No. 13-2235

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CSX Transportation, Inc.

Plaintiff-Appellee,

v.

Robert N. Peirce, Jr., Louis A. Raimond,
Dr. Ray A. Harron, M.D.

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of West Virginia, Wheeling
Case No. 5:05-cv-00202-FPS-JES
Honorable Frederick P. Stamp, Jr.

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel of record for Amicus Curiae American Association for Justice hereby certifies that to the best of his knowledge and belief as follows:

Amicus Curiae American Association for Justice has no parent companies, and there is no publicly held corporation holding 10% or more of its stock.

Date: March 3, 2014

Respectfully submitted,

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members represent plaintiffs in personal injury suits, civil rights actions, employee rights cases, and small business litigation. AAJ members frequently represent those who have been harmed by asbestos exposure and other victims of mass torts. AAJ has a direct interest in the resolution of this case in that the district court's decision threatens to chill the ability of its member attorneys to provide zealous representation to their clients, undermining Americans' access to the courts to seek redress for wrongful injury and weakening the accountability that serves to promote safety.

AAJ files this brief pursuant to the second sentence of Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this brief. AAJ further states that no party's counsel authored this brief in whole or in part, nor has any party or party's counsel contributed money intended to fund preparing or submitting this brief. No person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

1. Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO") with the expansive scope needed by law enforcement to eradicate

organized crime. At the same time, courts must guard against abuse of the statute to chill or eliminate constitutionally protected activity, particularly by private parties seeking to punish their litigation opponents.

CSXT alleged it was harmed by 11 false asbestosis claims, a tiny fraction of approximately 5,300 asbestosis claims filed by defendants against the railroad during an eight year period. The district court, denying defendants' motion to dismiss, ruled that the 11 isolated claims were not the predicate acts of racketeering activity essential to CSXT's RICO claim. Rather, the "mass lawsuits," 99.8 percent of which were wholly legitimate and non-fraudulent, served as predicate acts of racketeering activity, along with the filing of routine motions, the sending of routine correspondence, and even the filing of a petition for certiorari with the Supreme Court. Those litigation activities, the district court held, showed a sufficient pattern of racketeering activity to proceed to a jury trial. The district court's use of defendants' filing of legitimate lawsuits on behalf or injured persons as predicate acts of racketeering was clear error, requiring reversal.

In the context of asbestos litigation, the use of mobile screening units and the filing of "mass lawsuits" are neither unlawful nor unusual. Plaintiffs in these lawsuits are victims of the largest occupational injury disaster in U.S. history. Documents uncovered by plaintiffs' attorneys established that employers, who used asbestos in the workplace, including railroads, were aware of the dangers to

workers but failed to take safety precautions. Although the reading of x-rays involves some subjective interpretation, they have long been an accepted basis for filing claims for asbestos injury. Lawyers representing workers have long made use of x-ray screening and mass filings to make asbestos-exposed workers aware of their rights and provide access to the courts for their compensation claims.

2. Legitimate litigation activities by an attorney on behalf of his or her client, generally are not deemed to be acts of mail fraud for purposes of subjecting the attorney to civil liability under RICO. Indeed, the overwhelming weight of authority holds that the filing of a lawsuit, even if baseless or fraudulent, does not come within the scope of RICO. State counterparts to Federal Rule of Civil Procedure 11 and state tort remedies – including civil actions for fraud, malicious prosecution and abuse of process – provide state courts with the means to combat fraudulent claims and make whole the victims of such illicit activity. These are appropriate tools designed precisely for this purpose. Private parties should not be permitted to drag their state court litigation into federal court to punish the attorneys who filed personal injury suits against them.

3. Public policy counsels strongly against imposing crippling RICO liability based on the filing of personal injury lawsuits. First, the constitutionally protected right to petition the courts, recognized under the *Noerr-Pennington* doctrine, commands that RICO's scope be narrowly construed to avoid violating

the First Amendment. Second, expanding RICO for use to combat baseless state court lawsuits is unnecessary in view of the more appropriate and effective tools available to state courts. Instead, RICO will lure corporate defendants to the federal courthouse to lay their state court problems at the feet of federal judges in hopes of winning treble damages and attorney fees. At the same time, state courts will effectively operate under the tutelage of the federal courts.

Most importantly, the risk that a federal court might impose crippling RICO penalties on attorneys for injury victims at the behest of their party-opponents exacts too high a cost for all Americans. The harsh penalties designed to deter organized crime would, in the hands of private litigants, become weapons to punish their adversaries and deter attorneys in the future from zealously representing wrongfully injured victims.

