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# Comment

## ASBESTOS FRAUD SHOULD LEAD TO FAIRNESS: WHY CONGRESS SHOULD ENACT THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT

ELISE GELINAS\*

In response to the unique characteristics of asbestos litigation, courts developed “special asbestos law” to facilitate the management of asbestos dockets.<sup>1</sup> Special asbestos law, however, tipped the scale of justice in favor of plaintiffs by compelling defendant companies to settle mass quantities of claims at one time.<sup>2</sup> As plaintiffs’ firms responded opportunistically to their success by developing screening measures to recruit hundreds of thousands of claimants, asbestos litigation reached crisis status.<sup>3</sup> On numerous occasions, the Supreme Court of the United States, recognizing that the judiciary was incapable of managing asbestos dockets, called for an administrative solution.<sup>4</sup>

As Congress began to consider an administrative solution, however, the plaintiffs’ asbestos bar shifted focus due to fear that their investment in unimpaired asbestos claimants would become lost upon the enactment of legislation.<sup>5</sup> Because silica shares numerous characteristics with asbestos, plaintiffs’ firms directed their screening companies to recruit silicosis claimants.<sup>6</sup> But when the Judicial Panel on

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1. See *infra* Part I.

2. See *infra* Part I.A.

3. See *infra* Part I.

4. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[Asbestos] litigation defies customary judicial administration and calls for national legislation.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997) (“[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.”).

5. See *infra* Part III.

6. See *infra* Part III.

Multidistrict Litigation aggregated thousands of silicosis claims in the United States District Court for the Southern District of Texas, a historical opinion followed.<sup>7</sup> United States District Court Judge Janis Graham Jack found that almost all of the 10,000 silicosis diagnoses in her courtroom had been fraudulently manufactured.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

Despite this watershed event, the Fairness in Asbestos Injury Resolution Act ("FAIR Act")—Congress's attempt to enact an administrative solution to asbestos litigation—failed in the Senate in 2006.<sup>11</sup> One of the main reasons why the FAIR Act collapsed was because its drafters were concerned about their ability to predict the number of claims that would be filed with the administrative fund.<sup>12</sup> Using the tort system and asbestos trust funds as a guide, the Congressional Budget Office concluded that the fund would need approximately \$140 billion to pay all future legitimate asbestos claims.<sup>13</sup> Many feared that this estimate was too low; thus, the FAIR Act failed because it was unable to provide defendant companies and their insurers with certainty about their asbestos-related expenditures.<sup>14</sup>

The Congressional Budget Office, as well as the senators who supported the FAIR Act, erred by failing to fully appreciate Judge Jack's findings regarding the prevalence of fraud in asbestos litigation.<sup>15</sup> By failing to accord her opinion its deserved significance, the Senate did not realize that the tort model they were relying on to predict claims had a grossly inflated number of asbestos claims due to fraud.<sup>16</sup> As a result, the concern that \$140 billion would be insufficient to compensate all future claimants was unfounded.<sup>17</sup> Because of Judge Jack's

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7. See *infra* Part III.A.

8. See *infra* Part III.B.

9. See *infra* Part V.A.

10. See *infra* Part V.

11. See *infra* Part IV.

12. See *infra* Part IV.

13. See *infra* Part IV.

14. See *infra* Part IV.

15. See *infra* Part V.

16. See *infra* Part V.

17. See *infra* Part V.

findings and their implications, the FAIR Act should not have collapsed out of fear that the administrative system would receive too many claims.<sup>18</sup> In fact, Judge Jack's opinion should have reassured Congress that such a solution was more necessary than ever.<sup>19</sup>

I. THE EVOLUTION OF ASBESTOS LITIGATION: FROM "THE WORST OCCUPATIONAL HEALTH DISASTER IN U. S. HISTORY"<sup>20</sup> TO AN "ASBESTOS-LITIGATION CRISIS"<sup>21</sup>

Asbestos litigation possesses unique characteristics that have enabled it to become the longest-running mass tort litigation in the United States.<sup>22</sup> Tens of millions of Americans have been exposed to asbestos,<sup>23</sup> resulting in asbestos-related injuries such as mesothelioma, asbestosis, pleural plaques and thickening, and other cancers.<sup>24</sup> As of 2002, approximately 730,000 people have filed asbestos-related claims,<sup>25</sup> which has cost defendants and their insurers around \$70 billion.<sup>26</sup> The distinguishing feature of asbestos litigation, however, is its ability to evolve over time.<sup>27</sup>

Numerous factors have enabled asbestos litigation to reshape itself over time. First, the complex nature of asbestos-related injuries enables the litigation to adapt and overcome barriers that would have ended other mass tort litigation.<sup>28</sup> Asbestos litigation is complex be-

18. See *infra* Part V.

19. See *infra* Part V.

20. Stephen J. Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report*, 2002 RAND INST. FOR CIV. JUST. 16 [hereinafter RAND 2002] (citation and internal quotation marks omitted).

21. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

22. Stephen J. Carroll et al., *Asbestos Litigation*, 2005 RAND INST. FOR CIV. JUST. 21–22 [hereinafter RAND 2005].

23. *Id.* at 2.

24. *Id.* at 12. Mesothelioma is a cancer of the lining in the chest or abdomen and is considered inevitably fatal. *Id.* Asbestosis, a chronic lung disease, causes decreased lung capacity and can be debilitating or fatal. *Id.* at 13. Pleural plaques and pleural thickening are scarring of the membrane lining the chest wall and lungs, a nonmalignant abnormality. *Id.* at 14. The relationship between asbestos exposure and other cancers is controversial, but some claim the following are asbestos-related injuries: "leukemia[ ] and cancers of the bladder, breast, colon, esophagus, kidney, larynx, lip, liver, lymphoid, mouth, pancreas, prostate, rectum, stomach, throat, thyroid, and tongue." *Id.* at 13.

25. *Id.* at 71.

26. *Id.* at 92. After transaction costs, however, claimants' net compensation is only about 42% of this sum. *Id.* at 104. Additionally, asbestos litigation has bankrupted approximately eighty companies. John Wylie et al., *Trial Lawyers Inc. Asbestos: A Report on the Asbestos Litigation Industry*, 2008 MANHATTAN INST. CENTER FOR LEGAL POL'Y 2.

27. RAND 2005, *supra* note 22, at 21.

28. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 604–05 (2007).

cause millions of people used asbestos in a wide variety of settings over several decades, exposure resulted in both minor and serious injuries with long latency periods, and numerous companies could be held responsible for the same exposures.<sup>29</sup> Second, with billions of dollars of profit at stake, a creative asbestos bar has fought to keep asbestos litigation long-lasting.<sup>30</sup> For example, plaintiffs' firms have developed entrepreneurial methods to recruit vast numbers of claimants, have sought clients with both cancerous and nonmalignant injuries, and have exploited favorable jurisdictions.<sup>31</sup> Further, when the Johns-Manville trust fund ("Manville Trust")<sup>32</sup> became insolvent, the asbestos bar adapted by targeting companies with a more remote connection to asbestos and by developing new types of claims.<sup>33</sup>

A. *The Fifth Circuit's Decision in Borel v. Fibreboard Paper Products Corp. Catalyzed Mass Asbestos Litigation*

Until *Borel v. Fibreboard Paper Products Corp.*,<sup>34</sup> employees of asbestos-products manufacturers had to rely on workers' compensation claims to recover for asbestos-related injuries.<sup>35</sup> In *Borel*, however, the United States Court of Appeals for the Fifth Circuit determined that these manufacturers had failed to warn their employees about asbestos—an unreasonably dangerous product—and thus should be held strictly liable for resulting injuries.<sup>36</sup> After the *Borel* decision, product liability claims against asbestos manufacturers rapidly increased, and by the early 1980s, the number of claims reached more than 20,000.<sup>37</sup> During the 1990s, the number of claims exceeded 200,000.<sup>38</sup>

In some jurisdictions, federal and state courts struggled with how to best manage their asbestos caseloads.<sup>39</sup> Overwhelmed by the number of cases on their dockets, some judges adopted a formal approach

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29. *Id.*

30. *Id.* at 605.

31. *Id.*

32. When the Johns-Manville Corporation filed for bankruptcy, the bankruptcy court established the Manville Trust so that all present and future claimants could be compensated for their asbestos-related injuries. Ronald Barliant et al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 447–48 (2004).

33. Hanlon & Smetak, *supra* note 28, at 605.

34. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

35. Christopher J. O'Malley, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1106–07.

36. *Borel*, 493 F.2d at 1106.

37. RAND 2005, *supra* note 22, at 1.

38. David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & POL'Y 589, 595 (2008).

39. RAND 2005, *supra* note 22, at 28.

to managing asbestos litigation, while other judges adopted more informal approaches.<sup>40</sup> Regardless of these judges' intentions, many of their substantive and procedural shortcuts were ill-fated.<sup>41</sup> For example, one of the key features of such judicial management included the aggregation or consolidation of cases for pretrial processing.<sup>42</sup> By allowing plaintiffs to aggregate and consolidate their claims—consisting of different alleged injuries, causes of action, and time periods—courts gave plaintiffs an advantage.<sup>43</sup>

Using courts' "special asbestos law,"<sup>44</sup> plaintiffs' counsel developed strategies to coerce defendant companies to settle claims en masse.<sup>45</sup> For example, plaintiffs' counsel would group hundreds or thousands of claims together, where claimants ranged from mesothelioma victims to the unimpaired.<sup>46</sup> According to defendant companies, the aggregation of asbestos claims forced them to settle, regardless of the strength of each case, "to avoid the possibility of substantial punitive damages awarded by sympathetic juries hearing mesothelioma cases."<sup>47</sup> Thus, instead of aggressively contesting liability against claims of questionable merit, companies settled mass quan-

40. *Id.* at 1.

41. *See, e.g.*, Landin et al., *supra* note 38, at 600 (noting that some overwhelmed courts took "well-intentioned, but ill-fated, procedural shortcuts to usher the claims through the system"); Wylie et al., *supra* note 26, at 2 ("[J]udges in asbestos litigation have all too often processed massive caseloads 'without regard to whether the claims themselves are based on fraud, corrupt experts, perjury, and other things that would be deplored and persecuted by the legal profession if done within other commercial fields.'" (quoting Dennis Jacobs, *The Secret Life of Judges*, 75 *FORDHAM L. REV.* 2855, 2858 (2007))).

42. *RAND* 2005, *supra* note 22, at 28. Judges hoped that aggregating claims would facilitate settlement discussions. *Id.*

43. *See id.* (noting that judges group cases together to encourage settlement even if the claims include diverse locations and injuries); *see also* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims . . . [and] creates insurmountable pressure on defendants to settle, whereas individual trials would not.").

