

# Asbestos

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## Why We Have To Defend Against Screened Cases Now Is The Time For A Change

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**Commentary*****Why We Have To Defend Against Screened Cases  
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***I. Introduction: Now Is The Time For A Change***

The filing of unimpaired nonmalignant asbestos cases such as asbestosis and pleural disease continues to rise. Already unimpaired nonmalignant claims greatly outnumber malignant asbestos claims. While the defense of malignant claims demands more money and energy, the unimpaired nonmalignant claims are far more costly in the long run (i.e., small settlement averages per claim multiplied by large numbers of claims equate to huge payouts over time). Companies are going bankrupt, workers are losing jobs and plaintiffs with malignancies or impaired nonmalignancies are being denied full compensation because of the mass filings of unimpaired nonmalignant claims.

The reason for the rise in unimpaired nonmalignant claims is simple: Mass screening testing entities manufacture unimpaired nonmalignant claims. These screening entities travel around the country in mobile trailers and examine prospective claimants in parking lots, union halls and motel rooms. Their primary goal is to generate legal claims for their clients, certain plaintiffs' law firms.

Entering inventory settlements and refusing to conduct discovery against mass screening entities for fear of retaliation by plaintiffs' law firms simply has not worked. While many defendants (including many of those in bankruptcy) have agreed to forego defending unimpaired screened cases in return for low dollar averages in bulk inventory settlements, these practices have only provided the impetus for even more screenings and the filing of even more claims. Trying to buy a company's way out of asbestos litigation has not only proved unsuccessful, it has been the first step towards bankruptcy for many companies.

Defendants must realize they cannot settle their way out of "the asbestos litigation crisis" by keeping a low profile. Rather, they must rise up against the mass manufactured nonmalignant claims. This strategy involves employing the same litigation strategies that most defense counsel

use in a simple products liability case. It requires conducting discovery into how the claim came to be or the "manufacture" of the claim and deposing responsible physicians, technicians and testing entities.

The end goal of assertive discovery is to stop or slow down the manufacture of unimpaired non-malignant claims by mass screening entities. The filing of *Daubert/Frye* motions to dismiss or strike, arguing that screening companies use illegal or questionable techniques to manufacture claims, will help slow down or stop these claims. Numerous public policy arguments exist that warrant a Court dismissing screened claims. This article reviews how and why those claims are manufactured in order to advance those arguments.

Efforts in some Washington cases prove that assertive discovery can be effective. A motion was filed in Washington addressing Dr. Jay Segarra's involvement with the mass testing entity Respiratory Testing Services. Through discovery of the technicians, Respiratory Testing Services, and Dr. Segarra, the defendants showed the court the following:

It is indisputable that the five physicians illegally diagnosed the above plaintiffs with an asbestos-related condition based on the x-ray films taken by [Respiratory Testing Services'] uncertified x-ray technicians with RTS' unapproved x-ray machine and developed by those technicians in RTS' unapproved darkroom. For doing so, they received considerably more money from RTS than they would have received for a negative diagnosis. Given these breaches, none of the five physicians' diagnosis can constitute the requisite 'competent' expert evidence from which this court or any jury can determine with reasonable certainty that plaintiffs' suffer from an asbestos-related condition.

Defendant Metalclad's Motion for Summary Judgment Regarding Failure to Establish Proof of Injury for Certain XXIII Cases, at 11, *In Re Certain: Asbestos Cases* (ACR XXIII Cases), Superior Court of King County, Washington (October 3, 2003). The Washington Court agreed:

Dr. Segarra has the requisite skill, training and experience to render expert diagnoses concerning lung disease. However, when he participated in union screenings of certain plaintiffs, he performed examinations, rendered diagnoses, and recommended treatment without being licensed in Washington, a criminal offense. He also relied for his diagnoses on radiology reports from unregistered and uncertified technicians or radiologists using unregistered and uncertified equipment. The court concludes it would contravene public policy to accept such evidence.

Order by the Honorable Sharon S. Armstrong, ACR XXIII (Superior Court of King County, Washington, October 15, 2002). Similar motions should and could be worked up and filed in many screened cases.

Further, this discovery could encourage legislative scrutiny as another vehicle for exposing the manufactured nature of the unimpaired nonmalignant claims. See *The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. NO. 108-118, at 81-183, 108th Cong. 1 (2003) (statement by Senator Jon Kyl R-AZ). A Congressional inquiry could be an important fact-finding process to determine the validity of the proposed \$150 billion legislative solution. In other words, Congress could take some significant air out of that proposed \$150 billion legislation by investigating or demanding an investigation about how unimpaired nonmalignant cases end up being manufactured as well as the overall validity of some of those claims.

The time for a change is now. The status quo is not working. It is now time for the defendants to begin defending screened cases by conducting assertive discovery, uncovering the truths about mass screenings, and by filing the appropriate *Daubert/Frye* motions.

This article sets forth what many estimate to be the future of asbestos litigation if mass screenings continue unchecked, discusses mass screening entities, their manufacture of unimpaired nonmalignant claims and, most importantly, the necessity to defend against those claims. Unfortunately, there is far too much factual information to discuss every screening entity in detail, but this article should provide some insights into what one commentator called “[t]he great asbestos swindle.” Lester Brickman, *The Great Asbestos Swindle*, WALL ST. J., January 6, 2003, at A18.<sup>1</sup>

## **II. The Floodgates Are Wide Open**

Unimpaired nonmalignant asbestos claims far outnumber malignant asbestos claims. Though the ratios vary by jurisdiction, in some states nonmalignant claims outnumber cancer claims by margins as wide as 47 to 1. Roger Parloff, *Asbestos - The \$200 Billion Miscarriage of Justice*, FORTUNE.COM, March 4, 2002, at 7.

The Rand Institute estimated that nonmalignant claims account for 89% of all claims and that there have been more than 600,000 asbestos-related claims filed in the United States through the end of 2000. See Stephen J. Carroll, et al., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT, at 40 and 65 (2002). Of these, as much as 90% could be unimpaired claims. *Id.* at 20 (“Several more recent studies have found fractions of unimpaired claimants ranging from two-thirds to up to 90% of all current claimants...”).

While more than half a million unimpaired nonmalignant claims have most likely been filed, the Rand Institute estimates that less than half of all potential asbestos claims have come forward. Deborah Hensler, et al., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE, at 50 (2001). Some analysts predict that future asbestos filings could reach 2.5 million. See *Mass Tort Expert Addresses Asbestos with UBS Warburg Investors*, HARRISMARTIN COLUMNS, at 67 (May 2002) (citing data reviewed by Georgene Vairo).

