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## Retaliatory RICO and the Puzzle of Fraudulent Claiming

Nora Freeman Engstrom  
*Stanford Law School*

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# RETALIATORY RICO AND THE PUZZLE OF FRAUDULENT CLAIMING

Nora Freeman Engstrom\*

*Over the past century, the allegation that the tort liability system incentivizes legal extortion and is chock-full of fraudulent claims has dominated public discussion and prompted lawmakers to ever-more-creatively curtail individuals' incentives and opportunities to seek redress. Unsatisfied with these conventional efforts, in recent years, at least a dozen corporate defendants have "discovered" a new fraud-fighting tool. They've started filing retaliatory RICO suits against plaintiffs and their lawyers and experts, alleging that the initiation of certain nonmeritorious litigation constitutes racketeering activity—while tort reform advocates have applauded these efforts and exhorted more "courageous" companies to follow suit.*

*Curiously, though, all of this has taken place against a virtual empirical void. Is the tort liability system actually brimming with fraudulent claims? No one knows. There has been no serious attempt to analyze when, how often, or under what conditions fraudulent claiming proliferates. Similarly, tort reformers support RICO's use because, they say, conventional mechanisms to deter fraud fall short. But are conventional mechanisms insufficient? Hard to say, as there is no comprehensive inventory of the myriad formal and informal mechanisms already in use; nor do we have even a vague sense of how those mechanisms actually operate. Further, though courts have started to green-light retaliatory RICO actions, no one has carefully analyzed whether these suits are, on balance, beneficial. Indeed, few have so much as surfaced relevant risks. Addressing these questions, this Article attempts to bring overdue attention to a problem central to the tort system's operation and integrity.*

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\* Professor of Law, Associate Dean for Curriculum, and Deane F. Johnson Faculty Scholar, Stanford Law School. My thanks to Lester Brickman, Dick Craswell, Scott Cummings, Richard Epstein, John Freeman, David Freeman Engstrom, C. Scott Hemphill, Deborah Hensler, Daniel Ho, Ariel Porat, Robert Rabin, Deborah Rhode, Anthony Sebok, Shanin Specter, Robert Weisberg, John Witt, and Adam Zimmerman for helpful comments on previous drafts. I am also grateful to the participants of the Stanford Law School Faculty Workshop, the Columbia Law School Colloquium on Courts and the Legal Process, the Loyola Law School, Los Angeles, Faculty Workshop, the New York Torts Group at NYU School of Law, and the North American Workshop on Private Law Theory. Minh Nguyen-Dang, Michael Qian, and Rachael Samberg have my gratitude for exceptional research assistance.

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#### INTRODUCTION

Plaintiffs' lawyers have long been assailed for bringing spurious suits. In the late nineteenth century, railroad executives complained about bogus claims for railway injuries, ginned up, they said, by "[d]isreputable lawyers," alongside their "rascally confederates in the medical profession."<sup>1</sup> In the 1950s, a prominent physician complained in the *Saturday Evening Post* that all medical malpractice suits amounted to "legalized blackmail" and insisted that the prime objective of plaintiffs' attorneys in such cases was to "aid in

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1. Clark Bell, *The Duty and Responsibility of the Attending Physician in Cases of Railway Surgery*, 14 MEDICO-LEGAL J. 7, 12 (1896-97); see also *Notes and News*, 40 RAILWAY AGE 567, 569 (1905) (discussing the 1905 founding of the Alliance Against Accident Fraud, an organization "to protect and defend its members against fraudulent claims . . . [and] to collect and disseminate information . . . concerning fake claims, shyster lawyers, unprincipled physicians, ambulance chasers, false witnesses and others engaged in such practices").

the holdup and run with the loot.”<sup>2</sup> And, in the early 1990s, Peter Huber penned a popular book lamenting the “legions of case-hardened lawyers” intent on asserting patently false claims.<sup>3</sup>

There is at least a grain of truth to some of these dark assertions. To be sure, the doctor above was wrong—if you’re looking for fraudulent claims, medical malpractice litigation is probably the *last* place to look.<sup>4</sup> And, it is also true, and bears emphasis, that evidence suggests *most* suits within the tort liability system are genuine and meritorious.<sup>5</sup> Yet, it’s just as true that the tort system, writ large, has more than its share of specious activity. Various headline-grabbing mass torts—including cases such as fen-phen, asbestos, silica, and the Deepwater Horizon oil spill—have drawn many with dodgy entitlements to relief. And the auto accident system—responsible for the majority of all tort claims and three-quarters of all injury damage payouts—is, in certain segments, awash with those whose claims are feigned or built.<sup>6</sup>

These bogus claims are costly. They account for billions of dollars of losses per year.<sup>7</sup> They clog courts, making it harder for those with meritorious claims to obtain justice in a timely manner. They increase insurance premiums, and these hikes ultimately induce some individuals and entities

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2. Milton Silverman, *Medicine’s Legal Nightmare: Doctors in Court*, SATURDAY EVENING POST, Apr. 18, 1959, at 31.

3. PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 4–5 (1991); see also WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 270 (1991) (accusing plaintiffs’ lawyers of blithely peddling junk science and “savor[ing]” even their patently undeserved wins).

4. For why, see *infra* note 176 and accompanying text. Even Victor Schwartz, the American Tort Reform Association’s longtime general counsel, has conceded: “There is no question that it is very rare that frivolous suits are brought against doctors. They are too expensive to bring.” Nick Anderson & Edwin Chen, *The Race for the White House: Bush Pushes Stance Against ‘Junk Lawsuits’*, L.A. TIMES, Oct. 22, 2004, at A20.

5. See *infra* notes 27–29 and accompanying text.

6. Nora Freeman Engstrom, *An Alternative Explanation for No-Fault’s “Demise,”* 61 DEPAUL L. REV. 303, 303 (2012) (providing auto statistics). For fraud and “buildup” in this sphere, see *infra* notes 81–84 and accompanying text.