44. Joseph P. Helm, III, *Asbestos Litigation and the Proposed Administrative Remedy: Between the Values of Individualism and Distributive Justice*, 50 *EMORY L.J.* 631, 641 (2001) (citation and internal quotation marks omitted).

45. Wylie et al., *supra* note 26, at 10–11.

46. Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends*, 2007 *AM. ACAD. OF ACTUARIES* 3.

47. *Id.*; *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (explaining that when thousands of claimants file suit against a defendant, that defendant can "easily be facing \$25 billion in potential liability . . . [and] bankruptcy," and thus, "[t]hey will be under intense pressure to settle"); Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 *TEX. L. REV.* 1695, 1696–97 (1998) ("[D]efendants' liability, which should be a critical matter in the fashioning of a just solution, becomes submerged beneath the overwhelming volume of claims and the huge transactional costs of defending them.").

tities of cases.<sup>48</sup> Responding opportunistically to their success, plaintiffs' counsel sought out more claimants, and subsequently, developed an entrepreneurial method for recruiting hundreds of thousands of claimants through the use of mass screenings.<sup>49</sup>

Asbestos lawyers hired screening companies to recruit potential claimants who, although not currently suffering from asbestos-related injuries, exhibited symptoms of exposure.<sup>50</sup> These screening companies used mobile x-ray vans to seek out potential clients in the parking lots of hotels and restaurants.<sup>51</sup> The purpose of these screenings was to generate evidence—x-rays, pulmonary function tests, and medical reports—to support claims of asbestos-related injuries.<sup>52</sup> This entrepreneurial method of recruiting clients was wildly successful: From 1988 to 2006, mass screenings generated more than 90% of the approximately 585,000 nonmalignant claims filed with the Manville Trust.<sup>53</sup>

*B. The Supreme Court of the United States Requests an Administrative Solution to the Asbestos Litigation Crisis*

As asbestos cases continued to overwhelm certain jurisdictions, United States Chief Justice William Rehnquist formed an Ad Hoc Committee on Asbestos Litigation (“Ad Hoc Committee”) to examine possible solutions to the asbestos litigation crisis.<sup>54</sup> At the time of formation, the Chief Justice noted that “‘dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; [and] exhaustion of

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48. RAND 2005, *supra* note 22, at 1.

49. *See id.* at 23 (explaining that in their efforts to get more claimants, plaintiffs’ firms engaged in mass screenings of asbestos workers).

50. Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 604 (2007).

51. Victor E. Schwartz & Leah Lorber, *A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis*, 28 AM. J. TRIAL ADVOC. 295, 309 (2004).

52. *See, e.g.*, Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies* 29 CARDOZO L. REV. 513, 518 (2007) [hereinafter Brickman, *Disparities*] (“The sole object of these [mass] screenings is to generate medical reports to be used to support claims of asbestosis . . . .”); Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, 2005 AEI-BROOKINGS JOINT CENTER FOR REG. STUD. 4 (“[A]ttorney-sponsored mass medical screenings became a primary tool for the recruitment of new claimants, particularly clients with little or no impairment.”).

53. Brickman, *Disparities*, *supra* note 52, at 518–19.

54. O’Malley, *supra* note 35, at 1110.

assets threatens and distorts the process . . . .”<sup>55</sup> Based on these conclusions, the Ad Hoc Committee recommended the adoption of an administrative remedy for asbestos litigation.<sup>56</sup> In *Amchem Products, Inc. v. Windsor*,<sup>57</sup> the Supreme Court reached the same conclusion: “[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.”<sup>58</sup> Two years later, the Supreme Court again called for congressional action to solve the asbestos litigation crisis.<sup>59</sup>

## II. CONGRESS ATTEMPTS TO CREATE A PRIVATELY FUNDED, PUBLICALLY ADMINISTERED SYSTEM TO COMPENSATE LEGITIMATE ASBESTOS-RELATED INJURIES

Although Congress has repeatedly attempted to create an administrative system to replace asbestos litigation, these efforts have not succeeded.<sup>60</sup> On May 22, 2003, Senator Orrin Hatch (R-UT) introduced the Fairness in Asbestos Injury Resolution Act, which the Senate Judiciary Committee approved by a roll call vote of ten to eight.<sup>61</sup> When negotiations between the senators failed, however, Congress adjourned without voting on Senate Bill 1125.<sup>62</sup> During the following session, Senator Hatch reintroduced a revised version of the Act, known as Senate Bill 2290, which increased claim values and included an updated administrative structure.<sup>63</sup> Again, negotiations stalled and the 108th Congress adjourned without a floor vote on the bill.<sup>64</sup> When Congress reconvened in January of 2005, Senator Arlen Specter (R-PA) took control of the bill.<sup>65</sup> Congress adjourned again, however, without passing Senate Bill 852.<sup>66</sup> The Fairness in Asbestos Injury Resolution Act of 2006,<sup>67</sup> which Senator Specter introduced on May 26,

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55. *Id.* at 1110–11 (internal citations omitted).

56. *Id.* at 1111.

57. 521 U.S. 591 (1997).

58. *Id.* at 628–29.

59. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[Asbestos] litigation defies customary judicial administration and calls for national legislation.”).

60. O’Malley, *supra* note 35, at 1120.

61. John W. Ames & Andrew D. Stosberg, *The Fairness in Asbestos Injury Resolution Act of 2003: Is It a FAIR Act?*, 22 AM. BANKR. INST. J. 26, 26 (2003).

62. O’Malley, *supra* note 35, at 1120–21. The FAIR Act would have established a \$108 billion trust fund to resolve asbestos litigation. *Id.* at 1120.

63. *Id.* at 1121.

64. *Id.*

65. *Id.*

66. *Id.* at 1123.

67. Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. (2006).



2006,<sup>68</sup> represents Congress's latest attempt to create an administrative method for fairly compensating victims of asbestos-related injuries.<sup>69</sup>

Recognizing that the Supreme Court had requested a national asbestos claims system,<sup>70</sup> the FAIR Act purported to "create [a] legislative solution in the form of a national asbestos injury claims resolution program to supersede all existing methods to compensate those injured by asbestos."<sup>71</sup> In addition to establishing a privately funded and publically administered system to resolve asbestos claims,<sup>72</sup> the FAIR Act contained numerous provisions designed to prevent fraud and the compensation of illegitimate claims.<sup>73</sup> In response to Judge Jack's findings regarding silica litigation fraud,<sup>74</sup> the FAIR Act's draft-

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68. *Id.*

69. Beth A. Dickhaus & Darrin N. Sacks, *Recent Developments in Insurance Regulation*, 42 TORT TRIAL & INS. PRAC. L.J. 571, 585 (2007); see also GovTrack: Text of S. 3274 [109th]—FAIR Act of 2006, <http://www.govtrack.us/congress/billtext.xpd?bill=s109-3274> (last visited Oct. 29, 2009) (noting that no member of Congress has pursued this bill since 2006).

70. S. 3274.

71. *Id.* § 2(a)(7).

72. *Id.* § 2(b)(1).

73. See, e.g., *id.* § 101(c)(1)(D) (establishing audit procedures "to assure the integrity of the program"); *id.* § 101(c)(1)(H) (forbidding any attorney, physician, medical or diagnostic service provider, or laboratory who has engaged in fraudulent practices from participating in the program); *id.* § 101(c)(2) (establishing penalties for fraudulent statements or practices); *id.* § 101(e) (establishing "audit and personnel review procedures for evaluating the accuracy of eligibility recommendations of agency and contract personnel"); *id.* § 102(a)(3) (denying Advisory Committee membership to individuals who earned more than 15% of their income from asbestos litigation in each of the five previous years); *id.* § 103(b) (denying Medical Advisory Committee membership to individuals who earned more than 15% of their income from asbestos litigation in each of the five previous years); *id.* § 104(c) (denying participation of organizations with a financial interest in the outcome of claims); *id.* § 104(e)(1) (capping attorneys' fees at 5%); *id.* § 104(e)(2) (establishing punishments for exceeding the 5% cap on fees); *id.* § 105(c) (establishing qualifications of physician panels); *id.* § 114(a)(2) (permitting the Administrator to require additional evidence to prove any claim); *id.* § 115(a) (establishing "Medical Evidence Auditing Procedures"); *id.* § 115(b) (establishing "Review of Certified B-Readers"); *id.* § 121(b)(3) (creating procedures to ensure medical evidence is credible); *id.* § 121(c) (creating procedures to ensure exposure evidence is credible); *id.* § 225(b)(3) (requiring that preference be given to nonprofit organizations with asbestos-related experience for contracts related to education, consultation, screening, and monitoring); *id.* § 225(c)(6) (limiting compensation for medical screening services); *id.* § 401 (establishing penalties for fraud and false information).

74. *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 3274 Before the S. Comm. on the Judiciary*, 109th Cong. 7 (2006) (statement of Governor John Engler, President, National Association of Manufacturers) ("Senate bill 3274 goes even further than the earlier bill to prevent fraudulent claiming. We commend Federal Judge Janis Jack for exposing all of the fraud rampant in silica litigation . . .").

ers incorporated anti-fraud provisions into the bill to prevent the questionable practices that were occurring in the tort system.<sup>75</sup>

For example, the FAIR Act established an Office of Asbestos Disease Compensation (“Office”),<sup>76</sup> which was headed by an Administrator whose duties included processing claims for asbestos-related injuries and compensating eligible claimants on a no-fault basis and in a nonadversarial manner.<sup>77</sup> Significantly, the Administrator’s additional duties included “conducting such audits and additional oversight as necessary to assure the integrity of the program”<sup>78</sup> and “excluding evidence and disqualifying or debarring any attorney, physician, [or] provider of medical or diagnostic services . . . where the Administrator determines that materially false, fraudulent, or fictitious statements or practices have been submitted or engaged in by such individuals or entities.”<sup>79</sup>

Additionally, the Administrator would have received assistance from multiple advisory committees and experienced physician panels. The Advisory Committee on Asbestos Disease Compensation (“Advisory Committee”) would have consisted of members who had “experience or expertise in diagnosing asbestos-related diseases and conditions, assessing asbestos exposure and health risks, [and] filing asbestos claims.”<sup>80</sup> Importantly, none of these individuals could have served on the committee if he or she had, for each of the five years before being appointed, earned more than 15% of his or her income by serving as a consultant or an expert witness in asbestos litigation.<sup>81</sup> The Administrator also would have established a Medical Advisory Committee (“Medical Committee”) to provide expert advice on any medical issues that may have arisen.<sup>82</sup> Medical Committee members also could not have earned more than 15% of their income from work related to asbestos litigation during the previous five years.<sup>83</sup> Finally,

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75. See Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 CONN. INS. L.J. 517, 548–49 (2006) [hereinafter Hanlon, *Elegy*] (“[T]he FAIR Act emphasizes the importance of ensuring the quality of the data that are used in the administrative process . . . [which] is especially critical given the history of medical fraud and abuse that has made asbestos litigation such a scandal.”).

