regular Doctor to check on that, and tell the
25 patient.

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1 Q I noticed, in looking at the reports, the dictated
2 reports --
3 A Uh-huh.
4 Q -- that they're addressed to the Hissey, Kientz,
5 Herron -- I think Herron's on there, too. Forgive me,
6 Andrew, if I'm adding a name that's not there --
7 whatever it says. I notice it's not addressed to the
8 person that's just been examined. Do you send a copy
9 of this to them or do you leave that to the attorney?
10 A What I tell the patients is that I send this to the
11 attorney and then the attorney will send them a copy.
12 Q Okay. Do you send a copy of all of the documents
13 that would be found at the conclusion of your
14 evaluation to the attorneys --
15 A Yes.
16 Q -- including, for example, the intake form --
17 A No.
18 Q Okay. So, these two sheets of paper that we have
19 just discussed and are coming around the table, those
20 are not sent to the attorneys?
21 A No.
22 Q When you dictate your reports, are they done
23 digitally or are they done on old fashion, as I do,
24 tape?
25 A Tape.

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1 for right now. I'm going to slide down these three,
2 keep one on your end and sign those and return them to
3 me before we leave and again, as soon as they come in
4 I'll send you a copy and send Andrew a copy of
5 everything. And if you would prefer some different
6 kind of form, I'm happy to do that. I will tell you
7 that this is a form that my office uses, unless some
8 hospital has a very specific one they demand and some
9 do. I tell you that to let you know that, for example,
10 when I send this to somebody they may say, oh, we have
11 our own form and I may have to send it back to you.
12 MR. McENANEY: Rather than have a blank
13 form, would you be able to fill out the two
14 lines with the actual --
15 MR. HARRISON: Absolutely.
16 MR. McENANEY: Okay. Can we do that before -
17 -
18 MR. HARRISON: Absolutely. And he can --
19 you can do it in your own handwriting if you
20 want, put the names on it. I'd be more than
21 happy to. It doesn't have to be fancy. In
22 fact, they would probably like it better that
23 way. And thank you very much.
24 WITNESS: Do you mind if I don't put my
25 Social Security number on --

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1 MR. HARRISON: I don't mind at all. In fact,
2 I wouldn't want to do that either. One of our
3 paralegals sent that up to me. If they require
4 some identifying information, is there some
5 credential number, something like that that you
6 could put on it that they would know about?
7 (Witness completes documents)
8 MR. HARRISON: Thank you. Thank you,
9 Doctor.
10 DIRECT EXAMINATION - (Continuing)
11 BY MR. HARRISON:
12 Q We've gone through your certifications and the
13 nature of your practice. You are, though you do,
14 though you are a B-reader and we'll cover that in a
15 second, you are not a Radiologist, correct?
16 A That is correct.
17 Q You became a B-reader, as I recall, in 2007?
18 A Yes.
19 Q Is that right? Did you ever take the test and not
20 pass it?
21 A No.
22 Q Congratulations. There are some fine Doctors who
23 have.
24 (WHEREUPON, off the record break at 3:25
25 p.m.)

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1 (WHEREUPON, on the record after break at
2 3:26 p.m.)
3 DIRECT EXAMINATION - (Continuing)
4 BY MR. HARRISON:
5 Q I forgot how long those certifications are?
6 A It's four years and, in fact, I just inquired
7 earlier this week about re-certifying.
8 Q Have you ever been denied privileges at any
9 hospital?
10 A No.
11 Q Have you ever been -- had privileges withdrawn?
12 A No.
13 Q Or limited in any fashion?
14 A No.
15 Q Have you ever been disciplined by any medical
16 licensure boards?
17 A No.
18 Q Ever been suspended for any reason?
19 A No.
20 Q And your license has never been revoked through a
21 disciplinary matter?
22 A No. I have voluntarily surrendered licenses when
23 I've left different Countries.
24 Q That was my next thing that I was going to ask you
25 and I understand that Physicians do, for whatever

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1 reasons and not bad ones. Which ones have you
2 surrendered or just simply chosen not to renew?
3 A South Africa, and Saskatchewan in Canada and
4 Ontario in Canada.
5 Q Your formal education in post-graduate training,
6 that's covered in your C.V.; is that correct?
7 A Yes.
8 Q I'm not going to go back through that then. You
9 began in private practice in what Country in what year?
10 A Canada, 1984.
11 Q Did you -- well, let me quit trying to remember --
12 did you continuously practice in Canada before you came
13 here or did you first go to South Africa?
14 A No, I came from South Africa to Canada and when I
15 left Ontario, I went back to Britain and worked there
16 pending my green card coming here.
17 Q You then -- when you came to the States that was
18 what year, nineteen seventy --
19 A That was 2004.
20 Q No, no.
21 A 1994.
22 Q I'm not going to let you testify to that's, not
23 right. It was in the nineties, wasn't it?
24 A 1994, sorry.
25 Q Now, I can help you out more if you want me to.

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1 Just raise your hand and I'll try to do better. Okay.
2 And you were in Texas from '94 until around 2000?
3 A Yes.
4 Q While you practiced in Texas were you, primarily,
5 in pulmonary medicine?
6 A I did, basically, internal medicine and pulmonary
7 and probably because of the small communities that I
8 was in 50/50 at that time.
9 Q And while in Texas did you do any physical
10 examinations of any persons related to asbestos
11 litigation or anticipated asbestos litigation?
12 A No, well, I say no. I may have seen one patient
13 for the Baldwin law firm --
14 Q Scotty Baldwin?
15 A Yeah, but if it was one, that was the only one that
16 I can remember.
17 Q Did you testify in any way in that case?
18 A No.
19 Q Didn't give a deposition like we're doing today?
20 A No.
21 Q Did you write a report?
22 A I believe I did a physical exam and we may have
23 done a pulmonary function. I wasn't a B-reader then so
24 I was not the B-reader.
25 Q Might you have done an evaluation of some medical

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1 -- well, let me break it down. Might you, though not a
2 B-reader, as a Physician have looked at radiographs or
3 X-rays and rendered some --
4 A Yeah, I don't think I did.
5 Q Do you know whether you examined any medical
6 records beyond any you might have generated for that
7 person who you believe may have been represented by Mr.
8 Baldwin?
9 A There may have been some old records supplied to
10 me but like I said, it was a long time ago.
11 Q Did you do any, what we call and I don't mean this
12 in a disparaging way, did you do any paper reviews or
13 just medical record reviews for people that you did not
14 see in the Clinic in any way?
15 A For asbestos?
16 Q Yes, sir.
17 A No.
18 Q Did you do any evaluations or medical record
19 reviews or X-ray reviews for any one connected with the
20 silica cases?
21 A No.
22 Q And when you say that, we are talking about Texas?
23 A Right.
24 Q Did you work with, other than Mr. Baldwin assuming
25 that your memory's correct, did you work with any other

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1 law firms in Texas concerning either Silicosis or
2 asbestosis cases.
3 A No.
4 Q Did you work or have any interest in any pulmonary
5 function clinics, labs, or organizations, or
6 businesses?
7 A Other than the equipment that I have in my office,
8 no.
9 Q I saw or someone told me about a fellow by the name
10 of Mike Chestnut in Texas and I think he was -- was he
11 in the evaluation or screening of --
12 A Mike is a respirator technologist who has a
13 business is involved in doing pulmonary function tests
14 for asbestos cases.
15 Q Did you ever work for or with him?
16 A Not in Texas.
17 Q Okay. Did you ever work for -- I shouldn't say for
18 -- did you work -- well, I suppose you could ask -- did
19 you ever work for or with him on any asbestos related
20 allegation cases anywhere in the Country?
21 A Yes.
22 Q Okay. Where would that have been?
23 A I have seen cases with Mike in Oklahoma and Texas.
24 Q Okay. Were any of those for the Hissey, Kientz,
25 Herron firm?

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1 A Yes.
2 Q Were those both in Oklahoma and Texas?
3 A I believe so.
4 MR. HARRISON: Off the record.
5 (WHEREUPON, brief off the record break
6 taken at 3:32 p.m.)
7 (WHEREUPON, back on the record after break
8 at 3:33 p.m.)
9 DIRECT EXAMINATION - (Continuing)
10 BY MR. HARRISON:
11 Q Okay. Oklahoma and Texas. Do you know which
12 lawyers were funding or sponsoring those screenings, if
13 there were lawyers screening?
14 WITNESS: Do you remember the name of the
15 firm Mike worked with?
16 MR. McENANEY: (No response)
17 THE WITNESS:
18 A I know Hissey, Kientz was one of them.
19 Q Okay.
20 A There was another firm, I believe from Houston,
21 that we did some work for as well but I don't remember
22 their name. Now, Mike will remember it so I can
23 certainly get it from him.
24 Q Okay. Do you recall the name of his business by
25 chance?

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1 A I don't know, I think it's Chestnut Pulmonary
2 Services or something like that.
3 Q Okay. Do you have -- could you give me an estimate
4 of how many instances of persons being evaluated that
5 you work with him on?
6 A How many trips or how many patients?
7 Q How many persons, estimated, that you evaluated?
8 A The number varies from trip to trip and the number
9 I'm involved with depends on whether I'm doing the
10 physicals and the B-reads or whether I'm just doing the
11 B-reads. If there physicals, it's usually between,
12 depending on how many people show, fifteen to a maximum
13 of twenty five in a day. On a two day trip it usually
14 works out to about -- you know -- thirty six to forty
15 because people tend not to show, of course. B-reads,
16 if I'm only doing the B-reads, I may read anywhere from
17 eighty to a hundred and thirty, maybe, X-rays over a
18 two day trip.
19 Q Do you have a continuing relationship with him as
20 described it?
21 A Yes.
22 Q Does he pay you for your time and services or are
23 you paid by a law firm or union, or someone else?
24 A It varies. Mike usually pays my travel and
25 expenses, and I believe he gets reimbursed by the law

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1 firms for that, and if I'm doing physicals, he
2 reimburses me for the physicals and of course he's
3 reimbursed by the attorneys, and if I'm doing B-reads
4 up until recently, he submitted that bill for me and I
5 think we now submit the B-reads directly because we
6 took over the typing of the reports because there were
7 some errors being made and things had to go back and
8 forth until we got it right so, it worked out better
9 for us to do that.
10 Q What is your, in this setting that you're telling
11 us about, what is your charge for doing a typical
12 physical examination?
13 A I believe Mike pays me Three Fifty per physical.
14 Q For a B-read?
15 A I think it's a Hundred and Twenty or thereabouts.
16 Q You just got a raise recently, you raised it
17 $5.00?
18 A That's right.
19 Q And if you're doing both, is there some economy
20 scale here?
21 A Well, I don't get paid for the pulmonary functions
22 when I go away on the trips for Mike and I think what
23 he does is he rolls the physical and a small fee for
24 reading the PFT into one fees and pays that for a
25 physical and the B-reads are One Twenty, One Twenty

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1 Five, whatever it is. If we do B-reads here in the
2 office then, if we do X-ray and the B-read we charges
3 Two Hundred Dollars, at least that's what Christy tells
4 me, and the pulmonary function, I believe, is Four
5 Fifty, and the physical in the office is Two Hundred.
6 Q And I am correct in stating that the result,
7 whether it's positive or negative on your physical
8 exams, on your PFTs, on your B-reads, has nothing to do
9 with the compensation received, correct?
10 A Correct.
11 Q Okay. For curiosity sake, because I'm sure it's no
12 surprise to you, I am interested, we all are, in
13 knowing of the persons you see, what percentage, rough
14 -- and I realize it's an estimate, would you testify to
15 us, from the B-reads would have a -- be found to have
16 an abnormal review from the standpoint of possible
17 asbestos exposure?
18 A I would think somewhere in the region of 20 to 25%
19 and I say that because a lot of the B-reads that I get
20 are actually rereads of other B-reads. I mean, Dr.
21 Herring (phonetically) got himself into a lot of bother
22 and I guess his name was not very well thought of and
23 so I end up rereading a lot of X-rays that have
24 previously been read and many of those I don't feel are
25 positive. So, I would say about 20 to 25% and on some

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1 of the trips that I've taken, I would say we maybe have
2 gone as high as 35% on positive reads on some of the
3 trips and less than that on other trips.
4 Q So, if I've got the numbers correct, when you say
5 30 to 35, or whatever it is that you said, those are
6 the percentage of positives out of the total number
7 evaluated, or is that the number of abnormals or the
8 number of normals, that 30 or 35?
9 A Oh, no, no, that would be the number of abnormals
10 at the most. Now, normals, I would think -- I don't
11 really keep much -- I don't really pay attention to how
12 many are positive, how many are negative. I just read
13 each individual film -- you know -- as I say, it
14 doesn't make any difference to me whether they're
15 positive or negative but if I have to guess I would say
16 on average it's probably 20% to 25% positive --
17 Q Meaning they're abnormal.
18 A Now, if you look at other abnormalities, of
19 course, then the number of abnormals would be higher
20 but pertaining to asbestos, I would think 20 to 25%.
21 Q Now, let's step over to another setting. Let's
22 assume that I come to you again and say, I'd like to be
23 evaluated, so-and-so represents me and suggested I come
24 and see you, please evaluate me for possible asbestos
25 related disorder, complications, whatever, let's assume

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1 then that PFTs are done in your Clinic, that the X-ray
2 is taken here and read by you and that you do the
3 physical examination, do the numbers that you've given
4 to me -- given to us as the estimated percentages of
5 abnormalities found related to asbestos or believed to
6 be related to asbestos, are they the same as for those
7 in that setting of everything you've done at your
8 office or is it different, higher or lower?
9 A If I can understand what you're saying --
10 Q Let me redo it. That was a terrible question. You
11 shouldn't have to worry about, wonder about what I'm
12 asking you. Forgive me for that. I'm trying to put
13 you back, totally, in your own environment --
14 A Right.
15 Q -- not on the road, not looking at Dr. Herring,
16 re-reads, nothing like that --
17 A Right.
18 Q -- the person comes to your Clinic, has the PFTs,
19 has the X-rays, you read, you interpret the PFTs, you
20 interpret the X-rays, and you do the physical
21 examination and in that setting, that environment, what
22 percentage of abnormals on an evaluation would you
23 find, typically, or average, whatever phrase that's
24 better?
25 A Most of those are fairly selective cases because

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1 many of them have already got a positive B-read before
2 they're sent to me and the ones of those, I would say
3 less than 20% of those that have been previously noted
4 to have a positive B-read would I disagree that there
5 isn't any evidence of asbestos. So, if these are
6 patients that have already been assessed and I'm re-
7 assessing them independent of the previous assessment I
8 would say that -- you know -- 70% of those patients are
9 positive, in my estimation as well. If they're
10 patients that, let's say, come in off the street and
11 have never been assessed before then, obviously, the
12 percentage would be much lower because many of them
13 would be negative and it would be hard for me to give
14 you a fixed percentage in accuracy. It would be
15 significantly lower, I would think.
16 Q Is there even a range that you could estimate,
17 don't want you to guess, but an estimate, a range
18 perhaps?
19 A Thirty to fifty.
20 Q Okay. All right. Back to a question I asked a
21 moment ago, you're continuing work in doing
22 evaluations, whether it be on going to another location
23 or doing it here in your own Clinic, you have continued
24 to do so for the Hissey, Kientz firm, there's another
25 firm you believe in Houston that you're doing some work

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1 for --
2 A Yes.
3 Q By any chance is it Brent Coon?
4 A We have seen some cases for them. And we've seen
5 cases for Medesco (phonetically) and --
6 MR. CHAMBERS: Larry Medesco.
7 DIRECT EXAMINATION - (Continuing)
8 BY MR. HARRISON:
9 Q How about Simon Eddins?
10 A Simon?
11 Q Simon Eddins?
12 A I may have seen some --
13 MR. CHAMBERS: Greenstone.
14 MR. HARRISON: Yeah. What was that?
15 MR. CHAMBERS: Greenstone. Simon, Eddins
16 and Greenstone.
17 DIRECT EXAMINATION - (Continuing)
18 BY MR. HARRISON:
19 Q Greenstone.
20 A The name's kind of familiar but I'm not sure about
21 that one. And Moody, here in Little Rock.
22 Q Ed Moody, sure.
23 A And Pierce out of Pennsylvania, and one firm out
24 of California that I don't remember the name for.
25 Q Is the name Waters and Krause familiar at all to

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1 you?
2 A No.
3 Q How about Iola, Mark or Randy Iola?
4 A No, that doesn't ring a bell.
5 Q Since the first of the year, let's take a little
6 snippet, how many folks have you seen either on the
7 road or here in your own facilities for an evaluation,
8 however many pieces of the three fold evaluation there
9 may be, for an evaluation to determine the potential of
10 an asbestos related condition?
11 A Okay. Physicals, I would say fifty maybe, fifty
12 to seventy five. B-reads, oh, gosh, a hundred maybe to
13 a hundred and fifty, and PFTs, I'm guessing, but I
14 would say approximately fifty. Those are my best
15 guesstimates.
16 Q And you plan to continue with your consulting and
17 evaluation work that you've been doing?
18 A I hope to.
19 Q I read, I'm going to be very candid with you, I
20 read in one of the depositions you're estimate of
21 income and the first estimate that you gave, as I
22 recall, was approximately -- since you came to the
23 State -- well, that's not right -- since around the
24 time you came to Arkansas, around 2000, through last
25 year was around a Half a Million Dollars a year and

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then, on reflection, you thought, well, it might have been less and it might have been more, a Hundred and Fifty to Five Hundred Thousand a year, and then there was an attempt to try to get some kind of a (inaudible) and it says what it says. Since that time, have you, on reflection, sat down and tried to figure that out?
A I haven't, to be quite frank.
Q Okay.
A And I was kind of guesstimating then, and that's why one of the attorneys said, look, you shouldn't guess, if you're going to say it, say it, say what it is --
Q The Plaintiff's attorney, yes.
A Right. Exactly.
Q Would you -- you can, it is possible to determine that by reviewing your 1099s?
A Should be.
Q And then by also, reviewing whatever records you have for those that are done within your office, correct?
A Right.
Q I would ask that you undertake to do that but would like you to think about it first and to try to give us some sense of how much time it might take. I would not expect you to do it for free. I would not

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ask that. I've also not interested in paying a Million Dollars. So, somewhere way down on the other end of that range, and if you'll communicate that to Andrew, Mr. McEnaney, we'll visit about it.
A I mean, my inclination is not to.
Q Because of the time?
A Well, because of the time and also, our attorneys have advised me that that is not information that I want to disseminate. I mean, a lot of it is personal stuff.
Q Why don't I do this. Why don't I send you a written request, and I'll copy Andrew, and then you can show that to whatever attorneys you want, and let's get over that threshold first, whether you're agreeable to doing it or not, and then we can talk about some parameters and controls on it, if you will?
A Uh-huh.
Q And that way -- because it is a personal thing. I want to tell you that I think Arkansas Courts would compel it to be done. That's one lawyers view. Please do consult your friends, whoever, attorneys, whoever. I'll do that and I'll do it on behalf of the group.
All right, Doctor, thank you.
Q When you travel to other sites, who maintains the records for those site evaluations?

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A We would have copies of the dictated report that I produced and I believe that Mike would probably have copies of the pulmonary function and the intake forms taht they use and I would think that the originals probably all go to the attorneys, but I may be wrong on that. But from my prospective, what I keep are my original dictations, basically.
Q If you did the B-read, would you have at least a copy of that record?
A Yes, I would.
Q Okay.
A And I would not have the films because the attorneys retain the films.
Q Right. That was my next area I turned to, the films themselves. Do you maintain a record of the films here as flat films, as I call them. That's not a technical term, I know, but or digitally only such that they have to be printed?
A No. Our films are old fashion regular films.
Q They're actually required to be, aren't they?
A Yes --
Q For --
A -- you're not allowed to use digital.
Q Okay. And you do -- you keep the originals here?
A No, we send the originals to the attorney that's

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requested them.
Q Okay.
A And very often, of course, the X-rays that I read are sent to us by the attorneys so we send them back with the reports.
Q So, I was making a nice request to Mr. McEnaney to release these films, he would have those as best you know?
A As far as I know, yes.
Q Okay. If we were to set aside all of your litigation related evaluations -- let me say that differently -- if we were to set aside all of your evaluations concerning asbestos related conditions that are also related to litigation, exclude that from our discussion, how many patients that you see as patients coming into your office since you have moved to Arkansas would you estimate you have diagnosed to have asbestos related conditions?
A I think since we've been here, because of course, people know that I'm interested in asbestos related lung diseases and the other Physicians are aware of that, I get referred patients from other Physicians for evaluation of asbestosis and some patients that I've seen, particularly locally, with asbestos wish to come see me then as a regular patient, and I would say a

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1 rough estimate would be less than 10% of my patients.
2 Q And if I used this estimated average number of
3 patients that you've seen over the last however long we
4 were discussing, it would be what, 10% of that number,
5 or less?
6 A Or less, 10% or less.
7 Q Doctor, have you testified in a Courtroom during
8 the course of a Trial or an Administrative Proceeding
9 on any asbestos case?
10 A No.
11 Q You have, we know, given depositions in the past,
12 not many perhaps, but have given some. You gave one in
13 January of 2009 or 2010?
14 A Just --
15 Q 2010?
16 A Yes.
17 Q A couple of months ago?
18 A Yes.
19 Q We know you gave that. Have you actually given a
20 deposition in any other asbestos related cases?
21 A I gave a telephone deposition to the firm in
22 California and I think that was probably 2008, I would
23 think.
24 Q And do you know the results of that case?
25 A I believe it was -- in fact, I know it was settled

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1 because I saw the patient today and he told me he had a
2 check.
3 Q A check to pay you?
4 A No, he didn't give me a check.
5 Q Okay. Do you know what -- who his -- not his name
6 --
7 A Right.
8 Q -- but do you know who his attorneys were?
9 A I believe Ed Moody was the local attorney and he
10 then with another firm in California because the
11 patient had exposure in the shipyards in California.
12 Q Any other depositions?
13 A Not that I can remember, related to asbestos.
14 Q Yes, and thank you for adding that because that
15 was my intended question. Do you have, or were you
16 provided a copy of the telephone deposition?
17 A No.
18 Q I have a copy but just out of curiosity, do you
19 have a copy of the one that you gave in January of this
20 year?
21 A No, well, I tell a lie. Yes, I do.
22 Q That's not a lie. You made a mistake. Was that
23 sent to you in due course as a part of your work in
24 that case by the Plaintiff's counsel, or Defendant's
25 counsel?