## **III. The Rise In Unimpaired Nonmalignant Claims Defies Real World Incidences**

Do the numbers seen in the tort system correspond to the real world? Some analysts predict that over two million people are expected to bring claims for asbestos-related diseases. *Id.* If this is true, then why has there not been an outcry by the media and the medical community about this incidence of nonmalignant asbestos disease? There has been no outcry because the nonmalignant “epidemic” is only a legal fiction created by lawyers and their mass screening entities.<sup>2</sup> “[W]hile asbestosis may be disappearing from America’s hospitals, it is precipitously on the rise in America’s courthouses . . . .” Parloff, *supra*, at 2.

The National Institute for Occupational Safety and Health (“NIOSH”) publishes limited data on deaths due to asbestosis and the number of nonfatal workplace asbestosis claims. From 1990 through 1999, it reported 10,914 asbestosis deaths in the United States. See National Institute for Occupational Safety and Health, *Work-Related Lung Disease Surveillance Report 2002*, December 2002, at 7. NIOSH also has tracked nonfatal workplace illnesses and, in evaluating United States Bureau of Labor Statistics from 1997, found that diseases of the lungs (including asbestosis and silicosis) accounted for only 2,900 cases, which was less than 1% of all nonfatal occupational illness cases. See National Institute for Occupational Safety and Health, *Worker Health Chartbook 2000 - Nonfatal Illness*, at 17. In fact, the Office of Rare Diseases, part of the National Institute of Health, categorizes asbestosis as a “rare” disease. See *List of Rare Diseases*, Office of Rare Diseases, <<http://ord.aspensys.com/asp/diseases/diseases.asp?this=A>>, last visited August 8, 2003.

According to the medical community, “the number of new cases of asbestos-related disease has been falling....” Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, April 10, 2002, at A1. Dr. John Dement, an Associate Professor for Environmental and Occupational Medicine at Duke University and former Deputy Director at NIOSH, pointed out that there are far fewer serious cases of asbestosis today than five to ten years ago. *Id.* In fact, almost ten

years ago, "the medical text Occupational Lung Disorders describe[d] asbestosis as a 'disappearing disease.'" Parloff, *supra*.

In addition, reports from two hotbeds of asbestos litigation, Texas and Mississippi, are striking. In Mississippi, there were only 261 asbestosis deaths reported to health officials between 1991 and 1999. See National Institute for Occupational Safety and Health, *Work-Related Lung Disease Surveillance Report 2002*, December 2002, at 7. Further, the Texas Department of Health, which records the incidence of asbestosis in Texas, recorded only 37 cases of asbestosis in 1998. See Letter from Laurie Wagner, Texas Bureau of Epidemiology, dated May 21, 2003, on file at Socha, Perczak, Setter & Anderson, P.C.

While in all likelihood nonmalignant asbestos-related deaths and claims are underreported, one is hard-pressed to explain the huge discrepancy other than by the manufacture of claims by mass screening entities.

#### **IV. Mass Screening Entities' Manufacture Of Unimpaired Nonmalignant Claims Harms Everyone**

The number of manufactured unimpaired nonmalignant claims destroys everything in its wake. Not only are existing defendants looking at potentially over a million more claims, but new companies are added daily as defendants to make up for bankruptcies. Also, as companies go bankrupt, the public loses jobs and savings. Even plaintiffs themselves are harmed. Plaintiffs with malignant and/or impaired claims are seeing their recoveries shrink as unimpaired claims drain money out of an ever-shrinking pool of resources.

##### **A. The Companies**

Companies throughout the country are suffering from the mass screening entities' manufactured claims. The aggregate outlay for asbestos claims already totals \$54 billion. Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 57 (2003). However, projections estimate that only one-fifth to one-quarter of the eventual costs have already been paid. *Id.* at 58. If asbestos litigation continues at the present pace, its financial toll could reach \$200 billion. See Eric Roston, *The Asbestos Pit*, TIME, March 3, 2002.

Most of these costs are for nonmalignant claims. The Rand Institute estimates that 65% of all asbestos compensation is paid to nonmalignant diseases. See Carroll, *supra*, at 65. This percentage will only increase as the number of unimpaired nonmalignant claims continues to rise.

Over sixty companies have already filed bankruptcy due to asbestos liabilities. See Stiglitz, *supra*, at 58. The rise of unimpaired nonmalignant claims is directly to blame. In the last five years, thirty-five companies have declared bankruptcy, more than in the previous twenty years. *Id.* So long as mass screening entities are allowed to manufacture nonmalignant claims, the outcome is obvious. The Honorable Jack B. Weinstein forewarned all companies involved:

[I]f the acceleration and expansion of asbestos lawsuits continues unaddressed, it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy. This is increasingly the case as more obvious defendants become bankrupt and aggressive plaintiff lawyers move on to fresh victims.

*Notes for Remarks on Asbestos: Symposium, Asbestos What Went Wrong*, at 12, Bar Association of the City of New York, New York (October 21, 2002) (statement of the Honorable Jack B. Weinstein, Senior U.S. District Judge, Eastern District of New York).

When defendant companies go bankrupt, remaining defendants and new defendants pick up the bill as plaintiffs' attorneys search for more deep pockets. As plaintiffs' attorney Steven Kazan noted:

In the early days of the litigation, you had Manville. Manville goes away. Next in line are the regional distributors. If they go away, next in line are the contractors who bought from them. If those guys disappear, there are cases where we very legitimately are suing the neighborhood hardware store, because that's where the guy bought asbestos joint compound, or the lumberyard where he bought asbestos shingles, or the floor company where he bought floor tiles. They say, 'All of a sudden, why me?' One answer is: 'Consider yourself lucky that we left you alone for 20 years.' We're now higher in the tree.

See Parloff, *supra*, at 7. Already, companies in at least half of all industries have been sued and nontraditional defendants account for 60% of asbestos expenditures. See Hensler, *supra*, at 10-11. The fact that in 1983, 300 firms had been listed as defendants in asbestos cases, while by 2002, more than 6,000 companies had been listed demonstrates this trend. See Stiglitz, *supra*, at 55.

Further, bankruptcies tend to provide more incentives for manufacturing claims by the mass screening entities. As companies go bankrupt, they set up trusts with billions of dollars allocated for unimpaired claims. So long as these trusts conduct few audits and/or set up minimal medical criteria, they will continue to provide additional incentives for screening entities to manufacture claims. In essence, the involved screening lawyers look for nearly guaranteed payments from these trusts when few questions are asked. As a result, they can then file the same claims against the defendants who are in the tort system with less monetary risk. See Roger Parloff, *Mass Tort Medicine Men*, THE AMERICAN LAWYER, January 3, 2003.

