IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2135
(5:05-cv-00202-FPS-JES)

CSX TRANSPORTATION, INCORPORATED,
Plaintiff-Appellant,

v.

ROBERT V. GILKISON; PEIRCE, RAIMOND & COULTER, PC, a/k/a Robert Peirce & Associates, P.C., JOHN DOES; ROBERT N. PIERCE, JR.; LOUIS A. RAIMOND; MARK T. COULTER; DR. RAY A. HARRON,
Defendants-Appellees

and

RICHARD CASSOFF, M.D.,
Party-in-Interest

LUMBERMENS MUTUAL CASUALTY COMPANY,
Intervenor

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, COALITION FOR LITIGATION JUSTICE, INC., PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PLAINTIFF-APPELLANT CSX TRANSPORTATION, INC. SUPPORTING REVERSAL

Mark A. Behrens
(COUNSEL OF RECORD)
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, DC 20004
(202) 783-4200

Attorneys for Amici Curiae

(Of Counsel Listed on Following Page)

Of Counsel

H. Sherman Joyce
AMERICAN TORT
REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
(202) 682-1163

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 553-3826

Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Daniel Saphire
ASSOCIATION OF
AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, DC 20024
(202) 639-2505

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

As organizations representing asbestos defendants and their insurers, *amici* have a substantial interest in deterring fraud and abuse. *Amici*, therefore, support Plaintiff-Appellant's efforts to combat illegitimate litigation. *Amici* file this brief contemporaneous with an accompanying Motion for Leave to File.

INTRODUCTION

Asbestos and other mass torts pose special private and public costs because of fraud and abuse. "The rate of fraudulent asbestos claims is very high." Task Force on Contingent Fees of the ABA's Tort Trial & Insurance Practice Section, *Contingent Fees in Mass Tort Litigation*, 42 Tort Trial & Ins. Prac. L.J. 105, 153 (Fall 2006) (summarizing remarks of Mississippi defense attorney Danny Mulholland). "The clearest examples come from lawyer-sponsored screening programs that recruit tens of thousands of mostly bogus asbestosis and other non-cancer claims." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 529 (2007). As Professor Lester Brickman, an asbestos litigation and ethics expert, has explained,

> [A]sbestos litigation has become a malignant enterprise which mostly consists of a massive client recruitment effort . . . supported by baseless medical evidence which is not generated by good faith medical practice, but rather is primarily a function of the compensation paid, and by claimant testimony scripted by lawyers to identify exposure to certain defendants' products.

Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 33 n.a1 (2003).

The entrepreneurial model developed by plaintiffs' lawyers to pursue asbestos claims provides powerful incentives for fraud. *See* Lester Brickman, *The Use of Litigation Screening in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221 (2008). Lawyer-sponsored screenings have been used to generate staggering numbers of claims, overwhelming defendants and courts. This strategy prevents cases from being addressed on an individual basis. Economies of scale compel settlement of screened cases.

In addition, because the claims typically are filed in "magic jurisdictions"[1] like West Virginia—places the American Tort Reform Foundation calls "Judicial Hellholes"—plaintiffs' attorneys have an added weapon: if a defendant does not settle the entire inventory the plaintiff's lawyer will set "one good one for trial."

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[1] Former Mississippi asbestos plaintiffs' attorney Richard Scruggs has said,

> What I call the "magic jurisdiction," . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . .

American Tort Reform Foundation, *Judicial Hellholes 2009*, *available at* http://www.atra.org/reports/hellholes/.

As one commentator has explained, "In theory, judges should prevent abuses. In practice, trial lawyers depend on a few states, whose expansive liability laws, procedural rules or well-known anti-corporate bias shift the odds in their favor." Editorial, Robert J. Samuelson, *Shamelessly Milking the Asbestos Cash Cow: It Isn't Justice; It's a Business Worth $54 Billion*, Charleston Gazette & Daily Mail, Nov. 21, 2002, at 5A, *available at* 2002 WLNR 1037795.

Thus, it is extremely difficult for the defendant to separate the fraudulent from the merely weak or meritless. All of the cases tend to get tossed into the litigation Cuisinart and settled, regardless of their merits. It is important for the Court to appreciate this background to understand why the district court's reasoning was unsound and should be reversed. *See generally* Griffin B. Bell, *Judges Must Address Asbestos: Legal Abuses Cost Sick People and West Virginia*, Charleston Gazette & Daily Mail, July 30, 2002, at 4A, at 2002 WLNR 1024263.

