Testimony of

Professor Lester Brickman

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

BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY CONCERNING
"ASBESTOS: MIXED DUST AND FELA ISSUES"

February 2, 2005
Mr. Chairman and members of the Committee, I am Lester Brickman, a Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University. I thank you for inviting me to speak at this hearing about "Asbestos: Mixed Dust and FELA Issues." For the record, let me indicate that I am not representing any party or other entity with an interest in asbestos litigation or legislation. Moreover, I am not being compensated for my testimony.
For almost fifteen years, I have devoted considerable scholarly effort to the issue of asbestos litigation and more than a decade ago, drafted a proposed administrative alternative to asbestos litigation at the request of a federal executive branch agency. I welcome your interest in addressing a critical issue in the proposed National Asbestos Compensation Program to be created by the Fairness in Asbestos Injury Resolution (FAIR) Act. As proposed, the FAIR Act has a provision that would effectively preclude claimants with asbestos related conditions from bypassing the National Asbestos Compensation Program and filing ostensible silica claims in state and federal courts seeking recovery for what is in reality the asbestos-related condition (or, even worse, filing a claim with the program and then seeking additional money for the same medical condition by pursuing silica claims in court). If this protective provision is eliminated or diluted, the claimants will be able to seek recovery twice against many of the same companies for the same alleged injury and will encourage continuation of the asbestos litigation scandal under another name.
While the proposed legislation will hopefully bring some finality to the asbestos exposure tragedy and the ensuing asbestos litigation morass, changing the bill to eliminate this protection against double claiming will regrettably open the door to another elephantine mass of mostly baseless litigation. Specifically, it would create a significant danger that the mass filings of non-malignant asbestos claims generated by mass screening companies will be replicated and that asbestos claims will be regenerated as non-malignant silica claims. In fact, lawyers, the mass screening companies they employ, and the comparative handful of B-readers and other doctors they regularly retain, have in anticipation of federal asbestos legislation, already focused on a phenomenon known as "retreading," or turning asbestos claims into silica claims. If given a green light by the deletion of the provision in question, we can anticipate another massive failure of the civil justice system; retreaded silica claims will overwhelm the state and federal courts.
As you are all well aware, asbestos exposure has resulted in a national tragedy. A carcinogenic substance which has resulted in more than 100,000 deaths has been transformed into a malignant enterprise. As with asbestos, excessive silica exposure can also result in serious lung disease and even death. But also, as has been the case with asbestos, baseless claims are mounting exponentially. And, as with asbestos, the tragedy of silica exposure is being transformed into an enormous money making machine in which baseless claims predominate. And, as with asbestos litigation, this will not only deprive those with serious injuries of just compensation but also negatively affect job creation and shareholder value.
My testimony will consist of:
I. Statement of Qualifications
II. Overview
III. A Legal Not Medical Epidemic
IV. Dual Diagnoses
V. Silica Claims Problems
VI. Conclusion
I. QUALIFICATIONS
Over the past fourteen years, I have devoted a substantial amount of time to research on asbestos litigation. Because of my expertise, I was requested by the Administrative Conference of the United States, an executive branch agency

of the federal government, to draft a proposed administrative alternative to asbestos litigation and to organize a colloquy to consider and debate that proposal. I have published four articles on asbestos litigation; in these articles, I discuss the nature of asbestos-related disease; the history of asbestos litigation, including the phenomenon of the unimpaired claimant; the rise of an entrepreneurial model including attorney-sponsored mass screenings, the use of a comparative handful of B-readers who regularly over-diagnose x-rays and are induced to do so by substantial financial incentives, the administration of pulmonary function tests by screening enterprises that rarely conform to American Thoracic Society standards, and the use of witness coaching techniques that include the implantation of false memories; the effective hourly rates generated by contingent-fee-financing of the litigation and the effect of those fees on the litigation; the use and effects of forum selection; the impact of mass consolidations; and the culmination of the litigation in the bankruptcy of many former producers and sellers of asbestos-containing products and the administration of that bankruptcy process. These same issues and facts predominate in the silica litigation.
I have also recently been selected by President Bush to appear with him at "An Asbestos Litigation Conversation," which was held in Macomb County, Michigan, to explain to the audience how asbestos litigation had developed and why it was of critical importance to enact legislation to remove the litigation from the courts.
I append to this Written Statement an Appendix setting forth my qualifications in further detail.