### **B. The Public**

Bankruptcies also affect the public and the bankrupt companies' employees. Asbestos-related bankruptcies have already led to a loss of tens of thousands of jobs. See Stiglitz, *supra*, at 52. These bankruptcies have also shrunk workers' life savings. For example, the average worker at a bankrupt company lost 25% of their 401k accounts. *Id.* When Federal-Mogul filed for bankruptcy, its employees held 16% of the company's stock, which lost 99% of its value, and when Owens Corning filed for bankruptcy, its employees held about 14% of its stock, which lost 97% of its value. See Parloff, *Asbestos — The \$200 Billion Miscarriage of Justice*, *supra*, at 3.

As U.S. Senator Patrick Leahy (D-VT) noted, "[t]hese bankruptcies created a lose-lose situation. Asbestos victims deserving fair compensation do not receive it and bankrupt companies do not create new jobs nor invest in our economy." *The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. NO. 108-118, at 189, 108<sup>th</sup> Cong. 1 (2003) (statements by Senators Leahy, Kennedy, Biden, Kohl, Feingold, Durbin and Edwards).

### **C. The Plaintiffs**

Plaintiffs themselves suffer the most from the screening testing entities' manufacture of unimpaired nonmalignant claims. As defendants enter bankruptcy, the truly sick plaintiffs are left with a shrinking pool of compensation. Plaintiffs' attorney Mark Iola recognized this dilemma and concluded:

The seriously ill now have no place to go for compensation. The companies that are responsible for their injuries are in bankruptcy, because they've had to pay billions of dollars to people who don't manifest any impairment or disability. Lawyers are the ones doing this, and they're doing it for the money. They are stealing money from the very sick.

Thomas Korosec, *Enough To Make You Sick*, DALLAS OBSERVER, September 26, 2002. The Honorable Helen E. Freedman also noticed the problem:

Recoveries by unimpaired or minimally impaired plaintiffs deplete the funds needed to compensate present and future claimants with serious illnesses, and resources are dwindling as the 'elephantine mass of asbestos cases' nationwide drives large numbers of potentially culpable parties into bankruptcy.

Order by the Honorable Helen E. Freedman, *In Re: New York City Asbestos Litigation*, Index No. 40000/88, at 1-2 (Supreme Court of New York, all Counties within the City of New York, December 19, 2002).

Further, when the mass testing entities manufacture unimpaired claims, they advise individuals that they have an incurable disease. The unnecessary stress this puts on someone is obvious. According to a St. Louis Post Dispatch article, one person who attended a screening and who was told he had an asbestos-related disease committed suicide. His suicide note, which was on the back of the form the law firms asked him to fill out, said, "I don't want to be an invalid." Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST DISPATCH, 2003 WL 3554893, February 9, 2002, at 9.

**V. Mass Screenings Benefit Those Who Generate Unimpaired Claims (a/k/a 'Show Me The Money').**

The people who benefit from the mass manufacture of nonmalignant claims are the law firms sponsoring the tests, the mass screening testing entities and anyone working for the mass screening entities. These individuals make huge amounts of money at other's expense.

For example, the mass testing entity American Medical Testing grossed \$2 million in 2001. See Deposition Transcript of Guy Foster in *Marion Bentley, et al. v. Crane Co., et al.*, at 89, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (Dec. 12, 2001). The mass testing entity N&M charged a law firm over \$230,000 for just nine days of tests. See Deposition Transcript of N&M, Inc., Representative: Charlie Heath Mason in *Curtis Johnson, et al. v. American Optical Corporation and James Underwood, et al. v. American Optical Corporation, et al.*, at Exhibit 2, Cir. Ct. of Copiah County, Mississippi, No. 2002-0030 and 2002-0027 (July 8, 2003). Another mass testing entity, which only shoots x-rays, charges \$20,000 to advertise and conduct a single screening. See Deposition Transcript of Lloyd Criss in *Albert Deforest, et al. v. American Optical Corporation, et al.*, at 169, Dist. Ct. Bazoria County, Texas, No. 17165\*JG01 (Dec. 10, 2002).

The physicians who work for the mass testing entities also have become instantaneous millionaires. Dr. José Roman-Candelaria and Dr. Gregory Nayden charged a minimum of \$3,000 each for every day they participated in a screening. See Deposition of Guy Foster, *supra* at 145-146. However, rarely do these doctors only receive the minimum \$3,000. American Medical Testing paid Dr. Nayden \$80 for each report and he issued reports on approximately 15,000 people from 2000 to 2002. See Deposition Transcript of Dr. Gregory A. Nayden in *Marion Bentley, et al. v. Crane Co., et al.*, at 81, 86, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (March 28, 2002). American Medical Testing paid him about \$1,200,000 in 2000 and 2001. *Id.* at 86.

The mass screening entities' personnel also profit well. American Medical Testing pays its pulmonary function technicians \$20 per test. See Deposition Transcript of Guy Foster, *supra*, at 145. At this rate, it paid one pulmonary function technician \$50,000 for performing pulmonary function tests in less than one year. See Deposition Transcript of Helen Robinson in *Marion Bentley, et al. v. Crane Co., et al.*, at 25 and 51, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (December 13, 2001). Another pulmonary function technician for American Medical Testing who only worked part-time made more money working part-time than she did working full-time as a respiratory therapist at a local hospital. See Deposition Transcript of Vanessa D. Hughes in *Marion Bentley, et*

*al. v. Crane Co., et al.*, at 55-56, Cir. Ct. of Jasper County, Mississippi, No. 92-7655, (December 13, 2001).

Most importantly, the law firms sponsoring the screening tests generate huge attorney's fees from the mass filings of unimpaired nonmalignant claims. Asbestos plaintiffs' attorney Fred Baron estimated that an average unimpaired asbestos plaintiff receives \$60,000 in settlement money from the defendants. See Korosec, *supra*, at 36. Based on this average amount, it is easy to understand why law firms sponsor the mass tests. If the average unimpaired nonmalignant claim settles for \$60,000 and the average contingent fee is 33 1/3%, then a law firm generates fees of \$20,000 per claim. For every 1,000 unimpaired nonmalignant claims, the attorneys would generate \$20 million in attorney's fees; for 10,000 claims they generate \$200 million in fees and so on. With over 500,000 nonmalignant cases filed, one shudders when calculating the possible attorney fees involved — over \$10 billion in fees. An example is the 25-lawyer Silber Pearlman firm in Texas which took in \$100 million in revenue in 2000 with its inventory of unimpaired asbestos claims. *Id.*

## VI. **Manufacturing Unimpaired Claims**

The cause of all these problems and profiteering is mass screening testing entities manufacturing unimpaired nonmalignant claims. These screening entities often test scores, if not hundreds of people, per day in motel rooms, trailers or union halls. Their sole purpose is to generate asbestos claims for law firms. See Deposition Transcript of Guy Foster, *supra*, at 52. If someone already has an attorney, they are not permitted to attend the tests. See Deposition Transcript of Lloyd Criss, *supra*, at 268-69.