ARGUMENT

I. MASS TORTS GENERATED BY LAWYER-DRIVEN SCREENINGS PROVIDE INCENTIVES FOR FRAUD

A. Generation of Asbestos Claims through Mass Screenings

"Mass medical screening, or 'diagnosing for dollars,' currently fuels mass tort litigation." Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm. & Mary L. Rev. 2043, 2043 (2007). Asbestos screenings have "no medical purpose . . . and

claimants receive no medical follow-up." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003). Instead, screenings are intended to generate "litigants"; they are driven by profits, not medicine.

Indeed, "[b]y all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic." James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 823 (2002). The RAND Institute for Civil Justice has said that "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living." Stephen J. Carroll et al., *Asbestos Litigation* 76 (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf; *see also* Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186, *available at* 2004 WLNR 17888598 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds'--that is, they have slight or no physical symptoms.").

"Substantially all nonmalignant claimants are recruited by screening companies—entrepreneurial entities begun by individuals with no health care

background that are hired by plaintiff lawyers to solicit potential 'litigants.'" Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833, 836 (2005); *see also Owens Corning v. Credit Suisse First Boston* 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."). Screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. "It is not uncommon to see a billboard outside a union hall meeting stating, 'The X-ray van will be here next Tuesday.'" Jenni Biggs, *The Scope and Impact of Asbestos Litigation*, 44 S. Tex. L. Rev. 1045, 1051 (2003). *U.S. News & World Report* reported:

> To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WLNR 7718069.

Potential plaintiffs are drawn in by the allure of easy money. Anecdotes told to the *St. Louis Post-Dispatch* reflect the rationale behind many who have attended screening sessions:

> I saw the notice in the union newsletter and said, "Why not?" said an automotive worker from Ford. Sitting on the tailgate of his shiny, new Chevy pickup and lighting a fresh cigarette off the one he had just finished, he added: "It's better than the lottery. If they find something, I get a few thousand dollars I didn't have. If they don't find anything, I've just lost an afternoon."
>
> Standing nearby, a Boeing worker 10 days from retirement volunteered, "The lawyers said I could get $10,000 or $12,000 if the shadow is big enough, and I know just the fishing boat I'd buy with that."

Andrew Schneider, *Asbestos Lawsuits Anger Critics; Mass Medical Screenings, Run by Lawyers, Reel in Many Who Don't Feel Ill*, St. Louis Post-Dispatch, Feb. 9, 2003, at A1, *available at* 2003 WLNR 1763409.

In these screenings, X-rays are administered in an assembly line manner often using mobile x-ray equipment brought to parking lots, union halls and motel rooms. *See* David E. Setter et al., *Why We Have to Defend Against Screened Cases: Now is the Time for a Change*, 18:20 Mealey's Litig. Rep.: Asbestos 23 (Nov. 12, 2003). These vehicles allow lawyers to seek out potential plaintiffs across the country. Mobile claims manufacturing services generate diagnostic reports that become the medical basis for plaintiffs' claims. It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Brickman, 31 Pepp. L. Rev. at 69.

Because screenings are profit-driven and have no medical basis, "[d]octors abandon normal clinical standards solely to justify litigation opinions." Peter

Grossi & Sarah Duncan, *Litigation-Driven 'Medical' Screenings: Diagnoses for Dollars*, 33:41 Prod. Safety & Liab. Rptr. (BNA) 1027, 1027 (Oct. 17, 2005). Many "B readers" (X-ray interpreters) hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning v. Credit Suisse First Boston* 322 B.R. 719, 723 (D. Del. 2005); *see also In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002) (screening "programs rely almost solely on chest X-rays and pro-plaintiff readers").

Plaintiffs' attorneys seek out doctors willing to diagnose a problem where the vast majority of doctors would not. *See* Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 521 (2008) ("lawyers have paid doctors and other health care workers, some of whose credentials or services are suspect, to read X-rays or perform pulmonary function tests with a mandate to find positive results in a large portion of those screened."); American Bar Association Commission on Asbestos Litigation, *Report to the House of Delegates* 8 (2003), http://www.abanet.org/leadership/full_report.pdf ("Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars—in some cases, millions—in the aggregate by the litigation screening companies due to the volume of films read."). As one physician has explained, "the chest X-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's

behalf." David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.).[2]

B. Federal Court Silica Litigation and the Linkage With Asbestos

The tactics described above led at least one observer to question, "Do doctors hired to be expert witnesses by plaintiffs' lawyers need better eyeglasses, or is something more nefarious going on here?" Editorial, *X-raying an Asbestos Quagmire*, Chi. Trib., Aug. 16, 2004, at 16, *available at* 2004 WLNR 19912200. The federal silica multidistrict litigation provided an answer in 2005.