ARGUMENT

I. THE APPLICATION OF RICO TO LEGITIMATE LITIGATION ACTIVITIES PUNISHES ATTORNEYS FOR FILING VALID PERSONAL INJURY CLAIMS AND CHILLS ACCESS TO THE COURTS FOR THOSE WHO HAVE BEEN WRONGFULLY INJURED.

A. The District Court Erroneously Ruled That the Filing of Legitimate Asbestosis Lawsuits Were Predicate Acts of Racketeering Activity.

AAJ addresses this Court regarding the district court's unprecedented and disturbing extension of the federal RICO civil cause of action, giving private

parties a weapon to punish lawyers who seek legal redress in state courts on behalf of injured clients.

Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO") as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, for the purpose of "the eradication of organized crime in the United States by strengthening the legal tools . . . to deal with the unlawful activities of those engaged in organized crime." 84 Stat. at 922-23. *See United States v. Turkette*, 452 U.S. 576, 589 (1981). Congress included a private cause of action that includes treble damages and attorney fees, to one who has been "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c).

Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." "Racketeering activity" is defined in § 1961(1) to include any act indictable under numerous specific federal criminal provisions, including 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud).

Although Congress intended the courts to read RICO broadly, *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985), so that prosecutors could effectively

target organized criminal conduct, the Supreme Court also expressed "concern over the consequences of an unbridled reading of the statute." *Id*. at 481. Justice White, writing for the Court, warned specifically about the risk of overextension of RICO's civil action as "the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" *Id*. at 500.

This case presents the court with just such an overextension of the civil RICO cause of action to encompass legitimate activities of attorneys in a manner that allows a corporate defendant to chill the ability of attorneys to zealously represent ordinary Americans seeking legal redress for injury.

CSXT alleged that it was damaged by the filing of 11 allegedly false asbestos claims outlined in paragraph 147 of its Third Amended Complaint. *See* Mem. Op. & Order Denying Mots. to Dismiss 38 (Doc. No. 1050, filed May 3, 2012) (hereinafter "Mem. Op.").

The attorney defendants moved to dismiss, contending that the 11 allegedly false claims filed over the course of eight years did not amount to a "pattern of racketeering," but instead were merely "sporadic and isolated" incidents lacking the requisite continuity and relatedness. Mem. Op. 9. *See also Sedima*, 473 U.S. at 496 n. 14. ("[W]hile two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." . . . As the

Senate Report that accompanied the statute explained: 'The target of [RICO] is thus not sporadic activity.'" quoting S. Rep. No. 91-617, at 158 (1969).

The district court denied the motion, stating that the requisite predicate acts of racketeering were not the 11 individual cases. Rather, the predicate acts were the filing of seven "mass lawsuits" along with routine motions and attorney correspondence related to those claims, as described in paragraphs 90, 94, 105, 112, 119, 125, 128-29, 134, 139, and 159 (a-g) of CSXT's Third Amended Complaint.[1] Mem. Op. 24.

The FELA "mass" lawsuits "contained more than 5,300 asbestos-related claims, only 11 of which CSXT argues were fraudulent." Mem. Op. 7 n.3. As the district court explained, the non-fraudulent claims were alleged to be part of defendants' "plan to conceal the fraudulent claims." *Id*. at 34. The court below also indicated that, without the mass filings, the 11 cases alone were not sufficient to establish a pattern of racketeering.

> The lawyer defendants argue that this isolated conduct, a mere 0.2% of the asbestosis claims filed by the Peirce Firm against CSXT, does not create a pattern of racketeering activity. But this Court finds that the predicate acts alleged in the third amended complaint arguably encompass more than just the eleven fraudulent claims. CSXT asserts that the lawyer defendants

[1] The litigation activities alleged to be predicate acts of racketeering included the filing of a Petition to the Supreme Court for a Writ of Certiorari. Third Am. Compl. ¶ 128.

> "deliberately filed . . . mass lawsuits in overburdened courts to deprive CSXT of access to meaningful discovery, which in turn concealed fraudulent claims and leveraged higher settlements . . ."

Id. What turned the 11 isolated false claims into a pattern, CSXT alleged, was the filing of a large number of entirely legitimate cases as part of a system of fraud. The district court agreed, concluding,

> While the eleven fraudulent claims may have been a relatively small percentage of the total number of claims included in the mass lawsuits, *the third amended complaint defines the predicate acts as the mass lawsuits themselves* and the commission of other acts of mail and wire fraud in furtherance of those claims.

Id. at 35 (emphasis added). Those "mass lawsuits," almost all of which were not even alleged to be fraudulent, provided the essential continuity and relatedness to show a "pattern of racketeering activity." *Id*. at 31-37.