It is this mass screening process which the defense bar must uncover. By doing so, the defense bar could put an end to the mass screenings by filing motions to strike/dismiss, using the evidence at trial and educating the courts about the mass screenings. Many of these testing entities are easy to spot. They include, among others, American Medical Testing; Consultants of Pulmonary and Occupational Medicine; Gulf Coast Marketing/U.S. Mobile X-Ray; Holland, Bieber & Associates; Healthscreen; Most Health; Netherland Enterprises; N&M; Respiratory Testing Services; and Workers' Disease Detection Services. These screening entities manufacture asbestos claims for law firms by generating or facilitating, to various degrees, the x-rays, the B-reads, the pulmonary function tests, the physical examinations and the diagnostic reports that serve as the medical basis for plaintiffs' claims.

While these mass screening entities have different testing techniques and processes, we generalize them in this paper for illustrative purposes. For example, some mass testing entities only administer the x-rays that are then sent to a B-reader and, thereafter, another or the same screening entity will administer the pulmonary function tests, conduct physical examinations and render diagnostic reports. Other testing entities provide x-rays, B-read reports, pulmonary function tests, physical examinations and diagnostic reports all on the same screening day.

### A. **Step 1: Generate Clients**

The first step of a mass screening testing is to convince the masses to attend. This is generally done through mass mailings, often by local union officials on behalf of the mass screening testing entity or law firm, and through advertisements in local papers. For example, Gulf Coast Marketing<sup>3</sup> often sends newsletters to 15,000 to 20,000 people who are older than 50 and who live within 50 miles of the testing site. See Deposition Transcript of Lloyd Criss, *supra*, at 149-152. His newsletters are often titled "Senior Alert Newsletter." *Id.* at Exhibits 5 and 6. These "Senior Alert Newsletters" may recommend that: "If you have been tested before at another screening and the results were negative you are eligible [sic] for this screening and should be tested again." *Id.* at Exhibit 6.



Mass advertising in local newspapers also is common. These Advertisements often use such catchy phrases as: "ASBESTOS & SILICA DUST SCREENING ATTENTION . . . THERE ARE NO OUT OF POCKET EXPENSES," see Advertisement by The Schmidt and McGartland Firm, *THE DAILY JOURNAL*, Tupelo, Mississippi, January 2, 2002, and "A PICTURE OF YOUR LUNGS COULD BE WORTH MILLIONS." See Advertisement by Shapiro & Shapiro, *THE LEADER*, Corning, New York, November 4, 1999.

While these mass solicitations and advertisements are one way to attract individuals to a mass screening testing, there are also more seductive efforts. For example, during a mass screening in Texas by the testing entity N&M, several young women were seen near a street holding up signs for free tests to passing vehicles. See Complaint No. 1685, Texas Department of Health, Bureau of Radiation Control, Complaint/Technical Assistance Request Form filled out by Royce Harmon, X-Ray Inspector, 6-24-02, on file at Socha, Perczak, Setter & Anderson, P.C.

These tactics apparently work. Mass screening entities often test hundreds of people a day. In a solicitation letter to attorneys, Gulf Coast Marketing bragged that it administered x-rays to 540 people in two days (average of 270 people per day). See Deposition Transcript of Lloyd Criss, *supra*, at Exhibit 18. Similarly, N&M tested 3,257 people in 14 days (an average of 233 people per day). See Deposition Transcript of N&M, *supra*, at Exhibit 2. These numbers are not surprising. As one journalist reported about an individual who was at a mass screening in Missouri:

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.'

Schneider, *supra*.

#### **B. Step 2: 'Create' Sufficient Product Exposure**

Once individuals arrive at the screening testing site, the next step is to make sure they have had exposure to viable defendants' products. This is often done by either the law firms' or the testing entities' personnel.

The alleged effort to identify specific products by the Baron & Budd law firm has been well publicized, but it is worth repeating. Here are a few of the reported tactics:

Paralegals say — and neither Baron nor Budd denies — that workers are selectively shown pictures of asbestos products they should identify. [Paralegal] says that in meetings with clients, she would bring a "3- or 4- or 5-inch binder with pictures of asbestos products, divided up according to manufacturer. I'd go through page by page and encourage the client to recall the products they used. It would be pretty strong encouragement. Most of the time when I left, I had ID for every manufacturer that we needed to get ID for."

[Paralegal] insists that, for certain periods of time when tactical reasons dictated it was better not to have exposure to a bankrupt company's products, identification of those products was discouraged. Thus, when a client would say he saw, for instance, a Johns-Manville pipe covering, [Paralegal] says, she would hand them a line. "You'd say, you know, we've talked to some other people, other witnesses, and they recall working with Owens Corning's Kaylo. Don't you think you saw that?' And they'd say, 'Yeah, maybe you're right.'"

Later, she says, Johns-Manville began paying settlements, and she was ordered to go out and "meet these guys again" and get them once again to name Johns-Manville products.

Christine Biederman, et al., *Toxic Justice*, DALLAS OBSERVER, August 13, 1998.

Not surprisingly, most who attend a mass screening testing also happen to have the proper exposure to bring a claim against viable defendants. In Texas, Dr. Mark S. Klepper testified that he works with potential plaintiffs to document an exposure history and he recalled that only about one out of every 50 workers could not establish a convincing asbestos exposure history. See *What Experts Are Saying*, HARRISMARTIN COLUMNS, May 2002, at 6 (citing portion of Deposition Transcript of Mark S. Klepper, M.D., *Betty Joe Applewhite, et al. v. Owens Corning Fiberglas Corp. et al.*, Nueces County District Ct., Texas, No. 98-2888-C (Jan. 29, 2001)).

### C. Step 3: Manufacture The Diagnosis

Once the proper defendants' products are identified, the next step is to manufacture medical tests to show that the person has a nonmalignant asbestos-related disease. This includes x-rays, B-reader's interpretations of the x-rays, pulmonary function tests, physical examinations and a physician's diagnostic report.