7. See, e.g., STEPHEN CARROLL ET AL., *THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES* 23 (1995) (estimating that in 1993 fabricated and exaggerated auto claims cost auto insurers “an additional \$9–13 billion”); INS. RESEARCH COUNCIL, *FRAUD AND BUILDUP IN AUTO INJURY INSURANCE CLAIMS* 5 (2008) [hereinafter INS. RESEARCH COUNCIL, *FRAUD* 2008] (“IRC estimates of the amount of total excess payment from fraud and buildup [in the auto accident sector] in 2007 ranged from \$4.8 billion to \$6.8 billion . . .”).

to go “bare.”<sup>8</sup> And, they drain the coffers of corporate and individual defendants, diverting funds from those with valid entitlements and pressing financial need.<sup>9</sup>

Aside from these practical considerations, fraudulent claiming imposes other costs, too. Suspicion of fraud sows distrust between plaintiffs and their institutional adversaries—almost certainly inducing some to “fight fire with fire.”<sup>10</sup> Misdiagnoses, often at the heart of fraudulent filings, sometimes dupe innocent plaintiffs, causing some to think, erroneously, that they are terribly sick.<sup>11</sup> Finally and perhaps worst of all, fraudulent claims—and persistent beliefs about the prevalence of such claims—color the public’s perception of civil litigation.<sup>12</sup> This, in turn, causes judges and jurors to view future plaintiffs skeptically, tarnishes the reputation of the plaintiffs’ bar, and reduces injury victims’ interest in, and willingness to enter, the legal fray.<sup>13</sup>

Moreover, when it comes to the operation, integrity, and stability of the tort liability system, responses to the fraud problem are similarly consequential, with implications that are, if anything, *more* profound. Like the angry doctor above, defendants have long used the specter of fraudulent filings to justify broad efforts to clamp down on litigation more generally. Persuaded by this advocacy, judges and policymakers have radically overhauled the civil justice system—to erect heightened pleading standards, impose certificate-of-merit requirements, create professional screening panels, curtail the admission of expert testimony, liberalize restrictions on removal,

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8. See Stephen Carroll & Allan Abrahamse, *The Frequency of Excess Auto Personal Injury Claims*, 3 AM. L. & ECON. REV. 228, 228–29 (2001) (suggesting that feigned and built auto claims contribute to the high cost of insurance, which provides “an incentive to drive uninsured, thus exacerbating the uninsured-motorist problem”).

9. See David Egilman, Letter to the Editor, *Asbestos Screenings*, 42 AM. J. INDUS. MED. 163 (2002) (lamenting that, as a result of dubious screenings for asbestos-related injury, “compensation dollars are now unnecessarily diverted from real victims of asbestos exposure”).

10. See Bell, *supra* note 1, at 13.

11. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005) (discussing the incalculable harm that likely befell many of the 10,000 misdiagnosed plaintiffs).

12. See DEBORAH L. RHODE ET AL., *LEGAL ETHICS* 830 (6th ed. 2013) (asserting that “inadequate checks on fraudulent or other non-meritorious claims” constitute one of the four “most commonly cited problems” plaguing the civil justice system); David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC’Y REV. 551, 552 (1984) (“The popular culture is full of tales of feigned or exaggerated physical harms, of spurious whiplash suits, ambulance-chasing lawyers, and exorbitant claims for compensation.”); Valerie P. Hans & Juliet Dee, *Whiplash: Who’s To Blame?*, 68 BROOK. L. REV. 1093, 1097 (2003) (reporting a widespread perception “that fraud among claimants is rampant”).

13. For evidence of jurors’ skepticism, see Valerie P. Hans & Nicole Vadino, *Whipped by Whiplash? The Challenge of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 TENN. L. REV. 569, 584 (2000). For tarnished reputations, see KEN DORNSTEIN, *ACCIDENTALLY, ON PURPOSE: THE MAKING OF A PERSONAL INJURY UNDERWORLD IN AMERICA* 239 (1996). For how “prevailing legal lore” discourages claiming, see WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 9 (2004).

impose medical-criteria controls, limit class actions, and enhance Rule 11—all, in part, under the guise of smoking out fraudulent suits.<sup>14</sup>

Now, with potentially far-reaching implications, corporate heavyweights are sharpening a new tool to tamp down on fraudulent claiming: what I call “retaliatory RICO.” In recent years, more than a dozen corporate defendants have filed such actions against plaintiffs, their lawyers, and their experts to retaliate for the initiation of a wide range of allegedly bogus litigation, concerning matters as varied as asbestos injury, environmental devastation, workplace accidents, car wrecks, a motel fire, and elephant abuse.<sup>15</sup> Embracing this development, Tiger Joyce, the president of the American Tort Reform Association (ATRA)—and arguably the tort reform movement’s most

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14. See Hans & Dee, *supra* note 12, at 1108 (“Some major corporations, along with insurance companies, have pointed to the high cost of fraudulent claims and supposedly frivolous litigation to support their civil justice reform efforts, which are aimed at limiting their legal liabilities. These efforts have succeeded in many state courts.”); Robert E. Hoyt et al., *The Effectiveness of State Legislation in Mitigating Moral Hazard: Evidence from Automobile Insurance*, 49 J.L. & ECON. 427, 428 (2006) (observing that “tort reforms have been promoted as important elements in the fight against insurance fraud”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 364 (2013) (tracing the “dramatic procedural shifts [that] have occurred” based on assertions concerning the prevalence of extortive litigation).

15. See *infra* Part III; see also, e.g., *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425 (5th Cir. 2000) (personal injury); *Zenith Ins. Co. v. Eisenberg*, No. 94-55983, 1996 WL 588467 (9th Cir. Oct. 11, 1996) (workers’ compensation); *Garlock Sealing Techs., LLC v. Shein*, No. 3:14-cv-137, 2015 WL 5155362 (W.D.N.C. Sept. 2, 2015) (asbestos injury); *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett, Prof'l Corp.*, No. 3:14-cv-116, 2015 WL 5148732 (W.D.N.C. Sept. 2, 2015) (asbestos injury); *Garlock Sealing Techs., LLC v. Belluck & Fox, LLP*, No. 3:14-cv-118, 2015 WL 1022279 (W.D.N.C. Mar. 9, 2015) (asbestos injury); *Garlock Sealing Techs., LLC v. Waters & Kraus, LLP*, No. 3:14-cv-130, 2015 WL 1022291 (W.D.N.C. Mar. 9, 2015) (asbestos injury); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (overseas environmental devastation), *aff'd*, No. 14-0826(L), 2016 WL 4173988 (2d Cir. Aug. 8, 2016); *Nat'l Serv. Indus. v. Segarra*, No. 3:09-cv-083-HTW-LRA, 2012 WL 931975 (S.D. Miss. Mar. 19, 2012) (asbestos injury); *Curtis & Assocs. v. Law Offices of David M. Bushman*, 758 F. Supp. 2d 153 (E.D.N.Y. 2010) (legal malpractice claims), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman*, 443 F. App'x 582 (2d Cir. 2011); *State Farm Mut. Auto. Ins. Co. v. Makris*, No. CIV.A. 01-5351, 2003 WL 924615 (E.D. Pa. Mar. 4, 2003) (automobile claims); *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521 (S.D.N.Y. 2002) (asbestos injury); *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466 (N.D. Ill. May 11, 2000) (automobile accident); *Tribune Co. v. Purciogliotti*, 869 F. Supp. 1076 (S.D.N.Y. 1994) (workers’ compensation), *aff'd sub nom. Tribune Co. v. Abiola*, 66 F.3d 12 (2d Cir. 1995); *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 WL 72588 (D. Kan. May 30, 1990) (asbestos injury); *State Farm Mut. Auto. Ins. Co. v. Rosenfield*, 683 F. Supp. 106 (E.D. Pa. 1988) (automobile claims); *Fireman's Fund Ins. Co. v. Plaza Oldsmobile Ltd.*, 600 F. Supp. 1452 (E.D.N.Y. 1985) (automobile claims); *Complaint, Winters v. Jones*, No. 2:16-cv-09020-JMV-JBC (D.N.J. filed Dec. 5, 2016) (consumer class actions); *Complaint, John Crane Inc. v. Shein Law Ctr., Ltd.*, No. 1:16-cv-5913 (N.D. Ill. filed June 6, 2016), 2016 WL 3251230 (asbestos injury); *Complaint, John Crane Inc. v. Simon Greenstone Panatier Bartlett*, No. 1:16-cv-5918 (N.D. Ill. filed June 6, 2016), 2016 WL 3251232 (asbestos injury); *Don J. DeBenedictis, \$2-Million Civil RICO Suit Brought Against Accident Fraud Operation*, L.A. DAILY J., Mar. 2, 1984, at 16 (describing a RICO suit, *Allstate Insurance Co. v. Revere*, No. 98-55200, 2000 WL 1876657 (9th Cir. Dec. 26, 2000) (hearing case on appeal), against numerous lawyers and others for allegedly staging auto accidents); *Mark Thompson, RICO Suit Against Lawyers, Doctors Allowed*, L.A. DAILY J., Apr. 22, 1986, § 2, at 1 (describing the RICO