76. S. 3274 § 101(a)(1).

77. *Id.* § 101(a)(2); *id.* § 101(c)(1)(A).

78. *Id.* § 101(c)(1)(D).

79. *Id.* § 101(c)(1)(H). For each infraction, the Administrator may have imposed a fine of \$10,000 on anyone submitting “a materially false, fraudulent, or fictitious statement or practice under this Act.” *Id.* § 101(c)(2).

80. *Id.* § 102(a)(3).

81. *Id.* For members’ duties, see *id.* § 102(b).

82. *Id.* § 103(a).

83. *Id.* § 103(b).

to assist with making medical determinations for each claimant, the Administrator would have appointed Physician Panels.<sup>84</sup> To qualify for admittance on a Physician Panel, the physician needed to be licensed in any state and had to have “experience and competency in diagnosing asbestos-related diseases.”<sup>85</sup> While individuals appointed to a Physician Panel would have been reasonably compensated for their services,<sup>86</sup> they also could not have earned more than 15% of their income during the previous five years “as an employee of a participating defendant or insurer or a law firm representing any party in asbestos litigation or as a consultant or expert witness in matters related to asbestos litigation.”<sup>87</sup>

In addition to establishing advisory panels, the FAIR Act also included specific provisions designed to prevent—and punish—the types of fraudulent statements and practices exposed by Judge Jack. For example, the FAIR Act gave the Administrator authority to establish a claimant assistance program consisting of labor organizations and other entities, but these organizations were prohibited from having any financial interest in the outcome of the claims.<sup>88</sup> By eliminating financial incentives, organizations participating in the claimant assistance program would not have had illicit motivation to seek out claimants or embellish their numbers or injuries.

Additionally, while claimants were permitted to have legal assistance, the Administrator would have created a roster of qualified attorneys who had agreed to provide pro bono services.<sup>89</sup> Any attorney involved in the administrative claims process would have been forbidden from recovering fees above 5% of the claimant’s award.<sup>90</sup> Importantly, attorneys who recovered more than the 5% fee cap would have been fined up to \$5000 or twice the amount of the inappropriate fee charged.<sup>91</sup>

The FAIR Act specifically attempted to thwart the filing of illegitimate claims and fraudulent medical evidence. First, claimants seeking compensation under the FAIR Act needed to provide their name, Social Security number, and “a description of any prior or pending civil

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84. *Id.* § 105(a).

85. *Id.* § 105(c). Additionally, to be eligible, a physician needed to be board-certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology. *Id.* § 105(c)(2).

86. *Id.* § 105(e).

87. *Id.* § 105(c)(3).

88. *Id.* § 104(c).

89. *Id.* § 104(d)(2).

90. *Id.* § 104(e)(1).

91. *Id.* § 104(e)(2).

action or other claim brought by the claimant for asbestos-related injury or any other pulmonary, parenchymal, or pleural injury.<sup>92</sup> By requiring this information, Congress most likely wanted the Administrator to ensure that claimants had not already recovered for asbestos- or silica-related injuries through other means. In addition, the Administrator would have developed auditing procedures to evaluate medical evidence submitted by claimants.<sup>93</sup> If, through these audits, the Administrator determined that a physician's or medical facility's evidence was inconsistent with prevailing practices, all evidence from such a physician or facility would have been unacceptable.<sup>94</sup> Further, the Administrator would have maintained a list of acceptable, certified B-readers to independently review incoming x-rays.<sup>95</sup> Finally, anyone submitting false information could be punished under 18 U.S.C. § 1351<sup>96</sup> or Section 101(c)(2) of the FAIR Act.<sup>97</sup>

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92. *Id.* § 113(c).

93. *Id.* § 115(a)(1).

94. *Id.* § 115(a)(2)(A).

95. *Id.* § 115(b). A B-reader is a physician who has demonstrated proficiency in evaluating and interpreting chest x-rays for pneumoconiosis and other diseases. 42 C.F.R. § 37.51(b) (2008).

96. The FAIR Act would amend Chapter 63 of Title 18, United States Code, by adding the following:

§ 1351. Fraud and false statements in connection with participation in Asbestos Injury Claims Resolution Fund:

(a) Fraud Relating to Asbestos Injury Claims Resolution Fund.—Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud the Office of Asbestos Disease Compensation or the Asbestos Insurers Commission under title II of the Fairness in Asbestos Injury Resolution Act of 2006 shall be fined under this title or imprisoned not more than 20 years, or both.

(b) False Statement Relating to Asbestos Injury Claims Resolution Fund.—(1) . . . It shall be unlawful for any person, in any matter involving the Office of Asbestos Disease Compensation or the Asbestos Insurers Commission, to knowingly and willfully—(A) falsify, conceal, or cover up by any trick, scheme, or device a material fact; (B) make any materially false, fictitious, or fraudulent statement or representation; or (C) make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the award of a claim or the determination of a participant's payment obligation under title I or II of the Fairness in Asbestos Injury Resolution Act of 2006. (2) . . . A person who violates this subsection shall be fined under this title or imprisoned not more than 10 years, or both.

S. 3274 § 401(a).

97. *E.g.*, § 115(c)(4); *id.* § 121(c)(6).

### III. THE INTERSECTION OF ASBESTOS AND SILICA LITIGATION: THE SILICA MULTIDISTRICT LITIGATION'S ABILITY TO AFFECT ASBESTOS REFORM

When the United States Senate began considering an administrative solution to asbestos litigation, which would have limited compensation for unimpaired asbestosis claims to medical monitoring expenses, the asbestos bar began to shift focus.<sup>98</sup> Plaintiffs' firms and screening companies that had previously focused on asbestos began to recruit silicosis claimants "to keep the asbestos-litigation gravy train alive."<sup>99</sup> When the asbestos bar shifted to silicosis claims, it was able to use some of the same techniques that had proved to be advantageous in asbestos litigation.<sup>100</sup> For example, filing numerous silicosis claims could (1) overwhelm courts, thus enabling plaintiffs' counsel to settle claims without close supervision; (2) pressure courts to adopt innovative means of processing cases; and (3) prevent defendants from vigorously defending cases because of financial pressure to settle.<sup>101</sup>

As the FAIR Act was pending in the Senate, however, a federal judge from the Southern District of Texas handed down a decision that would profoundly affect the field of mass torts, including asbestos litigation.<sup>102</sup> That decision, made by Judge Janis Graham Jack in the Silica Multidistrict Litigation ("Silica MDL"), has been one of the most dramatic events to catalyze asbestos reform.<sup>103</sup> By uncovering a fraudulent operation to manufacture silicosis diagnoses, Judge Jack ex-

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98. Hanlon & Smetak, *supra* note 28, at 595 ("[T]he pendency of the FAIR Act has had a depressing effect on the recruitment of new non-malignant [asbestos] cases . . . [because] a change in law could render the investment in new cases useless.").

99. Andrew P. Morriss & Susan E. Dudley, *Defining What to Regulate: Silica and the Problem of Regulatory Classification*, 58 ADMIN. L. REV. 269, 344 (2006) (citations and internal quotation marks omitted).

100. *Id.* at 349–51.

101. *Id.*

102. See Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to be Turning*, 12 CONN. INS. L.J. 477, 493 (2006) [hereinafter Behrens & Goldberg, *The Tide*] ("Another event that should accelerate the demise of mass screenings was a watershed ruling in June 2005 by the manager of the federal silica multi-district litigation docket, U.S. District Judge Janis Graham Jack of the Southern District of Texas."); David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741, 741 (2006) (noting that Judge Jack's opinion "has been heralded as a major step in the movement for class action reform"); Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends*, 2007 AM. ACAD. OF ACTUARIES 6 (noting that Judge Jack's decision will likely lead to increased medical evidentiary standards for both silica and asbestos claims).

103. Frederick C. Dunbar et al., *Forecasting Asbestos Liability After Recent Bankruptcy Decisions: How Forecasts Must Adjust for Changes in the Tort System*, 2006 NERA ECON. CONSULTING 2.

posed lawyers, diagnosing doctors, and screening companies that had also been key players in asbestos litigation.<sup>104</sup>

A. *The Formation of the Silica MDL: One Step Closer to Exposing Fraudulently Generated Silicosis Diagnoses*

On September 4, 2003, the Judicial Panel on Multidistrict Litigation centralized over 10,000 silicosis claims pursuant to 28 U.S.C. § 1407 in the Southern District of Texas with Judge Jack.<sup>105</sup> Although Judge Jack surmised that the court lacked subject matter jurisdiction over the MDL cases, she allowed the defendants to conduct discovery on fraudulent misjoinder.<sup>106</sup> On January 23, 2004, Judge Jack ordered the parties to complete "Fact Sheets" to assist the court in determining its subject matter jurisdiction.<sup>107</sup> As such, each plaintiff needed to submit detailed medical information about his or her alleged exposure to silica dust and injuries.<sup>108</sup>

When the plaintiffs submitted their Facts Sheets, the court noticed that twelve doctors had diagnosed approximately 9000 claimants.<sup>109</sup> These doctors were not the plaintiffs' treating physicians, but rather were affiliated with a handful of law firms and screening companies.<sup>110</sup> On October 29, 2004, the defendants deposed Dr. George Martindale, who had diagnosed 3617 plaintiffs with silicosis.<sup>111</sup> Each of Dr. Martindale's medical reports contained the following language: "On the basis of the medical history review, which is inclusive of a significant occupational exposure to silica dust, physical exam and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty."<sup>112</sup> Despite this clear language, during his deposition, Dr. Martindale testified that he did not intend

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104. *Id.* Because silica litigation involves the same mode of operation as asbestos litigation, Judge Jack's decision will most likely "apply with equal force to asbestos litigation." Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289, 290 (2006) [hereinafter Brickman, *Applicability*].

105. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 573 (S.D. Tex. 2005); see also *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381, 1383 (J.P.M.L. 2003) (transferring silica cases to Judge Jack).

106. *In re Silica*, 398 F. Supp. 2d at 574-75.

107. *Id.* at 575-76.