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1 A I'm not quite sure who sent it. I thought it was
2 the Court Reporter.
3 Q It was, because you had to read and sign. I
4 remember that, that's right. Okay. I apologize for
5 wasting your time on that aspect of it. Okay. You
6 given at least one other deposition, I know, but I
7 can't recall what kind of case but maybe a welding case
8 or chemical exposure case, something like that?
9 A Was that a Workman's Comp. case? I've been before
10 the Administrative Law Judge on behalf of a patient but
11 that was for a disability Hearing. I've given
12 testimony for Entergy for a Court Hearing in Helena,
13 and that was, I think, around 2006, and --
14 Q It didn't have to do with mercury, did it?
15 A No, it was a toxic mold case. And I believe I gave
16 testimony in Court in Little Rock on a case of
17 industrial asthma on behalf of two railroad engineers,
18 and those are the only ones I remember.
19 Q Was this a State Court or a Federal Court,
20 railroad cases are often in Federal Court.
21 A I think it was Federal Court.
22 Q I'll come back to this. Andrew, can we just pause
23 for a second off the record.
24 (WHEREUPON, an off the record break was
25 taken at 4:01 p.m.)

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1 (WHEREUPON, back on the record after break
2 at 4:03 p.m.)
3 DIRECT EXAMINATION - (Continuing)
4 BY MR. HARRISON:
5 Q Have you reviewed any epidemiological studies that
6 would, in your view in any way, relate to what you
7 understand to be the work history of any of the three
8 individuals that bring us here today?
9 A Pertaining to these three, no.
10 Q Pertaining to the work, the kinds of work that
11 they do?
12 A Well, other than reviewing literature on asbestos,
13 asbestos related diseases, and the requirements for the
14 diagnosis and the occupations that are involved in the
15 exposure to asbestos, and no -- nothing other than
16 that.
17 Q So, for example, because you mentioned asbestos,
18 do you know whether you've reviewed -- or whether any
19 exists, any epidemiological studies exist concerning
20 people who work around boilers?
21 A Well, I mean, I've certainly read enough medical
22 text that indicate that boiler makers or people that
23 work around boilers are exposed to asbestos.
24 Q Let me re-direct your thinking. I'm going to
25 limit it to epidemiological studies about a particular

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1 trade or industry or kind of work.
2 A Only in the context of the clinical -- how can I
3 explain it -- I'm not an epidemiologist so my interest
4 in diseases, in how it pertains to the individual,
5 and/or a group of individuals and so, I'm aware of the
6 type of occupations that are associated with exposure
7 to asbestos but I've not, to my knowledge, specifically
8 reviewed -- you know -- epidemiological papers on the
9 degree of exposure, etc., for a specific population of
10 employers.
11 Q Incidents of exposure or incidents of this or
12 another firm, this or that trade, you haven't seen that
13 specific epidemiology studies for those kinds of
14 trades, right?
15 A I would have as it pertains to chemical disease
16 presentations.
17 Q I confess to you that I was snooping a bit and I
18 understand that, and I may be mistaken here, it's my
19 understanding that this facility is rented space as
20 opposed to a condominium type arrangement, correct?
21 A You mean the office?
22 Q Yes, sir.
23 A Yes.
24 Q And I noticed, or at least it's my understanding,
25 that you do own some real estate, or someone with a

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1 similar name owns some real estate but it's C. & L.
2 John.
3 A We have a company, I think it's Chris and Laurie
4 John Properties.
5 Q Does it have anything to do with your Clinic
6 practice and evaluation of asbestos?
7 A No, no.
8 Q Last I understood it, you have not been retained
9 by what we would typically call a defense law firm,
10 typically represent Defendants in litigation like this
11 have you, for asbestos related cases.
12 A Oh, not for asbestos, no.
13 Q It's still true, is it not, that you've not
14 engaged in any research studies, control studies
15 concerning asbestos?
16 A No.
17 Q Right.
18 A That's correct.
19 Q That'd be correct?
20 A Yeah, I'm a Clinician.
21 Q Okay. You mentioned a moment ago, in a general
22 way and I'm trying to describe that you have examined
23 literature concerning asbestos and asbestos related
24 potential conditions. Do you have -- what kind of
25 literature do you read?

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1 A Well, various respiratory text, Internet searches
2 and more -- as time has gone by, more Internet searches
3 than textbooks because textbooks tend to be out of date
4 by the time they print it, and if I come across
5 articles in various journals, like Chest magazine, or
6 Thoracic or the Medical Journal, New England Journal,
7 then obviously, I'll review those and -- but no
8 specific area. I simply look for information on it and
9 review it and see if it's pertaining to what I do and
10 is there anything new coming out in terms of the
11 diagnosis, treatment, and things like that.
12 Q Do you have any favorite text or treatise that you
13 do continue to refer to from time to time?
14 A Well, in regards to the B-reads, obviously --
15 Q Again, let me interrupt, I'm focusing only on
16 asbestos related conditions, or potential ones --
17 A Right. The B-read part of my asbestos.
18 Q Oh, certainly. What would you look at?
19 A I basically use the ILO information and the
20 standard films with that. In regards to the disease
21 process, I look at the papers by ATS, and basically
22 review several of the references that have the sites
23 that they will refer you to and of course, I look
24 through standard respiratory textbooks from a clinical
25 prospective.

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1 Q What surgical textbooks would you --
2 A Clinical.
3 Q -- clinical textbooks, I'm sorry.
4 A Well, I can't remember the one I've got down there
5 but it's a relatively older one but there's the Oxford
6 Text of Medicine, and New England Journal produces some
7 information and then, the Harrison's textbook --
8 Q Internal medicine?
9 A Right.
10 Q Am I correct that the current ILO package is for
11 2000, that that's the most recent? I'm not talking
12 about the ATS.
13 A You're talking about the films.
14 Q Instructive material, format and the films.
15 A I believe it is. Certainly sometime, whether it's
16 2000 or 2001, it's in that range.
17 Q You mentioned the ATS. Do you have and review
18 periodically the ATS guidelines for management --
19 diagnosis and management?
20 A Right.
21 Q Asbestos, whatever the title, asbestos related
22 conditions. And do you have and use the, what I
23 understand to be the latest released or approved in
24 late 2003, released in 2004, that ATS --
25 A That's the most recent one, right.

Exhibit 2

A – C)

IN THE CIRCUIT COURT OF TENNESSEE FOR THE THIRTIETH
JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY, TENNESSEE

BERTHA FARMER, Administrator Ad Litem	)	
of The Estate of WILLIAM E. FARMER, JR.,	)	
Deceased,	)	
Plaintiff,	)	
	)	
V.	)	CASE NO. CT-001881-07
	)	DIVISION III
ILLINOIS CENTRAL RAILROAD COMPANY,	)	
	)	
Defendant.	)	

ORAL DEPOSITION
OF
CHRISTOPHER LEIGH JOHN, M.D.
(Taken January 8th, 2010, at 1:23 p.m.)

1 APPEARANCES
2
ON BEHALF OF THE PLAINTIFF:
3
William P. Gavin, Esquire
4 Gavin Law Firm
17 Park Place
5 Belleville, Illinois 62226
6
ON BEHALF OF THE DEFENDANT:
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1 CAPTION
2 ANSWERS AND ORAL DEPOSITION OF CHRISTOPHER LEIGH
3 JOHN, M.D., a witness produced at the request of the
4 plaintiff, taken in the above-styled and numbered cause on
5 the 8th day of January, 2010, before Monique A. McAllister,
6 Certified Court Reporter, at 1:23 p.m., at the offices of
7 Southwest Pulmonary, 11321 Interstate 30, Suite 205, Little
8 Rock, Arkansas, pursuant to the agreement hereinafter set
9 forth.
10
11 * * * * * * * * *
12 STIPULATIONS
13 IT IS STIPULATED AND AGREED by and between the
14 parties through their respective counsel that the oral
15 deposition of CHRISTOPHER LEIGH JOHN, M.D. may be taken for
16 any and all purposes according to the Tennessee Rules of
17 Civil Procedure.
18
19 * * * * * * * * *
20
21
22
23
24
25

1 PROCEEDINGS
2 THEREUPON,
3 CHRISTOPHER LEIGH JOHN, M.D.,
4 THE WITNESS HEREINBEFORE NAMED, having been first duly
5 cautioned and sworn by me to testify to the truth, the
6 whole truth, and nothing but the truth, testified on
7 their oath as follows, to-wit:
8 EXAMINATION
9 BY MR. PETERS:
10 Q Could you state your name, sir.
11 A Christopher Leigh John.
12 Q And your curriculum vitae is going to be here
13 shortly, correct?
14 A Correct.
15 Q Now, I do understand that you started off in Wales;
16 is that right?
17 A Right. I did my medical degree in Wales at the
18 University of Wales in Cardiff.
19 Q Did you grow up in Wales?
20 A Yes.
21 Q What caused you to -- after you got your medical
22 degree in Cardiff, what did you do?
23 A I went to South Africa and worked there for
24 approximately two years at the University of Natal.
25 After that, I went to Canada to the University of

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1 Q And continuous laser course and certification, is
2 that basically the same thing?
3 A Yes, basically.
4 Q Vascular laser surgery course in Dallas, what's
5 that about?
6 A It was on how to use laser. It's a hands-on
7 training thing to use lasers for varicose veins and
8 things like that.
9 Q Do you do that in your practice?
10 A No, I never used it.
11 Q Why did you do that?
12 A I like to learn different things, and that's why I
13 liked to do that basically.
14 Q What about the vascular ultrasound course?
15 A Same thing. I did that in Houston. Just something
16 I wanted to learn how to do and so I could understand
17 it better when I got reports, things like that.
18 Q Okay. And your federally certified NIOSH chest
19 X-ray B-reader exam in 2007?
20 A Uh-huh.
21 Q What's -- I mean, I know what that is, but why did
22 you get that?
23 A To be able to do B-readings basically.
24 Q And why did you want to do B-readings?
25 A It was a challenge. I didn't really plan on doing

Page 19

1 it. But the more I read about it, you had -- you know,
2 it was a fairly hard exam to pass, so I thought, well,
3 I'll give it a shot. And one of the attorneys locally,
4 you know, said that he was having a problem getting
5 B-readers at that time and why didn't I think about
6 doing it. So it was kind of a challenge that he laid
7 down to me, and so I thought, what the hell, I'll go
8 ahead and do it.
9 Q What attorney was that?
10 A Edward Moody.
11 Q Had you had contact with Ed Moody before that?
12 Were you friends?
13 A Well, we were friends and colleagues. I'd seen
14 patients for him prior to that for evaluation of
15 asbestosis.
16 Q When did that start?
17 A About '91 -- no, not 91. Sorry. We came here --
18 2001.
19 Q I guess let's go back and catch up. So you're in
20 Texas and it's in approximately 1994, how long did you
21 stay in Texas?
22 A Until 2000.
23 Q Okay. And why do you leave Texas?
24 A Didn't like it in the place I was working.
25 Q And had you been in Brownwood all that time?

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1 A No. Stayed in Brownwood for a year and a half and
2 then moved to a place called Marshall, Texas.
3 Q How long were you in Marshall?
4 A Was there from '96 until 2000.
5 Q Now, in America, when you're in Brownwood and
6 Marshall, Texas were you working in the subspecialty of
7 pulmonary medicine --
8 A Uh-huh.
9 Q -- or were you working as an internist?
10 A Both.
11 Q What percentage of your work was done in pulmonary
12 medicine when you were in Brownwood?
13 A Probably 60 percent.
14 Q And how about Marshall?
15 A Probably about 50 percent there.
16 Q Up until the time you got -- what caused you to
17 come to Little Rock? Is that where you went in 2000?
18 A Yeah. Recruiters again.
19 Q Where did they recruit you to?
20 A Recruited me to this hospital, Southwest. What was
21 at that time called Southwest Regional Medical Center.
22 Q I've been to the hospital and been to the medical
23 office. Something ice obviously changed here?
24 A Yes. It was a HCA hospital and they sold it to
25 Baptist and Baptist is converting it into a psychiatric

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1 facility.
2 Q I take it you -- when it was Southwest Regional,
3 that's the primary place where you had privileges?
4 A Initially, yes. And then, after that, after I'd
5 been here just a short while, I got privileges at the
6 Arkansas Heart Hospital and also at Baptist Regional
7 Medical Center, which is the main Baptist downtown.
8 Q I take it now there is no Southwest Regional
9 Hospital?
10 A Correct.
11 Q And so you're --
12 A I work primarily out of the Heart Hospital and
13 infrequently at Baptist.
14 Q And is your specialty now more internal medicine?
15 A No. It's pretty much all pulmonary.
16 Q Okay. People with associated heart disease?
17 A Well, no. I'm the only pulmonologist on staff at
18 the Heart Hospital, so I pretty much do -- I do pretty
19 much all the pulmonary medicine, and I do most of the
20 critical care. And because the cardiologist don't like
21 to do internal medicine, I help them out in that
22 respect as well.
23 Q What percentage of your time is done doing internal
24 medicine pulmonology?
25 A Five to ten percent.

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1 A Yes, correct.
2 Q Have you ever followed any of those as patients
3 after that?
4 A Some of them. Not very many, but not some of them.
5 Q And how many people have you evaluated for
6 litigation purposes?
7 A Again, several thousand.
8 Q Okay. When did that start?
9 A 2001, I believe.
10 Q Okay. So you arrive in Little Rock in 2000 and
11 open up a practice, correct?
12 A Uh-huh.
13 Q Have to answer verbally.
14 A Oh, yes.
15 Q And then at some point, you run into Ed Moody
16 first?
17 A Yes.
18 Q And how did that happen?
19 A I don't honestly remember. I think we had several
20 patients that had asbestosis at that time who were
21 seeing me, and I don't know whether Ed got my name from
22 the patients or, you know, how it came about and he
23 just asked if I was interested in seeing patients with
24 asbestosis-related lung disease. And I said, yes,
25 sure, I'll see them. And so that's how it started out,

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1 I believe.
2 Q Are most of the patients that you see here from the
3 Little Rock area?
4 A Most of my patients are from Arkansas, in the sense
5 that the Heart Hospital pulls patients in from all over
6 the state, and so I -- it's hard for me to say the
7 majority are actually from Little Rock because there
8 are a lot of people that come from, you know, the
9 surrounding cities. I would say 50 percent of my
10 patients are Little Rock natives and then 50 percent
11 would be non-Little-Rock natives.
12 Q And is that the same census breakdown for the
13 several thousand asbestos or asbestosis patients you've
14 seen?
15 A The majority, I would think, would be from
16 Arkansas, although, we have had several from other
17 states as well.
18 Q And again, we're just talking about as a patient,
19 not for litigation purposes?
20 A Well, no. Most of the -- my patients with
21 asbestosis would be from Arkansas.
22 Q Okay. And again, that's several thousand patients
23 over the years since 2000?
24 A Yes.
25 Q Now, as part of your job, you report your diagnoses

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1 of various disease to the state and to the CDC,
2 correct?
3 A Not as a routine, no, not unless it's something
4 we're supposed to do.
5 Q You report asbestosis diagnoses to the CDC,
6 correct?
7 A No.
8 Q Do you -- is it your belief that you're not
9 required to do that?
10 A I wasn't aware of that.
11 Q I'm not either. I thought it was.
12 A Well, no. Why would they do it? Because they are
13 -- they are for infectious diseases.
14 Q How do you report the -- how do you report your --
15 if you diagnose asbestosis, how do you report it as far
16 as government agencies are concerned?
17 A I don't.
18 Q Do you ever report it to NIOSH?
19 A No.
20 Q Is there some unusual asbestosis epidemic in
21 Arkansas?
22 A Not that I'm aware of.
23 Q I mean, would it be your belief that most
24 pulmonologists deal with approximately -- since 2000,
25 have dealt with several thousand asbestosis patients?

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1 A No. Because most of my colleagues that I work
2 with, you know, know that I have an interest in that,
3 and so I get a lot of patients sent from that
4 perspective.
5 Q Okay. When did your interest in asbestosis start?
6 A Well, I used to see some in Texas, not a great
7 deal, but mainly when we came here.
8 Q In Texas, were you ever involved in any litigation
9 in Texas?
10 A No.
11 Q You never saw a patient for the purpose of
12 litigation while you were in Texas?
13 A Well, that's not true. Yes, I would have seen
14 some, but I was not involved in litigation per se. I
15 did see some patients that were sent by a law firm in
16 Texas, but I think I just did a examination on the
17 patients and possibly pulmonary function testing.
18 Q What was that law firm?
19 A It was in Marshall, and I don't remember the name
20 of them, but they were apparently at one point fairly
21 big in the asbestos field, but I don't remember the
22 name.
23 Q And when you got to Little Rock, you saw more
24 patients?
25 A Yes, yes.

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1 Q Was that -- when you first saw your group of
2 patients, were you surprised at the number -- I don't
3 know how a doctor comes into a place and gets a hundred
4 patients, but --
5 A Well, no. Right, no, no.
6 Basically, after Mr. Moody started sending me
7 patients, I guess there's word of mouth out there, and
8 so I would get patients coming to see me for asbestos
9 and, of course, Mr. Moody was sending me quite a lot of
10 patients with asbestos.
11 Q Okay. See, you're saying "sending me patients" and
12 that's throwing me off, so maybe I don't understand
13 this quite correctly.
14 Mr. Moody would have individuals that he would be
15 seeking to exams for the purposes of litigation,
16 correct?
17 A Correct.
18 Q You don't consider those patients, do you?
19 A Well, yes. If I'm seeing them as a physician, they
20 are a patient. I don't consider them my patients, no,
21 unless they decide to follow-up with us, but they are
22 still patients.
23 Q Okay. I mean, I'd call those claimants, but --
24 A All right.
25 Q Okay. So in addition to that, lawyers would send

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1 you people with asbestosis for purposes of
2 subtreatment, not just as for litigation?
3 A No, not lawyers. Either other physicians or
4 patients would call themselves.
5 Q Okay. And on the recommendation from a lawyer
6 or --
7 A Well, that, I don't know. Not that I was aware of,
8 no.
9 Q What I mean is: Have you ever referred asbestos
10 patients to lawyers?
11 A I've had some patients that have come in and I have
12 done that, yes.
13 Q And I take it you'd refer them to Mr. Moody?
14 A Yes, mainly.
15 Q And how often have you forwarded a patient that
16 came to you to Mr. Moody for the purpose of a lawsuit?
17 A Maybe, oh, gosh, two or three in a six-month period
18 perhaps.
19 Q And then, is it safe to say that the other patients
20 that you see already have lawyers, even if you may not
21 have contact with them?
22 A I would think so, yes.
23 Q Okay.
24 A They will often tell me that they are involved in a
25 class-action suit, and I don't typically ask them, you

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1 know, who the attorney is. I mean, I just realize that
2 they are in it and that's it.
3 Q Yeah.
4 But what percentage of the several thousand
5 patients you've seen didn't have a lawyer?
6 A Well, if they -- I don't really know how to answer
7 that because if they didn't -- I mean, I don't
8 specifically ask them do they have a lawyer, but I
9 would think a relatively small percentage of them don't
10 have an attorney.
11 Q What doctors send you patients for asbestos review?
12 A Well, family practitioners, some of the
13 cardiologists.
14 Q Do you have the names of some of the doctors who
15 have sent you the most?
16 A I couldn't give you a specific name and number, no.
17 Q Has anybody sent you, like, let's say more than 50
18 patients?
19 A No.
20 Q How about anybody send you more than 20 that you
21 know of?
22 A Well, you know, it's not something I would keep
23 count of. Because patients will often call themselves,
24 of course, and even though they have another doctor,
25 you know, they may basically contact my office and book

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1 an appointment. I mean, they don't have to be
2 referred, unless it's related to their insurance, in
3 which case, you know, they may say you've got to be
4 referred by your PCP. But they can make an
5 appointment, you know, on their own if they wish to.
6 Q And then when you take their history, you find out
7 who their internist is or who their family physician is
8 and you usually write them a letter about what you
9 found?
10 A If the patient requests that we do, correct. Some
11 patients don't want their primary care doctor to have
12 that information. Don't can ask me why. It's just the
13 way people are.
14 Q Does that happen often?
15 A It's not often that they'll say not to send a
16 report. But sometimes, you know, I would say
17 15 percent, maybe, 20 percent.
18 Q Have you ever figured out why any of them don't
19 want to tell their primary care doctor?
20 A Not my business.
21 Q When a lawyer refers you a patient for asbestosis
22 review or pulmonology review, do you do anything
23 different than if the person comes in as a patient off
24 the street?
25 A In what respect?