II. OVERVIEW

I do not intend this morning to discuss particular legislative language. Instead, I want to focus on why allowing claimants to recover from the National Asbestos Compensation Program for asbestos-related injuries and then separately to recover through litigation by claiming silica-related injuries would create a clear and present danger. This danger is a function of the same entrepreneurial screening activity that I described in detail in my article "On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality," published by the Pepperdine Law School a year ago. It is the mass conversion of bogus asbestos claims into bogus silica claims by the same plaintiffs' lawyers, screeners and B-readers that have made asbestos litigation into a national scandal. I took note of that occurrence in my law review article, where I stated that "the developing silicosis litigation phenomenon appears to be an attempt to replicate asbestos litigation and recycle asbestos claims." I have since had an opportunity to focus more specifically on silica litigation and can now report additional findings.
When the Congress started to focus seriously on creating an administrative resolution of asbestos claims, entrepreneurial lawyers and the mass screening enterprises that they spawned began to shift their efforts to the manufacture of silica lawsuits. Currently, these mass screenings are manufacturing silica claims at a rate never seen before. Just as there is a disconnect between medical science and claims of asbestosis, so too with silica claims. Here too, medical science offers no explanation for this by now familiar phenomenon. It can only be explained by the entrepreneurial litigation model. It involves the same process and the same individuals and firms that created entrepreneurial asbestos litigation. Further, and no doubt most troubling for any company which contributes to the National Asbestos Compensation Program, lawyers are using these same screening companies and physicians to morph or "retread" their prior asbestos diagnoses into silica diagnoses for the very same injuries.
These retreaded "asbestos-to-silica" claims must be dealt with by legislation. Silica litigation in key jurisdictions such as Mississippi and parts of Texas already has the hallmarks of a burgeoning mass tort: Mass screenings, mass "diagnoses," mass claims, and coerced mass settlements of mostly bogus claims when courts resort to aggregations to clear their calendars. With thousands of silica cases already clogging the courts, experience with asbestos litigation plainly indicates that we cannot rely entirely on the judicial system to separate the few bona fide silica claims from the mass of retreads. What is needed is a mechanism that separates the asbestos claims from genuine silica claims at the outset of a case. Moreover, in light of the numerous claims already retreaded and filed in the tort system, a claimant making a claim against the Compensation Program should be required to fully disclose whether he has previously made a claim involving asbestos exposure or has a medical or laboratory report indicating asbestos-related disease.

III. A LEGAL NOT MEDICAL EPIDEMIC

Only recently has silica litigation exploded. In the first half of 2003 alone, more than 17,000 plaintiffs filed suit. While one company was facing 3,505 claims in 2002, the next year it was facing 22,000 silica claims. Similarly, as of September 2003, one insurer identified 30,000 silica cases brought against its insureds compared to 2,500 cases it had one year earlier. Illustrating this trend is the Federal Silica MDL 1553 ("MDL") that now involves over 10,000 plaintiffs predominately from cases initially filed in the Mississippi state courts and removed to Federal court.
This rise in silica claims in the last few years seems incompatible with observations in the medical literature. I am not a medical doctor, but a few examples from the medical literature
demonstrate the lack of a medical epidemic. From 1950 to 1979, for example, Massachusetts General Hospital reported only 15 cases of silicosis and coal worker's pneumoconiosis. From 1980-1987, the Mayo Clinic found only 10-25 cases of silicosis per year from the approximately 250,000 patients seen annually. Between the two periods of 1969 to 1981 and of 1982 to 2001, the death rate for silicosis had dropped 70%. As one journalist noted, "litigation is

rising at the same time deaths from silica are falling . . . ."
Further, prior to 2001, there had never been a year in which more than 1,000 plaintiffs filed suit for silica related injuries. Yet in 2003 alone, 19,389 plaintiffs filed suit - more than in the previous thirty years combined. The chart below illustrates the silica litigation epidemic.
Silica Claims by Year

Further, these claims are being brought in a relatively few jurisdictions as illustrated below. Just as with asbestos, silica claims are largely brought in "magic" jurisdictions such as Mississippi and certain parts of Texas. For example, nearly 90% of claims filed to date against one company were in Mississippi or Texas.