108. *Id.* at 576. Judge Jack did not limit discovery to these Fact Sheets, but rather allowed discovery to proceed at the parties' discretion. *Id.*

109. *Id.* at 580. The doctors are the following: Dr. Robert Altmeyer, Dr. James Ballard, Dr. Kevin Cooper, Dr. Todd Coulter, Dr. Andrew Harron, Dr. Ray Harron, Dr. Glynn Hilbun, Dr. Richard Levine, Dr. Barry Levy, Dr. George Martindale, Dr. W. Allen Oaks, and Dr. Jay Segarra. *Id.* at 580 n.24.

110. *Id.* at 580.

111. *Id.* at 581.

112. *Id.*

to diagnose any plaintiff with silicosis, he did not speak with a single plaintiff during their screenings, and he did not even know the criteria for diagnosing silicosis.<sup>113</sup> Expressing concern over Dr. Martindale's withdrawal of his diagnoses, the court proposed *Daubert*<sup>114</sup> hearings and court depositions for the remaining diagnosing doctors and screening companies.<sup>115</sup> Judge Jack chose to conduct *Daubert* hearings because they "were the most efficient and effective way to allow the Defendants to depose the doctors (as is their right under the Federal Rules of Civil Procedure), while providing direct Court supervision over the proceedings . . . ."<sup>116</sup> Her decision to conduct *Daubert* hearings was unprecedented for this stage of a mass tort proceeding.<sup>117</sup>

*B. The Unprecedented Decision to Conduct Daubert Hearings Leads to Discoveries About the Prevalence of Fraud in Silica and Asbestos Litigation*

Judge Jack conducted *Daubert* hearings and court depositions before deciding whether the court had subject matter jurisdiction because such hearings were potentially relevant to the court's jurisdiction and were warranted by the defendants' motion for sanctions.<sup>118</sup> In performing a *Daubert* analysis, Judge Jack focused on the accepted criteria for diagnosing silicosis: (1) sufficient exposure to silica dust and an appropriate latency period; (2) radiographic evidence of silicosis; and (3) the elimination of alternative causes of the radiographic findings.<sup>119</sup> As a former nurse,<sup>120</sup> Judge Jack found that the diagnosing doctors' adherence to these criteria "ranged from questionable to abysmal."<sup>121</sup> The significance of these findings is not limited to silica litigation; Judge Jack's opinion is valuable because of the potential

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113. *Id.* at 581–82.

114. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993) (establishing criteria to determine the reliability of scientific expert testimony).

115. *In re Silica*, 398 F. Supp. 2d at 584. Despite the upcoming *Daubert* hearings, the court allowed the defendants to conduct previously scheduled depositions of Dr. Glynn Hilbun and Dr. Kevin Cooper, who each emphasized that they did not diagnose any of the plaintiffs with silicosis, but rather signed forms provided by the screening company without first reviewing them. *Id.* at 587–88.

116. *Id.* at 585–86.

117. *See Wylie et al.*, *supra* note 26, at 12 (explaining that the testimony and cross-examination of diagnosing doctors and screening companies in court was previously unheard of in mass tort proceedings).

118. *In re Silica*, 398 F. Supp. 2d at 579–80.

119. *Id.* at 622.

120. 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.* 253, 275 (2007).

121. *In re Silica*, 398 F. Supp. 2d at 622.

exposure of fraud in the asbestos arena.<sup>122</sup> Most importantly, the exact lawyers, doctors, and screening companies from the silica litigation had been using the same techniques to generate nonmalignant asbestos claims; thus, the legitimacy of most asbestos claims filed in the tort system within the last few decades is questionable.<sup>123</sup>

Regarding the first criterion for diagnosing silicosis, Judge Jack concluded that the diagnosing doctors' testimony could not be admitted under *Daubert* because almost all of the plaintiffs' diagnoses failed to satisfy the minimum medically acceptable standard for diagnosing silicosis.<sup>124</sup> According to one doctor, "it is not appropriate for anyone other than the physician or an agent of the physician to take the exposure and past medical history."<sup>125</sup> In this case, Judge Jack observed that people with no medical training obtained plaintiffs' exposure histories and that there were significant financial incentives to find adequate exposure.<sup>126</sup> For example, Dr. Barry Levy, a physician involved in both asbestos and silica litigation,<sup>127</sup> diagnosed approximately 1389 plaintiffs in the Silica MDL without taking their occupational or medical histories, performing their B-reads, physically examining them, or even speaking to them or their primary care physicians.<sup>128</sup> Judge Jack summarized the findings of Dr. Levy, who had performed 1239 evaluations in seventy-two hours: "Dr. Levy worked at a break-neck pace which apparently led to some errors; and his exposure and medical

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122. Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96 ("The real importance of [Judge Jack's] proceedings, however, is not what they reveal about possible fraud in silica litigation but what they suggest about a possible fraud of vastly greater dimensions. It's one that may have been afflicting asbestos litigation for almost 20 years . . .").

123. See Brickman, *Applicability*, *supra* note 104, at 290 ("Because silicosis litigation involves the same modus operandi as entrepreneurially generated nonmalignant asbestos litigation, the same screening enterprises, B Readers, diagnosing doctors, and law firms, it is reasonable to conclude that Judge Jack's findings apply with equal force to asbestos litigation."); see also Frederick C. Dunbar et al., Institutional Response to Tort System Breakdown: Asbestos Enters a New Phase 9 (July 21, 2006) (unpublished working paper, on file with the Maryland Law Review) [hereinafter Dunbar, *Institutional Response*] (noting that, following Judge Jack's decision, both the Manville Trust and the Eagle Picher Trust stopped accepting asbestos claims where the medical support was provided by the doctors or screening companies challenged in the Silica MDL).

124. *In re Silica*, 398 F. Supp. 2d at 625.

125. *Id.* at 623.

126. *Id.* at 622. Often, screening companies only received payment for providing the firm with positive diagnoses. *Id.* at 601, 628.

127. See Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 520 n.107 (2009) (noting that several asbestos trusts have banned Dr. Levy's medical reports after his involvement in the Silica MDL).

128. *In re Silica*, 398 F. Supp. 2d at 611. In fact, in the eighteen years prior to the Silica MDL, Dr. Levy was not acting as a treating physician, but rather had been consulting in litigation for plaintiffs' firms for \$600 per hour. *Id.* at 611 n.83.



histories were not taken by medically-trained people and were below the standard set by his [own] writings and his ‘protocol.’”<sup>129</sup> To Judge Jack, “it [wa]s clear that Dr. Levy had an agenda: diagnose silicosis and nothing else.”<sup>130</sup>

Additionally, plaintiffs’ diagnosing doctors did not satisfy the second factor required to establish a medically acceptable silicosis diagnosis. Judge Jack concluded that the plaintiffs’ radiographic evidence—positive B-reads—were insufficient to establish silicosis diagnoses according to conventional medical standards.<sup>131</sup> Even assuming that the diagnosing doctors’ B-reads were unbiased and reliable, which is highly unlikely,<sup>132</sup> Judge Jack declined to accept a positive B-read as radiographic evidence of silicosis for three reasons.<sup>133</sup> First, the B-reader system was not established for litigation purposes; thus, one positive B-read alone should not have been sufficient to diagnose silicosis.<sup>134</sup> Second, plaintiffs’ B-readers relied on the ILO classification system, but the ILO guidelines were never intended for application in a legal setting and were not supposed to be used to diagnose disease.<sup>135</sup> Finally, to reduce reader bias, B-readers should not know either the patient’s exposure history or the suspected disease.<sup>136</sup> In the plaintiffs’ cases, however, the diagnosing doctors had incentives to find silicosis.<sup>137</sup>

Regarding the last criterion for diagnosing silicosis—that plaintiffs’ diagnosing doctors eliminate alternative causes of positive B-reads—Judge Jack found that “[i]n almost all of the MDL cases, the challenged diagnosing doctors simply ignored this final criterion . . . .”<sup>138</sup> In fact, at least one diagnosing doctor seemed willing to change a claimant’s diagnosis depending on whether the firm wanted to file an asbestos or silicosis claim. This doctor, Ray Harron, had not practiced medicine for approximately ten years, but rather had worked exclusively for plaintiffs’ lawyers and the screening company

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129. *Id.* at 611–12, 615. Dr. Levy spent approximately four minutes per evaluation. *Id.* at 611–12.

130. *Id.* at 615.

131. *Id.* at 625.

132. *See, e.g., id.* at 629 (explaining why B-reads for silica and asbestos litigation are unreliable); *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (“Certain pro-plaintiff B-readers [are] so biased that their readings [are] simply unreliable.”).

133. *In re Silica*, 398 F. Supp. 2d at 625.

134. *Id.* at 626.

135. *Id.*

136. *Id.* at 626–27.

137. *Id.* at 627–28.

138. *Id.* at 629–30.

N & M, Inc.<sup>139</sup> During Dr. Harron's deposition, the court learned that he had failed to write, dictate, read, or personally sign any of the approximately 6350 medical reports he had issued.<sup>140</sup> Dr. Harron explained that his silicosis diagnoses, reported to be "within a reasonable degree of medical certainty," were not actual medical diagnoses, but instead merely set forth a legal standard.<sup>141</sup> Most importantly, the defendants presented evidence that prior to the Silica MDL, Dr. Harron had read 1807 x-rays as consistent with asbestosis but not silicosis; however, when reexamining the *same* x-rays for the silica litigation, he found silicosis in every case.<sup>142</sup> When presented with evidence of such reversals, Dr. Harron refused to continue with his deposition until he could consult with his own attorney.<sup>143</sup>

As such, after conducting *Daubert* hearings and court depositions, Judge Jack concluded that the plaintiffs' silicosis diagnoses were "manufactured on an assembly line."<sup>144</sup> She exposed the fact that plaintiffs' lawyers, doctors, and screening companies had concocted a scheme to manufacture diagnoses for money.<sup>145</sup> For example, Judge Jack noted that N & M, Inc., a Mississippi screening company that generated silicosis diagnoses for approximately 6757 plaintiffs, "found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same [two year] period."<sup>146</sup> Additionally, among the 6757 claimants generated by N & M, Inc., over 4000 of them had previously filed asbestosis claims,<sup>147</sup> even though having both asbestosis and silicosis is a "clinical rarity."<sup>148</sup>

Although Judge Jack recognized that plaintiffs' lawyers "had to know that he or she was filing at least some claims that falsely alleged silicosis," the court could neither sanction these lawyers nor rule on the admissibility of the diagnosing doctors' testimony because it

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139. *Id.* at 603–04.

140. *Id.* at 605. Dr. Andrew Harron, Ray Harron's son, testified in his own deposition that he used the same diagnosing procedure as his father. *Id.* at 609.

141. *Id.* at 604.

142. *Id.* at 607–08. According to one of plaintiffs' other experts, intra-reader variability simply cannot explain Dr. Harron's reversal rate. *Id.* at 608.

143. *Id.* at 607.