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1 Q In anything?
2 A No. They come in. They are treated like a regular
3 patient.
4 Q Pay, the payment's different, correct?
5 A Well, the payment's different in the sense that if
6 they are referred by an attorney, they pay us -- they
7 pay us as opposed to filing it on their insurance or
8 something like that.
9 Q Okay. So when -- let's say you've seen patients --
10 or I guess you call them patients, you've seen people
11 in litigation for Ed Moody, correct?
12 A Uh-huh, right.
13 Q Anything other than asbestosis individuals?
14 A From Ed?
15 Q Yeah.
16 A Not that I can remember, no. And he may have sent
17 me somebody that he was concerned about that maybe had
18 a tumor, you know, or an abnormal, if he got a B-read
19 that was abnormal from another physician that was
20 local, he might have sent me one or two like that.
21 Q Okay. And then what other lawyers have sent you
22 cases?
23 A Well, this gentleman's firm (indicating). I get
24 attorneys from, I believe, it's Pennsylvania. We've
25 had some from Florida, several from Texas, one from

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1 California. And I think that's, you know, from those
2 states, in general.
3 Q Are there any particular firms that you can recall?
4 A There are, but I don't remember their names. I can
5 get those for you, though.
6 Q I'd appreciate it if you'd get that for me and
7 forward them to Mr. Gavin and he can forward them to
8 me.
9 A Sure, not a problem.
10 Q Brayton and Purcell?
11 A Doesn't ring a bell.
12 Q Okay. Texas, Roven and Kaplan, Roven, Kaplan &
13 Wells?
14 A No.
15 Q Jones and Roget?
16 A No.
17 Q Anybody from Little Rock refer you cases, other
18 than Mr. Moody?
19 A No. At least not that I'm -- you know, that I can
20 remember offhand.
21 Q You've not heard of Chris Christy or Jones and
22 Roget?
23 A No.
24 Q How did Mr. Gavin first contact you regarding doing
25 work or seeing individuals for you?

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1 A I really don't know the answer to that. I think it
2 was probably through his connection with Ed Moody.
3 Q Of the several thousand -- I mean, can you be
4 anymore precise than that, 10,000; 2,000?
5 A No, it wouldn't be 10,000.
6 MR. GAVIN: From me?
7 MR. PETERS: No, no.
8 MR. GAVIN: Okay.
9 A Three to five maybe, and that's a guess.
10 BY MR. PETERS:
11 Q And of that 3,000 to 5,000, how many of those were
12 from Ed Moody?
13 A Guessing, I would say two-thirds.
14 Q Okay. And who would be the next highest person?
15 A Let's just say --I'd have to look, you know, up
16 their names, but I can certainly give you that
17 information.
18 Q Yeah. I'm wanting you to give me the name and also
19 give me the volume?
20 A Right, right, yeah I --
21 Q Do you keep track of that too?
22 A I don't. I don't know -- I mean, we don't
23 specifically keep track of which law firm sends us, you
24 know, which number. I'm just going on, you know, my
25 recollection of who I dictate the letters to.

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1 Q Yeah. See, that's what I'm going by. I know
2 you'll have -- I know you can produce to me a list of
3 the names of the people you work for, but my question
4 is whether I can found out what volume you do with
5 those people or am I left with your memory?
6 A I mean, I'll ask my ladies that work at front desk
7 because they do the typing and, you know, there may be
8 some way they can get that data.
9 Q But as far as your memory, have I exhausted you?
10 There's no name that -- Ed Moody, you say that's Ed and
11 I know that's Ed because I did two-thirds of my work
12 from him, but there's also Joe from San Francisco
13 because I do a lot of work from Joe.
14 A Do I think there's not another Ed out there, no.
15 One of the firms in Florida is Modesco (sic).
16 Q All right.
17 A And Hissie Kints, I believe, is in Houston. I got
18 no idea who it was in California because I know that
19 they didn't send us a great deal. I'll have to get
20 back to you because I wouldn't even -- you know, don't
21 remember.
22 Q You know, most of the people that you saw -- how
23 many people have you seen for Mr. Gavin?
24 A I've no idea.
25 Q More than a hundred?

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1 A I really don't know.
2 Q Okay. And of this, we're talking about actually
3 seeing people?
4 A Uh-huh.
5 Q Have you, since you've gotten your B-reader's
6 license, have you been reviewing X-rays for some
7 people?
8 A Yes.
9 Q And who have been reviewing X-rays for? I take it
10 it's a lot more?
11 A No, it would be -- that would include -- the list I
12 gave you there would include people I actually just do
13 B-reads for.
14 Q So 3,000 to 5,000 could have been an exam, it could
15 have been an exam and a B-read or it could have just
16 been a B-read?
17 A That's right.
18 Q Okay. When you see a patient for purposes of a
19 pulmonary review from a lawyer, who does the PFTs?
20 A We have 9 certified technicians.
21 Q So you do them?
22 A I don't do them, no. The technicians do them.
23 Q Talking about you being Southwest Pulmonary
24 Associates?
25 A Oh, I mean, yes. We do them here, yes.

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1 Q So you have everything you need here for volumes
2 and for --
3 A We have two complete body boxes on-site. We have
4 another body box in storage, and plus we have, you
5 know, I don't know how many spirometers. But we use
6 the body boxes for them.
7 Q And when did you get body boxes here?
8 A Oh, we've always had them here. We've had them in
9 Texas. We've had them in Canada.
10 Q Is that the typical thing that most pulmonologists
11 have?
12 A No.
13 Q Why did you have them in Texas?
14 A Because I'm a pulmonologist.
15 Q No. I said is that typically what most
16 pulmonologists have, they do lung volumes.
17 A Oh, right. Well, not that many do them in their
18 office.
19 Q Many of them do them in the hospital, right?
20 A Yeah.
21 Q Okay. And here, you've gone to the added expense
22 of having them here personally on the property, right?
23 A Ever since I've been in private practice.
24 Q Okay.
25 A Apart from the time I was in that group practice in

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1 Canada, I've always had a full pulmonary lab in my
2 office.
3 Q Okay. Do you ever do screenings or what I would
4 call screenings?
5 A What's a screening?
6 Q Where you would either have a bunch of people show
7 up from a lawyer and say, you know, ten guys, five
8 guys, eight guys and say, we're here for a --
9 A Asbestosis screen, yes. I have done that, yes.
10 Q Okay. How many -- how does that work?
11 A Well, I've done -- I've done two in Oklahoma. I've
12 done three or four in Texas. And basically, it depends
13 on whether I'm doing the physicals or whether I'm doing
14 the B-reads or whether I'm doing both. If I'm doing
15 physicals, they are usually people who have had a
16 positive B-read and the -- I guess the law firms
17 arrange for them to go to a medical office and the -- I
18 do it in conjunction with a nurse and a respiratory
19 therapist. And the nurse does the initial employment
20 screening, getting all the names of their employers,
21 where they worked, what they worked with. And then I
22 see them. I take my own history and do my own
23 physical, then they have a pulmonary function test.
24 And if their X-ray was, you know, longer than let's say
25 -- if it was several years ago, then they will often

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1 have a repeat X-ray. So I will do the physical exam,
2 read the B-read and read the pulmonary function and
3 then make a report basically.
4 Q And by "read the B-read", you don't mean read the
5 X-ray. You mean read the piece of the paper the
6 B-reader did?
7 A No, it depends. If they had an X-ray three months
8 ago or six months ago, then I probably just got the
9 B-read sheet. But more likely, it's something they had
10 several years ago, in which case they'll have a new
11 x-ray and I do the B-read on that X-ray.
12 Q How about before '07?
13 A Before '07?
14 Q Before you were a B-reader?
15 A Oh, well, in that case, then I would have had the
16 B-read report.
17 Q You would have had to rely on that?
18 A Right.
19 Q Did you ever disagree with the B-reader? I mean,
20 did you look at the X-rays when you did those exams?
21 A When I do the exam and I read the B-read myself, if
22 the B-read report is available to me, I will compare my
23 read with that. And certainly, there are times when I
24 disagree with, you know, what's on the report.
25 Q When do you -- I guess when you get the patient,

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1 you already know there's a positive B-read if you're
2 doing the physical exam?
3 A Not always. In the majority of cases, they seem
4 to. But there are some that come in basically that are
5 brought in that I would do, you know, do what I do and
6 read the B-read and the B-read may be negative, in
7 which case, you know, the patient, I guess they go and
8 nothing happens from it.
9 Q Uh-huh.
10 Okay. So how often does the person already have a
11 B-read at the time they got here prior to 2007 roughly?
12 A Oh, before 2007?
13 Q Before 2007.
14 A They would always have a B-read.
15 Q Okay. And then starting in 2007, how often would
16 they have a written B-read or a prior B-read from
17 somebody other than you?
18 A I'd be guessing on that one, but probably maybe
19 50 percent of the time.
20 Q Okay. And of those 50 percent, how many of them do
21 you disagree with?
22 A I've never really tried to put a figure on it, but
23 I would -- I would say maybe 10 percent. And I may be
24 way off there.
25 Q Uh-huh.

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1 And I take it you've had -- your -- the rate in
2 which you see people has picked up since 2007?
3 A No. The rate that I read X-rays has picked up.
4 Q Okay. If I was going to break it down, at least
5 several thousand from 2000 to 2009, I mean --
6 A I would say I saw more people, more patients,
7 between 2001 and 2007, and I've read more X-rays,
8 obviously, from 2007 to the present.
9 Q Have you ever given a deposition before?
10 A Yes.
11 Q To who?
12 A I gave a telephone deposition for a firm in
13 California, and I can check my records and see if we
14 can give you the name.
15 Q Okay. That's where a defense lawyer questioned
16 you, like I am now?
17 A Yes, right.
18 Q How long did that deposition take?
19 A Maybe 45 minutes.
20 Q Okay. Sorry.
21 And have you ever given any other depositions
22 besides that?
23 A Not for asbestos.
24 Q What else have you given depositions for?
25 A I do cases unrelated to asbestos. I gave

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1 depositions for one for Entergy. That was on a
2 mold-related case.
3 Q And you represented the plaintiff or you
4 represented Entergy?
5 A Entergy.
6 Q Okay.
7 A I've done them for medical insurance companies.
8 Mainly, though, not -- not so much deposition,
9 although, I think I gave one deposition. Those were
10 more reviewing chart information and determining
11 whether the case was viable or not, you know, for them
12 either to protect it or not. I'm due to give a
13 deposition in February on a malpractice case that's in
14 Arkansas for -- and I'm on the plaintiff's side on that
15 one, so I've done both sides of the fence, so to speak.
16 Q Uh-huh.
17 Have you ever done -- have you ever seen a
18 asbestos-related case for a defendant?
19 A No, never been asked.
20 Q Okay. How about for silica for a defendant?
21 A No.
22 Q Any other dust disease for a defendant?
23 A Let me correct myself. I did do -- it wasn't a
24 deposition. I was sent a case by some attorneys in
25 Northern Arkansas to review. They were on the defense

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1 side, to see whether the patient did or did not have
2 asbestosis. And the patient did not have asbestosis.
3 Q Were you disclosed in that case, do you know?
4 A I don't know.
5 Q Okay.
6 A I've never had to go to court or, you know -- they
7 actually didn't -- I actually didn't give a written
8 report.
9 Q Okay. Now, the -- have you ever diagnosed
10 asbestosis in an individual without a positive B-read?
11 A Not to my knowledge.
12 Q Is it your opinion that a positive B-read is
13 necessary to diagnose the disease asbestosis?
14 A I believe that a positive B-read is one of the
15 criterion that has to be met, yes.
16 Q Now, the approximately 50 percent of individuals
17 that you saw on referral from attorneys where you did
18 the B-read and the physical exam, what percentage of
19 those did you find the individual had the disease
20 process like asbestosis or silicosis?
21 A Well, the ones that I was primarily asked to do
22 physicals on from Mr. Moody, the majority of those had
23 previously positive B-reads and there were very few
24 that I disagreed with that did not have evidence of
25 asbestosis when I did the second B-read.

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1 For the attorneys where I'd gone to the screenings
2 and have done the B-reads myself or done the physical
3 exam and the B-reads, I would say that we've had a 15
4 to 20 percent positive result. So, out of let's say
5 there's 115 were positive, the others were negative.
6 Q And do you keep track of those numbers in any way?
7 A No.
8 Q Someone tried get a hold of your documents a while
9 back, in some Arkansas litigation?
10 A No, it was some kind of -- we got a subpoena from
11 -- I don't even know who it was from, and they
12 basically wanted everything since my birth up to the
13 present time. And I called Mr. Moody and he went
14 before a judge and they threw that out.
15 Q Okay. Was it General Electric?
16 A I don't know. It was a law firm and I didn't
17 really, you know, see who it was for basically.
18 Q Okay. Did they indicate -- do you recall whether
19 anybody from that law firm had called your office and
20 talked to the office manager?
21 A Yes. Somebody called and said I was going to get a
22 subpoena and that I'd better get all my records ready
23 by the next day or something like that. It was
24 something ridiculous. And she said, well, that's not
25 possible because, you know, a lots of these records are

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1 in storage and, you know, you have to tell us who so
2 that we can get you the right ones. And they said
3 basically they wanted everybody -- they wanted
4 everything. They wanted my financial records back to
5 the year dot. The only thing they didn't ask for was
6 my mother's, you know, blood type. And so it would
7 have taken us months to get all that stuff together.
8 And so I called Ed and said, you know, what am I
9 supposed to do with this because it was one of his
10 cases. And he said, oh, that's a load of BS and went
11 to -- before the judge that was, I guess, set to hear
12 the case and the judge threw it out and I've never
13 heard anything since then.
14 Q Did Ed ever show you the pleading they filed?
15 A No.
16 Q Don't quote me on this because it wasn't
17 significant enough for me to remember what it said, but
18 my understanding from the document was that there were
19 -- someone called your office and the manager was told
20 that you have separate litigation files, 13 file
21 cabinets is what I it said, 13; is that not true?
22 A You mean of the cases?
23 Q I think this lawyer represented in a pleading that
24 you had -- that he contacted your office manager and
25 your office manager told him that you had 13 separate

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1 files maintained separately that are just your
2 litigation files, not the people that you see on a
3 patient basis?
4 A Well, we do have a lot of files. I don't know how
5 many we've got, but we do have a lot of files and we do
6 file them separately.
7 Q That's what I'm getting at. So there is a file
8 room that has the people you see for lawyers some
9 place?
10 A There should be.
11 Q Okay.
12 A Well, not so much a file room, but there will be,
13 you know, files for those patients. Depending on how
14 old they are.
15 Q Uh-huh.
16 A Let's say they go back all the way to 2001, they
17 may be in our storage facility, as opposed to being
18 here.
19 Q What do you keep with respect to litigation that
20 you've been in involved in for a lawyer? Let's say you
21 do a screening, what information do you keep?
22 A Well, for Mr. Moody, we keep the patient's
23 information, anything that he has sent us in relation
24 to the patient and we keep my dictated report. And we
25 would, if we did a pulmonary function, of course, there

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1 will be a pulmonary function test in the report. And
2 if we've done the chest X-ray, my B-reading would be in
3 there or a copy of it. And if it was a B-read from
4 another physician, then there would be a copy of that
5 in the file.
6 Q Would you keep the X-ray?
7 A We keep -- if we'd done the X-ray, yes, we keep the
8 X-rays. Some attorneys, you know, wanted us to send
9 them to them. Others, we keep them.
10 Q So the only thing that would be different would be
11 that some lawyers would want you to send X-rays, so you
12 wouldn't have the X-rays. But even if it wasn't
13 Mr. Moody, is this the information you'd keep that you
14 described to me?
15 A For a different firm?
16 Q Yes.
17 A If we'd seen them here in the office, yes. If it's
18 someone we saw probably on an off-site, then probably
19 the only thing we would have would be my dictated
20 report. And if I did a B-read, then there would be a
21 B-read report. But normally, I wouldn't have the
22 pulmonary function test because I would have reviewed
23 that at the site, and so the lawyers keep that. I
24 don't get a copy of that.
25 Q Okay. Do you hire the screening company -- do you

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1 A Yeah. Most of them are, but more that and also for
2 some of the R and U patterns, they have got just a
3 small window of a film saying, you know, these are R
4 patterns, these are U patterns.
5 Q I guess that's what I'm getting at. So you put up
6 a film, and you're saying, well, it could be negative,
7 it could be positive, reach in the back and what's that
8 film you put up, is it a 10TT, or one of the four
9 films, which one do you use?
10 A No. I mean, if it looks like it's -- let's say
11 it's 2/3, then I'll put a 2/2 and a 3/3 up there and
12 look at it that way.
13 Q Right. I meant the point where it's between normal
14 and abnormal.
15 A Right. If I think it's normal, then that's the end
16 of it.
17 Q What if it's potentially abnormal, what film do you
18 look at?
19 A Right. Well, if it's normal -- you know, if I --
20 if I think it's normal, I simply make my report. If I
21 think it's possibly a 1/0, then I'm going to put the --
22 most of them are ST, so I'll put the 1/1 up and look at
23 that because, you know, I know that if it's less than
24 that, it's normal for sure, and if it's closer to that,
25 then, you know, it's probably a 1/0 because I've

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1 considered the 1/1 and it doesn't look quite as bad as
2 that, but I know it's not normal, so then I'll go with
3 the 1/0.
4 Q Okay. And the 1/0 is an ST film?
5 A Well, it depends. Most of them seem to be ST. I
6 mean some of them are SS.
7 Q I mean, the standard, the 1/0 standard you use is
8 an ST film?
9 A Well, they have got more than one. They have got
10 an SS. There's an ST.
11 Q Okay.
12 A And there's -- well, I think there's an -- yeah,
13 there's an SR as well.
14 Q Okay. And you may pick any one of those three
15 depending on what opacity you think -- the size of the
16 opacity --
17 A Yeah, right, whichever one I think is going to be
18 closest to it.
19 Q Okay. When you first start the reading, you don't
20 have any films up, other than the ones you're reading?
21 A Right.
22 Q Okay. How long does it take you to do a B-read?
23 You told me it's variable, but what's the range?
24 A Yeah. If it's clearly normal, you know, probably
25 three minutes. If it's clearly abnormal, then probably

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1 five or six minutes. And if it's in between, you might
2 look at it, I mean, I'll sometimes leave them up and
3 look at it and then, you know, come back and look at it
4 again before I make a final decision.
5 Q So what would be the time with the range of that?
6 A Five to ten minutes maybe.
7 Q And are most films in that mixed area or are most
8 clear one way or the other?
9 A I would say the majority -- well, no. I wouldn't
10 say the majority. There are a large number of films
11 that are negative.
12 Q Uh-huh.
13 A There are a smaller number of films that are,
14 obviously, very strongly positive, you know, 2/3s and
15 above. There's a percentage of films that have marked
16 pleural changes with not so clear parenchymal changes,
17 and then I would say the majority of the positive films
18 are somewhere between a 1/0 and a 1/2.
19 Q Now, you said pleural changes. Are there any
20 standardized films for pleural changes?
21 A Yes.
22 Q And do you use those too?
23 A Yes.
24 Q And is that just in grading the width and the
25 length of the plaque?

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1 A Right.
2 Q After you -- let's see where did I leave off?
3 Does the time you gave me include dictating the
4 report or filling out the report?
5 A Well, no. Probably it would be -- that would take
6 another couple of minutes.
7 Q And what do you charge to do just a B-read only?
8 A I knew you were going to ask that. I think it's
9 $125.
10 Q And has that been consistent since you started in
11 '07?
12 A Pretty much. It may have gone up $5.00, but pretty
13 close, I think.
14 Q And it's fair to say the first B-read you did was
15 in '07, correct?
16 A Yes.
17 Q What month did you get your B-read in?
18 A I believe it was March.
19 Q And how soon after that did Mr. Moody send you a
20 film to read?
21 A Probably the week I got back. And it took longer,
22 obviously, to read them then because I wasn't as sure
23 about myself and I made sure that I was, you know,
24 comparing them, and so it was -- it would take a lot
25 longer to read them initially and then as I got more

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1 comfortable with it, then it took less time.
2 Q As far as positive findings on a B-read, when you
3 go and do the exam, have you found -- what kind of
4 things have you found that accounted for changes on
5 X-ray that weren't asbestosis or silicosis or
6 pneumoconiosis?
7 A Well, I mean, any number of lung diseases. You
8 know, patients can have pleural fusions. They can have
9 pleural thickening from previous infections. Very few
10 people come in with obvious acute heart failure, you
11 know, I mean -- but some people will have some chronic
12 heart failure and they will have some abnormal breath
13 sounds then. But you know, so COPDers, I mean, we'll
14 sometimes get some of them, emphysema, you know, with
15 decreased breath sounds, that kind of thing. If they
16 had had surgery on their chest previously, then
17 obviously, that would account in some cases with
18 pleural thickening. If they have had previous heart
19 surgery, if they had a postoperative effusion or
20 postoperative bleeding, then that would make you think
21 about that being a cause of the pleural thickening as
22 opposed to asbestos exposures. So any number of things
23 really. And of course, if you had somebody with, you
24 know, obvious rheumatoid arthritis or ankylosing
25 spondylitis or somebody that's got hit by a truck and

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1 had a flailed chest and things like, but you pretty
2 much know that kind of thing on the X-ray.
3 Q Is the most common cause of interstitial markings
4 on X-ray idiopathic fibrosis?
5 A Well, idiopathic pulmonary fibrosis is a cause of
6 interstitial pattern. But interstitial fibrosis, per
7 se, is not a common pulmonary condition, so I would say
8 it's not likely the most common cause. I would think
9 that if you're looking at non-pneumonokonioc changes
10 that would cause an interstitial pattern, then it would
11 be mostly people who have had recurrent chest
12 infections, you know, with some interstitial scarring
13 as a result of that.
14 Q How does a pulmonologist after he gets a positive
15 B-read diagnose idiopathic pulmonary fibrosis?
16 A Well, you can do a lung biopsy, which would be
17 about the only way you'd know for sure. And you can do
18 a transbronchial or open-lung biopsy. Most of the
19 literature would support the use of either/or, although
20 there's no question that an open-lung biopsy would give
21 you a better likelihood of a positive answer. But you
22 know, it's not frowned upon if you do a transbronchial
23 biopsy because that's less invasive for the patient and
24 if it gives you an answer it might save them a more
25 invasive procedure.