AAJ is deeply concerned by the unwarranted extension of RICO that allows a private party to characterize the filing of valid lawsuits against it as predicate acts of "racketeering activity." The district court did not deem the 11 allegedly false claims sufficient to establish a pattern of racketeering. The court should have granted defendants' motions to dismiss, and the case should not have gone to trial. The court's failure to grant that motion calls for reversal by this Court.[2]

[2] CSXT apparently abandoned its "system of fraud" theory at trial, *see* Br. of Defendants-Appellants at 13 n.9, thereby abandoning its only approved basis for a finding of a "pattern of racketeering activity" in this case. Submission of the case

B. "Mass" Lawsuits Are Neither Uncommon Nor Unlawful As a Means of Providing Legal Recourse to the Victims of the Largest Occupational Injury Disaster in U.S. History.

Use of the term "mass lawsuits" by the district court cries out for context. The claimants in these cases are victims of "the worst occupational health disaster in U.S. history." Stephen J. Carroll *et al*., *Asbestos Litigation* xix (RAND Inst. for Civil Justice 2005) ("RAND 2005"), *available at* http://www.rand.org/pubs/monographs/ 2005/RAND_MG162.pdf.

Simply put, there is asbestos litigation because, "[a]lthough the dangers of asbestos were known well before World War II, many asbestos product manufacturers did not warn their employees of the risks of exposure or provide adequate protection for them." *Id*. at xviii-xix. As the Supreme Court has observed, behind asbestos litigation "is a tale of danger known in the 1930s" but nevertheless "inflicted upon millions of Americans" in the ensuing decades. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (quoting the *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 2-3 (Mar. 1991)). The industry actively hid the danger of serious and even fatal injury to workers who

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to the jury without evidence to support a pattern was itself reversible error. Affirmance would effectively bestow this Court's approval on the district court's unprecedented ruling that valid, non-fraudulent civil actions may be deemed "racketeering activity." Other corporate litigants have already looked to the district court's action as turning RICO into a weapon against attorneys representing the injured. *See id*. at 1-2 & n.1.

simply breathed in a workplace where asbestos was used. RAND 2005, at 12.[3] "The ensuing cover-up, effected through industry associations and research compacts, resulted in thousands of deaths." *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 739 (E.D.N.Y. 1991) (quoting D.E. Lilienfeld, *The Silence: The Asbestos Industry and Early Occupational Cancer Research*, 81 Am. J. Pub. Health 791 (1991)). An estimated 21 million Americans were significantly exposed to asbestos in the workplace. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 434 (1997).

"Through persistence, vigorous discovery and creative efforts, plaintiffs' attorneys representing persons suffering from asbestos-related injuries gradually uncovered extensive evidence indicating that manufacturers . . . knew that asbestos posed potentially life-threatening hazards and choose to keep that information from workers and others who might be exposed." *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 743 (citing Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 97-131 (1985)). The efforts of these plaintiffs' lawyers succeeded

[3] One of those dangers, asbestosis, "occurs as a result of the slow growth of fibrous or scar tissue between air cells of the lungs where the inhaled asbestos dust comes to rest. As the scar tissue increases, pulmonary function decreases," a process that can continue long after exposure to asbestos dust has ended. Deborah Hensler *et al.*, *Asbestos in the Courts: The Challenge of Mass Toxic Torts* 13 (RAND Inst. for Civil Justice 1985) ("RAND 1985"), *available at* http://www.rand.org/content/dam/rand/pubs/reports/2006/R3324.pdf. During the 1930s, asbestosis was widely recognized as a mortal threat affecting a large fraction of those who had regularly worked with asbestos. *Id.* at 14.

in "opening up the tort system to large numbers of injured workers who had heretofore not been able to obtain substantial compensation for asbestos-related diseases." RAND 1985, at vii. *See also* Ronald L. Motley & Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 Cardozo L. Rev. 1919, 1922-37 (1992) (detailing the industry's "history of deception"); and Environmental Working Group, *Something In the Air: The Asbestos Document Story*, *available at* http://www.ewg.org/asbestos/facts/fact3.php (last visited Feb. 19, 2014), which features images of some of the documents.

Claims against railroads were part of the first wave of asbestos litigation, due to the heavy asbestos exposure of many railroad workers. RAND 2005, at xxv. Two collections of papers uncovered by plaintiffs' lawyers—known as the "Association of American Railroads documents" and the "Alton Railroad documents" established that medical personnel of CSXT's predecessor corporation, the B&O Railroad,[4] were aware in the 1930s that asbestos caused asbestosis and other respiratory diseases and that specific precautions could protect railroad employees. *See Dale v. B&O R.R. Co.*, 552 A.2d 1037, 1039 (Pa. 1989)

[4] CSXT's website states: "CSX's roots date back to . . . the Baltimore and Ohio Railroad Company ("B&O")—the nation's first chartered common carrier." *Our Evolution and History*, http://www.csx.com/index.cfm/about-csx/our-evolution-and-history/ (last visited Feb. 25, 2014).