144. *Id.* at 633.

145. *Id.* at 635 ("The record does not reveal who originally devised this scheme, but it is clear that the lawyers, doctors and screening companies were all willing participants.").

146. *Id.* at 603.

147. *Id.*

148. *Id.* at 595; see also *Asbestos: Mixed Dust and FELA Issues: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16 (2005) (statement of Dr. Paul Epstein, Chief, Pulmonary and Critical Care Medicine) ("[I]t is my professional opinion that the dual occurrence of asbestosis and silicosis is a clinical rarity.").

lacked subject matter jurisdiction over almost all of the MDL cases.<sup>149</sup> Judge Jack disclosed the findings, however, so that state courts would not have to re-conduct *Daubert* hearings on the same challenged doctors and their diagnoses.<sup>150</sup> Overall, Judge Jack revealed that the silicosis epidemic was largely a result of misdiagnosis.<sup>151</sup> Most importantly, Judge Jack's decision revealed that the lawyers, diagnosing doctors, and screening companies that presented the fraudulent silicosis diagnoses had engaged in identical practices to generate claims for asbestos litigation.<sup>152</sup>

#### IV. THE DEMISE OF THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT: THE SENATE'S INABILITY TO PREDICT THE NUMBER OF FUTURE ASBESTOS CLAIMS IMPEDES NEGOTIATIONS

Despite Judge Jack's extensive findings of fraud in silica and asbestos litigation, the 109th Congress adjourned without passing the FAIR Act.<sup>153</sup> Much of the debate surrounding the FAIR Act focused on whether the administrative trust fund ("Fund") would have been sufficient to compensate claimants fairly and effectively without becoming insolvent.<sup>154</sup> Some opponents of the FAIR Act feared that the administrative remedy "would replace the current broken litigation system for asbestos injury claims with a complicated, expensive, and ultimately unsustainable entitlement program."<sup>155</sup>

##### A. *Disagreements over the Structure of the FAIR Act Impede Negotiations*

Numerous issues impeded negotiations over the FAIR Act, which ultimately prevented Congress from enacting the bill. First, the FAIR Act's drafters struggled to balance administrative efficiency and pro-

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149. *In re Silica*, 398 F. Supp. 2d at 636–37. The District Court of the Southern District of Texas had jurisdiction over one matter, and in that case, Judge Jack sanctioned the law firm of O'Quinn, Laminack & Pirtle for multiplying the proceedings "unreasonably and vexatiously." *Id.* at 673–74, 676 (quoting 28 U.S.C. § 1927 (2006)); *see also* 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

150. *In re Silica*, 398 F. Supp. 2d at 637.

151. *Id.* at 632.

152. Brickman, *Applicability*, *supra* note 104, at 299; *see also In re Silica*, 398 F. Supp. 2d at 629 ("[E]vidence of the unreliability of the B-reads performed for this MDL is matched by evidence of the unreliability of B-reads in asbestos litigation.").

153. Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8 (G)*, 83 N.Y.U. L. REV. 501, 507 n.41 (2008).

154. 152 CONG. REC. S875, 883 (daily ed. Feb. 9, 2006) (statement of Sen. Cornyn).

155. 152 CONG. REC. S781, 838 (daily ed. Feb. 8, 2006) (statement of Sen. Cornyn).

gram integrity.<sup>156</sup> While a highly adversarial program would increase program integrity by ensuring that only deserving claimants are compensated, it also would escalate transaction costs and delays, and thus decrease efficiency.<sup>157</sup> Specifically, the drafters disagreed on the best means to determine eligibility for claimants and claim values.<sup>158</sup> Opponents of the FAIR Act believed that the bill's medical criteria would compensate too many people without asbestos-related injuries.<sup>159</sup> For example, the biggest dispute was whether to allow victims of lung cancer without asbestosis to recover.<sup>160</sup>

Next, the parties disagreed over the best method of transitioning from the tort system to the FAIR Act's administrative system.<sup>161</sup> Defendant companies feared that if pending claims were permitted to remain in the tort system, attorneys would try to litigate as many claims as possible.<sup>162</sup> Conversely, some were concerned that if the FAIR Act immediately preempted the tort system, the time and resources of claimants who were far into the litigation process would be wasted.<sup>163</sup>

Additionally, defendant companies and their insurers struggled to agree on how to allocate the program's costs, which were estimated to be approximately \$140 billion.<sup>164</sup> Each defendant's contribution depended on an allocation formula that took the following factors into account: (1) whether the company was in bankruptcy; (2) the size of the company's gross revenue; and (3) the amount of the company's previous asbestos expenditures.<sup>165</sup> Critics argued that the FAIR Act's funding structure favored large companies over smaller ones and that it resulted in "takings" of insurance companies' assets.<sup>166</sup>

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156. Hanlon & Smetak, *supra* note 28, at 588.

157. Hanlon, *Elegy*, *supra* note 75, at 547.

158. Hanlon & Smetak, *supra* note 28, at 588.

159. 152 CONG. REC. S875, 897 (daily ed. Feb. 9, 2006) (statement of Sen. Cornyn).

160. Patrick M. Hanlon, *Federal Asbestos Legislation: Wrestling with the Medical Issues*, 15 J.L. & POL'Y 1171, 1195–96 (2007) [hereinafter Hanlon, *Wrestling*].

161. Hanlon & Smetak, *supra* note 28, at 590–91.

162. *Id.* at 590.

163. 152 CONG. REC. S875, 887 (daily ed. Feb. 9, 2006) (statement of Sen. Durbin).

164. Hanlon & Smetak, *supra* note 28, at 590.

165. Hanlon, *Wrestling*, *supra* note 160, at 1185.

166. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 253, 276–77 (2006) (citation and internal quotation marks omitted).

B. *The FAIR Act Fails to Survive a Technical Budget Point of Order Because Its Drafters Could Not Provide Assurance that the Fund Would Remain Solvent*

The FAIR Act ultimately failed because the Congressional Budget Office (“CBO”) could not confidently predict the number of future asbestos claims that would require compensation, and thus the bill’s drafters could not assure skeptics that the Fund would remain solvent.<sup>167</sup> Some believed that establishing the Fund would decrease the number of asbestos claims filed, while others argued that the opposite would occur.<sup>168</sup> Regardless, the drafters needed a way to accurately estimate the number of legitimate claims that would be filed in order to predict the total cost of the administrative system. As a result, the CBO used claim rates in the tort system and other asbestos trusts as a basis for projecting claims against the Fund.<sup>169</sup> Based on these models, the CBO predicted that the Fund would need approximately \$140 billion to fully compensate all legitimate claimants.<sup>170</sup> Whereas some trusted that \$140 billion would suffice and some did not,<sup>171</sup> most agreed that “the cost of an administrative system is inherently uncertain.”<sup>172</sup> In fact, the CBO even reported that predicting the administrative system’s cost was impossible because no one could guess the volume of future claims, the percentage of legitimate claims, or the pace of such approvals.<sup>173</sup>

As such, although one of the main purposes of the FAIR Act was to provide certainty to defendant companies about their total asbestos expenditures, the possibility that the Fund would become insolvent—thus requiring the parties to return to the tort system—defeated this

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167. See Hanlon & Smetak, *supra* note 28, at 589 (explaining that one of the principal issues plaguing the drafters concerned the cost of the administrative system).

168. 152 CONG. REC. S875, 881 (daily ed. Feb. 9, 2006) (statement of Sen. Bennett). The General Accounting Office has found that, in general, creating a trust fund results in twice as many claims as that predicted at the time of its creation. *Id.* at 882.

169. Hanlon, *Elegy*, *supra* note 75, at 568.

170. 152 CONG. REC. S1135, 1141 (daily ed. Feb. 14, 2006) (statement of Sen. Specter). Specifically, the CBO predicted that the Fund would require between \$120 and \$150 billion. *Id.* at 1142 (statement of Sen. Feinstein). Although the CBO’s estimated range implied that there was some risk that the Fund could become insolvent, the CBO did not predict a short term collapse. Hanlon, *Elegy*, *supra* note 75, at 566.

171. 152 CONG. REC. S875, 881 (daily ed. Feb. 9, 2006) (statement of Sen. Bennett).

172. Hanlon & Smetak, *supra* note 28, at 589; see also 152 CONG. REC. S875, 886 (daily ed. Feb. 9, 2006) (statement of Sen. Durbin) (noting that predicting the funding required for this administrative system was nearly impossible because the cost needed to be estimated over a fifty-year period).

173. 152 CONG. REC. S875, 889 (daily ed. Feb. 9, 2006) (statement of Sen. Specter).

purpose.<sup>174</sup> The FAIR Act's drafters wanted to provide defendant companies with certainty about their asbestos costs to promote financing of business operations and to reassure shareholders.<sup>175</sup> But when the drafters claimed that it was nearly impossible to predict the total required funding, the defendant companies and their insurers began to withdraw their support of the bill.<sup>176</sup> These companies and their insurers were reluctant to spend \$140 billion only to end up back in the tort system<sup>177</sup> and were unwilling to write a blank check to cover the system's costs.<sup>178</sup> Indeed, Senator Durbin (D-IL) argued that the \$140 billion estimate "falls short of the kind of certitude that we should have before we close down the court system of America to hundreds of thousands of injured people and their families."<sup>179</sup>

In addition to the concern over lack of certainty, the budget issue ultimately doomed the FAIR Act by causing a political rift between Democrats and Republicans.<sup>180</sup> Attempting to create a privately funded, no-fault administrative compensation program caused political tension because Democrats and Republicans take opposite positions regarding tort reform.<sup>181</sup> For example, Senator Orrin Hatch (R-UT) described the level of political compromise necessary to enact a legislative solution to the asbestos litigation crisis: "[C]onservatives . . . [must] turn a deaf ear to many of [their] traditional supporters and endorse the very kind of Federal structure against which [they] battle daily . . . [a]nd liberals . . . [must] say enough is enough to one of their most important and influential constituencies."<sup>182</sup> Ultimately, the FAIR Act failed because of lack of support from conservative Republicans.<sup>183</sup> Conservative senators feared that, should the Fund become insolvent, a future Congress would not allow the program to sunset; instead, it would use taxpayers' money to compensate remain-

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174. Patrick M. Hanlon, *The Proposed Federal Asbestos Trust Fund*, SK040 A.L.I.-A.B.A. 479, 501 (2004).

175. Hanlon & Smetak, *supra* note 28, at 589.

176. Hanlon, *Elegy*, *supra* note 75, at 568-69.

177. *Id.* at 578-79.

178. Patrick M. Hanlon, *Asbestos Legislation: The FAIR Act Two Years On*, 1 PRATT'S J. BANKR. L. 207, 237 (2005).

179. 152 CONG. REC. S875, 886 (daily ed. Feb. 9, 2006) (statement of Sen. Durbin).