#### 1. The X-Ray

Usually the first test done involves the shooting of x-rays. The x-rays are often taken by full service testing companies or by subcontractors who are hired by the screeners or lawyers to provide chest x-rays. For example, Netherland Enterprises uses a mobile x-ray trailer that travels state to state shooting x-rays. See Deposition Transcript of David T. Netherland, D.C. in *Marion Bentley, et al. v. Crane Co., et al.*, at 57-58 and 89, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (February 14, 2002). David Netherland with Netherland Enterprises simply drives the trailer to a motel and parks it in the parking lot, ready to conduct chest x-rays. *Id.* at 163-65.

By traveling state to state, the mass screening entities have no problem finding enough individuals to meet the law firms' demands. The owner of Netherland Enterprises has administered x-rays to between 10,000 and 20,000 people in Alabama, Arkansas, Georgia, Mississippi and South Carolina. Deposition Transcript of David T. Netherland, D.C., *supra*, at 33-35 and 57-58. Gulf Coast Marketing/U.S. Mobile X-Ray has administered x-rays to over 17,000 people in Arkansas, Louisiana, Massachusetts, Mississippi, Oregon and Texas. Deposition Transcript of Lloyd Criss, *supra*, at 130 and Exhibit 18.

#### 2. The B-Read

After the x-rays are shot, a B-reader interprets the x-ray films on or off site. For an x-ray to be read as "positive," mass screening entities and their customers (the lawyers) only require an ILO finding of 1/0.<sup>4</sup> The B-reads are usually conducted by the same few B-readers who are paid by the testing entity or the plaintiffs' law firm. For example, one B-reader, Dr. Ray Harron, may interpret between 100 and 150 x-rays in a day and charges \$25 per B-read. Deposition Transcript of Ray A. Harron, M.D. in *In Re: Asbestos Personal Injury Litigation*, at 25-26 and 37, Cir. Ct. Kanawha County, WV, No. 01-C-9002 (Jan. 18, 2002). On average, it takes him only a few minutes to interpret or "read" an x-ray. Deposition Transcript of Ray A. Harron, M.D. in *Thomas Abbott, et al. v. 20th Century Glove Corp. of Texas, et al.*, at 183-4, Circuit Ct. of Saginaw County, Michigan, Case No. 94-003151-NP through 94-004526-NP (May 15, 1997).

At these rates, there is unquestionably an issue of bias as the B-readers want to continue to be in this lucrative business. Not surprisingly, the number of positive findings by these B-readers is highly suspect.

In 1990, researchers re-evaluated 439 chest radiographs taken of tire workers. Reger, R.B., Ph.D., et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, J. OCC. MED. 32:1088-90 (Nov. 1990). Of the 439 x-rays that were reviewed, all had previously been thought to have conditions consistent with exposure to asbestos and all had filed legal claims for an asbestos-related injury. *Id.* at 1089. An independent panel of three board-certified radiologists reviewed the x-rays and determined that only 16 (or about 3%) of the subjects evaluated may have had a condition consistent with an asbestos exposure. *Id.* at 1088. In other words, the figures obtained by the independent panel were 40-fold lower than the results provided by the original screening doctors. *Id.* at 1090.

Also, in 1995, the Manville Trust initiated an audit of x-rays and by 1998, it required all asbestosis claimants to submit their x-rays for an audit by two independent B-readers. See Parloff, *Mass Tort Medicine Men*, *supra*. Under the audit, if either of the two independent B-readers agreed with the claimants' physicians' diagnosis based upon "subdiagnostic" indicia, then the Manville Trust would accept the claim. *Id.* Hardly a strenuous audit.

Nonetheless, the results were "mind-boggling." *Id.* The ten physicians whom plaintiffs' law firms used the most failed the audit an average of 63% of the time. *Id.* Additional research by National Economic Research Associates found that these ten physicians were responsible for 70,570 asbestosis claims in a six-year span and that one of these physicians was responsible for 30,467 claims. *Id.* His failure rate was 66%. *Id.* While plaintiffs' counsel effectively shut the audit down in 1999, it has been estimated from this audit that the Manville Trust overpaid at least \$190 million for over-read claims. *Id.*

A more recent study is even more striking. United States Senator Jon Kyl (R-AZ), commenting on this recent x-ray study, stated the following:

An even more extreme example of consistent misdiagnosis of asbestosis was provided directly to this committee by Mr. Otha Linton, who served for 25 years on the principal staff of the American College of Radiology Task Force on Pneumoconiosis, and Dr. Joseph Gitlin, a faculty member of the department of radiology at the Johns Hopkins Medical Institutions. Mr. Linton and Dr. Gitlin were asked to review over 500 chest x-rays that originally had been provided by an asbestos plaintiffs firm. The firm's medical reports had given 91.7% of these x-rays an ILO score of 1/0 or higher. (Which itself is only marginal evidence of asbestosis, see *infra* Attachment "E" (Letter of Dr. Crapo)). Mr. Linton and Dr. Gitlin arranged for a blind reading of those same x-rays by six consultants in chest radiology who were also B readers. These independent experts gave the same x-rays an ILO score of at least 1/0 in only 4.5% of their reports.

See *The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. NO. 108-118, at 96, 108th Cong. 1 (2003) (statement by Senator Jon Kyl).

One even wonders if the B-readers actually interpret the x-rays and fill out the B-read forms. Dr. Harron admitted that he sends out blank pre-signed NIOSH B-read forms to law firms. Deposition Transcript of Ray A. Harron, M.D., *supra*, at 143 (May 15, 1997). Heath Mason, an owner of N&M, recently advised that it had copies of blank Dr. Harron pre-signed NIOSH forms at its screenings. See Deposition Transcript of N&M, *supra*, at 236-37.

### 3. The Pulmonary Function Tests

After the B-read, a mass testing entity will administer a pulmonary function test to measure impairment. As with the x-rays, the pulmonary function tests are often performed in trailers in motel and union hall parking lots. See Deposition Transcript of Guy Foster, *supra*, at 48; Deposition Transcript of Jeffrey H. Bass, M.D. in *Eddie Caffey, et al., v. Foster Wheeler Corporation, et al.*, at 87-

88, Dist. Ct. of Cass County, Texas, No. B-150,896AD (May 10, 2003). Similar to the screening B-readers who often find positive x-rays, there are at times highly questionable methods employed to demonstrate impairment when individuals may not be impaired.

In their efforts to generate nonmalignant claims showing impairment for higher settlements, some of the mass screening entities may manipulate values involved with the pulmonary function tests. For example, the primary basis of Owens Corning's RICO and fraud lawsuit against the mass testing entity Pulmonary Testing Services involved the failure to have the tested individuals completely exhale during spirometry tests which resulted in diminished values that allegedly were interpreted as consistent with restrictive impairment. See Complaint in *Owens Corning v. Glenn E. Pitts, Jewell D. Pitts, Larry M. Mitchell, M.D., Leon Hammonds, Pulmonary Advisory Services, Inc., Pulmonary Advisory Services of Louisiana, Inc., and Pulmonary Testing Services, Inc.* (E.D. La., No. 96-2095, June 16, 1996).