visible champion—has prominently called for further use of this fraud-fighting tool: “Only when fraudsters face significant risk and multimillion-dollar consequences for their actions,” he has warned, “will their costly abuse of our civil justice system diminish.”<sup>16</sup>

This is all more than a passing curiosity. For one, RICO itself is a heavy-weight—in the words of one court, “the litigation equivalent of a thermonuclear device.”<sup>17</sup> Enacted in 1970 to combat organized crime, it grants plaintiffs unobstructed access to federal courts and provides for treble damages, attorneys’ fees, and, perhaps most tantalizing of all, the ability to brand the defendant a racketeer.<sup>18</sup> (Penalties under the much-ballyhooed Rule 11 seem almost quaint by comparison.) Corporate defendants’ use of RICO also comes with sizable risks: retaliatory RICO suits threaten to upset the delicate federal-state balance, limit court access, squander scarce judicial resources, exacerbate courthouse incivility, erode the finality of judgments,

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suit titled *Interinsurance Exchange v. Delug*, No. 84-8651 (C.D. Cal. Nov. 8, 1984), which alleged that dozens of lawyers and doctors in Los Angeles participated in a scheme to file over 1,000 fraudulent auto accident claims). To be sure, RICO suits against lawyers are not entirely new. Like many others, lawyers have been targeted by RICO filings for decades. What is relatively new, however, is RICO’s *retaliatory* use. For discussion of early RICO activity involving lawyers, see Paul D. Cooper & Kay Rice, *The Statutory Liability of Attorneys Under RICO*, 53 *INS. COUNS. J.* 549 (1986).

16. Tiger Joyce, Opinion, *Companies Find a New Way to Fight Fraudulent Lawsuits*, PITTSBURGH POST-GAZETTE (Oct. 17, 2013, 12:00 AM), <http://www.post-gazette.com/Op-Ed/2013/10/17/Companies-find-a-new-way-to-fight-fraudulent-lawsuits/stories/201310170333> [<https://perma.cc/J79E-HQN5>] [hereinafter Joyce, *New Way*] (extolling this “new model for punishing those who audaciously perpetrate this kind of costly fraud on our courts”); see also Tiger Joyce, Commentary, *How Business Can Fight Fraudulent Lawsuits*, WALL ST. J. (Mar. 6, 2014, 7:28 PM) (on file with the *Michigan Law Review*). Others are also on record embracing the tactic. See, e.g., CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., TRIAL LAWYERS, INC.: ASBESTOS, A REPORT ON THE ASBESTOS LITIGATION INDUSTRY 25 (2008), <http://www.manhattan-institute.org/pdf/TLI-ASBESTOS.pdf> [<https://perma.cc/K4NN-XLR6>] (stating that, when confronted with fraud, “corporate defendants should fight back, as CSX [a transportation company] has done in West Virginia”); VICTOR E. SCHWARTZ & CARY SILVERMAN, U.S. CHAMBER INST. FOR LEGAL REFORM, LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS AND PLAYERS 117–23 (2014), <http://www.instituteforlegalreform.com/uploads/sites/1/evolving.pdf> [<https://perma.cc/G4V4-RUWA>] (hailing defendants for “fighting back”); Paul M. Barrett, *Chevron’s RICO Victory Provides a Model for Other Companies*, BLOOMBERGBUSINESSWEEK (Mar. 5, 2014, 12:05 PM), <http://www.bloomberg.com/news/articles/2014-03-05/chevrons-rico-victory-provides-a-model-for-other-companies> [<https://perma.cc/43C5-J349>] (quoting Darren McKinney of ATRA saying “[w]e hope [Chevron’s RICO victory] will encourage other defendant companies that have been victimized by fraudulent lawsuits to fight back with RICO suits of their own”).

17. *Katzman v. Victoria’s Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996), *aff’d mem.*, No. 96-7929, 1997 WL 259746 (2d Cir. May 13, 1997) (quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)).

18. See JOHN J. HAMILL ET AL., RICO: A GUIDE TO CIVIL RICO LITIGATION IN FEDERAL COURTS § 1, at 1 (2014), [https://jenner.com/system/assets/publications/12740/original/Civil\\_RICO\\_2014.pdf?1393971640](https://jenner.com/system/assets/publications/12740/original/Civil_RICO_2014.pdf?1393971640) [<https://perma.cc/22NK-PM3E>]. RICO’s damage multiplier might be particularly alluring these days, as the Supreme Court has clamped down on punitive damages. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

and ultimately, skew the civil justice system further in favor of well-heeled players.<sup>19</sup>

Beyond that, retaliatory RICO's rise offers an occasion to assess carefully and systematically the fraud problem that plagues the tort liability system, perhaps for the first time. The problem of fraud is undeniably significant. And there's no question that fraudulent claiming (alongside its close cousin, "frivolous claiming") has been relentlessly trotted out to justify broad-brush attacks on the tort system's core. Yet, we know astonishingly little about the problem we're all seemingly so eager to address.<sup>20</sup> We lack an agreed-upon vocabulary to describe the conduct at issue. We do not know, even vaguely, where, when, how often, or under what conditions, such conduct proliferates.<sup>21</sup> Further, though tort reform advocates have embraced RICO because, they say, conventional fraud deterrence mechanisms are insufficient, we do not have anything approaching a comprehensive inventory of the formal and informal mechanisms that already exist in a fraud-fighter's arsenal, descriptions of how those mechanisms operate, or even a rudimentary sense of how those mechanisms fare.<sup>22</sup> Lastly, though a few courts have started to green-

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19. The American Association for Justice (AAJ) identified some of these concerns in a 2014 brief in the CSX case, explored *infra*. See Brief of Amicus Curiae American Association for Justice in Support of Defendants-Appellants and Reversal at 21–28, CSX Transp., Inc. v. Peirce, No. 13-2235, (4th Cir. Mar. 3, 2014) 2014 WL 882782 [hereinafter AAJ Brief]. For how the civil justice system is being slanted in favor of defendants, see Miller, *supra* note 14, at 357–59, 364. See also STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE (2015).