Silica litigation emerged in force on the tide of asbestos litigation. "[P]laintiffs' lawyers filed an unprecedented number of silica cases from 2002 to 2004—a total of 20,479 cases in Mississippi alone—an amount "five times greater than one would expect over the same period in the entire United States." David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms*, 26 Miss. C. L. Rev.

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[2] Some attorneys reportedly even pass an X-ray around to numerous radiologists until they find one who is willing to say that the X-ray shows symptoms of an asbestos-related disease—a practice strongly suggesting unreliable scientific evidence. *See* David Egilman, *Asbestos Screenings*, 42 Am. J. of Indus. Med. 163 (2002); Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at 1, *available at* 2002 WLNR 269888 (one medical witness for plaintiffs was "amazed to discover that, in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one.").

253, 258 (2007) (internal citation omitted).[3] Over 10,000 of these cases were removed to federal court and centralized for pretrial purposes before U.S. District Judge Janis Graham Jack of the Southern District of Texas.

"Remarkably, however, only twelve . . . doctors diagnosed more than 9,000 plaintiffs with silicosis." John P. Hooper et al., *Undamaged: Federal Court Establishes Criteria for Mass Tort Screenings*, American Bar Association Section of Litigation, 5:3 Mass Torts 12, 12 (Summer 2007). "In virtually every case, these doctors were not the Plaintiffs' treating physicians, did not work in the same city or state as the Plaintiffs, and did not otherwise have any connection to the Plaintiffs. Rather than being connected to the Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile x-ray screening companies." *In re Silica Prods. Liab. Litig. (MDL No. 1553)*, 398 F. Supp. 2d 563, 580 (S.D. Tex. 2005); *see also* Stephen J. Carroll et al., *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* (RAND Inst. for Civil Justice 2009), *available at* http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf [hereinafter RAND Silica Rep.]

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[3] Silica is a major component in soil, sand, rock, and many other materials. As a natural substance, it is not notably harmful. When fragmented into tiny particles, however, silica can be dangerous if inhaled, possibly leading to silicosis. Because the risks of exposure have been well-known for decades, the litigation had been stable for years with only a low number of people pursuing claims in any year. *See* Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 Mealey's Litig. Rep.: Asbestos 33 (Feb. 21, 2005).

In February 2005 *Daubert* hearings it was established that one screening entity, N&M, "helped generate approximately 6,757 claims in th[e] MDL, while [another screening firm,] RTS . . . helped generate at least 1,444 claims." *Id.* at 596. N&M generated these 6,500-plus claims in just 99 screening days. *See* David M. Setter & Andrew W. Kalish, Commentary, *Recent Screening Developments: The MDL Silica 1553 Daubert Hearing*, 20:9 Mealey's Litig. Rep.: Asbestos 38, 40 (June 1, 2005). To place this accomplishment in perspective, "in just over two years, N&M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period." 398 F. Supp. 2d at 603. Furthermore, at least 4,031 N&M-generated plaintiffs had previously filed asbestosis claims with the Manville Personal Injury Settlement Trust, although "a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis." *Id.*

The most prolific diagnosing physician was West Virginia doctor Ray Harron—the B reader used by the plaintiffs' lawyers in the subject litigation and a defendant in this case. Dr. Harron was involved in the diagnosis of approximately 6,350 of the silica MDL plaintiffs in just ninety-nine days, and was listed as the diagnosing physician for approximately 2,600 plaintiffs. *See id.* at 606. "He seemed at a loss to explain how permanent signs of asbestosis he'd diagnosed disappeared years later when he diagnosed the same workers with silicosis." Lynn

Brezosky, *Judge: Diagnoses Methods in Silicosis Case 'Frightening' West Virginia Doctor Involved in Multistate Lawsuit in Texas*, Charleston Gazette & Daily Mail, Feb. 19, 2005, at 6D, *available at* 2005 WLNR 2702789. His testimony "abruptly ended when the Court granted his request for time to obtain counsel." 398 F. Supp. 2d at 608.