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1 Q In cases where you've hired just to do B-read and
2 an exam, is there any way you can distinguish a
3 pulmonary fibrosis -- an idiopathic pulmonary fibrosis
4 from asbestos -- or asbestosis if the person gives you
5 a history of asbestos exposure?
6 A Well, the distribution of the fibrosis would tend
7 to be more generalized in the idiopathic pulmonary
8 fibrosis, and the distribution in asbestos would be
9 typically more in the mid and lower zones, lower and
10 mid, whichever way you want to put it round. But the
11 pattern on the chest X-ray, you know, could be
12 remarkably similar for both. And now, if it's more
13 advanced interstitial fibrosis, then they may have
14 developed some honeycombing. They may have become
15 clubbed. One of the things that surprises me about
16 asbestos is that even in patients with bad pulmonary
17 changes, very few of them ever get clubbed, where as
18 with interstitial fibrosis, clubbing seems to be a lot
19 more common than it is in asbestos-related lung
20 disease.
21 Q When you said interstitial fibrosis, did you mean
22 idiopathic interstitial --
23 A Idiopathic, yeah.
24 Q Because, I mean, you'd agree with me that
25 idiopathic is interstitial fibrosis?

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1 A Right, right.
2 Q When do you do an exam, how long does your exam
3 take when you include the history, your own history and
4 your physical exam?
5 A Depending on the patient, you know, some are a
6 little better than others, 35 minutes or so. And then,
7 another 10 to 15 minutes reviewing the data, pulmonary
8 function or dictating your report.
9 Q So the most -- if you're doing the exams, the most
10 you could see in a day is how many, 15, 10?
11 A Well, it depends. If it's a regular workday,
12 probably 100 or 12. If it's a screening day, those
13 days are longer, and so usually, I don't believe I've
14 ever seen more than, I think, 23 maybe would be the
15 most I've seen in a day. And that was a day that
16 starts at, you know, 7:30 and goes through till 6:30,
17 7:00 at night.
18 Q And what do you charge for -- when you do the
19 history and physical exam and dictate a report?
20 A I think it's either $275 or $300 for the physical
21 exam and report.
22 Q And has that changed since 2000?
23 A It's gone up a little bit, but not much.
24 Q Are we talking about $25?
25 A Yeah, maybe somewhere like that.

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1 A Yeah. This is my abridged curriculum vitae.
2 Q Does that curriculum vitae have anything in it that
3 deals specifically with the disease process asbestosis?
4 A Other than my pulmonary certification and my
5 federally certified B-reading, no.
6 Q Have you done any publish -- have you done any
7 independent research in the area of -- any published
8 research in the area of asbestos disease?
9 A No, no published research.
10 Q Have you presented any papers on it?
11 A No.
12 Q Have you spoke to any groups, even if it's groups
13 of lawyers, about asbestos disease or B-reading?
14 A No.
15 Q Again, what got you interested in doing asbestos
16 work?
17 A Well --
18 Q Back in 2000.
19 A -- being asked to consider it by Mr. Ed Moody.
20 Q Okay. Let me hand you Exhibit No. 2. Can you
21 identify that for me?
22 A Yes, it's a B-reading on William Farmer done
23 11/10/05, the film, and the reading was done 11/25/09.
24 Q Do you have any independent recollection of that
25 film or the circumstances under which you read it?

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1 A None whatsoever.
2 Q Do you know whether there was a prior B-reading?
3 A No.
4 Q Has anybody told you whether, since that time, that
5 there was a prior B-read?
6 A No.
7 Q Do you recall what was sent to you -- first of all,
8 do you have a file on this case, Farmer?
9 A The only thing I've got is this.
10 Q Let me see.
11 MR. PETERS: Can I have that cover page
12 marked?
13 MR. GAVIN: Sure, sure.
14 MR. PETERS: Mark cover page Exhibit 3.
15 (WHEREUPON, the document was marked for
16 purposes of identification as Exhibit No. 3
17 and is attached hereto.)
18 BY MR. PETERS:
19 Q All right. Let me hand you the first page,
20 Exhibit 3.
21 A Uh-huh. There's a typo on it. Should be 9, not
22 19.
23 Q Okay. Yeah, I figured you weren't alive then.
24 You know, you first did the B-read in this case on
25 November 25th of 2009, correct?

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1 A There's another typo on it, isn't there?
2 That's what I've got written here, yes.
3 Q Here is a typo, but it says November 24th?
4 A Right.
5 Q You wouldn't know whether it was the 24th or the
6 25th, correct?
7 A Well, I am fairly renowned for getting mixed up
8 with my dates. I would go on this one because my
9 secretary's far more likely to have the right date on
10 it than me.
11 Q And that's Exhibit 3?
12 A Yes.
13 Q Can you tell me what that first sentence means
14 under "Occupational History"?
15 A As indicated by the patient, he was exposed to
16 asbestos. And there is a -- there was a letter that --
17 okay, there was a letter from your firm that said would
18 I evaluate this patient for asbestos exposure. And I
19 think that's why my secretary put that there.
20 Q Okay. And so what does the "from" mean?
21 A What does that?
22 Q Do you know what the "from" is?
23 A No. I mean, she's obviously -- I don't know why
24 that's there to be honest.
25 Q I mean, did the letter tell you what from?

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1 A I don't know.
2 Q As you sit here today, do you know what asbestos
3 exposure Mr. Farmer experienced?
4 A No.
5 Q Do you know in what context it was?
6 A No. Never saw the patient. And just saw the
7 X-ray.
8 Q Is it fair to say that given that you're not aware
9 of his testimony, you can't diagnose -- I mean, aware
10 of his pulmonary function test -- strike that.
11 Are you aware of his pulmonary function test?
12 A No, the only thing I looked at was the X-ray.
13 Q Are able to make any diagnosis with respect to Mr.
14 Farmer based on what you did in this case?
15 A I'm able to make the diagnosis on the findings on
16 the B-reading showing that there was -- there were
17 changes compatible with a pneumoconiosis there. And
18 based on the asbestos history of exposure that was on
19 the letter, which I'm sure we've got a copy of, that
20 that was in keeping with a diagnosis of asbestos
21 exposure.
22 Q Do you -- would you make diagnoses of asbestosis
23 based upon what lawyers tell you exposure is?
24 A No, but this is reading a B-read for the question
25 of whether the patient did or did not have features

EXHIBIT J

B)

An Assessment and Comparison of the Uniformity and Reproducibility of B Readings among Multiple Readers: A Focused Study

I was asked to investigate the prevalence of radiographic evidence associated with parenchymal and pleural abnormalities of claimants in a legal matter. In accordance with National Institute of Occupational Safety & Health (NIOSH) recommended practices, a protocol was designed for multiple, blinded B-readers. I recruited three B-readers for the study. To reflect the overall population of US B-readers, two radiologists and one non-radiologist (pulmonologist) were recruited.

The purpose of this study was to assess the radiographic evidence consistent with asbestos-related disease and to assess the accuracy and reproducibility of ILO classifications reported previously by another B Reader (Dr. Breyer) when his findings were compared to those of three experienced NIOSH certified B Readers. This report summarizes the methodology used for this study, including B reader selection, randomization and de-identification of study films and inclusion of NIOSH control films. Results and conclusions associated with the summary assessments are also discussed. By comparing the summary assessments to Dr. Breyer's reported results, a discussion of the accuracy, reproducibility, and reliability in classifying chest radiographs as normal or abnormal is presented.

My name is Daniel A. Henry, M.D., F.A.C.R., and I am a Thoracic Radiologist and former Section Chief of Thoracic Imaging in the Department of Radiology at the Medical College of Virginia School of Medicine at Virginia Commonwealth University. I obtained my medical degree from the St. Louis University School of Medicine. I served an internship at the St. Louis University Group Hospitals, and a radiology residency at the Medical College of Virginia. Upon completion of my residency, I served two years in the U.S. Air Force, attaining the rank of Major, and returned to the Medical College of Virginia as a faculty member in 1977. My academic career has been solely confined to the teaching of and practice of imaging of the chest for the past 30+ years. In 1985, I was certified by the National Institute of Occupational Safety & Health ("NIOSH") as a B-reader and have been continuously recertified as a B-reader for the last 25 years. Since 1990, I have been a Member of the American College of Radiology ("ACR") Committee (Task Force) on Pneumoconioses, and I have been the Chairman of the ACR Pneumoconioses Committee since 2004. For many years, the ACR Pneumoconioses Committee in collaboration with NIOSH, has periodically taught an educational course for physicians who wish to be certified or recertified as a B-reader. As a member of the ACR Pneumoconioses Committee faculty for that course, I teach a segment of the B-reader course dedicated to asbestos-related disorders. I was program chair as well as a faculty member for the most recent American College of Radiology Symposium on Radiology of the Pneumoconioses in April 2009.

I am a cofounder and member of the Virginia Commonwealth University Occupational Pulmonary Committee. In this capacity I interpret chest X-rays for the Workers Compensation Committee of the Commonwealth of Virginia and recently participated in a redesign and update of that program. Since 1995, I have been an on-going participant in the NIOSH coal miners health surveillance programs and continue to act as consultant for their pneumoconioses chest radiography instruction programs. I also recently participated in the NIOSH reading trials for the conversion of analog to digital imaging for ILO classification of radiographs. I was an invited speaker at the recent (2008) NIOSH workshop on the Transition to Digital Imaging in Rockville, MD and also participated in the ILO Committee Discussion Group to revise the *ILO Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses* to include the classification of digital images. I am also a member of the Radiological Society of North America, American Roentgen Ray Society, Society of Thoracic Radiology, and a member and Fellow of the American College of Radiology.

Introduction

In 1949, the International Labour Office (ILO) promulgated guidelines for systematically describing lung abnormalities, seen in chest radiographs, associated with inhalation exposure to dusts (NIOSH, 2009a). By establishing a standard method for evaluation of chest radiographs, the ILO aimed to achieve uniformity in assessing pneumoconiosis across readers. In 2002, the ILO published a revision to the guidelines with the objective of "codify[ing] the radiographic abnormalities of the pneumoconioses in a simple, reproducible manner" (ILO, 2002).

The NIOSH B Reader program was established in 1974 and was designed to ensure competency and consistency, while limiting variation among radiographic readings (Mulloy et al., 1993). Physicians certified as NIOSH B Readers have demonstrated proficiency in classifying chest radiographs using the ILO standards for systematically describing and recording the appearance of abnormalities associated with the inhalation of dusts (Morgan, 1979; NIOSH, 2009a). Use of standardized ILO classifications helps to assure that chest radiographs are evaluated in a way that is fair, consistent, and reproducible geographically and over time.

The validity of ILO Classification has been repeatedly demonstrated in many settings and industries. For example, classifications of radiographs of coal miners have shown clear correlations with dust exposure, lung dust burden, lung pathology, and mortality (Attfield & Wagner, 1992; Ruckley 1984; Miller 1985). Although the classification system has been repeatedly validated, interpretation of chest radiographs using the ILO B-reader methodology has occasionally involved variability or possible bias; potential problems and the application of the ILO system have been discussed previously in the literature (Attfield & Wagner, 1992; Henry, 2002; Mulloy et al., 1993; Ohar et al., 2004; NIOSH, 2009b). It has been noted that the sources of this variability included inter-reader and intra-reader variability, as well as experience and

attitude of the reader (Henry, 2002). Also, although NIOSH-certified B Readers have demonstrated a degree of proficiency in classifying chest radiographs using systematic standards, it is possible that the awareness of supplementary details specific to individuals (i.e., medical or exposure information, or other readers' interpretations) can introduce bias into their classifications (ILO, 2002). To address these concerns, NIOSH has recently introduced a "B-Reader Code of Ethics" as well as recommended practices for "Contested Proceedings"(NIOSH 2009b, d).

My purpose, then, was to evaluate the accuracy and reliability of B Reader interpretations of chest radiographs using the current ILO Guidelines. To this end, a single-blind analysis was conducted where posteroanterior chest radiographs were assessed by three experienced NIOSH-certified B Readers.

Methods

Sixty-five posteroanterior (PA) chest radiographs or chest x-rays (CXR) were obtained during a medical screening and were previously classified by a NIOSH-certified B Reader (Dr. Breyer). In order to evaluate the validity and reliability of these reported findings, three highly-experienced NIOSH-certified B Readers were recruited to evaluate these 65 chest radiographs using the standard ILO radiographs and classification guidelines. Several criteria were met by the recruited experts:

a. Each physician was a current NIOSH certified B-reader;
b. Each was available to classify studies during the time of the study;
c. Each was an experienced B-reader with at least 20 years experience and each had successfully passed multiple B Reader re-certifications
d. Each was personally known to me as an individual of integrity; and
e. Each is considered a mainstream B Reader as defined by NIOSH (NIOSHe).

In addition to the above criteria, each physician reader was an academic clinician and teacher, was a faculty member in good standing at their respective academic medical centers and schools of medicine, and had authored peer-reviewed publications on the proper interpretation of radiographic studies used in the diagnosis of occupational lung disease.

The study group was comprised of 65 PA radiographs (n=65) provided by claimants' attorneys to defense attorneys. To promote a high degree of quality assurance in the classification process, and in accordance with NIOSH recommended practices, previously reviewed and categorized but unknown or control radiographs were added to the study group. Twenty-two control radiographs drawn from the NIOSH Home Study Syllabus material were included in the collection of films and all radiographs had been previously classified by expert B Readers. The control films included both normal and abnormal studies with a variety of classification findings. All

radiographs, including the control films, were masked in an identical fashion to prevent readers from discovering the identification or origin of any of the films.

The three expert NIOSH certified B Readers were blinded to the source of the radiographs, the purpose of the study, other B Readers involved in the study, previous classifications of all radiographs, additional reported findings, clinical histories of the subjects, and names and demographic information of the subjects. The expert B Readers were instructed to not discuss the cases with one another and were never in contact with one another during the study period. Each reader was compensated.

Identifying markings and information were masked from all radiographs (n=87) in an identical manner. Each radiograph was assigned a random six-digit identification code consisting of random numbers and letters. After masking, the radiographs were randomly ordered and shipped separately to each B Reader. Shipments included standard instructions to review the radiographs in a manner consistent with their training, certification and normal practices, 87 NIOSH Roentgenographic Interpretation (RI) forms, and a chain of custody document. Since the radiographs were de-identified and randomly ordered, study readers were unable to differentiate subject radiographs from NIOSH control radiographs. Upon return of the 87 radiographs and associated RI forms, the radiographs were repackaged in a random order and shipped to the next study reader. Upon completion of all readings, radiographs were unmasked and returned to the original source.

For the purposes of this study, pleural abnormalities were recorded as present or absent and the ILO classification for profusion rating was noted. As depicted in Figure 1, profusion is classified into one of four ordered major categories regarding the presence of small opacities (ILO, 2000). Category 0 refers to the absence of small opacities or the presence of small opacities that are less profuse that category 1. The level of profusion characteristic is chosen by comparing the subject radiographs with standard ILO radiographs that define the levels of profusion characteristics of centrally placed minor categories (0/0, 1/1, 2/2, 3/3) within these major categories (ILO, 2000). For contested proceedings, a small opacity profusion rating of 0 is normal and a profusion classification of 1/0 or greater is considered abnormal and frequently considered to be consistent with pneumoconiosis in compensation proceedings (NIOSH, 2010).

Increased profusion of small opacities												
Major Categories	0			1			2			3		
Minor categories	0/-	0/0	0/1	1/0	1/1	1/2	2/1	2/2	2/3	3/2	3/3	3/+

Figure 1: Major Categories and minor categories associated with profusion ratings (ILO Guidelines, 2000).

Prior to initiation of the study, a written protocol was reviewed by the Copernicus Group Independent Review Board (IRB). This IRB granted approval for this study protocol on March 16, 2010. I created the design of this study with respect to recruiting the study readers, the inclusion of control radiographs, and the blinding and randomization of the radiographs. Scientists from ChemRisk®, LLC carried out the data collection, review, and summary for the study in accordance with my study instructions. I did not participate in the study other than to review the control films, verify their classifications, and review the masking techniques employed for all radiographs.

For comparison purposes, a summary reading was calculated using the recommended NIOSH approach, which involves recording the median score of the independent study readers' findings. This approach removes potential outliers and allows direct comparison of the study readers' findings and Dr. Breyer's results. Data from the NIOSH RI forms were entered into a password-protected data file and tabulated with the results reported by Dr. Breyer.

Results

Results were obtained from the three expert B Readers and are summarized in Table 1. Study identification number, the date the radiograph was originally obtained, and the interpretation results reported by each reader are included. Each expert B Reader interpreted a total of 87 masked radiographs (65 subject and 22 NIOSH control radiographs) and none of the readers reported any problems or concerns with film quality. For comparison purposes, a summary rating associated with the profusion score (-/-) and the presence of pleural abnormalities were determined by using the median reading from the three expert readers, which is consistent with NIOSH recommendations (NIOSH, 2010b). The profusion ratings for Dr. Breyer, the three expert B readers, and the summary interpretations are listed in Table 1.

The individual and summary interpretation results associated with the 22 NIOSH control radiographs are presented in Table 2. ILO classifications including profusion ratings and the reported presence or absence of pleural abnormalities were obtained from NIOSH for the control radiographs and are listed along with the individual B Reader interpretation and the summary reading.

Expert reader classifications on control radiographs demonstrated the validity of his/her classifications according to the current ILO classification guidelines. Twelve of the NIOSH control films were previously classified as having profusion ratings of 1/0 or greater. The study summary reading indicated the same 12 of the 22 radiographs with a profusion rating of 1/0 or higher, which represents 100 percent agreement (Table 3). Additionally, 13 of the 22 NIOSH control radiographs were classified as having evidence of pleural abnormalities. For both

profusion rating and presence of pleural abnormalities, the summary of the expert B Readers' classifications agreed with the NIOSH control classifications with 100 percent accuracy.

With respect to the study summary readings of the subject radiographs (n=65), only one radiograph was categorized as being 1/0 or greater by the expert B readers. All other subject radiographs (n=64) in this study were classified with "no" or 0/0 for profusion rating, which represents the absence of small opacities. This leads to a prevalence of 1.5 percent (Table 4). On the other hand, Dr. Breyer's classifications of the same subject radiographs in this data set included 64 total radiographs with a profusion rating of 1/0 or higher. This represented a 98.5 % prevalence of small opacities. When small opacities were present with a 1/0 or higher designation, the profusion rating ranged from 1/0 to 2/1 (Table 1). For the radiographs which Dr. Breyer reported as having profusion of 1/0 or greater, 84% of the profusion ratings were listed as 1/0 (54/64). The expert readers identified small opacities in 1 or 1.5% of the radiographs while Dr. Breyer identified small opacities in 64 or in 98.5% of the study radiographs.

According to Dr. Breyer's classification of the subject radiographs, nine radiographs had evidence of pleural abnormalities (13.8 %). The expert readers identified three radiographs with the presence of pleural abnormalities, or a 4.6 % prevalence (Table 4).

Discussion

This study attempted to evaluate and validate NIOSH B Reader classifications and compared these results to Dr. Breyer's previously reported findings. Each expert NIOSH-certified B Reader recruited for this study was provided with standard instructions (Appendix A) and reviewed the identical cohort of 87 masked radiographs in a random order.

Although minor disagreements were identified between individual experts, the strategy for composing a panel of three B Readers was to eliminate potential outliers or unintentional individual tendencies of the B Readers according to the NIOSH recommendations for Contested Proceedings. While individual readers may vary in determining profusion or identifying pleural abnormalities, the summary reading provides an overall impression that can be compared with the NIOSH control radiograph classifications and with Dr. Breyer's interpretations.

The inclusion of NIOSH control radiographs that appeared identical to the subject radiographs provided an internal quality control measure to ensure that the study readers were consistently evaluating radiographs using the ILO classification guidelines. The summary readings determined from the three expert readers were in 100 percent agreement with the NIOSH findings for profusion rating (1/0 or higher) and for the presence or absence of pleural abnormalities.