20. While some have explored the problem in particular silos (bemoaning fraud in asbestos litigation, the workers' compensation system, or the auto accident realm, for example), vanishingly few have stepped back to analyze the problem *across* the tort law landscape. See Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 166–70 (2004) (describing specious tort claims as "the proverbial 800 pound gorilla" that "has corrupted the civil justice system" but of which "there is simply no acknowledgement" by scholars); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1227 n.21 (2008) [hereinafter Brickman, *Screenings*] (observing that "the subject of mass tort fraud is studiously avoided by most tort scholars"); Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983, 1011–12 (1993) ("I know of no major law review articles in the modern era that have dealt with the problems of waste, fraud, and abuse in . . . tort law itself. Modern torts scholars, it seems, either do not regard the problems as real ones—or . . . do not regard them as congenial for purposes of their own research efforts.").

21. In the words of Arthur Miller: "We never have defined either abusive litigation behavior or frivolous lawsuits; we never have measured the frequency of either; we do not know who is guilty of such conduct or which side of the litigation is more prone to commit such conduct . . ." Miller, *supra* note 14, at 361; see also Carroll & Abrahamse, *supra* note 8, at 229 ("Empirical estimates of the extent of excess claiming across the nation are not available.").

22. For example, ATRA's Tiger Joyce has insisted that RICO suits are warranted because "authorities largely seem to ignore fraud perpetrated by the lawsuit industry," and public officials "won't act to investigate and punish the obvious corruption and fraud in our civil courts." Joyce, *New Way*, *supra* note 16.



light retaliatory RICO actions, there has yet to be sustained scholarly analysis addressing whether use of this new mechanism is on balance beneficial—or even surfacing relevant risks.<sup>23</sup>

To bridge these gaps, this Article unfolds in five parts. Part I begins the inquiry by bounding, categorizing, and mapping the fraud concept. As such, it defines what constitutes a fraudulent claim and distinguishes between “fraudulent” and “frivolous” litigation. It then offers a typology of five distinct types of fraudulent-claiming behavior and, drawing on that typology, identifies where fraud is most apt to be found.

Part II pivots to RICO. It first traces RICO’s creation in the 1970s, its explosion in the 1980s, and its more recent retrenchment. Then it considers the matter directly at hand, chronicling two recent, prominent, and successful attempts by corporate entities to assert retaliatory RICO claims against plaintiffs and their lawyers and allies. With more than a trace of irony, this Part shows that civil RICO, once dubbed the “darling of the plaintiffs’ bar,” is now poised to become its foe.<sup>24</sup>

Part III puts RICO’s recent utilization in context by identifying and evaluating *conventional* methods to deter and punish fraudulent suits. Thus, Part III assembles in one place the myriad formal and informal fraud-fighting tools already available and offers an initial assessment of those tools’ weaknesses and strengths. This exercise yields three important insights. The first is that the past decade has witnessed a surge in anti-fraud activity. Over the last ten or fifteen years, private insurers, legislators, trust administrators, fraud bureaus, criminal prosecutors, and state and federal judges have all stepped up fraud-fighting efforts—seemingly, to positive effect.<sup>25</sup> Second, the exercise reveals that most fraud-fighting mechanisms only operate once a lawsuit is actually initiated. Thus, to the extent gaps *do* exist in the current, sprawling, multi-faceted regulatory regime, they are far more likely to exist when it comes to unfiled, as opposed to filed, claims. Third, Part III’s inventory highlights that courts have, for centuries, struggled with how to strike a sensible balance between tolerating abusive actions and going too far in the opposite direction, which would, inevitably, chill meritorious litigation, dampen zealous advocacy, and compromise the finality of judgments. Thus far in weighing these countervailing risks, courts have proceeded cautiously; they have penalized the initiation of litigation only infrequently and in truly exceptional circumstances. This suggests that, for better or worse, permitting

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23. *But cf.* H. Robert Fiebach, *A Chilling of the Adversary System: An Attorney’s Exposure to Liability from Opposing Parties or Counsel*, 61 TEMP. L. REV. 1301, 1315–20 (1988) (describing the “[m]enace of RICO [c]laims to the [a]dversary [s]ystem”); Briana Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165 (2016) (critiquing this new trend).

24. Andrew B. Weissman, *Moss Makes RICO Statute the Darling of Plaintiffs’ Bar*, LEGAL TIMES, Dec. 19, 1983, at 10.

25. Here and throughout, when I discuss “success” in fighting fraud, I am speaking narrowly about whether the particular fraud-fighting mechanism curtails fraudulent filings. I am not implying that the mechanism is, on balance, beneficial. For further context, see *infra* notes 243–249 and accompanying text.

a free-wheeling retaliatory RICO action would represent a stark departure from past practice.

Part IV then hones in on three potential problems with retaliatory RICO's rise, at times drawing on our past experience strengthening Rule 11 for empirical support. The first is distortion: retaliatory RICO suits threaten to distort conventional state and federal fraud-fighting mechanisms. The second is overdeterrence: because it's a "sledge-hammer," RICO is bound to overdeter and chill the initiation—and affect the litigation—of valid, as well as spurious, claims.<sup>26</sup> The third involves collateral consequences: even if retaliatory RICO suits do successfully reduce litigation fraud, that benefit will come at a very high cost.

Finally, Part V offers a prescriptive contribution. Parts I through IV of this Article identify where fraud is most likely to be found, where gaps in the current regulatory architecture are most likely to exist, and also where retaliatory RICO's use is apt to be particularly problematic. Drawing on these insights, Part V concludes that, though civil RICO may well have a role to play in deterring fraudulent filings, its use ought to be guided by the touchstones of *restraint* and *equality*. In terms of *restraint*, RICO may be profitably used if the conduct at issue involves a large, far-flung, and orchestrated scheme. But the statute should not be used to penalize the initiation of any single lawsuit, no matter how unjustified that suit may be. Interestingly, in most retaliatory RICO cases decided thus far, courts have, with only a few exceptions, hewed to this line. Part V suggests that courts ought to continue to exhibit this restraint and resist calls to expand the statute, no matter how loud or insistent those calls become.