In June of 2005, Judge Jack issued a scathing opinion in which she found that all but one of the plaintiffs' silicosis diagnoses were "fatally unreliable"—and inadmissible. *Id.* at 675. The claims "were driven by neither health nor justice: they were manufactured for money." *Id.* at 635. The broad media reporting of Judge Jack's findings sparked criminal and congressional inquiries at which the suspect doctors "took the Fifth." *See* Jonathan D. Glater, *Civil Suits over Silica in Texas Become a Criminal Matter in New York*, N.Y. Times, May 18, 2005, at C5, *available at* 2005 WLNR 7889661; Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. Times, Mar. 8, 2006, at C3, *available at* 2006 WLNR 3870056. Soon thereafter, the silica litigation collapsed and thousands of the cases were voluntarily dismissed.[4]

Judge Jack's opinion was "a critical turning point in mass tort litigation because for the first time it allowed a comprehensive examination of the mass tort

[4] More recently, Dr. Ray Harron invoked his Fifth Amendment privilege when deposed in an asbestos case previously pending in the United States District Court for the Northern District of West Virginia. *See Ayers v. Continental Cas. Co.*, 2007 WL 1960613, at *1 (N.D. W.Va. July 2, 2007).

scheme—a look behind the curtain of secrecy that had guarded the 'forensic identification of diagnoses' or as it is more commonly known, litigation screening. Maron & Jones, 26 Miss. C. L. Rev. at 261; *see also* Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 Sw. U. L. Rev. 733, 739 (2008) ("One of the most important things is I think judges are alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case.").[5]

Judge Jack's findings apply "with at least equal force to nonmalignant asbestos litigation: the diagnoses are mostly manufactured for money." Lester Brickman, *Disparities between Asbestosis and Silicosis Claims Generated by Litigation Screening Companies and Clinical Studies*, 29 Cardozo L. Rev. 513, 594 (2007). Judge Jack acknowledged, "[t]he screening companies were established initially to meet law firm demand for asbestos cases." 398 F. Supp. 2d at 597. Another commentator has explained,

> Although her opinion dealt with silica litigation, Judge Jack's findings significantly affect asbestos reform. By conducting Daubert hearings and court depositions that exposed the prevalence of fraud in silica litigation, Judge Jack exposed the prevalence of fraud in asbestos litigation as well. As a result, it is reasonable to conclude that the number of asbestos claims compensated through the tort system was greatly inflated due to fraud.

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[5] Reacting to Judge Jack's findings, the National Institute for Occupational Safety and Health (NIOSH) published a B Reader Code of Ethics. *See* National Inst. for Occupational Safety & Health, B Reader Code of Ethics, *available at* http://www.cdc.gov/niosh/topics/chestradiography/breader-ethics.html.

Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 Md. L. Rev. 162, 162 (2009).

The B readers and screening firms referenced in Judge Jack's opinion helped generate tens of thousands of asbestos claims. "According to the Manville Trust, perhaps the most complete database of asbestos claims, the six combined [screening doctors referenced in Judge Jack's opinion] authored an astonishing 140,911 asbestos 'diagnoses'—and the number is probably much higher." Editorial, *The Asbestos Waterloo*, Wall St. J., June 10, 2006, at A12, *abstract available at* 2006 WLNR 10062163; *see also* Roger Parloff, *Diagnosing for Dollars*, Fortune, June 13, 2005, at 95, *available at* 2005 WLNR 8694138 ("Just five screening doctors account for almost 25% of all the asbestos claims ever filed with the Manville Trust, while the top 25 account for 46%.").

For instance, Dr. Ray Harron reportedly diagnosed disease in 51,048 Manville asbestos personal injury claims and supplied 88,258 reports in support of other claims. *See* Editorial, *Silicosis Clam-Up,* Wall St. J., Mar. 13, 2006, at A18, *abstract available at* 2006 WLNR 4210261. In one day, Dr. Harron reportedly diagnosed 515 people, or the equivalent of more than one a minute in an eight-hour shift. *Id.* "Dr. Harron was not a professional rendering an independent opinion, but a vital cog in a multibillion-dollar lawsuit machine." Jonathan D. Glater,

Reading X-Rays in Asbestos Suits Enriched Doctor, N.Y. Times, Nov. 29, 2005, at A1, *available at* 2005 WLNR 19186866; *see also* RAND Silica Rep., *supra.*