Dr. Breyer found a prevalence of 98.5 percent of small opacities (profusion rating of 1/0 or higher) compared with 1.5 percent prevalence determined by the expert readers. Additionally, pleural abnormalities were also more prevalent among Dr. Breyer's findings (13.8 percent) compared to the summary readings from of the expert readers (4.6 percent). The marked inconsistency between Dr. Breyer's readings and the expert readers' findings for the profusion of small opacities indicates that Dr. Breyer's reported results are not reproducible and therefore calls into question their accuracy and reliability.

Since neither Dr. Breyer nor the three study readers identified any severe problems or concerns with film quality, the marked differences in radiograph classification are unlikely to be associated with film quality. This study included a sample size of 65 study radiographs initially interpreted by Dr. Breyer from January 2006 to February 2009. Regarding the consistency of Dr. Breyer's readings during this three-year period, there appears to be a pattern of persistent misclassification and lack of reproducibility in comparison to the expert readers' findings.

Conclusions

A study was conducted to assess the radiographic evidence consistent with asbestos-related disease and to assess the accuracy and reproducibility of ILO classifications reported previously by a B Reader (Dr. Breyer) in comparison to those of three, experienced NIOSH certified B Readers classifying the same subject radiographs. The marked differences between the ILO classifications of blinded study expert B Readers, supported by internal controls, and Dr. Breyer's reported findings indicate that Dr. Breyer's reported ILO classifications are not reproducible, and are therefore unreliable for diagnosing asbestos-related disease.

Daniel A. Henry, M.D., F.A.C.R. — 1-13-11 Date

List of Tables

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Table 2. Summary Pleural Abnormalities and Profusion Ratings Compared to Standard Radiograph Interpretations Established by NIOSH

Table 3. Comparison of Expert Summary Classification with NIOSH Control Classifications

Table 4. Comparison of the Prevalence of Profusion Ratings Greater than 1/0 and Presence of Pleural Abnormalities between Dr. Breyer and the Summary of the Expert Readers

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Tables

Table 1: Pleural Abnormalities and Profusion Ratings from Reontgenographic Interpretation Forms Obtained From Dr. Breyer and Study Readers

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/1)	N
				Summary	-	N
1	Charles E. Bailey	3/25/2006	S658Y9	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
2	Thomas G. Bohannan	2/7/2009	Q5S3VZ	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
3	Oylea Brown	3/17/2006	05ZRTZ	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
4	Bennie Broyles	2/7/2009	SFCTMG	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(2/1)	N
				Summary	(1/3)	N
5	Charles Cameron	7/14/2008	V6LSBN	Tarver	(1/2)	N
				Shipley	(2/2)	N
				Lockey	(1/1)	N
				Breyer	(1/0)	N
				Summary	-	N
6	Artis P. Clark	3/25/2006	7AY1YT	Tarver	-	Y
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
7	Arthur L. Cole	3/15/2006	K9H4V	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
8	Harold R. Collins	3/25/2006	CG4RH0	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	Y
				Summary	-	Y
9	Willie Lee Courtney, Jr.	2/1/2009	MA6VZU	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	N

n	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/0)	N
				Summary	-	N
10	Kenneth R. Covington	6/5/2008	0PBPJD	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(2/1)	Y
				Summary	-	N
11	Jerry D. Crowsey	3/21/2006	NU9NJN	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
12	Jimmie L. Cutsinger	2/7/2009	8VJLB7	Tarver	-	N
				Shipley	-	N
				Lockey	-	Y
				Breyer	(1/0)	N
				Summary	-	N
13	Curley Roberts	6/27/2008	4TTNUR	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
14	Charles E. Edwards	3/25/2006	XJWA5X	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
15	Burton Erber	12/10/2007	G8DWGF	Tarver	-	Y
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
16	Jerome Fair	10/8/2007	ZAEMT2	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	Y
				Summary	-	N
17	Ira H. Fisher	6/2/2008	URWKGZ	Tarver	-	N
				Shipley	-	Y
				Lockey	(1/1)	N
				Breyer	(1/0)	N
				Summary	-	N
18	Lonnie C. Fisher	2/2/2009	OABD6C	Tarver	-	N
				Shipley	-	N
				Lockey	-	Y

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/0)	N
				Summary	-	N
19	Oliver Galloway	4/30/2008	VMZ3T3	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
20	James Gill	9/9/2008	VEZHXU	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	-	Y
				Summary	-	N
21	Gonzalo Gomez	3/14/2007	ZVMYTF	Tarver	-	Y
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
22	William Gooseberry, Jr.	3/25/2006	I6WD9Z	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
23	Robert Hadley	5/21/2008	9JHWS2	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
24	James Hall	10/8/2007	NMTT69	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
25	Beverly A. Hayes	2/7/2009	XN4IO1	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/1)	Y
				Summary	-	N
26	James Hoffman	7/10/2008	0502RI	Tarver	-	N
				Shipley	-	N
				Lockey	(0/1)	Y
				Breyer	(1/0)	N
				Summary	-	N
27	Stephen W. Huselton	1/29/2008	DZ9HD2	Tarver	-	N
				Shipley	-	N
				Lockey	-	N

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/0)	N
				Summary	-	Y
28	James W. Hutchison	3/23/2006	HNT87S	Tarver	-	Y
				Shipley	-	N
				Lockey	-	Y
				Breyer	(1/0)	N
				Summary	-	N
29	Frankie Jackson	3/25/2006	G151QB	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
30	Byron James	6/2/2008	DOQVXC	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
31	John James	3/8/2006	EIQ9CF	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
32	Leslie R. Jeanlouis	3/16/2006	5OP2HV	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
33	Sue B. Jiner	5/21/2008	R63IFN	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	Y
				Summary	-	N
34	Robert R. Johnson, Jr.	1/31/2006	AAZQ1I	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
35	Jerry W. Kentle	6/13/2008	91DZ04	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
36	K.C. Keough	5/21/2008	5GM7PZ	Tarver	-	N
				Shipley	-	N
				Lockey	-	N

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/0)	N
				Summary	-	N
37	Billy R. King	3/17/2006	UDL8B1	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
38	Robert H. Landeros	3/18/2006	QYL846	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
39	Larry B. LeGard	3/23/2006	Z4PT4G	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
40	Eugene Linnel	3/25/2006	AS2B43	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	Y
				Summary	-	Y
41	Conrad E. Lindquist	5/13/2008	Y8J7Y6	Tarver	-	Y
				Shipley	-	N
				Lockey	-	Y
				Breyer	(1/0)	N
				Summary	-	N
42	Robert E. McQuinn	3/18/2006	ICKKL3	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
43	Howard T. Meadows	3/25/2006	QTN2WR	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
44	Charles Monroe	3/15/2006	8LB7VX	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
45	Clyde Morgan	3/25/2006	B24RDB	Tarver	-	N
				Shipley	-	N
				Lockey	-	N

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/0)	N
				Summary	-	N
46	Floyd Payne	5/21/2008	G7W0VB	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
47	Thomas Perry	6/3/2008	9PTS2R	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
48	James B. Punch	2/1/2009	QY8207	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
49	Robbie Punch	2/1/2009	W0R7VI	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/1)	N
				Summary	-	N
50	Leodus F. Qualls	3/25/2006	GKIOIS	Tarver	-	Y
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/1)	N
				Summary	-	N
51	Michael Reams	3/25/2006	OTS6ZI	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
52	Ronnie Reynolds	3/25/2006	Q01MT0	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
53	George Robinson	12/21/2006	L69D25	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
54	Randal L. Stanley	3/21/2006	Z79I5F	Tarver	-	N
				Shipley	-	N
				Lockey	-	N

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/0)	Y
				Summary	-	N
55	Arthur P. Terrell	3/18/2006	WAWH3Z	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/1)	N
				Summary	-	N
56	Henry L. Thomas	3/21/2006	PBRX20	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
57	Kenneth W. Thompson	8/29/2008	PZN96Q	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
58	Billie J. Titus	6/2/2008	PX5UK0	Tarver	-	N
				Shipley	-	N
				Lockey	-	Y
				Breyer	(1/0)	N
				Summary	-	N
59	Richard Watson	7/14/2008	0N3N2Y	Tarver	-	N
				Shipley	-	N
				Lockey	(1/0)	N
				Breyer	(1/1)	N
				Summary	-	N
60	Charles J. Wesson	2/7/2009	R3ODET	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	Y
				Summary	-	N
61	Micky Wheeler, Sr.	6/2/2008	HQD8C9	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/1)	N
				Summary	-	N
62	Henry L. Williams, Jr.	3/25/2006	U14E37	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
63	Isaiah Williams, Jr.	3/16/2006	5BWKJV	Tarver	-	N
				Shipley	-	N
				Lockey	-	N

	Name	Film Date	Study Identification Number	Reader Name	Profusion (-/-)	Pleura (Y/N)
				Breyer	(1/1)	N
				Summary	-	N
64	James H. Williams	2/7/2009	LBGPZ9	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				Breyer	(1/0)	N
				Summary	-	N
65	Robert L. Woodard	2/1/2009	05SXJM	Tarver	-	Y
				Shipley	-	N
				Lockey	-	N

Table 2: Summary Pleural Abnormalities and Profusion Ratings Compared to Standard Radiograph Interpretations Established by NIOSH

n	NIOSH Film Number	Film Date	Study Identification Number	Reader Name	Profusion	Pleura
				NIOSH	(2/3)	N
				Summary	(1/1)	N
N-1	47-122	--	YZTRMN	Tarver	(1/1)	N
				Shipley	(1/1)	N
				Lockey	(1/2)	N
				NIOSH	(0/0)	Y
				Summary	-	Y
N-2	59-118	--	DYAMPH	Tarver	-	Y
				Shipley	-	Y
				Lockey	(1/1)	Y
				NIOSH	(2/2)	N
				Summary	(2/3)	N
N-3	7-119	--	LVD8N6	Tarver	(2/3)	N
				Shipley	(2/2)	N
				Lockey	(3/3)	N
				NIOSH	(2/2)	N
				Summary	(2/2)	N
N-4	23-120	--	4E39ON	Tarver	(2/2)	Y
				Shipley	(1/2)	N
				Lockey	(2/2)	N
				NIOSH	(1/1)	N
				Summary	(1/2)	N
N-5	133-121	--	HLZMRY	Tarver	(1/2)	N
				Shipley	(1/0)	N
				Lockey	(2/1)	N
				NIOSH	(0/0)	Y
				Summary	-	Y
N-6	22-123	--	LX0J55	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y
				NIOSH	(0/0)	Y
				Summary	-	Y
N-7	44-124	--	1A122P	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y
				NIOSH	(0/0)	Y
				Summary	-	Y
N-8	84-125	--	4R755F	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y
				NIOSH	(0/0)	Y
				Summary	-	Y
N-9	14-126	--	2UBS7R	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y

n	NIOSH Film Number	Film Date	Study Identification Number	Reader Name	Profusion	Pleura
				NIOSH	(2/2)	N
				Summary	(2/1)	N
N-10	51-127	--	GM3H88	Tarver	(2/1)	Y
				Shipley	(1/2)	N
				Lockey	(2/2)	N
				NIOSH	(1/2)	N
				Summary	(1/1)	N
N-11	27-128	--	L0REKJ	Tarver	(1/2)	N
				Shipley	(1/0)	N
				Lockey	(1/1)	Y
				NIOSH	(1/0)	Y
				Summary	(1/1)	Y
N-12	123-129	--	1T8D0K	Tarver	(1/0)	Y
				Shipley	(1/0)	Y
				Lockey	(1/2)	Y
				NIOSH	(2/3)	Y
				Summary	(2/1)	Y
N-13	26-130	--	U0Q68P	Tarver	(1/2)	Y
				Shipley	(2/1)	Y
				Lockey	(3/2)	Y
				NIOSH	(2/1)	N
				Summary	(2/1)	N
N-14	127-131	--	5ST33H	Tarver	(1/1)	N
				Shipley	(2/1)	N
				Lockey	(2/2)	N
				NIOSH	(1/0)	Y
				Summary	(1/1)	Y
N-15	94-132	--	6ABS9V	Tarver	(1/2)	Y
				Shipley	(1/0)	Y
				Lockey	(1/1)	Y
				NIOSH	(0/0)	N
				Summary	-	N
N-16	16-134	--	YG89V8	Tarver	-	N
				Shipley	-	N
				Lockey	-	N
				NIOSH	(3/2)	Y
				Summary	(2/3)	Y
N-17	56-64-84	--	37JOXZ	Tarver	(2/2)	Y
				Shipley	(2/2)	N
				Lockey	(3/2)	Y
				NIOSH	(0/0)	Y
				Summary	-	Y
N-18	29-70-85	--	F4K1XP	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y

n	NIOSH Film Number	Film Date	Study Identification Number	Reader Name	Profusion	Pleura
				NIOSH	(0/0)	Y
				Summary	-	Y
N-19	70-72-86-AN		IHNYN1	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y
				NIOSH	(0/0)	Y
				Summary	-	Y
N-20	60-77-88-AN		7NZGTC	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y
				NIOSH	(0/0)	Y
				Summary	-	Y
N-21	71-79-89-AN		3QDHDY	Tarver	-	Y
				Shipley	-	Y
				Lockey	-	Y
				NIOSH	(2/3)	N
				Summary	(2/3)	N
N-22	68-133		XQLDES	Tarver	(2/2)	Y
				Shipley	(2/3)	N
				Lockey	(3/2)	N

Table 3: Comparison of Expert Summary Classification with NIOSH Control Classifications

Radiograph Classification	Total Number of 1/0 or Greater	Percent Agreement (Study/NIOSH)	Total Number of "Yes" for Pleural Abnormality	Percent Agreement (Study/NIOSH)
NIOSH Control Results	12	100.0%	13	100.0%
Expert Summary Results	12		13	

Data represent the NIOSH control classification scores and the median classifications of the three expert readers (n=22)

Table 4: Comparison of the Prevalence of Profusion Ratings Greater than 1/0 and Presence of Pleural Abnormalities between Dr. Breyer and the Summary of the Expert Readers

Radiograph Interpretations	Total Number with 1/0 or Greater	Prevalence of 1/0 or Greater	Total Number of "Yes" for Pleural Abnormality	Prevalence of Pleural Abnormalities
Dr. Breyer	64	98.5%	9	13.8%
Expert Summary	1	1.5%	3	4.6%

Data represent the radiographic classification scores of Dr. Breyer and the median classification score of the three expert readers (n=65)

Appendix A

Instructions:

- Please find 87 total chest radiographs enclosed with a corresponding Roentgenographic Interpretation Form (ILO revision 2000).
- A pre-paid return shipping label is enclosed
- Please fill out the attached inventory form
- Read each radiograph and fill out the entire RI form in a manner consistent with their training, certification and normal practices.
- After you have completed reading all chest radiographs, please repackage the films and associated Roentgenographic Interpretation Form and return to the following address:
  Dallas M. Cowan
  ChemRisk, LLC
  25 Jessie Street, Suite 1800
  San Francisco, CA 91405
- If you have questions about the return shipment or lose the enclosed Fed-Ex shipping label, please contact Dallas Cowan (dcowan@chemrisk.com) (303) 417 1046 x 1004

Monroe Rubber & Gasket Co., Inc.
Telephone (318)388-4114 - Fax (318)323-9366 - 1100 Louisville Ave. - PO Box 3285 - Monroe, Louisiana 71201

October 4, 2011

The Honorable Trent Franks
Chairman, Constitution Subcommittee
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Franks,

Thank you again for allowing me the opportunity to testify on the impact that fraudulent and abusive asbestos suits have on small businesses. My response to the question for the record submitted by Congressman Nadler is attached to this letter.

Sincerely,

Michael Carter
President

Questions for the Record from Congressman Nadler

1. Numerous studies show that when sheet gaskets, such as the gaskets sold by Monroe Rubber & Gasket, are removed from a flange, large amounts of asbestos are released into the air. In fact, testing has shown that using gaskets and removing gaskets with scrapers and wire brushes releases the same amount of asbestos as pipe-covering. A 2002 article summarized these studies, finding, "In these studies the airborne asbestos fiber levels measured in many of the samples exceeded all current and historical OSHA excursion limits and some previous permissible exposure limits based on eight-hour time-weighted average standards." Monroe Rubber & Gasket sold several asbestos containing gaskets up until OSHA's asbestos regulation in 1986, and continued to sell one asbestos sheet gasket until 2001. Based on this research, and what we know about asbestos exposure, it's safe to assume that numerous machinists who were exposed to asbestos while removing a Monroe Rubber & Gasket have developed asbestosis or mesothelioma as a result of that exposure. In all likelihood, these machinists will or have died prematurely. If Monroe Rubber & Gasket is not responsible for compensating these asbestos victims, then who should be?

Response

As I testified to the Subcommittee on September 9, 2001, Monroe Rubber & Gasket Company never manufactured any form of asbestos. Monroe bought finished product from its manufacturer and resold it to its end user. The end user requested the product by name. That Monroe didn't manufacture the product should in and of itself exclude us from liability.

I can say that this company has never been sued or received a workers' compensation claim from an employee alleging any kind of asbestos-related sickness. Sixty five other stores, spread throughout the nation, participate in the same purchasing co-operative as Monroe Rubber & Gasket. Many bought and resold gaskets in the same manner as Monroe Rubber & Gasket, and it is my understanding that, similarly, none of their employees has ever alleged an asbestos-related sickness. To be sure that it was safe for my employees to handle this product, I had OSHA come into my shop in 1986 and perform an air quality test while gaskets were cut out of sheet material. OSHA found no hazardous dust in the air.

Asbestos disease is a tragedy, but for anyone to believe that Monroe Runner & Gasket Company is responsible for serious asbestos-related disease is absurd. The truly responsible companies that manufactured and marketed asbestos products have declared bankruptcy and are no longer available to sue, and trial attorneys more interested in their personal well-being than the well-being of their clients and their communities are filing lawsuits against a new tier of businesses in the bankrupts' place.

Unless our elected officials act to put an end to this problem, businesses will be forced to close their doors and jobs will be lost. Monroe Rubber & Gasket and other companies that didn't manufacture asbestos should never have been brought into asbestos lawsuits, and that's why I'm fighting to end lawsuit abuse.

Charles S. Siegel
Partner
Waters & Kraus LLP
3219 McKinney Avenue
Dallas, Texas 75204

Hearing: September 9, 2011
"How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System"

Answers to Questions for the Record

Questions for the Record from Chairman Franks

1.) Our fees are justified, particularly in asbestos cases, based on the complexity of these cases, the expertise required, and the amount of work involved. When a client first retains our firm, neither we nor the client knows against whom they might file a claim. In asbestos cases, our firm must research each asbestos victim's exposure history, often from decades earlier. We must determine our clients' economic losses. This is particularly difficult in mesothelioma cases, because our clients often live for only a few months and are understandably anxious about providing for their families. We must hire medical, toxicological, and epidemiological experts to review their case. Only after this research is complete can we decide whether to recommend filing one or more trust claims and whether or not to file a tort suit as well.

The fees charged by my firm for an asbestos case vary for a number of reasons. First, attorneys' fees may be regulated under state law and, in the case of asbestos bankruptcy trusts, may also be regulated by the trust agreements. For instance, some of the asbestos trusts cap the available fees. In addition, many of my client contracts provide for payment at varying rates, often less than 40%. The contingent fees charged for trust recoveries are whatever is provided for in the contract or allowed for by law or by the terms of the trusts. The fees charged vary considerably depending on the state, the trust, or where and how a claim is brought.

It is also of importance to note that in all contingency fee cases, our clients pay nothing to bring a case; our firm pays all of the costs of pursuing a claim including court costs, costs for depositions and experts, costs to respond to asbestos defendants' motions, and the costs of filing trust claims. Our clients only pay attorneys' fees when there is a recovery.

In addition, it is inaccurate to classify trust claim proceedings as "non-adversarial." Most trusts permit individual review of claims which we routinely seek on behalf of our clients. Indeed, the individual review process requires marshalling substantial information, including our litigation history against the asbestos defendant for whom the trust was created, and we seek individual review on behalf of virtually all of our claimants. The recoveries in such cases are based on the exposure, medical, and damages proof we marshal on behalf of our client. If a client is unsatisfied with the offer from the trust, various mediation and arbitration procedures are provided for by the trust documents. These procedures are adversarial in nature. The claims are submitted based on information developed in the course of litigation, and involve substantial attorney expertise and work.

2.) No, Congress should not cap attorneys' fee recoveries in the asbestos bankruptcy trust context because doing so may deprive asbestos victims of adequate representation and the ability to recover for their devastating injuries. Further, such a proposal would trample on states' ability to regulate what has traditionally been a matter of state law. Indeed, these are private trusts, created under state law.

It is particularly short sighted to cap attorneys' fees in such complicated cases of devastating injuries. These cases often involve complicated legal issues and multiple wrongdoers. Further, the trust recovery process and the development of medical, damages and

exposure information sufficient to satisfy the trust payment requirements can be very complicated. This is particularly true when, as in the case for our firm, the claims are all submitted for individual review by the trusts. Substantial attorney and paralegal time is involved in the preparation of each claim, and each claim for a client with respect to different trusts requires the submission of different information. Capping attorneys' fees will have the overall effect of limiting the recoveries of asbestos victims, many of whom are dying, since many will be unable to get legal representation. In fact, most clients will simply be unable to marshal the proof necessary to obtain adequate payments from the trusts if lawyers are economically prevented from assisting them.