One obvious question is why has there been such a marked increase in silica claims in the last few years when the medical evidence points to a disappearing disease. The answer is simple. It involves the same reasons that account for the hundreds of thousands of non-malignant asbestos claims which I describe in my Pepperdine article. It is the application of the entrepreneurial model to silica, beginning with mass screenings sponsored by lawyers who have the economic incentive to convert asbestos claims to silica claims - perhaps motivated by the concern that the asbestos litigation end game has begun. Heath Mason, the co-owner of the mass screening entity N&M, Inc., testified that the reason his company started focusing on silica cases was because of a previous version of the very legislation that is before this Committee:
Q. With respect to testing that's being done by N&M these days, would you say that N&M is doing more silica testing versus asbestosis or what is the breakdown? . . .
A. I would say at the particular time that we did those tests we were doing more silica than we were doing asbestos.
Q. And is that true today?
A. As of the last month with the Hatch bill, yes, sir, I would say that it is.
Q. And has the Hatch bill influenced your business?
A. For sure.
Q. Has it influenced it in terms of better or worse?
A. From an asbestos standpoint, I would say worse.
Q. Has it increased your business for silicotics . . . testing?
A. I would say what it does is, it gets lawyers to have to change gears on what they think is going to work.

In other words, some asbestos lawyers simply are diversifying their litigation portfolios by using the proven screening machinery already in place. As one silica attorney ventured, "[w]hy reinvent the wheel?"
Advertisements routinely list screenings for both asbestos and silica. An advertisement for May 31, 2002 screening states in bold letters, "ASBESTOSIS, MESOTHELIOMA CANCER, LUNG CANCER OR SILICOSIS", a billboard in Indiana read, "Have YOU been tested? ASBESTOS/SILICA DISEASE SCREENING", and statements such as, "You may have silicosis and asbestosis at the same time. So, even if you have an asbestos case you should be tested for silicosis."
IV. DUAL DIAGNOSES

The fact that lawyers use certain mass screening companies and a handful of physicians to generate dual diagnoses, one for asbestosis and one for silicosis, is a relatively recent phenomenon. In my Pepperdine law review article, I described an x-ray that a physician had read for which he issued two separate narrative diagnostic reports for the same individual. In one report, he interpreted the x-ray as consistent with silicosis and without pleural plaques or pleural calcification. In the other report, which was written on the same day, he interpreted the same x-ray as consistent with asbestosis with a diaphragmatic plaque on the left. At the time of writing that article, this was the most direct evidence I had that the screening process was generating separate silica and asbestos claims for the same people. Through the discovery done and in progress in the MDL, I have learned that this is not at all a rare event. Quite to the contrary, the generation of subsequent and even simultaneous diagnoses appears to be quite common. In fact, it appears that at least 60% of the silica plaintiffs in the MDL also have or had asbestos claims. In the MDL, defendants provided the Manville Personal Injury Settlement Trust (a trust set up for asbestos claims after the Johns-Manville bankruptcy) with a list of the plaintiffs in the MDL. At that time, there were 8,629 silica plaintiffs in the MDL who had provided defendants with enough information to enable the Manville Trust to determine whether the plaintiffs had previously filed an asbestos claim with the Trust. It turns out that 5,174 of the 8,629 plaintiffs, or 60%, had previously filed an asbestos claim with the Manville Trust. One would expect a similar result for silica lawsuits pending in other jurisdictions.

This dual diagnosing phenomenon occurs in various ways. First, it can involve the situation described earlier where a physician interprets an x-ray, but then issues two separate "consistent with" disease diagnostic reports - neither of which refers to the other finding. Diagnosing report A finds that the plaintiff has changes "consistent with asbestosis" with no mention of silicosis. Diagnosing report B finds that the plaintiff has changes "consistent with silicosis" with no mention of asbestos. Heath Mason of N&M testified that his company pays Dr. Ray Harron $50 extra to write a second diagnostic report for silicosis based upon the same tests the physician relied upon that day to diagnose the individual with asbestosis. Because of the "bargain" it received on Dr. Harron's second report, N&M only charged its law firm customers half price for the bonus silica diagnosis.