Meanwhile, in terms of *equality*, courts should ensure that, *if* RICO is sharpened into a weapon to combat litigation fraud, there is not an asymmetric armament. If plaintiffs can fall within the statute's crosshairs for their egregious conduct while manufacturing claims, defendants ought to fall within the statute's crosshairs when they behave egregiously while seeking to defeat or diminish a plaintiff's valid claim to relief. What is good for the goose, in other words, is good for the gander, too.

#### I. DEFINING THE "FRAUDULENT CLAIM"

Before examining the pockets of fraud within the tort liability system, it is essential to recognize that, despite the persistence and resonance of claims to the contrary, there is no evidence that the tort system *as a whole* is beset with fraudulent, abusive, or vexatious litigation. Indeed, according to a recent study by the Federal Judicial Center, 85 percent of U.S. district court judges believe that "groundless litigation" is either "no problem" or is a

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26. Larry E. Parrish, *RICO Civil Remedies: An Untapped Resource for Insurers*, 49 INS. COUNS. J. 337, 349 (1982) (describing RICO as a "sledge-hammer").

small or very small problem. Only 3 percent of judges believe that it is a large or very large problem.<sup>27</sup>

Further, though fraudulent claiming is, admittedly, wickedly difficult to quantify, the limited available evidence generally supports judges' assessments.<sup>28</sup> The best studies indicate that most tort lawsuits are meritorious.<sup>29</sup> Further, when nonmeritorious tort lawsuits *are* filed, they are often abandoned soon after discovery.<sup>30</sup> This suggests that litigants file suit not to dupe the system or to obtain unjustified paydays, but rather, to gain access to material bearing on the defendant's culpability. Once that material is in hand, more often than not, litigants make sensible and appropriate judgments as to whether or not to proceed.

That said, some pockets of fraudulent claiming activity do exist—and this claiming activity must be better defined, identified, and understood. The remainder of Part I thus bounds, categorizes, and maps the fraud concept. Specifically, Section A bounds the analysis by defining fraud and distinguishing between the fraudulent—and the merely frivolous—claim. With fraud defined, Section B categorizes the fraud concept by breaking fraud down into five distinct types. Then, Section C draws on this typology to map where fraud is most likely to exist—and, just as importantly, not exist—across the contemporary tort liability system.

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27. DAVID RAUMA & THOMAS E. WILLGING, REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 3–4 (2005).

28. Fraud is difficult to gauge, in part, because “the very essence of fraud is concealment.” FLA. INS. RESEARCH CTR., UNIV. OF FLA., AUTOMOBILE INSURANCE FRAUD STUDY 24 (1990). In addition, the vast majority of lawsuits settle (often confidentially), and settlements often mask evidence of fraud. For scholars' dogged attempts to overcome these obstacles, see *infra* note 40.

29. In the medical malpractice context, for example, the best evidence suggests that the majority of filed medical malpractice claims (defined merely as written demands for compensation) involve both a bona fide error and a verifiable injury. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2024 (2006). Even Lester Brickman, an outspoken critic of the contemporary tort system, acknowledges that only “a minute fraction” of filed tort claims are “*totally* without any legal or factual basis.” LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 121 (2011); accord HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 75 (1991) (“[T]here is no evidence to support contentions that large numbers of [frivolous] cases actually lead to litigation.”).

30. See David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1103 (2006) (“Empirical studies do not support the inference that plaintiffs' attorneys file lawsuits they know are weak. The studies find that ‘drops’ occur when cases thought to be strong initially turn out to be weak once discovery is performed.”).

A. *Bounding the Concept: Distinguishing “Fraud” from “Frivolity”*

I begin by distinguishing between the “fraudulent” and the simply “frivolous” claim. Itself a notoriously slippery and elusive concept,<sup>31</sup> the “frivolous claim” label has been attached to a range of litigation that runs the gamut from suits with a negative expected value (i.e., suits in which the expected trial award is insufficient to cover the plaintiff’s litigation costs),<sup>32</sup> to suits initiated without adequate prefiling investigation,<sup>33</sup> to suits that are objectively unlikely to succeed,<sup>34</sup> to those suits that are spectacularly far-fetched.<sup>35</sup>

For present purposes, I need not parse these various definitions. But I do need to draw a clear line between the constellation of claims that may be considered “frivolous” and the smaller constellation of claims properly considered “fraudulent.” As I define it, a claim is “fraudulent” if the plaintiff or his or her lawyer has actual or constructive knowledge that some material element of the claim is not as it is portrayed.<sup>36</sup> Thus, a claim might be a long

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31. GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES* 244–45 (Richard G. Johnson ed., 3d ed. 2004) (“No workable test for frivolousness has been articulated, although courts and judges have tried.”); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (“We have no . . . common agreement on what constitutes a ‘frivolous suit.’”); *id.* at 596 (“Frivolous litigation . . . is difficult to define and almost impossible to observe, and it defies all attempts at simple explanation.”).

32. Eric Rasmusen, *Predictable and Unpredictable Error in Tort Awards: The Effect of Plaintiff Self-Selection and Signaling*, 15 INT’L REV. L. & ECON. 323, 337 (1995) (defining frivolous suits as those where “the expected value of the court award is less than the plaintiff’s transaction costs of obtaining the award”).

33. Bone, *supra* note 31, at 532 (suggesting that a suit is “frivolous” if, inter alia, a “plaintiff files without conducting a reasonable prefiling investigation”).

34. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 185–86 (2000) (“For most litigants . . . a frivolous case is simply a case in which the plaintiff has a low probability of prevailing at trial.”).

35. Adopting this last definition, Judge Frank Easterbrook has explained that “something is frivolous only when (a) we have decided the very point, and recently, against the person reasserting it, or (b) 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it’s untenable.” Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 375 (1987) (quoting Easterbrook).

36. Below, I say a lot about the “what” of fraudulent claiming while saying relatively little about the “who”—that is, whether lawyers, clients, or both are responsible. This lack of specificity is intentional, for when it comes to who bears the blame, there is great variation. In some instances, the lawyer displays the requisite mens rea (i.e., the lawyer has actual or constructive knowledge that some material element of the claim is not as it is portrayed), while the client does not. *See, e.g., In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005) (recognizing that, in the *Silica* litigation, many misdiagnosed plaintiffs were themselves victimized, as they were wrongly led to believe they had “a life-threatening condition”); James F. McCarty, *Judge Becomes National Legal Star Bars Firm from Court over Deceit*, *PLAIN DEALER* (Cleveland), Jan. 25, 2007, at B1 (noting that, though fraudulent claims were filed seeking compensation for Harry Kananian’s asbestos injury, “there was no evidence Kananian or his family was aware of their lawyers’ deceit”). In other instances, meanwhile, only the client may know that the claim is unjustified. (That may have been true, for example, in the case of

shot. It might induce head shakes and eye rolls. It might reflexively and properly trigger dismissal. But if no material aspect of the claim is fabricated or manufactured, the claim is not fraudulent. Obfuscation, fabrication, and deceit are the sine qua non of fraudulent litigation.<sup>37</sup>

### B. *Categorizing Fraud: A Typology of Fraud's Five Types*

Under the “fraud” umbrella, claiming activity can then be further broken down into five types. These include: (1) injury exaggeration, (2) injury fabrication, (3) obstacle avoidance, (4) the wholly manufactured claim, and (5) oversubscription.