(describing the contents of the AAR documents); *Williams v. CSX Transp., Inc.*, 626 S.E.2d 716, 726 (N.C. Ct. App. 2006) (stating that the jury could find from the AAR documents that, as early as 1937, "CSX had knowledge of the harm from asbestos."); *Fla. E. Coast Ry. Co. v. Osborne*, 699 So. 2d 724, 726-27 (Fla. 3d DCA 1997) (Cope, J., dissenting) (discussing the Alton Railroad and AAR documents in detail).

By 1981, the weight of the documentary evidence that the asbestos industry knew the dangers of asbestos exposure and concealed that danger from workers was overwhelming. RAND 1985, at 19. Because of the number of exposed workers and the long latency period of asbestos-related diseases, identifying those who had developed asbestosis required counsel representing such workers to adopt new tools.

> [P]laintiff law firms began to promote mass screenings of asbestos workers at or near their places of employment. Plaintiff law firms would bring suit on behalf of all the workers who showed signs of exposure, sometimes filing hundreds of cases under a single docket number.

RAND 2005, at 23.

It has long been recognized that although "X-rays have been widely accepted as one of the most valuable tools in identifying asbestos-related conditions . . . this process is to some degree inherently subjective." *In re Joint E. & S. Dist. Asbestos Litig.*, 237 F. Supp. 2d at 308. "Diagnosis of asbestosis

primarily depends on reading X-rays that are frequently ambiguous and interpreted in conflicting ways by plaintiff and defense experts." RAND 1985, at 87. A stern critic of such screenings concedes:

> [N]ecessarily many of the X-ray readings and medical diagnoses involve quite subjective judgments. I acknowledge that. In any given case or even a set of hundreds of cases involving the X-ray detection of pleural plaques or very mild asbestosis, medical experts can and do differ in their interpretations of the X-rays.

Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 42 (2003).

Nor are mass screenings unlawful. One scholar has observed that "the effort to build aggregations of cases against the same defendant is analogous to solicitation of members of a class for purposes of bringing a class action." Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 Pepp. L. Rev. 175, 182 (2003). To prohibit unions from assisting their members in learning whether they have a health problem and simultaneously referring them to a lawyer would implicate First Amendment associational rights. *Id.*

Professor Brickman has noted that over one million persons screened in this manner have been found to have some asbestos-related injury. Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1313 (2008). Although the practice has been the subject of federal investigation, not a single criminal conviction, or even a single indictment has been

returned against attorneys who use such screenings to identify potential clients. *Id.* at 1347. Nor have there been "any discipline or judicial sanctions" applied to plaintiff lawyers using mass screenings "to recruit asbestos clients." Cramton, *supra*, at 182.

Similarly, "mass lawsuits" are neither uncommon nor unlawful. During the 1980s attorneys representing workers "learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together, and negotiating with defendants on behalf of the entire group. Often, defendants would agree to settle all of the claims that were so grouped, including weaker as well as stronger claims, to reduce their overall costs of litigation." RAND 2005, at 23.

Although such mass lawsuits may fall short of the ideals of individual justice, leading judges and academics have argued that, in the mass tort context, such devices are fairer and more efficient than case-by-case adjudications with high transaction costs and lengthy delays. Cramton, *supra*, at 191 (citing Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 84-88 (1995)).

Regardless of whether the filings of aggregated claims is a preferred means of obtaining compensation for the victims of mass torts, they are routine, lawful litigation activities that should not be deemed predicate acts of racketeering for purposes of a private civil suit under RICO.

II. OVERWHELMING AUTHORITY HOLDS THAT LEGITIMATE LITIGATION ACTIVITIES OF AN ATTORNEY ON BEHALF OF A CLIENT, INCLUDING THE FILING OF LAWSUITS, MAY NOT BE DEEMED ACTS OF RACKETEERING FOR PURPOSES OF SUBJECTING THE ATTORNEY TO CIVIL LIABILITY UNDER RICO.

The district court held that use of the mail to file "massive lawsuits," file routine motions, and send attorney correspondence in connection with the asbestos cases constituted predicate acts of racketeering "whether or not the pleadings and correspondence themselves were false or fraudulent." Mem. Op. 26.

AAJ submits that this unwarranted expansion of the private civil RICO cause of action is inconsistent with settled legal protections of litigants and their attorneys from retaliation at the hands of adverse parties.