In addition, Heath Mason, an owner of the mass screening entity N&M, stated that N&M hired a pulmonary function technician who had manipulated tests while working for another mass screening testing entity:

- Q. There's a graph bar on that [DLCO] test, is there not?  
A. Yes, sir, that is. That is the sample this is where the — it takes a sample of the — of when he blows out, basically, of what he's blowing out. That's the sample time. . . .  
Q. Has N&M had experiences with people moving that bar?  
A. I've had experience with — with employees that came from other companies who thought that they were going to show me how to make it easier to do a right DLCO.  
Q. And?  
A. And they were reprimanded in the fact that we explained to them that at N&M we do not move the bar.  
Q. [I]f I understood what you're saying, some employee that currently works for N&M or worked for N&M?  
A. When she first came over, we made her show us what her pulmonary function practice was. She's a respiratory therapist. She showed us. She did a DLCO on me. The first two were not within — the main problem was the breath hold time, so what she tried to do was, was to adjust the bar to match breath hold time, which is a major no-no in our book.  
Q. And when you do that, you decrease the DLCO, right?  
A. You got it.

See Deposition Transcript of N&M, *supra*, at 281-82.

Another instance of possible manipulation occurred with the mass screening entity Healthscreen and was uncovered when the defendants deposed the diagnosing physician, Dr. Jeffrey Bass, regarding the pulmonary function test results. At his deposition, Dr. Bass admitted that Healthscreen's pulmonary function technician may have deleted the best test results and might have "phantom" trials:

- A. And the tech — there were no error codes listed. And the tech apparently — after I consulted with Dr. Petrini, it appears the tech disabled the wrong test and disabled the better test accidentally, and so we got the poor lung volume readings. Now, this has happened a couple of the times in the past with other patients and it's rarely changed my diagnosis, but in this case it does.

- Q. It changes your diagnosis significantly, doesn't it, Doctor?  
A. It does. Yes, it does.  
Q. We're no longer restrictive; is that right, Doctor?  
A. That is correct.  
Q. How about any of these other values? The VC for 5.27, where does that come from?  
A. I don't know where that came from.  
Q. Doctor, could it be we have a phantom trial in here that's altering the values?  
A. I suppose that's possible.

See Deposition Transcript of Jeffrey H. Bass, M.D., *supra*, at 130-33.

Besides possible manipulations and use of "phantom trials," mass screening entities may also manufacture impairment by employing questionable testing techniques. The American Thoracic Society (ATS) sets forth criteria and standards for the administration of pulmonary function tests. The mass screening entities, however, often do not always follow these standards. One example is from Dr. Segarra, who has worked for numerous screening entities, including Respiratory Testing Services and Holland, Bieber. He recognized Respiratory Testing Services may not have followed the ATS' recommendation of a fifteen-minute interval between the nitrogen washout trials for lung volumes and DLCO tests which could lead to a reduced DLCO value. Deposition of Jay Segarra, M.D. in *Richard Morehouse v. North American Refractories Co, et al.*, at 313-318, Circuit Court of Jackson County, Mississippi CI-2002-00253(2) (October 14, 2002). Further, Dr. Segarra acknowledged that issues may exist about whether Holland, Bieber followed the ATS' requirements for DLCO sample and collection volumes. See Deposition Transcript of Jay Segarra, M.D. in *Murrell, et al. v. Kellogg-Brown & Root, Inc., et al.*, at 142-43, Dist. Ct. of Harris County, Texas, No. 2002-28477 (August 15, 2003).

#### 4. *The Physical Examination And Diagnosis*

After the administration of the pulmonary function tests, a potential plaintiff usually receives a physical examination. These physical examinations might occur in the very motel rooms that the technicians and physicians slept the night before. See Deposition Transcript of Dr. Jeffrey Bass, *supra*, at 87-88. The physicians and the technicians wake up, make their beds and then examine the prospective plaintiffs. *Id.*

Needless to say, the physical examinations are often cursory. Dr. Michael Conner, who worked for the mass testing entity Pulmonary Function Laboratory, said that he examined approximately 200 people on a single day. See Deposition Transcript of Michael G. Conner, M.D. in *In Re Asbestos Plaintiffs v. Borden, Inc., et al.*, at 67-68, Parish of Orleans, LA, No. 91-18397 (March 29, 1993).

Notwithstanding, the physical examination is the last step before a physician paid by the mass screening entity renders a diagnosis. This diagnosis, however, may be pre-determined before the physical examination. For example, Dr. Gregory Nayden, who works for the mass testing entity American Medical Testing, stated that he has never found someone who did not have asbestosis when he worked at a screening:

- Q. [Y]ou're saying that all of the individuals are already considered by you as positive for asbestosis?  
A. Well, like I said, I mean, they wouldn't reach me unless they had positive — a positive work history and a positive chest x-ray.  
Q. And, for you, that's sufficient for a diagnosis of asbestosis?  
A. Yes.

- Q. Have you seen any individuals that came through that you did not render a report saying that they had asbestosis?
- A. No.

See Deposition Transcript of Gregory A. Nayden, M.D., *supra*, at 165.

Dr. Nayden apparently applied this assumption to approximately 14,000 people. *Id.* at 164-65. This 100% diagnosis rate is not much more than another physician, Dr. Roman-Candelaria. Since Dr. Roman-Candelaria began participating in asbestos screenings in 1999, he has examined between 4,000 and 5,000 people and has diagnosed approximately 90% of them with a condition consistent with asbestosis. See Deposition Transcript of José Roman-Candelaria, M.D., *Gary Koontz, et al. v. AC&S, Inc., et al.*, at 20, Sup. Ct. of Marion County, Indiana, No. 49D02-9601-MI-0001-668 (October 11, 2002), electronic version.