To be sure, these categories are neither perfect nor pristine: the lines dividing the five ideal types sometimes blur. Some cases occupy multiple categories (e.g., a plaintiff might both exaggerate an injury and also fabricate evidence concerning the defendant’s culpability for that exaggerated injury). And even with the benefit of hindsight, some cases resist clear categorization, either as to whether they are fraudulent at all or, if they are, what kind of fraud they exhibit. But despite this conceptual blurriness, the categorization scheme helps us to identify, sort, and begin to assess the fraud problem in the tort litigation system. Below, Table 1 identifies the five types of fraud, offering examples of each.

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Richard Swimm, discussed below.) Finally, on some occasions, both the lawyer and the client are in on the scheme. *See, e.g.,* *Feld Entm’t Inc. v. Am. Soc’y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 300–02 (D.D.C. 2012) (suggesting that both plaintiffs and plaintiffs’ counsel were engaged in obfuscation). Sidestepping this complication, for current purposes, I define a claim as “fraudulent” if the plaintiff *or* his or her lawyer has actual or constructive knowledge that some material element of the claim is not as it is portrayed.

37. *See* MODEL RULES OF PROF’L CONDUCT R. 1.0(d) (AM. BAR ASS’N 2016) (“‘Fraud’ or ‘fraudulent’ denotes conduct that . . . has a purpose to deceive.”); JAY M. FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON’T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* 168 (2010) (offering the Coalition Against Insurance Fraud’s definition of fraud as “when someone intentionally deceives another about an insurance matter to receive money or other benefits not rightfully theirs”); *Fraud*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”); William C. Lesch & Bruce Byars, *Consumer Insurance Fraud in the US Property-Casualty Industry*, 15 J. FIN. CRIME 411, 412 (2008) (offering the Insurance Information Institute’s definition of insurance fraud as “a deliberate deception perpetrated against or by an insurance company or agent for the purpose of financial gain”).

TABLE 1  
FRAUD TYPES, CHARACTERISTICS, AND EXAMPLES

Type	Characteristics	Example(s)
Injury Exaggeration	Plaintiff tacks request for excess compensation onto otherwise meritorious claim	-Medical buildup in the auto accident context -Plaintiff intentionally malingers, accruing excessive lost wages
Injury Fabrication	Plaintiff seeks compensation for a nonexistent or preexisting injury, following a bona fide accident involving the at-fault defendant	-Plaintiff seeks compensation for whiplash reportedly suffered in car wreck even though the plaintiff's neck is fine
Obstacle Avoidance	Plaintiff uses falsehoods to overcome legal impediments to recovery	- <i>American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.</i> , which involved deception regarding whether a plaintiff satisfied Article III's standing requirements -Plaintiff lies about an injury's onset to fit a claim within a statute of limitations
Wholly manufactured claim	Plaintiff seeks compensation, though the plaintiff and/or the plaintiff's attorney knows the plaintiff has no valid entitlement to relief	-Plaintiff stages an auto accident -Plaintiff stages a slip-and-fall accident
Oversubscription	A settlement fund, defendant, or trust is overrun by those without a valid entitlement to relief. This is a creature of mass torts  <i>Oversubscription often comes in one of three forms:</i>	
	-Deliberate Misdiagnosis	-Fen-Phen, Silica, and Asbestos
	-Defendant Manipulation	-Baron & Budd Memorandum
	-Double Dipping	-Plaintiff seeks relief from multiple funds, using contradictory theories or while deliberately concealing duplicate payments

The first fraud category is *injury exaggeration*. Sometimes called “padding” or “medical buildup,” injury exaggeration involves the submission of a meritorious claim for a bona fide injury that deliberately tacks on a demand for excess compensation, typically by inflating claimed medical expenses. A paradigmatic example would be an auto accident victim who has suffered whiplash and, to treat her genuine neck pain, visits a physical therapist twelve times, rather than six times, in order to inflate her claimed economic loss. In our example, these six extra visits obviously benefit the therapist

(who profits from the extra treatment). But they benefit the accident victim too, given the collateral source rule (in those states where it still exists<sup>38</sup>) and because, in the rough-and-tumble world of claims adjustment, a claimant's medical bills are typically used as a rough benchmark from which to calculate her noneconomic damages. As such, the higher the medical bills, the higher the plaintiff's ultimate reward.<sup>39</sup>

A number of researchers have assessed the prevalence of injury exaggeration using several different methodologies. Unfortunately, though, the one thing these studies prove for certain is that (like fraud, more generally), injury exaggeration is a remarkably difficult thing to quantify; each methodology is susceptible to criticism.<sup>40</sup> But even with that caveat, two findings stand out. First, the studies consistently indicate that, particularly in the auto accident realm, injury exaggeration imposes substantial costs. Most notably, the Insurance Research Council (IRC)—which periodically gathers and publishes data from American auto insurers—estimates that a whopping 20 percent of *all* paid third-party, bodily injury auto accident claims involve the deliberate inflation of damages.<sup>41</sup> Second, the studies also consistently indicate that injury exaggeration is the most prevalent form of litigation abuse.

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38. The collateral source rule bars the admission of evidence showing that a plaintiff's losses have been fully or partially compensated by another source, such as the plaintiff's health insurance. As a consequence, in the absence of subrogation, the rule may allow a plaintiff to be compensated twice. The rule has been under fire in recent years and has been abrogated or modified in many states. For context, see *Collateral Source Rule Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/collateral-source-rule-reform> [<https://perma.cc/FX8S-J8KB>] (collecting enactments).

39. For more on this dynamic, see Engstrom, *supra* note 6, at 343. No-fault laws with monetary thresholds create an extra incentive to pad claims, because the higher the medical bills, the better the chance of piercing the threshold, permitting entrance into the traditional tort system. *See id.* at 342–44. If neither the claimant nor her lawyer is aware of the overtreatment, then the claim is not “exaggerated” for current purposes.