180. Hanlon, *Elegy*, *supra* note 75, at 519.

181. Robert S. Peck, *Violating the Inviolable: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 308 n.5 (2006). Tort reform divides the political parties because Democrats generally represent the interests of unions and trial lawyers, whereas Republicans usually align with the interests of businesses and professionals. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1491 (2005).

182. 152 CONG. REC. S1135, 1151 (daily ed. Feb. 14, 2006) (statement of Sen. Hatch).

183. Hanlon, *Wrestling*, *supra* note 160, at 1177.

ing claimants.<sup>184</sup> Thus, they wanted to avoid enacting a bill that would become a federal financial responsibility.<sup>185</sup>

V. JUDGE JACK'S FINDINGS IN THE SILICA MDL AND THE EVENTS THAT RESULTED INDICATE THAT THE FAIR ACT'S FRAMERS OVERESTIMATED THE NUMBER OF CLAIMS THE ADMINISTRATIVE SYSTEM WOULD RECEIVE

The results from the Silica MDL should significantly affect asbestos reform because, by conducting *Daubert* hearings and court depositions, Judge Jack exposed the prevalence of fraud in both silica and asbestos litigation. Based on the prevalence of fraud uncovered, it is reasonable to conclude that the number of asbestos claims filed in the tort system is greatly inflated due to illegitimate claims.<sup>186</sup> The CBO, as well as the senators who supported the FAIR Act, failed to recognize the importance of Judge Jack's findings.<sup>187</sup> Instead, they used the tort and bankruptcy-trust systems, which have grossly inflated asbestos filings, to predict how many claims would be filed with the Fund.<sup>188</sup> Because of this oversight, supporters of the bill were unable to reassure its opponents that the \$140 billion estimate was sufficient to cover the administrative system's costs.

A. *Judge Jack's Findings in the Silica MDL Demonstrate that the Total Number of Asbestos Claims in the Tort System Is Grossly Inflated Due to Fraud*

Even though Judge Jack's opinion focused on silicosis claims, the fraud uncovered during the *Daubert* hearings and court depositions applies to asbestos litigation as well. Judge Jack's findings directly affect asbestos-related claims because such claims are generated by the same mass screening procedures discussed in the Silica MDL<sup>189</sup> and the retreaded asbestosis claims were based on unfounded medical di-

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184. *Id.* at 1186–87; see also *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 3274 Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (statement of Douglas Holtz-Eakin, Director, Council on Foreign Relations) (arguing that a future Congress will most likely use taxpayer dollars to bail out the Fund instead of reducing claim values or heightening eligibility standards).

185. Hanlon, *Wrestling*, *supra* note 160, at 1177–78.

186. See *infra* Part V.A.

187. See *infra* Part V.B.

188. See *infra* Part V.B.

189. See *infra* Part V.A.1.

agnoses.<sup>190</sup> Additionally, more recent events have substantiated Judge Jack's findings with respect to asbestos litigation.<sup>191</sup>

1. *The Number of Legitimate Asbestos Claims Is Probably Inflated Because Most Claims in the Tort System Were Generated Through Mass Screenings*

While evaluating the legitimacy of more than 10,000 silicosis claims in her courtroom, Judge Jack noted that, according to statistics from the National Institute for Occupational Safety and Health, one could anticipate approximately eight new silicosis diagnoses per year in Mississippi.<sup>192</sup> From 2002 to 2004, however, about 20,479 plaintiffs filed silicosis claims in Mississippi, which is "over five times greater than the total number of silicosis cases one would expect over the same period in the *entire* United States."<sup>193</sup> According to Judge Jack, the number of silicosis claims defied "all medical knowledge and logic."<sup>194</sup> Instead, the enormous discrepancy occurred because of mass screenings, which dramatically inflate the number of claims beyond what is scientifically expected.<sup>195</sup>

Judge Jack's findings about the fraudulent nature of mass screenings implicates many asbestos claims because the methods of diagnosing asbestosis and silicosis through these screenings are virtually identical.<sup>196</sup> In fact, the plaintiffs' firms involved in the Silica MDL

190. See *infra* Part V.A.2.

191. See *infra* Part V.A.3.

192. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 571 (S.D. Tex. 2005).

193. *Id.* at 572 (emphasis added).

194. *Id.* at 620. Judge Jack concluded the following:

In short, this appears to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system: the defendants, who have already spent millions of dollars defending these suits; the plaintiffs, who have been told that they are suffering from an incurable, irreversible and potentially fatal disease; and the courts, who must determine whether they are being faced with the effects of an industrial disaster of unprecedented proportion—or something else entirely.

*Id.* at 572–73.

195. Matthew Mall, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass-Tort Medical Diagnosing*, 48 WM. & MARY L. REV. 2043, 2049–50 (2007); see also Eleanor Barrett, *Maybe This Time*, BEST'S REVIEW, Dec. 1, 2005, at 102, 104 (noting that mass screenings are responsible for the increase in nonmalignant, unimpaired claims). Unimpaired claims are typically generated by for-profit screening companies "whose sole purpose is to identify large numbers of people who have minimal x-ray changes that are 'consistent with' prior asbestos exposure, thus providing the pretext for a lawsuit." Mark A. Behrens & Phil Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20 MEALEY'S LITIG. REP. 33, 34 (2005).

196. David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, NAT'L L.J., Feb. 28, 2005, at 1, Col. 1; see also Thomas A. Donovan, *Can the Courts Prevent Being Used as an Instrument to Perpetuate Fraud?*, FED. LAW., Nov./Dec. 2005, at 5 ("Comments made by plaintiffs' trial counsel in attempting to justify the silicosis claims—together



were using the same methodology to generate claims for asbestos litigation.<sup>197</sup> Evidence seems to support the conclusion that numerous asbestos claims in the tort system are also unfounded.<sup>198</sup> Studies examining asbestos-related diagnoses in the tort system show that 66% to 97% are unfounded claims.<sup>199</sup> For example, after 439 claimants filed suit after a mass screening in 1986, neutral professors and radiologists examined their x-rays and concluded that, at most, 2.5% had conditions consistent with asbestos exposure.<sup>200</sup> The claimants' diagnosing doctors, however, had diagnosed all 439 with an asbestos-related disease, which indicates that their diagnoses were "mistakenly high."<sup>201</sup> Similarly, when the Manville Trust ordered independent experts to audit claimants' medical evidence, the auditors concluded that over 40% of submitted claims were inaccurate.<sup>202</sup>

2. *The Prevalence of Retreaded Asbestosis Claims in the Silica MDL Indicates that Fraudulent Diagnoses Are Not Limited to Silica Litigation*

The prevalence of retreaded asbestosis claims in the Silica MDL suggests that fraudulent diagnoses also exist in asbestos litigation because having both diseases is clinically rare, and even plaintiffs' trial counsel "call[ed] into question the validity of thousands of asbestosis claims."<sup>203</sup> In fact, at least 60% of the Silica MDL plaintiffs were asbestos retreads, which occurs when a claimant has already received com-

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with the overall similarity in the medical screening procedures used in preparing silicosis and asbestosis claims—call into question the validity of thousands of asbestosis claims as well.”)

197. See Donovan, *supra* note 196, at 7 (noting that Judge Jack's findings in the Silica MDL raised doubts about many diagnoses in asbestos litigation because the same plaintiffs' firms and diagnosing doctors were involved in both).

198. See, e.g., Abadie v. Metro. Life Ins. Co., 784 So. 2d 46, 97 (La. Ct. App. 2001) (describing how an expert in internal and pulmonary medicine testified that “most asbestos-related disease claims are specious because they are manufactured for the purpose of litigation”); Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 843 (2004) (explaining that asbestos claims generated by mass screenings are unreliable based on a study by independent consultants in chest radiology).

199. Parloff, *supra* note 122, at 96; see also *Commission on Asbestos Litigation: Report to the House of Delegates*, 2003 AM. BAR ASS'N 8 (stating that the rate of diagnoses generated by mass screening companies is “startlingly high,” often exceeding 50% and sometimes reaching 90%); Pendell, *supra* note 52, at 5 (noting that several major audits of asbestos and silicosis diagnoses indicate a high rate of false positives).

200. R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. OCCUPATIONAL MED. 1088, 1088–89 (1990).

201. *Id.* at 1089–90.

202. Pendell, *supra* note 52, at 6–7.

203. Donovan, *supra* note 196, at 5, 7.

pensation for an asbestos-related injury.<sup>204</sup> In response to one screening company's asbestos retreads, Judge Jack observed that "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 . . . [but this screening company] parked a van in some parking lots and found over 4,000 such cases."<sup>205</sup> Because having both asbestosis and silicosis is a clinical rarity,<sup>206</sup> one could reasonably conclude that either the silicosis or asbestosis diagnoses—if not both—are fraudulent. In fact, in response to Judge Jack's troubling discovery, plaintiffs' counsel admitted that the prior asbestosis diagnoses were probably unfounded.<sup>207</sup> Furthermore, when an independent, blind panel of physicians reviewed 492 x-rays that had been generated by physicians involved in both the Silica MDL and prior asbestos litigation, the experts found that only 4.5% of the x-rays showed signs of asbestosis.<sup>208</sup> Thus, due to evidence that fraudulent diagnoses were used in asbestos litigation, using the tort system as a model to predict future legitimate claims is unreliable.

3. *Since Judge Jack Handed Down Her Opinion in the Silica MDL, Others Have Revealed Additional Fraudulent Practices in Asbestos Litigation*

Since Judge Jack published her opinion in the Silica MDL, others have exposed additional fraudulent occurrences in asbestos litigation. In December 2005, in the Northern District of West Virginia, CSX Transportation, Inc. ("CSX") claimed that a law firm—in conjunction with Dr. Ray Harron—filed fraudulent asbestosis claims against the company.<sup>209</sup> CSX proved that one plaintiff, who had tested negative for asbestosis, had used a second claimant's positive x-ray to settle his fraudulent claim for \$8000.<sup>210</sup> Additionally, in January 2007, Judge Harry Hanna of the Cuyahoga County Court of Common Pleas disqualified Brayton Purcell, a plaintiffs' firm specializing in asbestos litigation, because the firm had filed claims against many different

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204. Maron & Jones, *supra* note 120, at 259.

205. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 603 (S.D. Tex. 2005).

206. *Id.* at 595.

207. Dunbar, *Institutional Response*, *supra* note 123, at 8.

208. Donovan, *supra* note 196, at 7.

209. *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2009 U.S. Dist. LEXIS 66995, at \*3–4 (N.D. W. Va. July 30, 2009).