A. Litigation Activities Undertaken By Attorneys on Behalf of Their Clients Are Not Predicate Acts of Mail Fraud Racketeering.

The Eighth Circuit has observed that the provision of routine legal services does not come within the ambit of § 1962(c):

> [A] growing number of courts, including our own, have held that an attorney or other professional does not conduct an enterprise's affairs through run-of-the-mill provision of professional services. *See Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521 (2d Cir.1994) (finding no RICO liability where defendant had "acted as no more than [an] attorney"); *Baumer v. Pachl*, 8 F.3d 1341, 1344 (9th Cir.1993) (affirming dismissal of case against attorney whose "role was limited to providing legal services") . . . [W]e find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a

> client or performing ordinary legal tasks (that is, by acting like an attorney).

Handeen v. Lemaire, 112 F.3d 1339, 1348-49 (8th Cir. 1997).

District Judge Matsumoto explored this issue in detail in *Curtis & Associates, P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153 (E.D.N.Y. 2010). In this factually complex case, the Curtis law firm alleged that the attorney defendants had engaged in a scheme to defraud plaintiff by soliciting and filing baseless legal malpractice suits against the Curtis firm on behalf of former Curtis clients. All the predicate acts alleged in the complaint involved the mailing of pleadings and routine correspondence connected with the legal malpractice cases. *Id.* at 169 & n.19. The district court dismissed Curtis' RICO cause of action. The court stated that such a misapplication of RICO "would turn every state court lawsuit into a predicate for a subsequent federal RICO action," inundating the federal courts with issues the state courts could deal with, and chilling the efforts of attorneys to represent their clients. *Id*. at 173. "For all of these reasons, this court joins a long line of cases in finding, as a matter of law, that the 'litigation activities' pleaded in the Complaint cannot constitute predicate acts for the purposes of RICO." *Id.* at 174.

Many other courts have had occasion to hold that, "[i]n general, litigation activities do not properly form the basis for RICO predicate acts." *Chandler v. Suntag*, No. 1:11-CV-02-jgm, 2011 WL 2559878, at *7 (D. Vt. June 28, 2011).

See, e.g., DirecTV, Inc. v. Lewis, No. 03-cv-6241, 2005 WL 1006030, at *8 (W.D.N.Y. Apr. 29, 2005) ("Courts have held that serving litigation documents by mail cannot be a predicate act to establish mail fraud under the RICO statute."); *Kashelkar v. Rubin & Rothman*, 97 F. Supp. 2d 383, 393 (S.D.N.Y.2000) (soundly rejecting the contention that "legitimate conduct of attorneys representing their clients in pending litigation" can constitute mail or wire fraud); *Auburn Med. Ctr. v. Andrus*, 9 F. Supp. 2d 1291, 1297 (M.D. Ala. 1998) ("engaging in the type of litigation activities described in this action does not constitute mail fraud for purposes of supporting a RICO claim."); *D'Orange v. Feely*, 877 F. Supp. 152, 156 (S.D.N.Y. 1995) (allegedly fraudulent documents sent by mail "cannot be considered predicate acts because they constitute legitimate conduct of attorneys acting on behalf of a client in the course of pending litigation"); *Morin v. Trupin*, 711 F. Supp. 97, 105 (S.D.N.Y. 1989) (legitimate acts of attorneys on behalf of their clients, such as sending a demand letter to plaintiff's counsel, cannot form the basis of a RICO claim); *Gunn v. Palmieri*, No. 87-cv-1418, 1989 WL 119519, at *1 (E.D.N.Y. Sept. 29, 1989), *aff'd*, 904 F.2d 33 (2d Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991) (rejecting as "untenable" an interpretation of RICO that would permit litigation activities such as the filing of an answer or motion to be construed as RICO predicate acts of mail fraud).

B. The Filing of Civil Actions on Behalf of Clients Cannot Serve As Predicate Acts of Racketeering for RICO Purposes.

Similarly, the great weight of authority holds that "filing and prosecuting a complaint is not considered mail or wire fraud or a predicate act under RICO." *Drobny v. JP Morgan Chase Bank, NA*, 929 F. Supp. 2d 839, 848 (N.D. Ill. 2013) (quoting *Carthan-Ragland v. Standard Bank & Trust*, No. 11 C 5864, 2012 WL 1658244, at *2 (N.D. Ill. May 11, 2012)); *see also Hexagon Packaging Corp. v. Manny Gutterman & Assocs., Inc.*, Nos. 96 C 4356, 99 C 5493, 2000 WL 226396, at *6 (N.D. Ill. 2000) (The "initiation of lawsuits does not constitute [a] scheme to defraud under [the] mail or wire fraud statutes"); *Capasso v. Cigna Ins. Co.*, 765 F. Supp. 839, 843 n.2 (S.D.N.Y. 1991) (The initiation of a legal action cannot constitute a predicate act under RICO).