40. Some develop estimates by having knowledgeable adjusters evaluate claims files. *See, e.g.*, FLA. INS. RESEARCH CTR., *supra* note 28, at 25–30; INS. RESEARCH COUNCIL, FRAUD 2008, *supra* note 7, at 7; INS. RESEARCH COUNCIL, FRAUD AND BUILDUP IN AUTO INJURY CLAIMS: PUSHING THE LIMITS OF THE AUTO INSURANCE SYSTEM (1996) [hereinafter INS. RESEARCH COUNCIL, FRAUD 1996]. But while these studies tell us a great deal about suspected fraud, they do not tell us for sure whether the claim is actually exaggerated. Others draw estimates by considering suspicious jurisdictional variations, *e.g.*, J. David Cummins & Sharon Tennyson, *The Tort System “Lottery” and Insurance Fraud: Theory and Evidence from Automobile Insurance* 5–6 (Wharton Sch. Fin. Insts. Ctr., Univ. of Pa., Working Paper 94-05, 1993), <http://fic.wharton.upenn.edu/fic/papers/94/9405.pdf> [<https://perma.cc/AG9X-WPRW>], by examining the ratio of bodily injury claims to property damage claims over time, *e.g.*, Hoyt et al., *supra* note 14, at 428, or by evaluating the ratio of “hard” to “soft” injuries, *e.g.*, Carroll & Abrahamse, *supra* note 8, at 235. But these studies cannot rule out that some jurisdictional or temporal variation arises innocently. At the opposite end of the spectrum, some measure fraud by counting fraud convictions. *E.g.*, Richard A. Derrig & Valerie Zicko, *Prosecuting Insurance Fraud—A Case Study of the Massachusetts Experience in the 1990s*, 5 RISK MGMT. & INS. REV. 77, 77 (2002). But that seems destined to underestimate fraud's prevalence, probably dramatically. Further clouding the analysis, many estimates are generated by insurers or insurer-funded organizations, and insurers have an incentive to overstate fraud's prevalence, since high levels of fraud may justify frequent claim denials. *See* FEINMAN, *supra* note 37, at 170.

41. INS. RESEARCH COUNCIL, FRAUD 2008, *supra* note 7, at 2, 14.

It is far more prevalent, researchers agree, than injury fabrication or the outright manufacture of claims.<sup>42</sup>

Second, rather than merely exaggerating an injury (as above), a plaintiff may engage in *injury fabrication*. Injury fabrication refers to the submission of claims for nonexistent or preexisting injuries following a bona fide accident at the hands of an at-fault defendant. In the auto accident context, it appears that injury fabrication is again quite common, particularly among those seeking damages for so-called soft-tissue injuries (typically sprains, strains, contusions, and whiplash). Indeed, a 2001 study of auto claiming behavior concluded that nearly half (42 percent) of soft-tissue-injury claims (defined narrowly as sprains and strains to the neck and back) were for nonexistent or preexistent injuries.<sup>43</sup> Note that in both of these first two fraud types, the defendant may well be at fault, and the law may well entitle the plaintiff to relief. Only the damages are manipulated.

The third fraud category is *obstacle avoidance*. Obstacle avoiders are those who may have sustained an injury at the hands of an at-fault defendant but, facing technical obstacles under the formal law, take duplicitous steps to eliminate, minimize, or circumvent those obstacles. For this, *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*,<sup>44</sup> described in some detail in Part II below, is a paradigmatic example. In *Feld*, the defendants may well have violated the applicable statute. But, owing to restraints imposed by *Lujan v. Defenders of Wildlife* and its progeny, the plaintiffs had trouble satisfying Article III's standing requirement.<sup>45</sup> It was in their haste to satisfy that requirement that they took a series of questionable steps. Another example might be a plaintiff, eager to fit her claim into a two-year statute of limitations, who "misremembers" when exactly she initially fell ill. Or another might be a patron who slips and sustains an injury on the defendant's premises, but later, in an effort to satisfy demanding constructive-notice requirements, offers fabricated testimony concerning what the state of the dangerous condition was.

There are no reliable estimates concerning the prevalence of obstacle avoidance. Indeed, the closest thing we have to empirical evidence is a non-scientific test conducted back in 1980 by *The American Lawyer* magazine.<sup>46</sup> In that experiment, a journalist posing as an accident victim in a slip-and-fall case approached thirteen New York City lawyers purporting to seek representation. As the journalist described her "case" to the lawyers, she made it clear she had tripped outside a construction zone on a city sidewalk, though

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42. Sharon Tennyson & Pau Salsas-Forn, *Claims Auditing in Automobile Insurance: Fraud Detection and Deterrence Objectives*, 69 J. RISK & INS. 289, 289–90 (2002) (reporting that all relevant studies conclude that "the vast majority of suspicious claims involved potential buildup" rather than the outright manufacture of claims).

43. Carroll & Abrahamse, *supra* note 8, at 247–48 (offering this "conservative" estimate for both tort and dollar-threshold no-fault states—though recall, for reasons described *supra* at note 40, this estimate may over- or under-estimate fraud's prevalence).

44. 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd*, 659 F.3d 13 (D.C. Cir. 2011).

45. *Id.* (citing 504 U.S. 555 (1992)).

46. Jane Berentson, *Integrity Test*, AM. LAW., May 1980, at 15.



the statute of limitations against the city had run. Picking up on this, the majority of lawyers declined the representation, correctly insisting: “You have no one to sue.”<sup>47</sup> Dispiritingly, though, plenty of attorneys did offer to help. In fact, a solid minority (five of the thirteen), made it clear that they would represent the journalist, using deceit to overcome legal impediments. “All you have to do,” said one, “is shade the facts a bit.”<sup>48</sup> This test might suggest that lots of lawyers are willing to fib to overcome technical obstacles. But of course, the study’s tiny sample size, old age, and limited geographic reach substantially impair its generalizability. Further, even if we could theoretically say that many lawyers are willing to engage in obstacle avoidance, that does not necessarily imply that many lawyers actually embrace the tactic.

A fourth fraud type is the *wholly manufactured claim*. Here, a plaintiff seeks compensation though either she or her attorney knows she has no valid entitlement to relief. Examples might be a plaintiff who sues a drug company for causing her impairment, though she never actually ingested the drug at issue—or an employee who files a workers’ compensation claim, although she was hurt at home, rather than on the job. The case of Richard Mark Swimm of Greensboro, North Carolina, provides another exemplar. Before his 1982 criminal prosecution, Swimm apparently made something of a living by drinking sodas in supermarkets and convenience stores, spitting the soda on the floor, and then “slipping” on the mess he’d created.<sup>49</sup> Further examples are claimants who stage or deliberately cause auto accidents (such as by the so-called “swoop-and-squat”), claimants who seek compensation though they were not actually involved in the collision at hand (“jump-ins”), and claimants who simply make the whole thing up (“paper accidents”).<sup>50</sup> Though stories of manufactured claims are certainly colorful, by most accounts, these claims are rare.<sup>51</sup> In the auto accident context, for example, studies suggest that wholly manufactured claims account

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47. *Id.* at 16. Or, “[n]o lawyer is going to help you if he knows you’re lying.” *Id.*

48. *Id.* at 17.