"But Harron is only the most prolific of a prolific breed." Parloff, *Diagnosing for Dollars*, *supra*, at 98. Another silica screener, Dr. James Ballard, provided 10,700 primary diagnoses and another 30,329 reports in support of asbestos claims. *See id.* Dr. Jay Segarra "participated in almost 40,000 positive diagnoses for asbestos-related illnesses over the last 13 years, or about eight per day, every day, including weekends and holidays. There were about 200 days on which Dr. Segarra rendered positive diagnoses for more than 20 people, and 14 days with more than 50." Adam Liptak, *Defendants See a Case of Diagnosing for Dollars*, N.Y. Times, Oct. 1, 2007, at A14, *available at* 2007 WLNR 19170105.

In the wake of Judge Jack's findings, several state medical licensing agencies have taken action against Dr. Harron.[6] In February 2009, the manager of the federal asbestos multidistrict litigation, U.S. District Judge Eduardo Robreno of the Eastern District of Pennsylvania, granted defendants' motions to exclude Dr. Harron's testimony and dismiss cases where Dr. Harron was the diagnosing physician. *See In re Asbestos Prods. Liab. Litig. (No. VI),* MDL No. 875 (E.D. Pa.

[6] In California and Florida, Dr. Ray Harron agreed to voluntarily surrender his medical license. In Mississippi, New Mexico, and Texas, Dr. Harron entered into agreed orders not to practice medicine until his license expired and not to renew it thereafter. North Carolina and New York permanently revoked Dr. Harron's medical license. In addition, Drs. Andrew Harron and H. Todd Coulter were later reprimanded in Mississippi. *See* Mark Behrens, *What's New in Asbestos Litigation?,* 28 Rev. Litig. 501, 521 (2009).

Feb. 2, 2009) (order). In addition, some trusts set up by bankruptcy courts to pay asbestos claims "finally have begun their own crackdown on claims submitted on the strength of B-reads performed by the discredited doctors." William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J. Bankr. L. & Prac. 257, 281 (2008).

In September 2009, former West Supreme Court of Appeals Justice Arthur Recht, who has presided over all Federal Employers' Liability Act asbestos cases filed in West Virginia since 2002, issued a revised case management order applicable to all such cases brought by Robert Peirce & Associates, the law firm Defendant in this case. Notably, this order applies to the lawsuits which contained the Baylor and other frauds at issue in this appeal. Among other things, the order provides that "upon Motion of the relevant Defendant, the court shall dismiss, without prejudice, any Plaintiff's claim that relies only on a B read or other interpretation of diagnosing lung imaging or a diagnosing report prepared by Dr. Ray Harron." *In re FELA Asbestos Cases*, No. 02-C-9500 (Cir. Ct. Kanawha County, W. Va. Sept. 9, 2009) (Revised Case Management Order).

There is recent evidence that other courts may be more willing to entertain motions aimed at curbing asbestos lawsuit abuse. For instance, in January 2007, Cuyahoga County (Cleveland) Court of Common Pleas Judge Harry Hanna barred a prominent San Francisco-area asbestos plaintiffs' firm and one of its lawyers

from appearing in his court due to their alleged dishonesty in litigating a mesothelioma case. *See Kananian v. Lorillard Tobacco Co.*, 2007 WL 4913164 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 19, 2007), *appeal dismissed*, No. 89448 (Ohio App. Feb. 21, 2007), *review denied*, 878 N.E.2d 34 (Ohio 2007). Judge Hanna's ruling received national attention for exposing inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims. Judge Hanna's decision ordering the plaintiff to produce claim forms submitted to various trusts "effectively opened a Pandora's box of deceit," revealing "conflicting versions of how Kananian acquired his cancer." James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1, *available at* 2007 WLNR 1527886; *see also* Kimberly A. Strassel, Opinion, *Trusts Busted*, Wall St. J., Dec. 5, 2006, at A18, *available at* 2006 WLNR 21034229. Emails and other documents from the plaintiff's attorneys also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated." Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, 137, *available at* 2006 WLNR 14482372. Judge Hanna later said, "In my 45 years of practicing law, I never expected to see lawyers lie like this. . . . It was lies upon lies upon lies." McCarty, *supra*. The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required

reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts." Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14, *abstract available at* 2007 WLNR 1291484.