210. Linda Harris, *Federal Jury Clears Man in CSX Asbestos Case*, STATE J., Aug. 14, 2009, <http://statejournal.com/story.cfm?func=viewstory&storyid=64683&catid=166>. CSX had been unable to identify the "ghost claim" because it had been inundated by thousands of asbestosis claims. Wylie et al., *supra* note 26, at 16.

asbestos bankruptcy trusts “even though it could not have been possible for the underlying plaintiff to have suffered exposure from the products of all of the defendants.”<sup>211</sup> These incidents reveal that fraudulent diagnoses are neither limited to silica cases nor to Judge Jack’s courtroom.<sup>212</sup>

Unfortunately, misbehavior is not limited to plaintiffs’ firms, screening companies, and their diagnosing doctors; it also occurs within chambers. In 2003, Allegheny County Common Pleas Judge Joseph Jaffe pled guilty to extortion.<sup>213</sup> In charge of the 2200-case asbestos docket in Pittsburgh, Judge Jaffe solicited bribes from plaintiffs’ counsel in exchange for influence in his courtroom.<sup>214</sup> For these reasons, relying on the tort system to predict the number of legitimate claims that would be filed in the administrative system is improper. Unless fraudulent asbestos claims in the tort system are taken into account, using the tort system would result in an overestimate of legitimate claims.

*B. Judge Jack’s Scathing Opinion Suggests that Fewer Asbestos Claims Will Be Filed in the Future*

Judge Jack’s opinion in the Silica MDL, commended as a giant stride toward reducing fraudulent and unethical conduct in mass torts, will likely lead to a reduction in asbestos claims because the use of mass screenings is no longer practicable and filing unimpaired nonmalignant claims is no longer profitable for plaintiffs’ counsel.<sup>215</sup> Judge Jack’s criticism of the mass screenings used in the Silica MDL has echoed throughout the legal community.<sup>216</sup> After conducting court depositions, she suggested that “in every case involving a screen-

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211. Mark D. Taylor, *As the Wave of Asbestos Bankruptcies Recedes: What Have We Learned?*, 6 MEALEY’S ASBESTOS BANKR. REP. 2 (2007).

212. Additionally, even before Judge Jack uncovered massive fraud in the Silica MDL, United States District Court Judge Carl Rubin called into question the legitimacy of asbestos-related claims. See Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 104 (2003) [hereinafter Brickman, *Theories*] (noting that when Judge Rubin substituted impartial medical experts to review the plaintiffs’ claims, those experts found that only 15% had asbestosis).

213. Wylie et al., *supra* note 26, at 16.

214. *Id.*

215. See *infra* Part V.B.1–2.

216. See Behrens & Goldberg, *The Tide*, *supra* note 102, at 493 (“Another event that should accelerate the demise of mass screenings was a watershed ruling in June 2005 by the manager of the federal silica multi-district litigation docket, U.S. District Judge Janis Graham Jack of the Southern District of Texas.”).

ing company, the diagnoses were essentially manufactured on an assembly line.”<sup>217</sup>

1. *Using Mass Litigation Screenings to Recruit Claimants Is No Longer Practicable Since Judge Jack Denounced the Practice*

By exposing the abuses prevalent in mass screening practices, Judge Jack’s scathing opinion has likely rendered the use of mass screenings obsolete.<sup>218</sup> Although the use of attorney-sponsored screenings had already begun to decline before 2005, they are likely to decline even more since Judge Jack published her opinion because the practice is now associated with scandal.<sup>219</sup> The decline of mass litigation screenings is important because, as the RAND Institute of Civil Justice has recognized, the exponential growth of asbestos litigation can be attributed to increased filings of nonmalignant claims, which are generated by mass screenings.<sup>220</sup> In fact, more than 90% of the last 200,000 claims filed with the Manville Trust resulted from attorney-sponsored mass screenings, and more than 90% of all claims alleged only nonmalignant asbestos disease.<sup>221</sup> Thus, in order to use the Manville Trust as a model to predict future legitimate filings in the administrative system, claims generated from screenings should be discounted. Furthermore, because the vast majority of nonmalignant claims are filed by unimpaired plaintiffs,<sup>222</sup> there will be fewer compensable claims in the administrative system because the unimpaired are not substantially compensated under the FAIR Act.<sup>223</sup> Thus, the demise of mass screenings will significantly reduce the number of asbestos claims filed in both the tort system and bankruptcy trusts, which should be taken into account before these systems are used as models to predict future asbestos filings.

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217. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 633 (S.D. Tex. 2005) (emphasis added).

218. See Patrick M. Hanlon & Elizabeth Runyan Geise, *Asbestos Reform—Past and Future*, 22 MEALEY’S LITIG. REP. 9 (2007) (discussing how the screenings have been abashed by the opinion); see also Brickman, *Applicability*, *supra* note 104, at 314 (“The specter of facilitating the emergence of another entrepreneurial claim generation process will undoubtedly affect many judges’ discretionary decisions that will determine the scope of mass tort litigations.”).

219. Hanlon & Geise, *supra* note 218, at 9.

220. RAND 2005, *supra* note 22, at 73–74.

221. S. REP. NO. 108-118, at 84 (2003).

222. *Id.* at 68; see also *In re Joint E. & S. Dist. Asbestos Litig.*, 237 F. Supp. 2d 297, 306 (E.D.N.Y. 2002) (explaining that the asbestos litigation crisis was caused by filings generated by claimants who were asymptomatic).

223. See Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. § 131(b)(5) (explaining that claimants with “asymptomatic exposure” are only eligible for medical monitoring expenses).

Current trends in asbestos litigation, which show dramatically reduced filings by unimpaired claimants, support the prediction that the demise of mass screenings will result in fewer claims. Since 2001, large defendant companies have reported an 80% reduction in asbestos filings and reported dismissal rates generally exceeding 75%.<sup>224</sup> In 2003, the Manville Trust received approximately 90,000 claims, but received less than 10,000 in 2006.<sup>225</sup> Additionally, jurisdictions that were previously overwhelmed by asbestos filings now report more manageable numbers. For example, asbestos cases in Fulton County, Georgia, have dropped from 1200 to about one dozen.<sup>226</sup> Florida, which used to get approximately 500 new asbestos cases per month, now only receives forty to sixty new filings per month.<sup>227</sup> Similarly, Mississippi's asbestos filings decreased from a few thousand to a few hundred in 2005.<sup>228</sup> Even insurance companies have reported a reduction in asbestos claims. In June 2006, during a Senate hearing on the FAIR Act, an executive of Liberty Mutual Insurance testified that claims have dramatically decreased, including a 90% and a 65% decrease in Mississippi and Texas, respectively.<sup>229</sup>

In addition to the reduction in unimpaired claimants, the demise of mass screenings should also reduce the prevalence of impaired, nonmalignant cases—and possibly asbestos-related cancers as well.<sup>230</sup> Because plaintiffs' firms generally found impaired claimants as a by-product of mass screenings, eliminating screenings will also reduce impaired claimants' filings.<sup>231</sup> Therefore, although asbestos-related claims have already dropped dramatically, it is reasonable to expect future reductions as well because "after Judge Jack's groundbreaking revelations of massive double-dipping . . . the tort bar has had to tread more carefully."<sup>232</sup> The current sense of scandal arising from Judge

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224. Robin Cantor & Mary Lyman, *Asbestos and State Tort Reforms*, 20 JOHN LINER REV. 39, 43 (2007).

225. Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends*, 2007 AM. ACAD. OF ACTUARIES 17. The Manville Trust functions as a "bellwether" for trends and patterns in asbestos litigation; thus, data from the trust can be used to gauge claim filing activity within the tort system. Cantor & Lyman, *supra* note 224, at 42.

226. Chris Schmitt & Jillian Aldebron, *Asbestos Cases in the Court: No Logjam*, 2006 PUB. CITIZEN 15.

227. *Id.* at 16.

228. *Id.* at 16–17.

229. *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 3274 Before the S. Comm. on the Judiciary*, 109th Cong. 16–17 (2006) (statement of Edmund F. Kelly, Chairman, Liberty Mutual Life Insurance).

230. Hanlon & Geise, *supra* note 218, at 9.

231. *Id.*

232. Wylie et al., *supra* note 26, at 22; *see also* Cantor & Lyman, *supra* note 224, at 42–43 (explaining that recent tort reform, including Judge Jack's influential opinion, has re-

Jack's excoriating opinion has quashed the use of mass screenings to recruit litigants, and it is questionable whether these practices will ever make a comeback.<sup>233</sup>

2. *Filing Unimpaired Nonmalignant Asbestos Claims Is No Longer Profitable Because Such Claims Are Scrutinized More Closely Since Judge Jack's Opinion*

The demise of mass litigation screenings inhibits the asbestos bar's ability to recruit thousands of unimpaired, nonmalignant claimants, and therefore plaintiffs' firms will most likely find that it is no longer profitable to file such claims. Because of Judge Jack's findings, courts are willing to scrutinize unimpaired claimants more closely,<sup>234</sup> resulting in more costs than benefits in bringing an unimpaired nonmalignant claim.<sup>235</sup> Additionally, evidence shows that defendants have gained confidence from Judge Jack's opinion and increasingly contest plaintiffs' claims by requesting a broader range of discovery in the pretrial phase.<sup>236</sup> Based on Judge Jack's findings of fraud, defend-

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sulted in a dramatic reduction of asbestos claims over the last few years); Hanlon, *Wrestling*, *supra* note 160, at 1206–07 (“[A]s a result of . . . the increasing scandal that began to be associated with asbestos litigation, filings plummeted.”); Hensler, *supra* note 166, at 279 (“In the past several years, the number of new cases filed annually has dropped dramatically . . . [and] charges of fraudulent claims associated with mass screenings are said to have disrupted those practices.”).

233. Hanlon & Geise, *supra* note 218, at 9.

234. See, e.g., Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends*, 2007 AM. ACAD. OF ACTUARIES 6 (predicting that Judge Jack's findings will lead to increased medical evidentiary standards for both silica and asbestos claims); Mass Torts Subcomm., *Current Issues in Asbestos Litigation*, 2006 AM. ACAD. OF ACTUARIES 8 (asserting that Judge Jack's findings led to heightened scrutiny of silica and asbestos claims, which will probably affect whether and how mass litigation screenings are performed in the future).

