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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

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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]

[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; s*ee* 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

[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/cda/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

[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. The Disconnect Between Nonmalignant Claim Filings with Asbestos Bankruptcy Trusts and in the Tort System

[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

[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

[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.