Another variation of this dual diagnosis practice involves a physician rendering a single diagnosing report that identifies both silicosis and asbestosis. A third variation involves a physician rendering an asbestosis or silicosis diagnosis based upon an x-ray and then later, the same or another physician, interprets the same or another x-ray and issues another separate diagnosing report but for the other disease.

All of these variations have one common goal: To keep the asbestos-litigation gravy train alive and in many cases require some companies to pay the same individuals twice for the same injuries. It is incumbent on this Committee to report out a bill that will foreclose this double indemnity.

V. SILICA CLAIMS PROBLEMS

Much of the information that has been discovered in the MDL to date is disturbing to say the least. The MDL currently has over 10,000 plaintiffs. The vast majority of these plaintiffs' lawsuits were the result of litigation-driven mass screenings using a handful of physicians. Very few, if any, of these plaintiffs were ever diagnosed with silicosis by his or her treating physician. As Heath Mason of N&M has explained: "[W]e have no doctor-patient relationship with these people." Instead nearly every plaintiff was diagnosed by the same handful of B-reader physicians used by the lawyers to support the mass filings of non-malignant asbestos claims. Further, only five B-readers were responsible for over 7,000 silicosis diagnoses in the MDL. One of these physicians diagnosed 111 people in a single day; another averaged 75 diagnoses per day, and a third diagnosed 225 plaintiffs on April 19, 2004.

The MDL cases also involve some of the same physicians that have been discredited by previous studies. A study published in Academic Radiology casts doubt on the validity of certain physicians' B-reads. In that study, the authors set up a blinded panel of B-readers to interpret 492 chest x-rays previously read by physicians employed by plaintiffs' lawyers. The plaintiffs' doctors had found that 95.9 percent of the x-rays were positive for changes consistent with asbestos. The blinded panel, however, found that only 4.5 percent of the x-rays had changes consistent with asbestosis. One of the subject B-readers in this study has diagnosed at least 2,400 of the plaintiffs in the MDL. Another one is responsible for at least a thousand B-reads in the MDL. Additionally, the Manville Trust conducted an audit of its x-rays and found that the ten B-readers with the highest volume of claims had a failure rate from 34% to 70%. Many of these same B-readers involved in the Manville audit are plaintiffs' B-readers in the MDL as well. Further, Dr. Gary Friedman issued a report analyzing x-ray reports, pulmonary function tests and other data for a representative sample randomly selected from 22,578 asbestos non-malignant claims submitted to Owens Corning's National Settlement Program. He found that only five B-readers accounted for over 80% of the claims and had findings that were "not consistent with the spectrum of non-malignant asbestos related disease identified within the peer review literature authored by plaintiff's experts or authors deemed authoritative by plaintiff experts." (Emphasis in original). These B-readers included Dr. Harron and Dr. Ballard, who are two of the handful of B-readers who account for most of the cases in the MDL.

The reason the plaintiffs are being diagnosed by the same physicians who diagnosed scores if not hundreds of thousands of plaintiffs in the asbestos litigation is that they are following the same practices and procedures that have been used to generate the massive number of non-malignant asbestos tort claims. Heath Mason of N&M testified that there is no difference between an asbestos and silica screening.

N&M was responsible for screening approximately 6,577 of the plaintiffs, or approximately 65% of the MDL. Over 90% of these plaintiffs were screened in a short period of time, from July 2001 to September 2002. To put the matter in its proper perspective, N&M, which screens for litigation purposes, has found at least 40 times more silicosis cases in just over one year than the Mayo Clinic treated in seven years. Recall that this is the same screening company that its owner testified pays a physician $50 to render a separate silicosis diagnostic report in addition to an asbestos diagnostic report.

This extraordinary accomplishment begins to make more sense when we consider that three physicians who worked for N&M and who together seemingly diagnosed about 3,700 plaintiffs, all later withdrew their silicosis diagnostic reports. Each one testified that N&M had inserted diagnostic and prognostic language into their reports and these physicians refused to adopt that language at the time of their depositions.