235. Dunbar, *Institutional Response*, *supra* note 123, at 20.

236. See, e.g., *Mount McKinley Ins. Co. v. Pittsburgh Corning Corp.*, No. 06cv1085, 2006 WL 2850573, at \*1 (W.D. Pa. Oct. 3, 2006) (relying on *In re Silica*, defendants requested discovery to investigate possible medical fraud that had been found in nationwide asbestos litigation); *In re G-I Holdings*, Nos. 01-30135(RG), 01-38790(RG), 2006 WL 2403531, at \*4–6 & n.11 (Bankr. D. N.J. Aug. 11, 2006) (believing claims against them to be illegitimate, defendant debtors sought increased pretrial discovery, especially where players denounced by Judge Jack were involved); *Lopez v. City of Houston*, No. H-03-2297, 2006 WL 1663374, at \*7 (S.D. Tex. June 12, 2006) (relying on *In re Silica*, defendants challenged the methodology of plaintiffs' experts); *In re Welding Fume Prods. Liab. Litig.*, No. 1:03 CV 17000, MDL NO. 1535, 2006 WL 1173960, at \*7 (N.D. Ohio Apr. 5, 2006) (claiming that plaintiffs' medical screenings were similar to those condemned by Judge Jack); *Ballard v. Illinois Central R.R.*, 2006 U.S. Dist. LEXIS 51311, at \*11–12 & n.2, 17 (N.D. Ala. Mar. 9, 2006) (granting defendants' request to depose a diagnosing doctor denounced by Judge Jack and allowing for discovery on diagnosing doctors).

ants' challenges to questionable diagnoses are more likely to be deemed credible by judges.<sup>237</sup>

United States District Court Judge James Giles of the Eastern District of Pennsylvania exemplifies the use of stricter scrutiny in response to Judge Jack's opinion. In charge of the asbestos multidistrict litigation, Judge Giles had always been cautious about permitting discovery, stating, "I do not presume that there is fraud in mass tort litigation."<sup>238</sup> More recently, however, Judge Giles recognized that "[c]urrent litigation efforts in this court and in the silica litigation have revealed that many mass screenings lack reliability and accountability and have been conducted in a manner which failed to adhere to certain necessary medical standards and regulations."<sup>239</sup> With these new findings in mind, Judge Giles agreed to conduct hearings on the evidentiary sufficiency of nonmalignant diagnoses supported by mass screenings.<sup>240</sup>

In addition to Judge Giles, others have changed their pretrial and trial procedures in response to Judge Jack's findings in the Silica MDL. For example, in Broward County, Florida, a trial judge issued a case management order in the wake of Judge Jack's opinion, causing dozens of plaintiffs to dismiss their cases.<sup>241</sup> In Philadelphia County, Pennsylvania, after the court allowed close scrutiny of the claimants' diagnoses through a case management order, dozens of plaintiffs dismissed their cases, and the defendants found that approximately two-thirds of the claimants were asbestos retreads.<sup>242</sup> Similarly, in the Court of Common Pleas in Cuyahoga County, Ohio, a judge dismissed approximately 3755 asbestos cases after the claimants' diagnosing doctors—many of whom were denounced in Judge Jack's opinion—refused to testify as to their diagnosing practices.<sup>243</sup> The court put another 35,000 asbestos cases on hold until the claimants could get positive diagnoses from doctors other than those criticized by Judge Jack.<sup>244</sup>

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237. Kara Sissell, *Grace Settles Asbestos Claims; Advances Chapter 11 Exit*, CHEMICAL WK., Apr. 2008, at 9 (claiming that Judge Jack's opinion established judicial precedent that makes it more likely for defendants to prevail when challenging questionable claims in court).

238. Brickman, *Disparities*, *supra* note 52, at 522 n.27.

239. *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875, 2007 WL 2372400, at \*2 (E.D. Pa. May 31, 2007) (Admin. Order No. 12).

240. *Id.*

241. Carlyn Kolker, *Lighter Caseloads for All: Judge Jack's 2005 Ruling Continues to Snuff Out Silica Cases Nationwide*, AM. LAW., July 2006, at 17.

242. *Id.*

243. Behrens & Goldberg, *The Tide*, *supra* note 102, at 494.

244. *Id.* at 494–95.

3. *Judge Jack's Denouncement of Nine Diagnosing Doctors Will Dramatically Reduce Future Asbestos Claims*

Judge Jack weakened numerous diagnosing doctors' credentials, which should reduce future asbestos-related filings because these individuals account for a significant portion of asbestos claims in the tort and bankruptcy systems. After Judge Jack handed down her ruling in 2005, authorities launched grand jury investigations to consider bringing criminal charges arising out of the Silica MDL.<sup>245</sup> As a result, the Manville Trust, the Eagle-Picher Asbestos Settlement Trust, and the Celotex Asbestos Settlement Trust announced that they would no longer accept medical reports or diagnoses from doctors or screening companies denounced by Judge Jack.<sup>246</sup> As a result of this decision, a major source of asbestos claims has been eliminated. For example, Dr. Ray Harron, who diagnosed approximately 78% of the silicosis claimants in the Silica MDL, is responsible for about 10% of the claims filed with the Manville Trust.<sup>247</sup> In fact, Dr. Ray Harron, Dr. James Ballard, Dr. George Martindale, and Dr. W. Allen Oaks submitted at least 66,000 claims to the Manville Trust.<sup>248</sup> Additionally, the following five doctors denounced by Judge Jack are responsible for approximately 80% of the claims submitted to Owens Corning before it filed for bankruptcy: Dr. Ray Harron, Dr. Jay Segarra, Dr. Richard Keubler, Dr. Philip Lucas, and Dr. James Ballard.<sup>249</sup>

## VI. CONCLUSION

Opponents of the FAIR Act feared that the projection of \$140 billion was too low to compensate all deserving claimants.<sup>250</sup> Their fear was based on precedent trust funds—the Manville Trust, the Black Lung Program, the Vaccine Injury Compensation Program, the Energy Employees Occupational Illness Compensation Program, and the Radiation Exposure Compensation Program—that all needed Congress to bail out their “exploding costs with tax dollars.”<sup>251</sup> For

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245. Pendell, *supra* note 52, at 9.

246. Behrens & Goldberg, *The Tide*, *supra* note 102, at 494. These doctors include the following: Dr. James Ballard, Dr. Kevin Cooper, Dr. Todd Coulter, Dr. Andrew Harron, Dr. Ray Harron, Dr. Glynn Hilbun, Dr. Barry Levy, Dr. George Martindale, and Dr. W. Allen Oaks. Letter from David Austern, President, Claims Resolution Management Corporation (Sept. 12, 2005) (on file with author).

247. Parloff, *supra* note 122, at 96.

248. *Id.*

249. Brickman, *Disparities*, *supra* note 52, at 521 n.19.

250. *See supra* Part IV.

251. 152 CONG. REC. S1135, 1158 (daily ed. Feb. 14, 2006) (statement of Sen. Gregg); *see also* Hanlon, *Elegy*, *supra* note 75, at 568 (“Beginning at least with the Black Lung program



example, the Manville Trust predicted that it would receive approximately 200,000 claims, but it actually received about two million.<sup>252</sup> While the fear of underestimating asbestos liability is understandable, this time, Congress can be confident that the CBO's estimate of \$140 billion could cover future asbestos costs. In fact, the Silica MDL may even indicate that this estimate is more than sufficient.

Although claims projections for previous asbestos trusts were too low, the underestimation occurred because the trusts were unable to predict that an extraordinary number of nonmalignant claims would be filed.<sup>253</sup> Predicting future cancer claims, however, has not been problematic.<sup>254</sup> Thus, because Judge Jack's findings in the Silica MDL have reduced and will continue to reduce these unimpaired, nonmalignant claims,<sup>255</sup> concern about underestimation should be diminished. Furthermore, in response to Judge Jack's findings of fraud, the FAIR Act incorporated provisions that would prevent illegitimate claims from being compensated.<sup>256</sup> Thus, the Fund would not be depleted by unfounded claims, which is important because "[t]he principal reason why all attempts to predict the total number of asbestos claims have proven woefully inadequate is [because] claims are being compensated for illnesses that . . . either are not caused by asbestos or do not result in a significant impairment . . ." <sup>257</sup> Here, however, Congress is better able to predict future asbestos filings because, since Judge Jack's ruling, claims based on unfounded medical evidence are no longer acceptable. As such, previous trusts funds, including the Manville Trust, are not accurate indicia of future compensable asbestos filings because the overwhelming majority of nonmalignant claims paid by the Manville Trust went to unimpaired claimants.<sup>258</sup> Under the FAIR Act, unimpaired claimants do not receive compensation beyond medical monitoring costs, and this should be taken into account.<sup>259</sup>

To estimate the number of future asbestos claims that would be filed under the FAIR Act, the CBO assumed that the ratio of nonmalignant to malignant claims "would be similar to the historical

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there has been a history of underpredicting the number of claims that would have to be paid under administrative schemes.").

252. 152 CONG. REC. S1135, 1161 (daily ed. Feb. 14, 2006) (statement of Sen. Durbin).

253. Hanlon, *Elegy*, *supra* note 75, at 568–69.

254. *Id.*

255. *See supra* Part V.

256. *See supra* Part II.

257. Brickman, *Theories*, *supra* note 212, at 38 n.12.

258. 152 CONG. REC. S1135, 1148 (daily ed. Feb. 14, 2006) (statement of Sen. Leahy).

259. *Id.*

ratio of claims compensated by existing bankruptcy trusts.”<sup>260</sup> The CBO’s assumption is improper, however, because it does not accord enough importance to Judge Jack’s decision, which indicates that the number of legitimate nonmalignant claims should substantially decrease.<sup>261</sup> In fact, between 2003 and 2005, the ratio of nonmalignant to malignant claims has fallen from 9:1 to 2.65:1.<sup>262</sup> Additionally, the Eagle-Picher Trust and Celotex Asbestos Settlement Trust have experienced a reduction in claims ranging between 25% to 35%.<sup>263</sup>

Although Senator Specter has attempted to revive the bill,<sup>264</sup> Democrats’ current control of Congress, as well as the election of a Democrat President, will most likely impede the enactment of an administrative solution in the near future.<sup>265</sup> Despite the positive events resulting from Judge Jack’s findings, it is possible that the creative asbestos bar will find new ways to profit, and in the meantime, the litigation may grow more intense.<sup>266</sup> Unfortunately, it seems that any chances that the FAIR Act will be revived are slim.<sup>267</sup>

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260. 152 CONG. REC. S875, 891 (daily ed. Feb. 9, 2006) (statement of Sen. Specter).

261. *See supra* Part V.

262. Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 1012 n.93 (2005).

263. *Id.*

264. 3 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 26:1 n.33 (2005–2006 ed. & Supp. 2008).

265. *See supra* text accompanying notes 180–81.

266. Hanlon & Geise, *supra* note 218, at 12.

267. Cantor & Lyman, *supra* note 224, at 40.