More recently, in November 2008, Wayne County (Detroit) Circuit Court Judge Robert Colombo, Jr. granted a defense motion to exclude plaintiffs' expert testimony by Lansing-based Dr. R. Michael Kelly of Mid-Michigan Physicians. *See* Editorial, *Columbo, The Asbestos Sleuth*, Wall St. J., Dec. 23, 2008, at A12, *abstract available at* 2008 WLNR 24641859 ("In his ruling, Judge Colombo laid out the facts and found that 'the only conclusion in the face of such overwhelming medical evidence is that the opinions of Dr. Kelly are not reliable.' He then disqualified him from the case."). The motion argued that Dr. Kelly, who earned $500 per exam and had diagnosed more than 7,000 asbestos litigants, should be excluded because Dr. Kelly was not a radiologist, nor board certified in reading X-rays, and because independent radiologists that examined 1,875 of Dr. Kelly's cases found no evidence of disease in 88% of the cases. *See id.* "The medical records also showed that the vast majority of the lung-function tests Dr. Kelly performed failed to meet accepted standards." Editorial, *Michigan Malpractice*, Wall St. J., Nov. 10, 2008, at A18, *abstract available at* 2008 WLNR 21517487; *see also* Editorial, *A Strange Find Up in Michigan: The Evidence for Asbestos*

Claims Needs to Be Examined Very Carefully, Charleston Gazette & Daily Mail (W. Va.), Nov. 14, 2008, at 4A, *available at* 2008 WLNR 21798130 ("Defendants also found from medical records that most of the lung-function tests Kelly performed didn't meet standards.").

II. SCREENINGS HAVE HAD SERIOUS ADVERSE CONSEQUENCES

"'[T]he 'asbestos-litigation crisis' would never have arisen" if not for the deluge of lawyer-generated claims filed by the uninjured. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 273 (2001) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997)).

Individuals with legitimate claims may be harmed most, as resources are depleted and payments are threatened, whether the funds come from bankruptcy trusts or the tort system. As asbestos plaintiffs' lawyer Steven Kazan of Oakland told the U.S. Senate Judiciary Committee in 2003:

> Asbestos litigation has become a nightmare because the courts have been inundated by the claims of people who may have been exposed to asbestos but who are not sick – who have no lung function deficit. This flood is conjured up through systematic, for-profit screening programs designed to find potential plaintiffs with some x-ray evidence "consistent with'" asbestosis. Ironically, and tragically, in many states, that x-ray evidence triggers the statute of limitations, literally forcing the filing of premature claims. These claims are choking the asbestos litigation system and keeping the courts from doing their job: providing compensation for people who are genuinely injured by asbestos diseases."

The Asbestos Litigation Crisis Continues – It is Time for Congress to Act: Hearing Before the Sen. Comm. on the Judiciary. (Mar. 5, 2003) (statement of Steven Kazan), http://judiciary.senate. gov/hearings/testimony.cfm?id=617&wit_id=1678.

The Manville trustees report that a disproportionate amount of settlement dollars have gone to claimants who have "no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6. The Trust is now paying out *five cents on the dollar* to asbestos claimants. *See id.* Other trusts have also cut payments to claimants. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 262 (2006).

Cancer victims now have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. *See, e.g.*, Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, Wash. Post, Sept. 25, 2002, at E1. In fact, some lawyers who primarily represent cancer victims have been highly critical of other plaintiffs' lawyers who file claims on behalf of the non-sick:

- Matthew Bergman of Seattle: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . the genuinely sick and dying are often deprived of

adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."[7]

- Peter Kraus of Dallas: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."[8]
- Andrew O'Brien of St. Louis: "There is a limited amount of money available to properly compensate people who are really sick from asbestos disease" and consideration should be given to "the needs of those who are seriously ill" by not "flooding the courts with those who are not sick today and may never become impaired to the point they can't lead a normal life."[9]
- Randy Bono, formerly of SimmonsCooper in Madison County, Illinois: "Getting people who aren't sick out of the system, that's a good idea."[10]

At least eighty-five employers have been forced into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, with devastating impacts on employees, retirees, shareholders, and affected communities. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,* 12 J. Bankr. L. & Prac. 51 (2003).

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."

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[7] Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer, May 30, 2002, at B7, *available at* 2002 WLNR 2149929.

[8] Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, *abstract available at* 2002 WLNR 2320384.

[9] Andrew Schneider, *Asbestos Lawsuits Anger Critics; Mass Medical Screenings, Run by Lawyers, Reel in Many Who Don't Feel Ill*, St. Louis Post-Dispatch, Feb. 9, 2003, at A1, *available at* 2003 WLNR 1763409.