Dr. George Martindale withdrew approximately 3,700 purported diagnoses as "overstatements." Although plaintiffs' counsel had submitted reports from Dr. Martindale purporting to be his diagnoses, Dr. Martindale testified that he never intended to make a diagnosis of silicosis on any of the plaintiffs. In fact, Dr. Martindale testified that he did not

even know the criteria for diagnosing silicosis. Dr. Martindale testified that he got into the asbestos/silica screening business to supplement his income and was paid $35 a read by N&M.
Dr. Glyn Hilbun testified that he was hired by N&M for $5,000 a day for five days, or $25,000, to do abbreviated physical examinations at certain screenings. He, however, testified that N&M had inserted language on his reports without his knowledge that purported to say that he had diagnosed the plaintiffs with silicosis. To the contrary, Dr. Hilbun testified that he had never diagnosed silicosis in his life.
Dr. Kevin Cooper worked for N&M for what he called "easy money." He also testified that N&M hired him only to do abbreviated physical examinations at certain screenings, but that he had never diagnosed silicosis before and did not intend to diagnose any of the 239 plaintiffs for whom N&M had inserted diagnostic language in his reports. Dr. Cooper testified that he signed the reports, but did not read them before signing them because he was a "very, very busy" man.
Upon learning of Dr. Martindale's testimony, the Honorable Judge Janis Graham Jack, who presides over the MDL, stated at a recent hearing that "it's clear this Martindale business is fraudulent" and that there is "a fraudulent problem [here]." Judge Jack realized how these "fraudulent" cases would harm the legitimately sick: "But what happens is, as we all know, is that sometimes the good is thrown in with the bad and it prevents people who really need to go forward with their case from being heard and getting their discovery. And that's why something like this is so crucial to lay to rest." She has now ordered every physician who had diagnosed any of the plaintiffs and at least the screening companies N&M and RTS to appear before her in two weeks, on February 16-18, 2005. There is every reason to believe that the hearing before Judge Jack will bring still more unsavory facts about the silica litigation to light. In truth, silica litigation today is as scandalous as asbestos litigation - it is just smaller.
VI. CONCLUSION
The proposal to remove the bar against dual claiming is a clear and present danger to the efficacy of the proposed National Asbestos Compensation Program. It would constitute nothing less than the granting of an imprimatur to the retreading of asbestos claims into silica claims with dual diagnoses for the same injury. This phenomenon is already occurring in anticipation of the enactment of the FAIR Act. It is brought into being by an entrepreneurial trial bar using mass screeners and a handful of physicians who are not engaged in good faith medical practice, but who are rather "diagnosing for dollars." Unless the provision in question is retained, the retreading of asbestos claims will defeat the very purpose of the National Asbestos Compensation Program, which is to substitute a fair and efficient administrative compensation system for a tort system that is out of control. Indeed, removal of the bar will allow claimants to obtain double recovery against the same defendants for the same injury, or more typically, for no injury at all.
The bill before you should thereafter retain effective provisions to take the profit for the lawyers and screeners out of retreading. I understand that this is not a silica bill, and I do not expect that it will deal with "pure" silica claims. But it should not be possible to evade the National Asbestos Compensation Program by means of the entrepreneurial, if not fraudulent, conduct that I have described.
We cannot rely on the normal workings of the court system to address this problem. As the asbestos experience shows, the normal process of litigation grinds to a halt when tens of thousands of cases are brought in magic jurisdictions. It is critically important to make sure that the asbestos claims masquerading as silica claims are identified and weeded out at the outset of the litigation process.
Finally, given the prevalence of retreading, any initial disclosure must include information on past asbestos claims and medical reports mentioning asbestosis.

Appendix To Written Statement of Lester Brickman
Statement of Qualifications of Lester Brickman
To Testify On The Fairness In Asbestos Injury
Resolution (FAIR) Act

1. I am a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University and have been teaching courses and seminars on legal ethics and legal profession for almost 40 years.

2. I have published four articles on asbestos litigation: The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?, 13 Cardozo L. Rev. 1819 (1992); The Asbestos Claims Management Act of 1991: A Proposal To The United States Congress, 13 Cardozo L. Rev. 1891 (1992); Lawyers' Ethics And Fiduciary Obligation In The Brave New World Of Aggregative Litigation, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 272-98 (2001); On The Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality, 31 Pepp. L. Rev. 33 (2004). In these articles, I discuss the nature of asbestos-related disease; the history of asbestos litigation, including the phenomenon of the unimpaired claimant; the role of contingency fees in the claiming process; the

effects of forum selection on the litigation; and the impact of aggregations including mass consolidations and joinders on asbestos litigation. In addition, I am currently working on an article for publication, titled: "Ethical Issues In Asbestos Litigation."