Also, the comparison of the asbestos trusts to other non-adversarial federal compensation programs indicates a total misunderstanding about how asbestos trusts are funded and created. First, asbestos trusts differ significantly from other federal compensation programs, such as the James Zadroga 9/11 Health and Compensation Act, which includes a cap on attorney fees. This program and other federal compensation programs are funded with taxpayer dollars. On the other hand, asbestos trusts have no federal funding, but are funded solely with private funds from an asbestos defendant. Second, asbestos trusts are created for an entirely different purpose than other federal compensation programs. Federal non-adversarial compensation programs are usually created because either there is no entity left to hold legally accountable, or because the U.S. itself is responsible for the injuries. This differs from asbestos exposure, where private companies profited by exposing workers and families to a known carcinogen, and are thus legally responsible for the harm they caused. The trusts are created because the asbestos defendant's outstanding asbestos liability is so great that they seek protection under bankruptcy law. Third, other federal compensation programs tend to involve significant outreach assistance to claimants to help them collect benefits. Asbestos trusts do not provide any outreach assistance, so claimants who have claims against the trusts predictably rely on attorneys to help them navigate the trust process. Fourth, other federal programs are typically meant to compensate individuals for injuries sustained from *one* incident or accident, and that particular compensation program is usually the sole source of compensation for victims. Conversely, asbestos victims have often been exposed to a number of different asbestos-containing products over the course of their working lifetime by a number of different employers, and therefore, they likely have multiple claims against a number of different asbestos defendants, including trusts and solvent defendants. Further, the latency period for asbestos disease is unique; it will take decades before most asbestos victims show symptoms. Thus, by the time an asbestos victim becomes ill with an asbestos disease, they likely have very little information about which products caused their illness. It is necessary for most asbestos victims to rely on the assistance of an attorney to obtain full and fair compensation from all the companies responsible for their disease. Finally, unlike other federal compensation programs, asbestos trusts are established and governed by *state* law. Some states impose fee caps while others do not. It is not appropriate, and arguably unconstitutional, for Congress to impose rules on trusts established under state law.

3.) As discussed at the hearing, despite the asbestos defendants scouring the legal system looking for examples of inconsistencies between tort litigation and trust submissions, they were able to come up with only three isolated examples of alleged inconsistencies between the trust

submissions and discovery responses filed by those clients in the tort system. And in each of these cases, *current law* provided a remedy.

With respect to *Kananian,* the system worked; the claims were rejected and the lawyers were disciplined. The case should not be cited as a reason to enact federal legislation to alter the bankruptcy courts oversight of asbestos trusts. Rather, it proves that our current legal system deals readily with isolated instances of wrongdoing. *Kananian* illustrates that defendants, through discovery, already have the means to identify any inconsistencies between statements filed in court and with trusts and that when they find such inconsistencies, the Courts will take action. In the *Warfield* and *Edwards* cases, the dispute centered on the timing of the trust disclosures, and the court promptly agreed with the defendants and amended the standing orders governing Baltimore asbestos cases to require the disclosure of trust claims during discovery in the tort case.

In these three isolated instances, the remedies available to the defendants under the rules of court were adequate to address any alleged malfeasance. These cases are the exceptions, not the rule. It is simply unnecessary to take the extraordinary step of imposing Federal intervention of state tort law claims and trusts organized under state laws.

Moreover, these isolated instances of alleged litigation misconduct pale in comparison to the long history of corporate deceit and silence with respect to the mining, manufacture and marketing of asbestos products over many decades. This indefensible corporate conduct poisoned hundreds of thousands of workers unnecessarily, and these workers and their families should not have to apologize for seeking compensation.

4.) Asbestos disease is typically the result of being exposed to multiple asbestos-containing products over the course of a person's working lifetime. As well, the law in every state is settled that any victim can recover from every defendant who substantially contributed to their illness or injury. Thus, when an asbestos victim recovers from each defendant whose product contributed to their disease, that victim is in no way acting inappropriately or filing "inconsistent" claims; rather, they are recovering a portion of their damages from each corporation responsible for their harm. Indeed, bankruptcy trusts operate under these principles, and each trust is responsible for and pays for only its own share of the damages. Thus, asbestos victims can assert claims against each of the trusts that are responsible for the products to which the asbestos victim was exposed. This means that some asbestos victims bring claims against several trusts and/or defendants while other victims have claims against only one or two.

While it is inappropriate for a plaintiff to submit *inconsistent* exposure information; the fact that the exposure information submitted to one trust is *different* from the exposure information submitted to another does not mean it is inconsistent. A trust's TDP establishes those exposures compensated by the trust. A claim to that trust need only recite the exposures compensated by it. A claim to another trust might recite additional or different exposures, compensated by that trust. For example, a WWII veteran exposed in a Navy shipyard to asbestos supplied by Manville would cite such early exposures in seeking compensation from the Manville trust. If such a veteran later worked in the construction industry as a pipefitter and was exposed to a different manufacturer's asbestos years later, his lawsuit would recite this later

exposure history as a construction worker. These exposure scenarios are different, but they are not inconsistent. And, the defendant in the latter case would be entitled to learn of any earlier exposures during discovery.

5.) As stated above, asbestos victims will frequently have causes of action against multiple asbestos defendants. Some of these defendants have created an asbestos bankruptcy trust, while other solvent defendants may still be held liable in a court of law. In any case, the asbestos defendants who have created bankruptcy trusts are not part of the litigation in court. In fact, that is why they created a trust, so they could not be held liable in a court of law.

It is typical in a tort case (involving only that solvent asbestos defendant), that the defense will only put forward evidence of that the solvent defendant's liability. In such circumstances, if the jury assigns little or no liability to the other bankrupt defendants, it may simply reflect the solvent defendant's trial strategy, rather than demonstrating that no other defendant was also liable for the harm. Regardless of whether an asbestos victim brings a claim through a trust or through the tort system, that victim must still prove their case for each defendant, showing to a certain standard of proof that that particular asbestos defendant exposed them to asbestos and is responsible for harm created by that exposure.

It is also important to note that all asbestos defendants, whether solvent or represented through a trust, have a right of contribution against any and all other defendants. Thus, if one defendant feels that they have paid for more than they are truly responsible, that defendant can bring a claim of contribution, seeking reimbursement from all the other defendants responsible for an asbestos victim's exposure.

Questions for the Record from Mr. Nadler

1.) Almost two decades ago, OSHA observed that "it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure."[1] Hundreds of thousands, perhaps millions, of asbestos workers, their families, and other members of communities with high asbestos exposure either have become ill or died or will do so in the future. In 1982, William J. Nicholson in his seminal study, "*Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*" ("the 1982 Nicholson Study"), predicted expected cancer mortality from asbestos among workers in several occupations. A copy of his cancer mortality estimates is attached. Since 1982, both OSHA and EPA have relied upon these estimates – which have proven to be remarkably accurate – as the basis for asbestos regulation. Nicholson predicts that occupational cancer mortality from asbestos peaked in 1992 at 9,739 deaths per year and will decrease to 1,739 deaths per year by 2027. Nicholson predicts 6,460 asbestos-related cancer deaths among workers in 11 industrial sectors in 2012.[2]

[1] 51 Fed. Reg. 22,615 (1986).
[2] William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*, 3 American Journal of Industrial Medicine 259, 259 (1982) (hereinafter "1982 Nicholson Study")

These figures represent the estimated cancer mortality experience among workers exposed to asbestos. Thousands more workers each year are diagnosed with asbestosis – a disabling, yet non-fatal lung disease. These workers spend their retirement years suffering from severely reduced lung function and a significantly decreased quality of life. The National Institute for Occupational Safety and Health (NIOSH) tracks the incidence of asbestosis among workers. Its Work-Related Lung Disease Surveillance System provides estimates of deaths where asbestosis was a contributing cause. Since 2000, NIOSH has found more than 1,400 instances where asbestosis was a contributing cause of death.[3] Asbestos morbidity is not counted in these numbers.

To make matters worse, not just workers are affected by asbestos disease. Asbestos disease has caused significant death and disease among communities where it was mined and manufactured, such as Libby, Montana, and among spouses and children of asbestos workers who were exposed to fibers brought home on the workers' clothing.

2.) According to the National Institutes of Health, mesothelioma is "a rare but serious type of cancer. It usually starts in the lungs, but can also start in the abdomen or other organs. Most people who develop mesothelioma have worked on jobs where they inhaled asbestos particles. It can take a long time - 30 to 50 years - between first being exposed to asbestos and showing symptoms of the disease. Treatment includes surgery, radiation, chemotherapy or all three."[4]

The disease has devastating consequences for the children and spouse of a mesothelioma patient because the health effects are severe and the disease is almost always fatal. According to the Mayo Clinic, "mesothelioma is an aggressive and deadly form of cancer. Mesothelioma treatments are available, but for many people with mesothelioma, a cure is not possible. Instead, treatment for mesothelioma is often focused on keeping you as comfortable as possible."[5] Courts have recognized that mesothelioma is "an invariably fatal cancer...for which asbestos is the only known cause. . . .'It kills its victims generally within two years of diagnosis[,]' during which they 'invariably suffer great pain and disability.'"[6]

In addition to the horrific emotional costs of asbestos disease, families also suffer extreme financial hardship. According to Dr. Barry Castleman, a leading expert on the history of asbestos exposure, "studies have been done to determine how the economic loss is borne by families who suffer the premature loss of a father from asbestos disease. The families involved were the survivors of 249 insulation workers who died of asbestos diseases before the end of their expected work lives. The families sustained an average net economic loss of $101,000 each

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[3]National Institute for Occupational Health and Safety, *Figure 1-1. Asbestosis: Number of deaths, crude and age-adjusted death rates, U.S. residents age 15 and over, 1968-2005*, WORK-RELATED LUNG DISEASE SURVEILLANCE SYSTEM (2008); available at http://www2a.cdc.gov/drds/WorldReportData/FigureTableDetails.asp?FigureTableID=488&GroupRefNumber=F01-01 .

[4]National Institutes of Health, U.S. National Library of Medicine, *Mesothelioma*; available at: http://www.nlm.nih.gov/medlineplus/mesothelioma.html.

[5]Mayo Clinic, *Mesothelioma: Definition*, (Aug. 7, 2010); available at: http://www.mayoclinic.com/health/mesothelioma/DS00779.

[6] *In re Patenaude*, 210 F.3d 135, 138 (3d Cir.), cert. denied, 531 U.S. 1011 (2000), and *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 633 (3d Cir.), aff'd 521 U.S. 591 (1997).

(much more in cases where death occurred well before retirement age) in 1979. The economic loss to survivors here was taken as the worker's wage income, net of taxes and the consumption of the worker. The cost of medical care was not counted in these loss figures. Income in 1979 from all sources (government funds, pensions, workers' compensation, and personal injury suits) combined came to only 22.8 percent of this conservatively estimated economic loss. Fully half of the families in this survey (125) were receiving no income from any source to offset the loss of the breadwinner. Thus, most of these insulation workers' families were drastically impoverished by the occupation-related deaths of the men. Economists Johnson and Heler estimate the gross income loss to 420,000 workers (expected to die from asbestos diseases) and their families at $326 billion, over the years 1967-2027."[7]

It is also important to note that these figures do not include the cost of medical care to asbestos victims, the cost to society of administering social programs providing benefits to these families, the cost of disability from asbestos disease which does not result in death, or any amount for the pain and suffering these families endure. Dr. Castleman estimates that the cost of medical care and administering social service programs for asbestos victims bring the total cost of asbestos disease to more than $500 billion.[8]

3.) The claim that asbestos trusts are controlled by plaintiffs' lawyers is patently false. The trusts are private entities established under state law to resolve claims arising from the asbestos products. While 524(g) gives federal approval to the trust process, the trusts are governed by a body of law in every state regulating them.

When the bankruptcy court confirms the debtor's reorganization plan, the court appoints independent trustees, many of whom are retired judges, to oversee the trust administration. In addition, the court appoints a Trust Advisory Committee and a Futures Representative to represent the interests of present and future claimants, whom the trustees must consult with respect to particular issues, as set out in the trust agreement and trust distribution procedures ("TDPs"). The bankruptcy court retains jurisdiction over the trust and, if necessary, will resolve disputes involving the trust, as set out in the plan and trust documents. The bankruptcy court is not involved in the day-to-day administration of the trusts. Like all trusts, the asbestos trusts are creatures of the law of the respective states in which they were created, and operate according to the provisions of the relevant state law. In addition, these are private entities; no public funds are involved in asbestos trusts.

4.) First, asbestos disease is typically the result of being exposed to multiple asbestos-containing products over the course of a person's working lifetime. Second, the law in every state is settled that any victim can recover from every asbestos defendant who substantially contributed to their illness or injury; this includes asbestos trusts because the trusts essentially step into the place of the former defendant. Thus, when an asbestos victim recovers from each defendant whose product contributed to their disease, that victim is in no way "double-dipping;" rather they are recovering a portion of their damages from each of the corporations who harmed them. In fact, each trust is responsible for and pays for only its own share of the damages.

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[7] William Johnson and Edward Heler, *The Costs of Asbestos-Associated Disease and Death*, 61 MILBANK MEMORIAL FUND QUARTERLY 177 (1983).

[8] BARRY CASTLEMAN, ASBESTOS MEDICAL AND LEGAL ASPECTS 737 (Aspen Publishers, 4th ed. 2005).

Further, asbestos victims receive only a fraction of the scheduled value provided for each disease category, so to suggest that victims are somehow being overpaid is entirely false. RAND finds that "[m]ost trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered." The median payment percentage is 25 percent, but some trusts pay as low as 1.1 percent of the value of a claim.[9]

The asbestos trusts generally are underfunded because the debtors that established them were insolvent. The trusts are required to ensure that they have adequate funds to pay present and future claimants and to treat all such claims in "substantially the same manner."[10] To meet this statutory requirement, trusts often pay claimants only a fraction of the scheduled value of their claim. For example, the Manville Trust currently pays 7.5% of its settlement amounts; the Federal-Mogul trusts pay 6%; the Owen-Corning Trust pays 10%; the Armstrong Trust pays 20%; the USG Trust pays 35%; and the Dresser Trusts have one of the highest payment percentages: 52.5%.[11]

In addition, the amount of money set aside in bankruptcy trusts – entities which relieve the asbestos company from paying liabilities to current *and future* claimants – is based on actuarial projections of liabilities. Trusts pay only a fraction of the scheduled value of each claim because, historically, these actuarial estimates have consistently underestimated the amount of money necessary to pay claims.

It is also of importance to note that bankruptcy trusts freeze the money available to pay claims, even when while the assets of the defendant tortfeasor continue to grow.

Because they are underfunded, mesothelioma victims whose claims are paid by bankruptcy trusts are woefully undercompensated for their fatal illnesses. The *scheduled* value for mesothelioma claims across trusts ranges from $7,000 - $1.2 million.[12] However, the average payment for mesothelioma claims from all trusts was $126,000 in 2008; for all malignant claims in 2007 the average payment was $21,700; and in 2008 the average payment for malignant claims was $34,100.[13] Even as medical costs and other expenses of illness rise and even while the profits of asbestos defendants also rise, these compensation values are frozen. These figures are substantially below what a mesothelioma victim can expect to recover if his case is tried.

5.) Yes, each asbestos trust resolves claims against only one asbestos defendant – the debtor who established the trust. Trusts pay no more than the scheduled value of each disease, according to their TDPs. These values are established based solely on the relative liability of the debtor, regardless of what the liability of other potential asbestos defendants might be. And, as

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[9] Lloyd Dixon, et al, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts,* RAND INSTITUTE FOR CIVIL JUSTICE, page xv (2010); available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf (hereinafter "Dixon RAND Report").
[10] Bankruptcy Code § 524(g)(2)(B)(ii)(V).
[11] Dixon RAND Report, p. 38 (2010).
[12] Dixon RAND Report, p. 36 (2010).
[13] Dixon RAND Report, p. 33 (2010).

noted above, trusts usually pay only a fraction of the scheduled value for each disease because the trust has been underfunded. In cases where a victim was exposed only to the products of one debtor, the trust it established might be that victim's sole source of compensation. In other cases where a victim was exposed to asbestos products manufactured by several defendants, the trust might be responsible only for a fraction of that victim's compensation.

There is no set amount of damages to which a victim of mesothelioma or other asbestos-related disease is entitled. The value of each claim is determined by a jury through a trial, or, more often, through settlements. Thus, by definition, the verdict against an individual defendant — after any set-offs or contributions have been made — reflects that defendant's "share" of liability. This is as true for asbestos trusts as it is for solvent defendants. Further, in evaluating its share of potential liability, a solvent defendant will determine other potentially responsible parties, including trusts, and will take into account the settlement amounts that trusts typically pay claimants, which are set out in the TDPs published on the trusts' websites.

6.) There is ample information publically available about trust payments and procedures, the purpose which is to provide asbestos victims with the information necessary for filing a claim. To the extent that an asbestos defendant seeks information from a trust that is not publically available, the information is discoverable by the defendants under state law. In fact, more information is available about the compensation paid by trusts than is available about the compensation paid by solvent defendants. Thus, trusts are far more transparent than are other defendants in the tort system.

Each trust's TDP is available on its website. The TDP includes information on the scheduled value for each disease. Payment percentages are also publicly available information and defendants have full access to this information.

Individual settlement information, however, is generally treated as confidential *by both asbestos victims and asbestos defendants*. Indeed, the solvent asbestos defendants themselves always insist that the settlements they reach with asbestos victims remain confidential, and do not share that information with their co-defendants. Naturally, defendants would like to know how much the plaintiff has accepted from other settling tortfeasors, as it would give them greater insight into what amount the plaintiff might be willing to accept in their own settlement negotiations. For the same reason, plaintiffs also would like to know what the solvent defendants have paid other plaintiffs. But courts routinely refuse to compel discovery of settlement information.[14] Settlements by asbestos trusts are no exception.[15]

When asbestos victims sue solvent defendants in the tort system, the defendants routinely seek, and obtain, discovery from the plaintiff regarding any claims that the plaintiff submitted to any of the asbestos trusts. But just as they refuse discovery of settlements with any other co-

[14] *See*, N.Y. Jur. 2d Disclosure, §214, Settlement Agreements (2011) ("Defendants are generally not entitled to disclosure of settlement agreements . . ."). See also, e.g., *In re N.Y. Cnty. Data Entry Worker Prod. Liab. Litig.*, 635 N.Y.S.2d 641, 641-42 (1995); *ABF Capital Mgmt. v. Askin Capital, Nos.* 96 Civ. 2978, 95 Civ. 8905, 97 Civ. 1856, 97 Civ. 4335, 98 Civ. 6178, 98 Civ. 7494, 2000 WL 191698, at *2 (S.D.N.Y. Feb. 10, 2000).

[15] See, e.g., *Dent v. Westinghouse*, MDL No. 875, EDPA Civil Action No. 08-83111, 2010 WL 56054, at *1 (E.D. Pa. Jan. 4, 2010) (denying discovery of settlement information from asbestos trusts); *Shepherd v. Pneumo-Abex, LLC*, MDL No. 875, EDPA Civil Action No. 09-91428, 2010 WL 3431633, at *2 (E.D. Pa. Aug. 30, 2010) (same).

defendants or potentially responsible parties, courts presiding over asbestos cases — including the Eastern District of Pennsylvania, which oversees the federal multi-district asbestos litigation, comprising about 60,000 cases and 3.5 million individual claims — routinely refuse to compel disclosure of information regarding the fact of settlement with, and settlement amounts plaintiffs have received from, settling asbestos trusts until after a verdict has been entered against the defendant (at which point the settlement amounts may be relevant in determining any set-offs to which the defendant may be entitled).[16] And jnst as a solvent corporation has no obligation to make settlement information available to the public, an asbestos trust has no obligation to do so either.

Asbestos trusts are currently transparent and there is nothing in current law which prevents asbestos defendants from obtaining all of the information relevant to a particular case. Further, the trusts are governed by state law and state courts have the authority to decide what information beyond that which is publically available, should be discoverable under a state law claim for damages.

7.) Asbestos use in the US peaked in 1973 and has been declining since.[17] Occupational exposure to asbestos has been further reduced since 1986 when OSHA promulgated a comprehensive standard regulating the cancer risk from asbestos.[18] But, asbestos disease has a long latency period, usually estimated to be between 20 and 40 years, so many workers exposed in the 1970s are getting sick now. Some of the increase in litigation of the past few years represents illness among workers exposed decades earlier. As the years since peak asbestos exposure grows, the incidence of asbestos disease is likely to decline. Less asbestos disease means less asbestos litigation.

Further, when an asbestos defendant files for bankruptcy protection, all asbestos litigation against that defendant is stayed. During the pendency of the bankruptcy proceeding, which can take 3-5 years, no asbestos claims are paid. When the bankruptcy proceeding is complete, and an asbestos trust established under section 524(g) of the Bankruptcy Code, all claims which have accumulated during the several years of the bankruptcy proceeding are filed with the trust.

Thus, within the first few years after a trust is established, there is a short-term increase in claims filed against the trust which represents the backlog created while the bankruptcy proceeding was pending. This increase in claims filed does not represent fraud, rather it represents justice delayed for the asbestos victims who happen to develop fatal asbestos-disease while the bankruptcy proceeding are concluded. In recent years, several large bankruptcy proceedings, involving significant numbers of asbestos claims have been resolved. These include, W.R. Grace, ASARCO and GAF. Any increase in claims filing likely represents the backlog of claims against these companies.