## VII. Travel Woes: State Violations

Many mass testing entities travel throughout the country conducting tests to manufacture asbestos claims for law firms. For example, Most Health Services, Inc. has screened over 400,000 workers in every state plus Puerto Rico. See Memorandum In Support Of Motion For Case Management Order Concerning Mass Litigation Screenings, *In re: Asbestos Products Liability Litigation* (No. VI), Civ. Action Nos. MDL875, 2 MDL 875, at 10, (E.D. Pa., Oct. 12, 2001). Respiratory Testing Services has performed screenings in 40 states. See Deposition Transcript of Charles Foster in *Morehouse v. North American Refractories Company*, at 138, Cir. Ct. of Mobile, Alabama (August 6, 2002), electronic version. Gulf Coast Marketing/U.S. Mobile X-Ray has administered x-rays to over 17,000 people in Arkansas, Louisiana, Massachusetts, Mississippi, Oregon and Texas. Deposition Transcript of Lloyd Criss, *supra*, at 130 and Exhibit 18. The owner of Netherland Enterprises has administered x-rays to between 10,000 and 20,000 people in Alabama, Arkansas, Georgia, South Carolina and Mississippi. See Deposition Transcript of David T. Netherland, D.C., *supra*, at 33-35 and 57-58.

All these screenings in numerous venues, at times, lead to potential violations of state laws and regulations and possible illegal activities. Starting with the x-rays, mass testing entities often violate state x-ray regulations. First, most states require that a licensed physician individually order x-rays unless various exceptions apply. See 64E-5 Florida Admin. Code 64E-5.502(1)(a)(6) and MS ADC § 801.F.3(a)(7). Many testing entities sometimes disregard this law by not obtaining the required physician's order. See Deposition Transcript of Lloyd Criss, *supra*, at 37-47.

Other screening entities violate this law by using "blanket orders" by a doctor for x-rays without any individuals identified. For example, Dr. Vance Baucum wrote a letter on August 7, 1995 authorizing chiropractor David Netherland of Netherland Enterprises to administer chest x-rays for asbestos disease evaluations. See Deposition Transcript of David T. Netherland, D.C., *supra*, at Exhibit 4. Netherland Enterprises used this blanket prescription as authority to provide chest x-rays for asbestos evaluations as late as 2001 on numerous individuals and over the course of several years. *Id.* at 43-44.

However, Dr. Baucum's letter was written on August 7, 1995. Dr. Baucum even went so far as to say that this blanket x-ray prescription stayed in effect until Mr. Netherland's death. Deposition Transcript of Vance Baucum, M.D. in *Marion Bentley, et al v. Crane Co., et al*, at 87-88, Cir. Ct. of Jasper County, Mississippi, No. 11-0064 (September 12, 2002). Dr. Baucum wrote this blanket x-ray prescription upon the request of attorney Charles Blackwell of the Mississippi law firm Morris, Sakalarios & Blackwell. *Id.* at 86. Dr. Baucum and Charles Blackwell were personal friends and Dr. Baucum testified that he wrote the blanket prescription because "that's what friends are for." *Id.* at 94-95. Most importantly, under the blanket prescription, it is up to the lawyers or Mr.

Netherland to determine if an individual has a sufficient history of exposure that warrants being subjected to x-rays. See Deposition Transcript of David T. Netherland, D.C., *supra*, at 114.

The South Carolina Department of Health investigated Mr. Netherland and found that 4,000-5,000 x-rays he administered in South Carolina were in violation of state regulations. See Orders in *In Re: A. Joel Bentley, Jr., Esq., Reginald D. Simmons, Esq. and David Netherland, DC*, South Carolina Board of Health and Environmental Control, January 8, 2001 attached as Exhibit 4 to Deposition Transcript of David T. Netherland. Mr. Netherland is not alone. Many of the x-rays administered by mass screening entities are in violation of state law.

In addition, the pulmonary function technicians are rarely licensed in the states where they conduct the tests, a requirement under many state laws. See, e.g., Mississippi Regulations Governing Licensure of Respiratory Care Practitioners § 9-1 and § 1-3(i); Fl. St. §§ 468.351, 468.352, 468.359 and 468.366; and Ga. Code § 43-34-150(a). An example is Mr. Robert Mosher, a pulmonary function technician for Respiratory Testing Services and American Medical Testing. He admitted that although he has administered pulmonary function tests in states such as Alabama, Arkansas, Florida, Mississippi and possibly Louisiana, he was not licensed in any state. See Deposition Transcript of Robert B. Mosher in *Marion Bentley, et al. v. Crane Co, et al.*, at 48-50, Cir. Ct. of Jasper County, Mississippi, No. 11-0064 (Feb. 1, 2002).

Another common violation involves the requirement that pulmonary function tests be ordered by a licensed physician. See, e.g., Miss. ADC § 1-3 (e), (f), & (i) (a licensed physician must prescribe a pulmonary function test). Some of Dr. Gregory Nayden's practices offer some insights about how this requirement may not be met. He testified that he allowed American Medical Testing to photocopy one of his orders for pulmonary function tests as his prescription for each new set of pulmonary function tests. See Deposition Transcript of Dr. Gregory A. Nayden, *supra*, at 239-40. Dr. Nayden further admitted that he has ordered pulmonary function tests in several states where he is not licensed to practice medicine. *Id.* at 128.

Next, some of the physicians who travel with the mass screening entities perform physical examinations, prescribe pulmonary function tests and render diagnoses, when they are not licensed in the states in which they perform these services. For example, Dr. Roman-Candelaria, who worked for Respiratory Testing Services, was only licensed in Puerto Rico, but had worked at mass screenings examining individuals, ordering pulmonary function tests, and rendering diagnoses in Alabama, Georgia, Indiana, Louisiana, Mississippi and Oklahoma. Deposition Transcript of Dr. Roman-Candelaria, *supra*, at 13-14. In many states, conducting physical examinations, prescribing pulmonary function tests and rendering diagnoses may constitute the practice of medicine requiring that the physician be licensed in the state. See e.g. Indiana Statute § 25-22.5-1-1.1(a) (defining the practice of medicine as the diagnosis of any disease).

### **VIII. How Is This Happening — The Blind Eye**

The manufacturing processes conducted by these mass screening entities has been well publicized. Commentators, courts, medical groups and legislators all have expressed doubt over the validity of the medical results generated by the mass screening entities. Professor Lester Brickman has called it "a massively fraudulent enterprise that can rightfully take its place among the pantheon of such great American swindles as the Yazoo land frauds, Credit Mobilier, and Teapot Dome." Lester Brickman, *Asbestos Litigation: Malignancy in the Courts?*, Civil Justice Forum of the Manhattan Institute No. 30, Aug. 2002, at 7. Dr. David Egilman identified the mass screening tests as "rackets perpetrated by money-hungry lawyers, ..." Schneider, *supra*. Senator Jon Kyl wrote in his legislative statement: "[A]mong ordinary people, there is a word for this: Fraud. This is a legalized fraud." See *The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. NO. 108-118, at 98, 108th Cong. 1 (2003) (statement by Senator Jon Kyl R-AZ), quoting Robert J. Samuelson, *Asbestos Fraud*, WASH. POST, November 20, 2002, A25. The Association of Occupational and Environmental Clinics' President Rachel Rubin, M.D., MPH, voiced her concern: "These tests do not con-

form to the necessary standards for screening programs conducted for patient care and protection.” Rachel Rubin, M.D., MPH, *President's Column*, AOEC NEWS, Winter 2001, Vol. 9, Issue 2.