The district court cited this court's decision in *United States v. Murr*, 681 F.2d 246 (4th Cir. 1982), for the proposition that "the fraudulent filing of § 1983 lawsuits is an indictable offense under the federal mail fraud statute," which "suggests that the filing of a fraudulent lawsuit can constitute racketeering activity." Mem. Op. 26. *Murr*, as its caption indicates, was not a private civil action, but a criminal prosecution. This is a distinction worth emphasizing. Congress enacted the broadly-framed RICO provisions mindful that "the restraining influence of prosecutorial discretion" would guard against abuse. *See Sedima*, at 503. The Department of Justice has assured that extreme cases would

not be brought, despite the statute's broad language, because the Department would exercise "sound discretion" through a centralized review process. *Id*. at 503-04. In this case, by contrast, a private entity with no such public responsibility or restraint seeks the authority to impose ruinous damages on attorneys who have sued the entity on behalf of injured individuals.

In addition, the district court below gains little support from the few decisions by other courts that "have held that the filing of a fraudulent lawsuit can be a predicate act of mail and wire fraud." Mem. Op. 24-25 (citing *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 443 (5th Cir. 2000); *Warnock v. State Farm Mut. Auto. Ins. Co.*, No. 5:08cv01, 2008 WL 4594129, at *7 (S.D. Miss. Oct. 14, 2008); *State Farm Mut. Auto. Ins. Co. v. Makris*, No. 01-5351, 2003 WL 924615, at *10 (E.D. Pa. Mar. 4, 2003)).

None of the cited decisions holds that the filing of legitimate lawsuits may serve as predicate acts of racketeering for RICO purposes.[5] Indeed, the great weight of authority among federal courts holds that the filing of a civil action – even those that may be baseless or fraudulent – do not warrant the heavy damages

[5] Although the court in *Warnock* denied defendant attorneys' motion to dismiss, the court subsequently granted their motion for summary judgment, holding that the filing of baseless lawsuits cannot, as a matter of law, constitute mail or wire fraud. *Warnock v. State Farm Mut. Auto. Ins. Co.*, 833 F. Supp. 2d 604, 609 (S.D. Miss. 2011).

imposed by RICO. There are better and more appropriate remedies for such abuses under state law.

The Eleventh Circuit, for example, has held that the mailing of litigation documents such as affidavits, even if false, do not constitute a predicate act of mail fraud for RICO purposes. *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002). Likewise, the court in *I.S. Joseph Co., Inc. v. J. Lauritzen A/S*, 751 F.2d 265 (8th Cir. 1984), held that a threat to file a lawsuit likewise cannot serve as the basis of a RICO claim. "If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary." *Id.* at 267-68.

The great weight of authority among district courts holds that the filing of lawsuits, even if baseless or fraudulent, may not serve as the basis for RICO liability; state tort remedies for malicious prosecution or abuse of process are more appropriate tools. *See, e.g.*, *Daddona v. Gaudio*, 156 F. Supp. 2d 153, 162 (D. Conn. 2000) ("Attempts to characterize abuse of process or malicious prosecution claims as mail and wire fraud violations for RICO purposes have been scrutinized by the courts, and have been rejected where the only allegedly fraudulent conduct relates to the filing of documents in litigation."); *Nakahara v. Bal*, No. 97-CV-2027, 1998 WL 35123, at *7 n.7 (S.D.N.Y. Jan. 30, 1998) (That "the initiation of unjustified lawsuits constituting malicious prosecution cannot alone form a

predicate act for purposes of RICO has been reached by numerous courts."); *Harris Custom Builders, Inc. v. Hoffmeyer*, No. 90 C 0741, 1994 WL 329962 (N.D. Ill. July 7, 1994) (scheme of filing lawsuits to enforce a fraudulently obtained copyright does not constitute a predicate act of racketeering for purposes of RICO); *Ippolito v. State*, 824 F. Supp. 1562, 1575 (M.D. Fla. 1993) (claims amounting to malicious prosecution do not constitute predicate acts supporting a RICO action); *von Bulow v. von Bulow*, 657 F. Supp. 1134, 1143 (S.D.N.Y. 1987) (same).

AAJ does not defend the filing of fraudulent lawsuits. But it is quite another matter to contend that corporate defendants should be given the powerful RICO cause of action to use as a weapon against attorneys who have allegedly brought false claims against it. Such an expansion of RICO invites abuse.