3. I began research on asbestos litigation in 1991. Later that year, I was requested by the Administrative Conference of the United States, an agency that was part of the executive branch of the federal government, to draft a proposed administrative alternative to asbestos litigation and to organize a colloquy to consider and debate that proposal. As stated by the Chairman of the Administrative Conference:
[W]e asked Professor Lester Brickman to prepare a paper proposing an administrative claims solution for comment and criticism by the panel, and we look forward to comments by the audience. Let me introduce Professor Brickman, who teaches law at Cardozo Law School, Yeshiva University. He is a leading authority in the area of attorneys fees and has written numerous articles on the subject. Professor Brickman became interested in the subject of asbestos litigation some years ago when he was hired as a consultant by one of the defendants in the asbestos litigation to review contingent fee issues. He has since had the opportunity to extensively review empirical data, case files, and other materials on the subject. Because of his work in this area, we asked Professor Brickman to draft a proposed administrative solution which our panelists have been invited to criticize.

Administrative Conference of the United States, Colloquy: An Administrative Alternative To Tort Litigation To Resolve Asbestos Claims, October 31, 1991, Transcript at 4. To participate in the colloquy, I invited: U.S. District Court Judge Jack Weinstein; Deborah Hensler, a senior social scientist at the Rand Civil Justice Institute; Ronald Motley, a leading plaintiffs' attorney; Andrew Berry, a leading defendants' attorney; Howard D. Samuel, President, Industrial Union Department of the AFL-CIO; and Judge G. Mervin Bober, Associate Chief Administrative Law Judge, U.S. Department of Labor.
4. On the basis of the expertise I had developed and the work I did for the Administrative Conference, as well as additional research I undertook which included accessing then unpublished data compiled by the Manville Trust and the Rand Foundation, I published two law review articles in 1992, which are the first two articles listed in ¶ 2. The first one listed is an analysis of asbestos litigation and has been cited by the U.S. Supreme Court, federal courts of appeals, state courts, casebooks and scores of scholarly articles.

5. In the other article generated by the colloquy, I set forth the proposed legislation which I drafted. Under that proposal, all claims of injury due to exposure to asbestos-containing products would be removed from the tort system and channeled to an industry-financed trust fund to pay claims to those injured and impaired by exposure to such products. The proposal included the establishment of an Asbestos Claims Management Board within the Office of Workers Compensation of the U.S. Department of Labor to promulgate medical criteria for eligibility and to create and administer a claims procedure in accordance with the provisions of the proposed act. In preparing the proposal, I consulted other proposals for setting up an administrative process as an alternative to the tort system. In addition, in the article, I analyzed constitutional and policy questions raised by interposing an administrative agency for payment of claims in place of the tort system.

6. Because of my expertise with regard to asbestos litigation, in October 1991, I was also invited to testify before a subcommittee of the Judiciary Committee of the House of Representatives. My prepared remarks were titled: Effects Of Asbestos Injury Litigation On Federal And State Courts. I was not retained with regard to that testimony.

7. I devoted approximately 30 pages to asbestos litigation in a 2001 law review article on aggregative litigation which is the third article listed in ¶ 2 above. In preparing this article, I conducted extensive research on asbestos claiming behavior and the resulting impact on asbestos trusts. I examined how typical "exposure only" asbestos cases are developed and processed; the origin of the Manville Trust, the first bankruptcy trust, which was created in the aftermath of the bankruptcy of the Johns¬Manville Corporation; the trust distribution procedure ("TDP") which it adopted and which became a model for subsequent asbestos trusts; the Trust's later attempt to develop and apply an audit program to identify and weed out claims which lacked minimally requisite medical documentation and reflected extraordinarily high incidences of misdiagnoses by a handful of B-readers; and conflicts of interest created by plaintiff lawyers' contingency fee arrangements.

8. In that same article, I also examined the recent trend towards aggregating litigations, including asbestos litigation; the enormous financial incentives unleashed by such aggregations; and the effect of those financial incentives on

litigation behavior, in particular, the coercive effect on defendants and the perverse effects on the generation of claims because of the incentives for lawyers to recruit new claimants to replenish their "inventories" of claims.