If mass screening tests are as unreliable as these commentators note, then why are these mass manufactured unimpaired cases continuing to rise in numbers? And, why are the testing entities and those associated with them continuing to generate huge profits? It is because the defendants, the courts and even some of the commentators have turned a blind eye to this mass manufacture of unimpaired nonmalignant claims.

Examples abound. Dr. Nayden had diagnosed approximately 14,000 people with asbestos-related diseases for law firms until he was deposed for the first and only time on March 28, 2002. See Deposition Transcript of Dr. Gregory A. Nayden, *supra*. Similarly, Dr. Roman-Candelaria had diagnosed approximately 4,000 people with asbestos-related diseases for plaintiffs' law firms before he was deposed for the first and only time on October 11, 2002. See Deposition Transcript of Jose E. Roman-Candelaria, *supra*.

The mass screening entities are deposed even less than the physicians. Gulf Coast Marketing/U.S. Mobile X-Ray had administered x-rays to over 17,000 people in Arkansas Louisiana, Massachusetts, Mississippi, Oregon and Texas before it was deposed for the first and only time on December 10, 2002. See Deposition Transcript of Lloyd Criss, *supra*, at 130 and Exhibit 18. American Medical Testing grossed over \$2,000,000 in testing before it was deposed for the first and only time on December 12, 2001. See Deposition Transcript of Guy Foster, *supra*, at 89.

Similarly, Respiratory Testing Services and N&M have only been deposed once each even though they are actively testing people throughout the country. In fact, there are several other mass screening testing entities who have never been deposed even though they are responsible for manufacturing scores of claims. This may also be the case for many of the pulmonary function technicians who work for the mass screening entities. They may have pertinent information regarding systemic manipulative techniques used in administering pulmonary function tests.

Defendants, courts and some commentators choose to turn a blind eye to the mass testing entities' manufacture of claims for various reasons. First, the focus of the defense has generally been on the malignancy cases. While the malignancy cases are individually more expensive for defendants, they are not more expensive when the total number of nonmalignant claims is calculated. At least 65% of all asbestos compensation is paid on nonmalignant cases. See Carroll, *supra*, at 65. And this trend has only started to increase. With the huge pecuniary gain and the lack of discovery done against them, there is no reason for the mass screening entities to stop manufacturing claims. As Professor Brickman appreciated, “[f]or practical purposes, the supply of such plaintiffs claiming workplace exposure to asbestos but no injury is essentially infinite. Asbestos litigation will go on until the last dollar is extracted from an ever-widening group of defendants.” Lester Brickman, *The Great Asbestos Swindle*, *supra*.

No doubt many defendants fear, and rightfully so, the threat of massive judgments in pro-plaintiff jurisdictions if they do not settle a massive inventory of unimpaired nonmalignant cases. Dickie Scruggs, a well-known asbestos and tobacco attorney, has acknowledged the use of these certain jurisdictions:

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’ve got large populations of voters who are in on the deal. . . . 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. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or the law is.



Jim Copland, Opinion, *The Tort Tax*, WALL ST. J., JUNE 11, 2003, at A16 (quoting Dickie Scruggs). In these pro-plaintiff jurisdictions, plaintiffs' lawyers often join hundreds of nonmalignant claims manufactured by mass screening entities to a few malignant claims. Defendants are reluctant to conduct discovery into the hundreds of nonmalignant claims manufactured by the mass testing entities because they fear the plaintiffs' lawyers will not settle the malignant claims with them and end up trying a case in a "magic jurisdiction."

By not focusing on the unimpaired nonmalignant claims and refusing to uncover the mass manufacturing of these claims, many defendants may have guaranteed their own downfall: "Looking back ruefully, many defendants now believe that by settling so readily for so many years they unwittingly encouraged the filing of increasingly marginal and dubious claims." Roger Parloff, *Asbestos — The \$200 Billion Miscarriage of Justice*, FORTUNE.COM, March 4, 2002, at 6.

Another DRI presenter sadly forecasted this dilemma almost seven years ago:

If the screenings are conducted properly, then defendants have nothing to fear. If the screenings are conducted improperly, then the defendants will find themselves defending, at great cost, thousands of meritless claims. And if the defendants pay settlement money on thousands of meritless claims, then there will be thousands more meritless claims. *And then, shame on us.*

Dwight E. Tarwater, *Plaintiffs' Mass Screening Programs: How Are They Done, What Do They Tell You, And How Can You Challenge Them?*, Asbestos DRI Seminar 1996, at C-17.

The time for a change is now. Tomorrow is too late.

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## ENDNOTES

1. For a more in-depth article about mass screenings, the processes involved and their effect on "the asbestos litigation crisis," please refer to Lester Brickman's article in the Pepperdine Law Review Symposium on Asbestos Litigation, which at the time of submission of this article had yet to be published. See Lester Brickman, "On the Theory Class' Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality," 31 PEPPERDINE L. REV. \_\_\_ (2003) (to be published).
2. There is also most likely a discrepancy between rates of "real world" asbestos-related lung cancer and rates seen in the tort arena. About 1200 new asbestos-related lung cancer claims were filed annually in the 1990s. See D.E. Lilienfeld, et al., Projection of Asbestos Related Diseases in the U.S., 1985-2009, 45 British J. of Indus. Medicine 283 (1988). Most lung cancer claims are brought on behalf of smokers who have also been exposed to asbestos but their injuries may more likely be attributable to their smoking. See The Fairness in Asbestos Injury Resolution Act of 2003 Report, S. Rep. No. 108-118, at 99, 108th Cong. 1 (2003) (statement by Senator Jon Kyl R-AZ).
3. The owners of Gulf Coast Marketing are Lloyd Criss and Richard Kirkpatrick. Mr. Criss is the father of a Galveston County, Texas District Judge. Mr. Kirkpatrick is an attorney who has used Gulf Coast Marketing to conduct screenings for his own cases. See Deposition Transcript of Lloyd Criss, *supra* at 26-27.
4. A 1/0 means that the B-reader determined that the x-ray was a category 1 (mild), but seriously considered a category 0 (normal). The ATS recommends a 1/1. American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, AM. REV. RESPIR. DIS. 134:363-368 (March 1986). ■