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[16] See, e.g., *Shepherd v. Pneumo-Abex, LLC*, MDL No. 875, EDPA Civil Action No. 09-91428, 2010 WL 3431633, at *2 (E.D. Pa. Aug. 30, 2010) (federal MDL court denying discovery of trust settlement information); *Gaull v. Wyeth Labs, Inc.*, 687 F. Supp. 77, 83 (S.D.N.Y. 1988) (denying request for disclosure of settlement agreement, and noting chilling effect an order of disclosure would have on future settlement negotiations).

[17] U.S. Department of the Interior, U.S. Geological Survey, *Some Facts About Asbestos* (March 2001); available at: http://www.capcoa.org/Docs/noa/%5B12%5D%20USGS%20Facts%20on%20Asbestos.pdf

[18] 29 CFR 1910.1001.

8.) Union Carbide Corporation was a primary producer of asbestos and its product directly caused or contributed to asbestos disease in untold numbers of workers and their families. Worse, Union Carbide continued in the asbestos business until 1985, long after it was widely known that asbestos caused cancer and other serious health hazards. The company operated chrysotile asbestos mines from 1963 to 1985, during which time the evidence shows the company was well aware of the risks its product posed to its workers.[19] Please see attached 6 pages, which summarize Union Carbide's corporate knowledge of asbestos use and dangers. To suggest that a corporation that knowingly poisoned its workers and their families is paying "too much" is offensive to those families who have suffered the devastating consequences of asbestos disease.

9.) Please see above answer to question #3.

10.) Please see above answer to question #7.

11.) We believe that if Monroe Rubber & Gasket sold asbestos containing products that caused or contributed to the disease of workers and their families, then Monroe Rubber & Gasket should be responsible for compensating these asbestos victims. Monroe Rubber & Gasket began selling asbestos containing products in 1975. By that time, asbestos was a known, well-recognized carcinogen to which no safe level of exposure has been identified.[20] Given the latency period for mesothelioma and given the facts that Monroe Rubber & Gasket did not begin selling asbestos-containing products until 1975 and continued to do so at least through 2001[21], it is likely that future victims of exposure to gaskets sold by this company have yet to be diagnosed. If Monroe Rubber & Gasket put a defective and/or unreasonably dangerous product into the stream of commerce, thus exposing end-users to a carcinogen that later caused disease, then Monroe Rubber & Gasket should be liable.

[19] BARRY CASTLEMAN, ASBESTOS MEDICAL AND LEGAL ASPECTS , 565-570 (Aspen Publishers, 4th ed. 2005).
[20] National Institute for Occupational Safety and Health, *Criteria for a Recommended Standard*, U.S. Dep't of Health (1972); National Institute for Occupational Safety and Health, *Revised Recommended Standard Asbestos Standard*, U.S. Dep't of Health (1976). International Agency for the Research of Cancer, *Asbestos*, 14 MONOGRAPH ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS (Lyon,France , Originally published 1977; Revised 1998).
[21] Deposition of Michael Carter in the matter of *Barker v. Olin Corp.*, et al, August 24, 2001

Table A.1: Nicholson Cancer Projections (1990-2027)

Death Year	Type of Cancer Meso	Lung	Othc
1990	2,608	5,487	1,494
1991	2,678	5,492	1,494
1992	2,748	5,497	1,494
1993	2,792	5,449	1,480
1994	2,836	5,402	1,466
1995	2,881	5,354	1,453
1996	2,925	5,307	1,439
1997	2,969	5,259	1,425
1998	2,987	5,146	1,395
1999	3,005	5,033	1,365
2000	3,024	4,919	1,334
2001	3,042	4,806	1,304
2002	3,060	4,693	1,274
2003	3,048	4,539	1,230
2004	3,036	4,384	1,186
2005	3,023	4,230	1,143
2006	3,011	4,075	1,099
2007	2,999	3,921	1,055
2008	2,931	3,734	1,006
2009	2,864	3,547	958
2010	2,796	3,361	909
2011	2,729	3,174	861
2012	2,661	2,987	812
2013	2,545	2,811	762
2014	2,429	2,635	713
2015	2,314	2,460	663
2016	2,198	2,284	614
2017	2,082	2,108	564
2018	1,965	1,937	519
2019	1,847	1,766	474
2020	1,730	1,596	430
2021	1,612	1,425	385
2022	1,495	1,254	340
2023	1,379	1,132	307
2024	1,264	1,011	274
2025	1,148	889	242
2026	1,033	768	209
2027	917	646	176

company's insurer conducted air sampling in the plant. In the late 1950s, McAllister recalls that there was considerable discussion over the deaths of three Ehret workers from lung cancer and nonmalignant lung conditions (Deposition of J.D. McAllister, same case as Satterthwaite deposition).

E.R. Stevens, President of Baldwin-Ehret-Hill from 1959-1968, has testified that the use of asbestos in insulating cements was unnecessary, and the use of a small fraction of asbestos in "Monoblock" (1940-1968 or later) was just a "sales gimmick." Stevens was among industrialists attending presentations by Dr. Selikoff in 1964, where hazards to insulators were discussed (E.R. Stevens deposition in *Bade v. Armstrong World Industries*, Superior Court of NJ, Middlesex Co. Docket No. W-000026-87, Jan. 24, 1989).

Baldwin-Hill patents in the 1950s stressed that insulations whose use entailed "a minimum of dusting" would have "practically no industrial health hazard." These patents also demonstrated that mineral wool could be used instead of asbestos (Patent No. 2,633,433, granted in 1953; and No. 2,732,295, granted in 1956).

On February 9, 1976, within months after the U.S. Environmental Protection Agency banned asbestos-containing molded insulation, Keene's Joseph Saville wrote to a Miami firm about liquidating Keene's inventory of calcium silicate insulation. He offered to discount material with a "list value" of $70,000, for export "outside of the continental United States." (letter to Edgar Gerber, Multi-Trades Inc.)

In 1982, samples of warehoused insulation at Amerada Hess's giant oil refinery in St. Croix were analyzed to see if they contained asbestos. A sample of Thermacil calcium silicate from Keene Corporation, labeled asbestos-free on the bag, was found to have 20-25% amosite asbestos. Orders were sent to the refinery to remove the material and dispose of it (O.W. Henderson memorandum to W. Jones, "Asbestos Samples," Jan. 19, 1983).

Ehret Magnesia was a member of the Magnesia Insulation Manufacturers Association in the 1950s, and Baldwin-Ehret-Hill belonged to the National Insulation Manufacturers Association in the 1960s.

Keene filed for Chapter 11 bankruptcy in 1993.

UNION CARBIDE CORPORATION
(bought by Dow Chemical in 2001)

Union Carbide operated chrysotile asbestos mines in California from 1963 until 1985. So-called "Calidria" or "Coalinga" asbestos is short grade fiber, and has been used as a filler, reinforcing agent, opacifier, and thickening agent in such products as drywall patching compounds, plastics, and paints.

Carbide salesman P.R. Cheston in London wrote to corporate headquarters that Southalls Paper Mills "wanted to use our asbestos in sanitary tissue of the internal type." Southalls was concerned about dangers to health from asbestos and had asked specific questions that the salesmen were unable to answer. The letter does not say whether one of these questions had to do with what to tell consumers who might inquire about the hazards of asbestos in tampons. By January 12, 1966, Cheston had obtained the just-published proceedings of the New York Academy of Sciences conference, "Biological Effects of Asbestos." He alluded to the controversy over whether metallic trace elements in asbestos fibers might be factors in causing illness, observing that, if Carbide's fiber had very little of these, this might offer "good copy for publicity use." (letter to A.E. Pufahl, UCC, New York)

At least one Carbide occupational health specialist walked a few blocks up Park Avenue from corporate headquarters to attend the New York Academy of Sciences conference on asbestos, at the Waldorf Astoria (Paul W. McDaniel, memorandum to J.A. Riddle, Oct. 21, 1964). Following that, Union Carbide's New York headquarters drafted an Asbestos Toxicology Report "in order to counteract any serious problems or worries before they get out of hand." (T.J. Hall, "Asbestos Toxicology Report," Jan. 12, 1965) The report was authored by Dr. Carl Dernehl, Carbide's Director of Toxicology, and his assistant, Dr. K.S. Lane. It contained specific comments on possible problems in paper manufacturing and in consumer acceptance of products. It said that in average lighting conditions, dust concentrations below 8-10 MPPCF were not visible. The report said no cases of asbestosis had occurred at or below 5 MPPCF, despite large-scale utilization of asbestos. As for cancers even in workers without asbestosis, "it is believed by most authorities that these cases have been associated with exposure significantly exceeding (5 MPPCF)." This was bolstered by the assertion that an unnamed asbestos mining and manufacturing company "has not been able to show an increase in cancerous growths in men (exposed at the TLV)." The risks of using asbestos paper products in feminine hygiene products or using them in contact with food were not mentioned, only inhalation hazards were acknowledged:

> It is believed that the addition of asbestos at the proposed levels during the manufacture of paper products would be harmless to the consumer. Total dusting would have to be well in excess of any levels acceptable to the consumer for the asbestos concentration to approach the Threshold Limit Value.

The "Asbestos Toxicology Report" concluded that asbestos could be used safely as long as airborne dust exposures were below the TLV.

Southalls did run a two-day trial at the end of 1965, and this "showed some technical advantages." But right around this time, the Paper and Board Makers Federation sent out notice to its members that the U.K. government had issued regulations allowing for compensation to be paid to workers who develop mesothelioma. This, and perhaps some of the publicity following the publication of the report of Newhouse and Thompson, appears to have changed minds at Southalls. Carbide UK official Ian Sayers noted that Southalls "calculated that there would be at least 2 lbs. of airborne asbestos produced each day at the creping doctor." (Sayers report, below)

Increasing sales resistance to asbestos was encountered in the mid-1960s in the United Kingdom. Media stories and anticipated pressures from unions and government inspectors prompted "over 20 potential customers" to request assurance that Carbide's material would not endanger their employees. Dockers were refusing to handle imported sacks of asbestos in London and Liverpool.

A rather thorough 19-page report was prepared by I.C. Sayers of the Alloys Division of Union Carbide U.K. Limited (*Asbestos as a Health Hazard in the United Kingdom*, 1967). This was located at the library of the Quebec Asbestos Mining Association in Montreal (now called Asbestos Institute; document no. 3095), where the index card on it read, "Confidential—not circulated."

The review by Sayers describes the 1965 mesothelioma epidemiology study of Newhouse and Thompson. It has separate sections on asbestosis, lung cancer, and mesothelioma. Mesothelioma is described as the "most disturbing" effect because it could occur after only brief exposure. The 1938 TLV of 5 MPPCF is described as an arbitrary choice having no experimental foundation. "There is a growing feeling that the quoted 'Threshold Limit Value' is no longer tenable." In a section entitled "Moral Issues" the report states:

> On the basis of present evidence we are not entitled under any circumstances to state that our material is not a health hazard. What is more, if it is believed that a potential customer would use our material 'dangerously,' and that he is unaware of the toxicity question, then it must surely be our duty to caution him and point out means whereby he can hold the asbestos air float concentration to a minimum.

Dr. Dernehl, who has testified that he knew asbestosis was a potentially fatal disease when he was hired by Union Carbide in 1947, found the report to be "reasonably accurate." In a letter to a Carbide physician in Europe, he wrote that he still believed the 5 MPPCF level would be sufficient to prevent asbestosis (letter to T.J. Hall, June 7, 1967). But for

mesothelioma, he wrote, "I have no idea what concentration might be effective in preventing this disease and I would wonder whether even a limit of one million particles per cubic foot would be effective in this regard." Dernehl, by then Associate Medical Director, also referred to experimental studies comparing Carbide's asbestos with "standard fiber" and Johns-Manville chrysotile.

> The only conclusion we can draw from this crude test is that is possible that our Coalinga product may be more hazardous to use than long fiber asbestos in that it may induce the disease, asbestosis, at an early time after exposure.

Carbide plant manager J.A. Riddle later told a commercial asbestos customer that "a connection between chrysotile asbestos and mesothelioma or lung cancer has not been clearly determined." He enclosed Carbide's "Asbestos Toxicology Report." (reply letter to Frank Tobin, plant manager, Stedfast Rubber Co., May 9, 1969. See also p. 265).

The U.S. Bureau of Mines conducted a health survey at the Union Carbide asbestos mine in California in 1971. The government mining engineers found that the bagger operator was exposed to eight times the 5 f/cc limit and had one exposure 12 times that high. The palletizer operator had exposures almost as high. The general mill atmosphere, also reported as the foreman's time-weighted exposure, also exceeded the 5 f/cc level. Likewise the foreman's office sample was 7.5 f/cc, possibly from dust on workers' clothes tracked into the office. Numerous recommendations were made for new engineering controls and better maintenance of dust control systems. Vacuum cleaning was ordered, to replace manual sweeping and blowing with compressed air. Other "housekeeping" measures were recommended. No fines were issued (G.W. Sutton, Bureau of Mines, letter and report to P.H. Larrison, Union Carbide, Jan. 28, 1972).

Carbide asbestos salesmen were having more difficulties with customers after OSHA issued its regulations in June, 1972. They were advised first of all to "set the mood" and given pointers in dealing with emotionally irate callers (B.L. Ingalls, memorandum, June 22, 1972):

> If the customer is persistent and threatens to eliminate asbestos – a certain amount of aggressiveness may be effective. Words and catch phrases such as "premature", "irrational", or "avoiding the inevitable" will sometimes turn the table. The main objective is to keep the customer on the defensive, make him justify *his* position. Most customers who call are on the offensive, often prepared with "loaded" questions and expecting an argument. Change the mood before discussing anything pertinent about the new regulations. Alternating between an aggressive and submissive attitude is confusing and allows you to bide your time.

The OSHA regulations also led to sampling in the insulation fabrication shop at the Institute, West Virginia plant, where high asbestos exposures had been identified in 1962-63. Some measurements exceeded the ceiling exposure limit of 10 f/cc for 15 minutes, but at least initially, the exposure values were not reported to the employees nor to shop supervision (H.H. Frazier, "Asbestos Sampling Values 511 Insulation Fabrication Shop," Jan. 24, 1973).

In the use of asbestos for oil drilling "muds" Carbide representatives recognized that "atrocious" conditions prevailed (EJ. Kleber, Union Carbide, "Shell Oil," Sept. 24, 1974). By 1975, a number of major companies had taken the position that there was no practical way to meet the OSHA monitoring and medical examination requirements and had stopped using asbestos in oil drilling. Smaller contractors stopped using asbestos after being told that warning signs were required (H.B. Rhodes, "Dust Controlled 'Calidria' Products," July 24, 1975).

In a letter to the corporate law department years later, Carbide official John Myers reported that labels appeared on sacks of Carbide asbestos from 1968 to 1972, including these words (letter to G. Brown, Jan. 22, 1987):

> Warning: Breathing Dust May Be Harmful
> Do Not Breathe Dust

Only after the 1972 OSHA standard was issued, with its caution label requirement, were workers handling sacks of Carbide asbestos able to read that, in contrast to nuisance dust, breathing asbestos dust could cause "serious bodily harm."

By 1975, Carbide lawyers worried that even the OSHA caution label was insufficient to protect the company from product liability suits, and they proposed including a warning that asbestos could cause cancer. This prompted vigorous opposition from Harry Rhodes, who represented the company's asbestos business in the regulatory arena and evidently prevailed in this case (memorandum to W.C. Thurber, May 30, 1975):

> We cannot predict what effect the use of the proposed label will have on our business, but the general feeling here is that it is likely to vary somewhere between serious and fatal.

On August 15, 1975, Dr. Arthur Rohl and co-workers at the Mt. Sinai School of Medicine published a report in *Science* on the high levels of airborne asbestos exposure entailed by mixing, sanding, and sweeping up after applying drywall spackling and joint compounds. The Natural Resources Defense Council then petitioned the Consumer Product Safety Commission to ban asbestos in such products. Throughout 1977, Union Carbide led the opposition to the ban. The day before the ban order was published in the *Federal Register*, Union Carbide reiterated its

objection, on the basis that "consumer" exposure (as distinct from occupational exposure) did not entail an "unreasonable risk" (H.B. Rhodes and J.F. Collings, Union Carbide Corp. Metals Div. Letter to R.D. Pittle, Consumer Product Safety Commission, Dec. 14, 1977).

Dr. Hans Weill had been a medical consultant to asbestos companies for years by the time the asbestos litigation loomed large in the United States. The Board of Directors of the Asbestos Information Association turned to him to identify medical experts for use in defense of civil suits (AIA Board minutes, Dec. 9, 1976).

Union Carbide hired Dr. Weill to fly to Bhopal, India, in the wake of the catastrophic chemical release in that city on December 3, 1984. Dr. Weill, who also serves as an expert witness in asbestos product liability suits, has testified (*Timm v. Raymark*, Solano County, CA Case No. 85911, Jan. 14-15, 1985) that he was correctly quoted in the *New York Times*, which reported on December 15, 1984:

> Dr. Weill said that the victims who had survived to this point "have an encouraging prognosis" and that most would probably recover fully.

This extraordinarily optimistic outlook was not shared by the editors of the prestigious journal, *Lancet*, who stated that longterm lung effects "can be expected" (Dec. 15, 1984). Nor has it been borne out by experience. In March, 1985, Indian doctors reported that pulmonary fibrosis had developed in approximately 20,000 people, diagnosable by chest X-ray and pulmonary function tests. By 2002, the estimated number of deaths attributed to the Bhopal disaster had doubled, and the number of city residents with chronic health effects from the 1984 chemical release was over 50,000.

Even before the purchase of the asbestos mines, Union Carbide (Chemicals Co.) was aware that asbestos dust was hazardous. Insurer Actna identified high exposures in workers adding asbestos and silica to mixers and filling bags of asbestos from bins at a Carbide plant in Speedway City, Indiana, in 1959 (J.M. Robinson, "Occupational Disease study," May 11, 1959). The company conducted tests to determine the relative exposures from Johns-Manville and Owens-Corning thermal insulation products (See 1962 Peele study in Table 8, Chapter 5).

Union Carbide played a leading role in the National Safety Council in the 1930s and in the Industrial Hygiene Foundation in the 1940s, having representatives on the executive boards of these organizations. Carbide sent three representatives to the Seventh Saranac Symposium in 1952, where asbestosis and cancer were discussed (See "The Seventh Saranac Symposium" in Chapter 2). As a major chemical company, Carbide would have made use of *Chemical Abstracts*, which contained numerous citations on asbestos disease (See "Abstracts," in Chapter 10).

ANSWERS FOR THE RECORD BY JAMES L. STENGEL, ESQ.

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HEARING ON ASBESTOS LITIGATION FRAUD AND ABUSE

HOUSE JUDICIARY COMMITTEE:
SUBCOMMITTEE ON THE CONSTITUTION

OCTOBER 4, 2011

Questions for the Record from Chairman Franks

Question 1. Please provide the Committee with pleadings, filings, and other documents that support your written testimony regarding inconsistent claiming in the *Warfield* and *Edwards* cases.

See Appendix A, attached.

Question 2. In his written testimony, Mr. Siegel noted that plaintiffs' lawyers have no control over the payment of particular trust claims. What is your response to that? Does the incredible concentration of trial attorneys on the largest trusts' advisory committees, as shown by a recent RAND report, have an impact on which claims are paid, how claims are paid, or otherwise significantly influence outcomes?

Mr. Siegel's statement that plaintiffs' lawyers have no control over the payment of particular trust claims is incorrect. The very structure of section 524(g) of the bankruptcy code enables plaintiffs' lawyers to significantly influence the outcome of the trust distribution processes. The supermajority requirement of the bankruptcy code states the following:

> (IV) as part of the process of seeking confirmation of such plan—
>
> > (aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and
> >
> > (bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and **votes, by at least 75 percent of those voting, in favor of the plan**;[1]

Claimants' legal representatives vote on their clients behalf. Plaintiffs' lawyers often deliver their votes in a block – "listing the names of those they claim to represent and the total

[1] Bankruptcy Code, § 524(g)(1)(B)(ii)(IV)(bb)(emphasis added).

vote for and against."[2] Thus, section 524(g) of the bankruptcy code ensures plaintiffs' lawyers control over the asbestos trust distribution processes.

The influence of plaintiffs' lawyers over the voting system under section 524(g) has not gone unnoticed, indeed Judge Weinstein commented on the consequences of this process. According to Judge Weinstein:

> A second factor inhibiting the courts [sic] inclination to obtain a vote is the practice of permitting attorneys to vote on behalf of their clients. This does not seem appropriate in the context of asbestos litigation, particularly with respect to the Trust. The fee and solicitation positions of attorneys in this specialized and concentrated litigation amount to vested interests quite distinct in some circumstances from those of injured claimants. Moreover, conflicts among the masses of clients each major attorney represents arise because of vast differences in exposures, kinds of diseases, ages and needs of clients and the like. Any position taken by an attorney is bound to place him or her or one of the clients at a relative disadvantage or advantage. This has been true for the last decade in asbestos litigation.[3]

Furthermore, other evidence suggests that a small group of plaintiffs' lawyers control the trust process. According to the RAND report from 2010:

> …[A]ll trusts exist for the sole purpose of assuming a debtor's asbestos-related liabilities and, by law, must use the assets held in trust to treat current and future PI claimants equitably. In addition, the newer trusts have nearly identical criteria and governing structures. This similarity may be the product of repeat players in the asbestos bankruptcies: a small group of asbestos plaintiffs' attorneys representing a large number of claims…[4]

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[2] S. Todd Brown, Section 524(g) *Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 Colum. Bus. L. Rev. 841, 907-908.