[10] Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties; Bill Would Substitute Trust Fund for Lawsuits*, St. Louis Post-Dispatch, July 23, 2003, at A1, *available at* 2003 WLNR 16160981.

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314. More than 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns – Raising the Bar in Asbestos Litig., Aug. 2004, at 5, including at least one company in nearly every U.S. industry. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen J. Carroll et al., *Asbestos Litigation* 94 (RAND Inst. for Civil Justice 2005), *at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf. One plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

III. FINDING THE FRAUD IN THE HAYSTACK

The RAND Institute for Civil Justice recently published a comprehensive report which explains how the economies of scale in mass torts, such as asbestos, compel settlement and invite fraud and abuse:

> *Plaintiffs can attempt to overwhelm defendants with claims to force defendants to settle with little attention paid to the merits of the claims. It can be extremely costly for defendants to investigate the merits of a substantial proportion of the claims, and some may conclude it is cheaper, at least in the short run, to settle. Judges have an incentive to push for rapid settlements that clear their overloaded dockets.*

RAND Silica Rep. at 26 (emphasis added). "Such situations are ripe for the abuse of expert evidence." *Id.*

Likewise, Boston University Law School Professor Keith Hylton has said that plaintiffs' lawyers have an incentive to file fraudulent claims because the *"lawyer knows that it is costly to determine whether any given victim is fraudulent. He knows that it would not be rational, given the cost of checking, to examine every victim in the class to determine validity.* Keith Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 Sw. U. L. Rev. 511, 586-587 (2008) (emphasis added).

Indeed, in the federal court silica litigation, plaintiffs' lead counsel was confident enough that defendants would be pressured to settle prior to discovery that he "presented the defendants with a letter demanding $1 billion to settle the cases. He suggested that the price was a bargain, because 'litigating the Silica MDL will collectively cost the defendants more than $1,500,000,000' in pretrial expenses alone." Parloff, *Diagnosing for Dollars*, *supra*, at 104.

Defendants' incentive to spend substantial resources to investigate claims of nominal value is further diminished by the fact that plaintiffs' lawyers typically file screened cases in certain jurisdictions that are perceived by civil defendants to be unfair forums. If a defendant does not agree to settle the lawyer's entire inventory, it risks losing a potentially large verdict in an asbestos-related cancer case at trial.

Thus, it is extremely difficult for any asbestos defendant to police fraud in a particular case. It is important for the Court to appreciate this background to understand why the district court's reasoning was unsound and should be reversed.

CONCLUSION

For these reasons, this Court should reverse the trial court below.

Respectfully submitted,

/s Mark A. Behrens
Mark A. Behrens
(COUNSEL OF RECORD)
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, DC 20004
(202) 783-4200
Attorneys for Amici Curiae

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1163

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Daniel Saphire
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, DC 20024
(202) 639-2505

Of Counsel

Dated: January 14, 2010

CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.

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/s/ Mark A. Behrens
Mark A. Behrens

Dated: January 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was filed with the Court Clerk through the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. In addition, per Local Rule 31(d), eight bound copies of the foregoing Brief were sent to the Court Clerk and two copies were sent to each counsel listed below via first class U.S. Mail postage prepaid:

E. Duncan Getchell, Jr.
McGuire Woods LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-1000

Walter P. DeForest
DeForest Koscelnik Yokitis
Kaplan & Berardinelli
3000 Koppers Building, 436 7th Avenue
Pittsburgh, PA 15219
(412) 227-3100

Dan Himmelfarb
Mayer Brown LLP
1999 K. Street, N.W.
Washington, DC 20006
(202) 263 3000

John E. Gompers
Gompers, McCarthy & McClure
60 Fourteenth Street
Wheeling, WV 26003
(304) 233-2450

Marc E. Williams
Riley Nelson Mullins &
Scarborough LLP
P.O. Box 2185
Huntington, WV 25722
(800) 237-2000

Daniel R. Schuda
Schuda & Associates, PLLC
232 Capitol Street, Suite 200
Charleston, WV 25335
(304) 343-8928

Stanley W. Greenfield
Greenfield & Kraut
1040 5th Avenue, 3rd Floor
Pittsburgh, PA 15219
(412) 261-4466

/s/ Mark A. Behrens
Mark A. Behrens

Dated: January 14, 2010