III. IMPOSING CRIPPLING RICO LIABILITY ON ATTORNEYS FOR FILING PERSONAL INJURY SUITS WOULD VIOLATE THE FIRST AMENDMENT RIGHT OF PETITION, INTERFERE WITH THE OPERATIONS OF STATE COURTS, AND CHILL THE ABILITY OF WRONGFULLY INJURED VICTIMS TO OBTAIN LEGAL REPRESENTATION TO PURSUE MERITORIOUS CLAIMS.

Even if RICO might be construed to impose liability based on a pattern of "racketeering activity" that consists of filing personal injury lawsuits, public policy counsels strongly against such a statutory interpretation.

A. Expansive Interpretation of RICO to Penalize the Filing of Personal Injury Suits Would Violate the Noerr-Pennington Doctrine.

The *Noerr-Pennington* doctrine proceeds from the First Amendment's "right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Under *Noerr-Pennington*, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct, including the pursuit of litigation. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *IGEN Int'l, Inc. v. Roche Diagnostics GmBH*, 335 F.3d 303, 310 (4th Cir. 2003).

"Although the *Noerr-Pennington* doctrine originated in antitrust law, its rationale is equally applicable to RICO suits." *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 826 (7th Cir. 1999). Indeed, the doctrine may be viewed as "a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the right protected by the Petition Clause," including RICO. *Sosa v. DirecTV*, 437 F.3d 923, 931 (9th Cir. 2006). The Ninth Circuit in *Sosa* held that RICO must be construed narrowly to exclude the sending of pretrial demand letters as predicate acts in order to avoid impinging upon the right of petition. *Id.* at 931-32. *See also*

Forty-Eight Insulations, Inc. v. Black, 63 B.R. 415, 418 (N.D. Ill. 1986) (expressing "doubt as to whether the filing of a chapter 11 petition and a complaint could constitute mail fraud" for RICO purposes because such a result may infringe upon the "right to petition the government through the courts as guaranteed by the First Amendment of the United States Constitution.").

It is true that *Noerr-Pennington* does not immunize the filing of "sham" lawsuits that are objectively baseless and subjectively intended to abuse process. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). As the Supreme Court explained:

> If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, . . . Under the second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use [of] the governmental *process*—as opposed to the outcome of that process.

Id. (internal citations and quotations omitted) (emphasis in original). The Court also made clear that the party opposing *Noerr-Pennington* immunity bears the burden of proving both the objective and subjective components of sham litigation. *Id.*

In this case, CSXT did not bear its burden of negating any objective basis for the 11 claims at issue. In each case, the claimant had been employed by CSXT and had been exposed to asbestos on the job. Br. of Defendants-Appellants at 15-16.

Each had an x-ray that had been interpreted by Dr. Harron, whose B-readings had previously been accepted by CSXT, *id*. at 9, as positive for asbestosis. After CSXT stated it would no longer accept Dr. Harron's reads, another physician B-reader confirmed the positive reading for 10 of the 11 claimants (one having settled on the basis of a different injury). *Id*. at 11-12 & n. 8. Clearly, as a matter of law, there was an objective basis for those claims.

Moreover, the district court failed to address the second essential element to the "sham" exception to *Noerr-Pennington* – that the defendants subjectively intended to accomplish an illicit purpose by "the use [of] the governmental process—as opposed to the outcome of that process." *Prof'l Real Estate Investors*, at 60-61. It is clear that the defendant attorneys did not attempt to use the filing of lawsuits to damage CSXT's business relationships or competitiveness. Their goal, as CSXT concedes, was to recover damages for their clients—the very "outcome of [the petitioning] process" that *Noerr-Pennington* protects. *Id*.

This Court should narrowly construe the private civil remedy of RICO to avoid such clear infringement of the First Amendment right of Petition.

B. The Private RICO Cause of Action Is the Wrong Tool to Address Fraudulent Claims in State Courts.

To the extent that false or fraudulent claims pose a problem in state courts, the state courts themselves have more appropriate tools available to them. For example, West Virginia Rule of Civil Procedure 11 requires attorneys who file in

West Virginia court to certify that the claims and allegations they assert are made in good faith and have some basis in law and fact. AAJ wholeheartedly agrees with defendants in this case that violation of Rule 11 does not support a RICO private cause of action for damages. Br. of Defendants-Appellants at 24-26. W. Va. R. Civ. P. 11 carries its own set of sanctions to be administered by West Virginia judges who, as this Court has pointedly observed "are perfectly capable of handling [any] malfeasance in their own courts." *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 403 (4th Cir. 2001).