9. In April, 2003, I was invited to be one of fifteen panelists to speak at a symposium on Asbestos Litigation & Tort Law: Trends, Ethics, and Solutions, at the Pepperdine Law School. Among the panelists and speakers were the Hon. Alfred Chiantelli, formerly Coordinator of Asbestos Litigation for the San Francisco Superior Court; Professor Roger Cramton of the Cornell Law School; Professor Deborah Hensler of the Stanford Law School, co-author of the RAND Corporation reports on asbestos litigation; Professor Frances McGovern of the Duke University School of Law, Professor George Priest of the Yale Law School, Victor Schwartz, of Shook, Hardy, & Bacon; the Hon. Griffin B. Bell of King & Spalding, and formerly Attorney General of the United States; Steven Kazan of Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise; and Alan Brayton of Brayton Purcell.

10. In the article that I prepared for the symposium, which was published in January 2004, I analyze asbestos litigation including an extensive empirical description and analysis of attorney-sponsored asbestos screenings and the role that such client recruitment efforts play in the litigation. This included studying the deposition testimony of approximately forty screening company principals, their key employees and the B-readers and other doctors they retained. I address, inter alia, the financial incentives that pervade the recruitment process and how those incentives influence: (1) the actions of B-readers and other doctors involved in rendering diagnoses and producing other medical evidence in support of the claimants so recruited; and (2) the administration of pulmonary function tests as further support. On the basis of the documentary evidence I consulted, I was able to reach conclusions with regard to whether asbestos screening companies adhere to American Thoracic Society standards in administering pulmonary function tests and the consequences of their failure to do so. I also considered the efforts of the Manville Trust to amend its Trust Distribution Procedures to implement an audit procedure in response to tens of thousands of asbestos injury claims presented with inadequate medical documentation or with spurious documentation provided by a select few B-readers, whose diagnoses and reports, according to most neutral medical experts and scientists, lack credibility. I also consider how other asbestos trusts have been plagued with similar volumes of abusive claims and why attempts to resolve the inadequacies of the bankruptcy trust distribution procedures have foundered.
11. In June 2003, I was requested by a staff member of this Committee to permit review of parts of my draft article in connection with hearings that were being planned on legislation addressing the asbestos litigation crisis. Senator Jon Kyl of Arizona cited the forthcoming article, with approval, in the Report of the U.S. Senate Committee or of the Judiciary on S.1125.

12. In researching both asbestos litigation and the formation of asbestos bankruptcy trusts, I have focused on the role of financial incentives in: Generating the medical data used in asbestos claiming; determining the structure of the trusts; and the nature of administration of the trusts and their TDPs. I have been aided in this endeavor by my previous teaching and research on the effect of financial incentives, in particular, contingency fees on the tort system. For the past 15 years, I have been teaching a three credit seminar titled: The Legal Ethics of Legal Fees and Its Effect On the Tort System. In that seminar, I directly address the effect of fee structures and fee incentives on the tort system, using articles that I have authored and co-authored and the other research I have conducted. To my knowledge, this is the only such course offered in any law school.

13. In May 2004, I testified before the Committee on Judiciary of the Ohio Senate on Ohio H.B. 292, to reform asbestos litigation. I was paid a fee for studying the bill and preparing my testimony.

14. In July 2004, I testified before the subcommittee on Commercial And Administrative Law of the U.S. House of Representatives Committee on the Judiciary on asbestos bankruptcies. I was not retained with regard to that testimony.

15. In the past several years, I have been invited to appear as a panelist or presenter at numerous conferences and programs on asbestos litigation. I have accepted two such invitations. In June 2004, I was a presenting panelist at the HarrisMartin "Conference on Asbestos Allocation: Apportionment Liability In Asbestos Litigation." My topic was "Ethical Issues in Asbestos Litigation." I also was a presenting panelist at the Mealey's National Asbestos Conference in September 2004, and spoke on the failure of asbestos screenings to adhere to a medical model for screening an exposed population.

16. On January 7, 2005, at the invitation of the White House, I appeared with the President in a "town hall" style event in Macomb County Michigan, titled: An "Asbestos Litigation Conversation." The President asked me to address the audience on why the asbestos litigation system was broken and needed a Congressional fix.