[3] *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 838 (E.D.N.Y. & S.D.N.Y. 1991).

[4] Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts*, at xi (RAND Corporation 2010)[hereinafter RAND 2010 Report].

Moreover, documents from the Manville Trust indicate that "85% of the claims on file are represented by only 55 law firms.[5] Thus, there is ample evidence to suggest that plaintiffs' lawyers have control over the payment of particular trust claims.

Question 3. Mr. Siegel's testimony indicated that asbestos claimants receive "pennies on the dollar" from the trusts. What is your response to that?

Contrary to Mr. Siegel's testimony, claimants receive much more than "pennies on the dollar" from these trusts. Mr. Siegel's statement is misleading as it focuses on the relatively low percentage that each claimant receives from a single trust, however, a typical claimant receives compensation from 20 to 30 defendants and a substantial number of trusts. Indeed, these trusts alone paid $3.3 billion to claimants in 2008.[6]

In fact, one source suggests that individual claimants receive more than $1 million from bankruptcy trusts. According to the consulting firm, Bates White, the typical mesothelioma claimant will receive $600,000 from a "target defendant" then another $100,000 each from 3 to 5 more defendants, and finally will receive $15,000 from each of another 10 to 20 defendants.[7] Thus the typical mesothelioma claimant will receive between $1.0 million and $1.4 million.[8] Indeed, the consulting firm Bates White has determined that a typical mesothelioma claim could grow to about $2.0 million when the pending trusts go online.[9]

Bates White's February 2010 report entitled *The Claiming Game* lists trust settlement values depending on the industry and occupation of the claimant. As an example, this recent case study indicates that the average value for a United States Gypsum Asbestos Personal

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[5] Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz* 80 Texas L. Rev. 1925.

[6] Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, at xi (RAND Corporation 2011)[hereinafter RAND 2011 Report].

[7] Charles E. Bates, Charles H. Mullin, *Show Me the Money*, 22 Mealey's Litigation Report: Asbestos, 2 (Dec. 3, 2007).

[8] *Id.*

[9] Charles E. Bates, Charles H. Mullin, *The Naming Game*, 24 Mealey's Litigation Report: Asbestos, 1 (Sept. 2, 2009).

Injury Settlement Trust is $225,000 per qualifying mesothelioma claim and pays 45% for a settlement value of $101,250.[10] This average of $101,250 is significantly greater than the $30,000 average payment made by the company on mesothelioma tort claims prior to bankruptcy reorganization.[11]

According to Bates White, lack of transparency in the trust context produces the following result, which is reflective of anything but "pennies on the dollar:"

> This lack of transparency between the tort and trust systems prevents solvent defendants from returning to their appropriate several shares. As a result, solvent defendants continue to pay well above their historical liability share while plaintiffs double collect, once from tort settlements and then again from the asbestos trust settlements.[12]

The goal is to bring the trust and tort systems together so that claimants can receive 100% of the value of their claims, not 200% or 10%. Indeed, 100% payments do exist. In the THAN (T. H. Agriculture and Nutrition) bankruptcy trust case, an expert in the case estimated that the average value for a mesothelioma claim against THAN in the pre-filing calibration period of 2003 to 2006 was $66,455. However, the plan set the average mesothelioma value at $238,000 with a maximum value of $900,000 and a contemplated 100% payment to approved personal injury claims.

Interestingly, Mr. Siegel's law firm, Waters & Kraus objected at the confirmation hearing, with Mr. Kraus making the following statement:

> If you'll look at the values that mesothelioma claimants are to receive under the trust distribution procedures, the averages are a multiple of two of the THAN litigation history against all other claimants.[13]

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[10] Charles E. Bates, Charles H. Mullin, and Marc C. Scarcella, *The Claiming Game*, 25 Mealey's Litigation Report: Asbestos, 2 (Feb. 3, 2010).
[11] *Id.*
[12] *Id.* at 2.
[13] Transcript of Hearing and Final Confirmation Hearing. Case No. 08-14692, at 16 (May 21, 2009).

Even Mr. Siegel's law firm acknowledges that scheduled payments are substantially in excess of historical experience. Moreover, payment percentages are not a product of the tort system as Mr. Siegel contends, but rather, they are the product of negotiations between plaintiffs' counsel – who, as previously demonstrated, have leverage, and debtors – whose goal is to resolve the issue and are indifferent to the specific values or allocation. A further illustration of the politics behind these payment schedules is also found in the THAN trust context: on April 1, 2011, after only 16 months of the trust becoming effective, THAN finally allowed those with new claim filings. On this same date, the THAN trust announced that it had dropped the payment percentage from 100% to 30% after determining that the "remaining $500m in trust assets were not sufficient."[14] "Conveniently" all of the "Approved PI Voting Claims were paid at 100% prior to this revelation."[15]

Politics aside, even at the 30%, the average mesothelioma value in THAN is well above the historical average calculated by the expert for the future claimants' representatives. Finally, this payment is only one of 20 to 40 (or more) payment sources a claimant will pursue.

[14] Kirk Hartley, et al. *Pre-Packaged Plan of Inequity: The T H Agriculture & Nutrition 524(g) Asbestos Bankruptcy*, Mealey's Asbestos Bankruptcy Report (In Press 2011).
[15] *Id.*

Question 4. In his written testimony, Mr. Siegel said that "[i]n New York, Pennsylvania, for the most part in Texas and California, and in nearly all the jurisdictions with any significant number of cases, there is no joint and several liability ..." Is that an accurate statement?

Mr. Siegel's characterization of joint and several liability in New York, Pennsylvania, Texas, and California is incorrect. According to the 2011 RAND Report, New York, Pennsylvania, Texas, and California have all adopted some form of several liability.[16]

In New York, liability is joint and several for economic damages. There is several liability for a defendant who is found to be 50 percent or less at fault for non-economic damages.[17] However, a defendant will be jointly and severally liable for noneconomic damages if that defendant is found to have "acted recklessly or to have acted in concert with other parties to conceal the dangers of asbestos."[18]

Liability for asbestos injuries has recently changed in Pennsylvania. As of June 28, 2011 Pennsylvania has several liability for asbestos injuries, subject to some exceptions.[19]

In Texas, there is several liability when the defendant is 50 percent or less responsible for the injury. If a defendant is more than 50 percent at fault, then there is joint and several liability. According to the 2011 RAND Report, liability for both economic and noneconomic damages is nearly always several in Texas asbestos cases.

Finally, in California, there is joint and several liability for economic damages and several liability for non-economic damages.

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[16] RAND 2011 Report, *supra* note 6, at 18.
[17] RAND 2011 Report, *supra* note 6, citing to 740 ILCS 100/2(f).
[18] *Id.* citing to New York Civil Practice Law and Rules, Article 16 §§ 1601(7) and (11).
[19] *Id.* at xi.

Question 5. A few years ago, a Baron & Budd memo that instructed witnesses to claim they were exposed to solvent defendants' asbestos products rather than those of bankrupt companies became public. Does this sort of coaching – sometimes called "enhanced identification" – remain common today? If so, could you please provide some examples or evidence of this practice?

Instances such as the Baron & Budd memorandum rarely rise to the level of public attention.[20] While many agree that "coaching" does occur, few plaintiffs' lawyers would allow such provocative documents to leave law firm walls. Scholars, such as Roger Cramton have described the problem of coaching in the asbestos litigation context as follows:

> [i]n the absence of ethics opinions, disciplinary decisions and cases involving judicial sanctions dealing with improper coaching as an ethics violation, patterns of 'aggressive' coaching are prevalent in many sectors of the litigation bar.[21]

"Coaching" in this context is difficult to prove, and yet, evidence of "suspicious circumstances abound":

> On other issues, such as mass recruitment of clients, the coaching or improper use of testimony, and the reasonableness of fees, suspicious circumstances abound but there is insufficient empirical evidence to determine whether professional rules that are rarely enforced are in fact being violated.[22]

Given that we currently lack that level of transparency as to the interaction of tort and trust, and the potential for fraud and abuse, we are forced to rely upon anecdotal evidence. While we do not have information as to what occurred between plaintiffs and counsel in the Warfield and Edwards cases, we do know that there was some process by which completely inconsistent claims were alleged by these plaintiffs in the tort litigation process versus the trust compensation system.

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[20] See appendix A.
[21] Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 Pepp. L. Rev. 2003.
[22] *Id.*

In Warfield, the claim forms revealed that the period of exposure alleged in the litigation versus that alleged in the trust submissions was materially different. Moreover, in Edwards, as trial drew near, the plaintiff amended his discovery responses to assert that the only asbestos-containing material to which he had been exposed was that of the only remaining solvent defendant. However, two weeks prior to trial, plaintiff produced claims materials relating to 16 trusts.

These are not the only instances of suspicious behavior however. A recent unpublished opinion by the Fourth Circuit reversed a motion to dismiss, allowing a RICO case against asbestos plaintiffs' lawyers to continue.[23] In the latter case, CSX Transportation accused the Robert Peirce & Associates law firm of fraud and racketeering by deliberately filing false asbestosis claims against the railroad company.[24]

There are examples which strongly, albeit circumstantially, suggest coaching as to product identification. In the Kalil case in California, the plaintiff gave extremely detailed testimony about his workplace and product exposure in the late 1960's and early 1970's. In contrast, he forgot the fact that he was married at the time and altered his position again when confronted with documents from his 1971 divorce.

While concrete evidence of coaching such as the Baron & Budd memorandum is difficult to identify, "suspicious circumstances abound" and only transparency can remedy this practice.

[23] CSX Transp., Inc. v. Gilkison, No. 09-2135 (4th Cir. December 30, 2010).
[24] *Id.*

Questions for the Record from Mr. Chabot

Question 1. Some people recognize that we had a problem with asbestos mass medical screening fraud, but claim that the screening fraud issue has been eliminated and that today there is little fraud and abuse in asbestos litigation. How do you respond to this?

Screening fraud has certainly not been eliminated in recent years. While it may be true that following Judge Jack's Silica multi-district litigation opinion in 2005 there has been a reduction in the ability of certain number of "bad doctors" as identified in the Jack opinion,[25] to submit medical evidence, others appear to be stepping up to fill that gap. The flow of unimpaired claims in the bankruptcy trust setting is steadily rising. The sheer volume of these unimpaired claims raises substantial questions about the quality and veracity of this current "medical" evidence.

According to Professor Brickman's written testimony, information released by the Manville Trust indicates there has been a substantial increase in nonmalignant claim filings beginning in 2007 through mid-2011:

> New claim filings for 2007 were about 10,000, increased to 13,400 in 2008, 20,600 in 2009 and 28,400 in 2010; in the first half of 2011, new claims filings were approximately 20,900 compared to 8900 in the first half of 2010.[26]

The increase in volume of nonmalignant claims combined with the blatantly misleading techniques employed by plaintiffs' firms (see below) indicates that the system is still fundamentally flawed.

Advertisements, such as the following, found on the David Law Firm site, http://www.calldavid.com/janice-mcqueen.html, are indicative of the grossly misleading techniques employed by plaintiffs' firms to find potential claimants. This advertisement, used in

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[25] *In re* Silica Products Liab. Litig., 398 F. Supp.2d 563 (S.D. Tex 2005) (MDL No. 1553).

[26] *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System*: Hearing Before Judiciary Committee's Subcomm. on the Constitution, 112th Cong. (2011) (written testimony of Professor Lester Brickman).

commercials across the nation, as well as online, makes no mention of asbestos and instead targets individuals diagnosed with lung cancer looking to receive compensation for their disease. The advertisement states that there is over "30 Billion dollars, to financially assist individuals with lung cancer" and does not, at any point, discuss asbestos exposure. Advertisements such as the commercial produced by the David Law Firm combined with steadily rising nonmalignant claims suggest that screening fraud is far from eradicated.

Question 2. Some argue that transparency in asbestos trusts is not a problem for solvent tort defendants because tort defendants can obtain discovery of any information they need. Could you please explain whether the availability of discovery solves the asbestos trust transparency problem?

The availability of discovery solves part of the trust transparency problem by creating a theoretical ability to detect fraud or inconsistent claim filings. Discovery, in this context, has several limitations which make its curative powers more theoretical than real. First, a reality of asbestos litigation is that few plaintiffs have the ability to identify entities against which they may have claims without the active (or in the case of the Baron & Budd memo,[27] over-active) assistance of counsel. By selectively refreshing or creating recollections of product identification and exposure, plaintiffs' counsel can effectively control which "evidence" is available at any given point in time. Second, most of the current cases actively litigated are "preference" or "exigent" cases which can go to trial mere months after filing. This fact, coupled with the likely inclusion of 30, 40 or 50 defendants, along with limits in many jurisdictions on the length of depositions, makes it difficult to obtain reliable evidence as to actual or potential

[27] See appendix A.

trust claims. This fact, coupled with the more generous time limits for filing trust claims, in turn facilitates delay in trust claiming until the tort litigation is completed.

Transparency of asbestos exposure claims will benefit not only defendants in the tort system, but will also benefit the trusts, as well as those claimants who would otherwise be barred from recovery as a result of double recovery by competing claimants.

As evidenced by the cases below, the lack of transparency creates conditions which make it very difficult, if not impossible to discover fraud or inconsistent claiming. The current asbestos litigation system also functions to provide economic incentives for misconduct and, without transparent discovery, such misconduct will continue.

Our current lack of transparency in the discovery process creates incentives for inconsistent or conflicting positions. Abuse of this process and the potential impact on both defendants and bankruptcy trusts was demonstrated starkly in the case: Kananian, et al., v. Lorillard Tobacco Company. In Kananian, the defendant in an asbestos personal injury action sought discovery of the plaintiff's claims against various trusts.[28] After extensive litigation and substantial effort by plaintiffs' counsel to avoid discovery, clear efforts to manipulate claims to recover from the trusts were revealed. The plaintiff in Kananian had received substantial recoveries from the Manville and Celotex trusts predicated on exposure to those companies' products. The plaintiff then attempted to either avoid acknowledging that inconvenient fact, or, in the alternative, to modify the claim forms so as to diminish their power as proof of alternative causation. No effort was made to inform the trusts of this substantial modification or to return the funds received. The defendant Lorillard pressed for discovery of Mr. Kananian's trust submissions; and his lawyers resisted strenuously,

[28] Kananian v. Lorillard Tobacco Co., No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga Cty, January 18, 2007)(order) at 5.

going so far as to urge the Celotex trust to resist discovery while at the same time asserting cooperation before the Court. When the trust materials were finally produced, they revealed not only evidence inconsistent with the plaintiff's positions in the Lorillard case, but also clear factual inconsistencies between and among Kananian's claim submissions to various trusts.

Kananian was not an isolated incident. In Warfield, there were substantial and inexplicable discrepancies between the positions taken in Court and the trust claims. Despite specific and explicit requests, Warfield failed to disclose nine trust claims. As revealed in the claim forms, the period of exposure alleged in the litigation versus that alleged in the trust submissions was materially different.

At nearly the same time, in another Baltimore case, Edwards, the plaintiff had, prior to trial, failed to disclose whether or not he had filed any claims with bankruptcy trusts. Then, two weeks prior to trial filed sixteen trust claims.

Trust transparency in the discovery process would ensure that these fraudulent and inconsistent claims are never filed.

Question 3. Is it true that restrictive confidentiality provisions are often put into effect after the bankruptcy court has confirmed the trust at the behest of the trial lawyers who sit on the trusts' governing committees? Can you discuss the implications this has?

Many of the trusts' distribution procedures reflect an affirmative effort to limit or preclude disclosure.[29] There is evidence to suggest that restrictive confidentiality provisions are often put into effect after the bankruptcy court has confirmed the trust. Based upon a comparison of trust distribution procedures originally submitted to bankruptcy courts and those later amended there are a number of section 524(g) trusts that

[29] William P. Shelley, Jacob C. Cohn & Joseph A. Arnold, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, Norton J. Bankr. L. & Practice 257, 262 (2008).

have added restrictive confidentiality provisions post-confirmation.[30] The following asbestos-related bankruptcies were modified post-confirmation to include either "confidentiality provisions" or "sole benefit" provisions:[31]

- *In re AC&S, Inc.*, Case No. 02-12687 (Bankr. D. Del.);
- *In re Armstrong World Industries*, Case No. 00-4471 (Bankr. D. Del.);
- *In re ASARCO LLC*, Case No. 05-21207 (Bankr. S.D. Tex.);
- *In re Babcock & Wilcox Co.*, Case No. 00-10992 (Bankr. E.D. La.);
- *In re Celotex Corp.*, Case No. 90-10016 (Bankr. M.D. Fla.);
- *In re DII Industries, LLC*, Case No. 03-35592 (Bankr. W.D. Pa.);
- *In re Federal-Mogul*, Case No, 01-10578 (Bankr. D. Del.);
- *In re Kaiser Aluminum Corp.*, Case No. 02-10429 (Bankr. D. Del.);
- *In re National Gypsum Co.*, Case No. 90-37213 (Bankr. N.D. Tex.);
- *In re Owens-Corning*, Case No. 00-03837 (Bankr. D. Del.);
- *In re Porter-Hayden Co.*, Case No. 02-54152 (Bankr. D. Md.); and
- *In re United States Gypsum Corp.*, Case No. 01-2094 (Bankr. D. Del.).

The implications of these post-confirmation restrictive confidentiality provisions are significant. As indicated in Kananian, Warfield, and Edwards, transparency in the trust process is critical. Without transparency, fraud and inconsistent claims filing remain un-checked.

Questions for the Record from Mr. Nadler

Question 1. Do you now or have you ever advised, either directly or indirectly, any asbestos defendant, its insurer, or an asbestos trust?

Yes. I currently represent The Union Carbide Corporation in asbestos litigation and have provided advice in this context to The Dow Chemical Company. From 1992 until approximately 2001, I represented the Manville Personal Injury Settlement Trust in a variety of capacities. During that time period, I also represented the Raymark and H. K. Porter Trusts for the limited

[30] The specific trust distribution procedures should be accessible online however they are also available upon request.
[31] "Sole benefit" provisions state that evidence submitted to the respective trust to establish proof of an asbestos-related claim is for the sole benefit of the respective trust, not third parties or defendants in the trust system.

purpose of asserting claims against the tobacco industry on behalf of these trusts. I have also advised, from time to time, the Institute for Legal Reform of the United States Chamber of Commerce on asbestos-related issues. But to reiterate the qualification I placed on my written statement and my oral testimony, the views I have offered to the Subcommittee are my independent, personal views and not those of any other person, firm, entity or organization.

Question 2. Numerous studies show that when sheet gaskets, such as the gaskets sold by Monroe Rubber & Gasket, are removed from a flange, large amounts of asbestos are released into the air. In fact, testing has shown that using gaskets and removing gaskets with scrapers and wire brushes releases the same amount of asbestos as pipe-covering. A 2002 article summarized these studies finding, "In these studies the airborne asbestos fiber levels measured in many of the samples exceeded all current and historical OSHA excursion limits and some previous permissible exposure limits based on eight-hour time-weighted average standards.:" Monroe Rubber & Gasket sold several asbestos containing gaskets up until OSHA's asbestos regulation in 1986, and continued to sell one asbestos sheet gasket until 2001. Based on this research, and what we know about asbestos exposure, it's safe to assume that numerous machinists who were exposed to asbestos while removing a Monroe Rubber & Gasket have developed asbestosis or mesothelioma as a result of that exposure. IN all likelihood these machinists will or have already died prematurely. If Monroe Rubber & Gasket is not responsible for compensating these asbestos victims, then who should be?

I do not represent Monroe Rubber & Gasket or any other similarly situated defendant, so I cannot respond and would defer, respectfully, to Monroe's counsel on this issue.

Appendix A

Edwards:
Union Carbide Corporation-Motion-to-Compel-Discovery
Union Carbide Corporation-Motion-to-Compel-Discovery-PO
Resp-Union Carbide Corporation Motion to Compel
Exhibit A part 1 and 2
Resp-Union Carbide Corporation-Motion-to-compel-ORDER
Edwards Supplemental Interrogatories
Edwards Oct 26, 2010 response
All documents provided by Edwards on October 26, 2010

Warfield:
Ex-B: Plaintiff's Answers to Defendants' Joint Interrogatories
Ex-C: Deposition of Warfield
Ex-D: Plaintiff's 5th Supp Answers to Defendants' Interrogatories
Ex-F: Original Submitted Claim – online form
Ex-G: Online claims submission from Warfield
Ex-H: Warfield Claim View Detail Report and Certified Statement of Exposure
Ex-I: BW Warfield proof of claim forms
Ex-J: H.K. Porter Asbestos Trust Claim Form
Ex-K: Celotex Asbestos Settlement Trust Form
Ex-L: UNR Asbestos Disease Claims Trust
Ex-M: Certified Statement of Exposure – National Gypsum
Ex-N: Certified Statement of Exposure – Celotex
Ex-O: AWI claim form
Ex-P: Owens Corning Claim form
Ex-Q: Owens Corning Claim form – discrepancies with Exhibit P
Ex-R: Union Carbide Corporation Supp Interrogatories to Plaintiffs
Ex-S: Steven Parrott's letter requesting productions of plaintiffs' documents
Union Carbide Corporation Motion for Sanctions

Baron and Budd Memorandum