Rule 11, like its federal counterpart, is designed to enable state court judges to police the filings in their courts, not to allow litigants "to use sanctions as substitutes for tort damages." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 553 (1991). This Court should not invite parties to do so under the guise of RICO. Indeed, RICO's powerful lure of treble damages and attorney fees would dramatically undermine the efforts of state courts and place federal courts in the position of supervising the day-to-day operations of state courts.

In addition, State law does provide remedies—for example, fraud, malicious prosecution, and abuse of process—designed to make the victim of such harms whole. Inviting state court litigants to rehash their experiences before federal judges with the promise of treble damages and attorney fees undermines the use of

those remedies that were designed for precisely those situations where parties have been the victims of false claims. As one district court observed, "Congress did not intend to effect a wholesale preemption of state civil law in its enactment of RICO." *von Bulow*, 657 F. Supp. at 1143.

District Judge Matsumoto correctly rejected this as an "absurd" result that would "turn every state court lawsuit into a predicate for a subsequent federal RICO action." *Curtis & Assocs.*, 758 F. Supp. 2d at 173. As another district court stated, where the state court "can fully protect the rights of the parties from abuse or unethical conduct, we see no reason to torture the limits of the mail fraud statute to allow such collateral suits. We do not think Congress intended such a result where alternate remedies exist. *Spiegel v. Cont'l Illinois Nat'l Bank*, 609 F. Supp. 1083, 1089 (N.D. Ill. 1985), *aff'd*, 790 F.2d 638 (7th Cir. 1986). *See United States v. Eisen*, 974 F.2d 246, 254 (2d Cir. 1992) (noting the "understandable reluctance" on the part of Congress "to use federal criminal law as a back-stop for all state court litigation").

C. Authorizing Powerful Private Litigants to Employ the RICO Civil Suit As a Weapon Against Attorneys Who Have Brought Suit Against Them Will Chill Attorneys' Ability to Represent Injured Persons and Hinder Those With Meritorious Claims from Obtaining Legal Representation.

Most importantly, the risk that a federal court might impose civil RICO penalties on attorneys for injury victims at the behest of their party-opponents

exacts too high a cost for all Americans. Civil justice in America depends in large part on private initiative in pursuing legal recourse. The tort remedies that compensate the victims of wrongful injury and deter unreasonably dangerous conduct require the unstinting efforts of the private bar of plaintiff attorneys.

Congress made provision in RICO for onerous penalties, including treble damages and the awarding of attorney fees. In addition, RICO liability "has vast implications for the defendants because of . . . the possibility of permanent reputational injury to defendants from the allegation that they are 'racketeers.'" *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 536 (S.D.N.Y. 2009). *See also World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 495-96 (S.D.N.Y. 2007) (Noting that RICO has "an almost inevitable stigmatizing effect on those named as defendants.").

Congress clearly and rightly sought to punish and deter organized crime, not to punish and deter representation of those seeking legal redress. To impose such penalties on attorneys conducting routine and legitimate litigation activities, including the filing of personal injury lawsuits "would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts." *Curtis & Assocs.*, 758 F. Supp. 2d at 173. *See also Chandler*, 2011 WL 2559878, at *7 (similar); *Morin*, 711 F. Supp. at 106 (If threats to file a lawsuit were deemed a pattern of racketeering activity, "citizens and foreigners alike might

feel that their right of access to the courts of this country had been severely chilled.").

It should also be recalled that "asbestos litigation was originally viewed as a high-risk enterprise." RAND 1985, at 17. Plaintiffs' attorneys doggedly pursued seemingly hopeless claims on behalf of asbestos victims, poring over documents obtained in discovery and resisting once-settled defenses. Uncovering the facts "required sustained efforts over many years by plaintiff lawyers who followed up numerous leads at considerable expense." *Id*. at xxvi. Their efforts succeeded in "opening up the tort system to large numbers of injured workers who had heretofore not been able to obtain substantial compensation for asbestos-related diseases." *Id*. at vii.

The possibility that an adversary can impose crushing civil liability on the basis of RICO's broadly framed cause of action will chill the zealous pursuit of just compensation on behalf of injury victims that has brought legal redress to many workers injured by asbestos and other toxic substances. The decision below places a blunt and fearsome weapon in the hands of corporate defendants for use in discouraging attorneys from representing those who have been harmed by mass misconduct and should be overturned.

CONCLUSION

For the foregoing reasons, the decision by the district court should be reversed.

Date: March 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 28.1(e)(2) or 32(a)(7)(B) because this brief contains 6,411 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Further, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2014, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record. Due to inclement weather, the requested eight paper copies will be sent to the Clerk of the Court on the 4th day of March, 2014, via United Parcel Service overnight delivery.

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