49. DORNSTEIN, *supra* note 13, at 267.

50. INS. RESEARCH COUNCIL, FRAUD 1996, *supra* note 40, at 14 (describing the “swoop-and-squat”); Melanie Campbell, *OIFP Civil Enforcement Actions Pack a One-Two Punch in the Fight on Fraud*, N.J. INS. FRAUD, Mar. 2004, at 48 (describing “jump-ins”), [http://www.nj.gov/oag/insurancefraud/report/oifp-ar-2003-complete\\_rv10.24.12.pdf](http://www.nj.gov/oag/insurancefraud/report/oifp-ar-2003-complete_rv10.24.12.pdf) [<https://perma.cc/LEX4-T3N6>]; Mark Thompson, *Highway Robbery*, CAL. LAW., May 1991, at 28 (describing “paper accidents”).

51. To be fair, a provocative 2011 study casts some doubt on the scarcity of manufactured claims. Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011). In this study, 734 lawyers were presented with a hypothetical negotiation scenario, where they were told that they represented a client who believed his ex-girlfriend had infected him with the “DONS virus,” a fictitious, allegedly fatal disease, transmitted via sexual contact. *Id.* at 116. The client (at least initially) believed he was infected because he took two DONS home tests, both of which were positive. *Id.* Moments before the start of a negotiation with the ex-girlfriend and her attorney, however, the client revealed to the lawyer that the two positive tests were, in fact, false positives. Yet the client asked the lawyer to push ahead, to try to secure compensation for the

for roughly 3 percent of paid claims and 13 percent of claims that are ultimately denied.<sup>52</sup>

A fifth and final type of fraud, commonly dubbed *oversubscription*, is a creature of the mass tort universe.<sup>53</sup> Oversubscription refers to the phenomenon where, following a mass tort, some excess claimants flock to the scene—whether entirely on their own volition or as a result of recruitment by shady lawyers and claims brokers. Here, typically, the underlying lawsuit was found or conceded to be meritorious, and *some* claimants are genuinely entitled to relief. Yet, sensing a payday, extra claimants come forward with their hands out, and it is the tacked-on claimants' entitlement to relief that fairly generates skepticism. Beyond that, as Table 1 indicates, oversubscription often takes one of three forms: misdiagnosis, defendant manipulation, or double dipping. The most familiar type of oversubscription, "misdiagnosis," refers to diagnoses that are deliberately fabricated or distorted. "Defendant manipulation" refers to filing claims against a defendant who is not liable when the *actual* tortfeasor is a less attractive target. Finally, "double dipping" refers to the initiation, and deliberate concealment, of inconsistent claims against multiple tortfeasors.

No empirical study quantifies oversubscription's prevalence, but it appears that it has plagued many, and perhaps most, of the nation's most prominent mass torts.<sup>54</sup> For instance, oversubscription became a problem in the 1981 Hyatt Skywalk collapse case where, according to Francis McGovern, "more people filed claims than there were people who could have possibly been in virtually every hotel in Kansas City."<sup>55</sup> Oversubscription was also at play in the recent BP Deepwater Horizon class action settlement. There, capitalizing on the settlement's objective but flexible definition of a compensable claim, some imaginative plaintiffs' lawyers advertised to local businesses that they could "be compensated for losses that are unrelated to the spill."<sup>56</sup>

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phantom infection, and to "refrain from revealing the fact that he does not have the disease during the negotiation." *Id.* at 116–17. Of course, to acquiescence to the client's demand would make the lawyer complicit in pursuing a "wholly manufactured" claim. The study's authors reported, however, that 19 percent of surveyed lawyers (142 respondents) said they would do just that, while another 19 percent (140 respondents) were not sure how they would respond. *Id.* at 118. As noted, the study is provocative—and it certainly casts a shadow on lawyers' negotiation ethics. However, the study stops far short of showing that actual claims, initiated by real clients, in the real world, are in fact frequently manufactured or feigned.

52. INS. RESEARCH COUNCIL, FRAUD 2008, *supra* note 7, at 9–10; INS. RESEARCH COUNCIL, FRAUD 1996, *supra* note 40, at 18 fig.3-1.

53. For more on oversubscription, see generally S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559 (2012).

54. See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688 (1989) ("[M]ature mass torts generate an overabundance of plaintiffs . . . including a substantial number of false positive claims.").

55. Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1024 (1995).

56. Philip Sherwell, *Louisiana Makes a Dash for BP's Cash*, DAILY TELEGRAPH (London), Aug. 3, 2013, at 20 (quoting a solicitation letter by lawyer Kevin McLean); see also Scott Pelley, *BP Cries Foul in Massive Oil Spill Settlement*, CBS NEWS (May 4, 2014), <http://>

Oversubscription played at least some part in the first-responder litigation initiated in the wake of September 11th.<sup>57</sup> And, oversubscription involving misdiagnosis notoriously swamped the 2005 *Silica* MDL, where transferee Judge Janis Graham Jack concluded that the medical diagnoses underlying the claims of roughly 10,000 plaintiffs were “manufactured for money.”<sup>58</sup>

In the early 2000s, the fen-phen litigation, in which thousands of plaintiffs claimed to have sustained heart damage after taking the diet-drug combination of fenfluramine and phentermine, was the target of similar shenanigans. There, the lead plaintiffs’ lawyer for the fen-phen class alleged that a stunning 70 percent of class claimants had diagnoses for severe heart-valve damage that were “medically unfounded and unjustified because the claimant doesn’t have the condition.”<sup>59</sup> A Duke University cardiologist called in to review claimants’ echocardiograms concluded: “Thousands of people have been defrauded into believing that they have valvular heart disease when in fact they do not.”<sup>60</sup> And, the federal judge overseeing the litigation

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www.cbsnews.com/news/over-a-barrel-bp-oil-spill-settlement-60-minutes [https://perma.cc/VT9C-8KUT] (rebroadcast Sept. 7, 2014). Under the agreement, a business qualified for compensation if its revenue dropped in the months after the spill and then subsequently rebounded. Susan Beck, *How BP Decided to Fight the Deepwater Settlement*, AM. LAW. (Feb. 27, 2014) (on file with the *Michigan Law Review*). Before that, the Gulf Coast Claims Facility (GCCF)—the no-fault fund created in the wake of the Deepwater Horizon spill—also saw a “substantial” number of fraudulent filings. According to Kenneth Feinberg, the GCCF’s administrator, the GCCF determined that roughly 18,000 individual applications (out of 1.1 million filed) appeared fraudulent; of those, 4,000 were so suspicious that the GCCF referred the claimants to the Department of Justice for criminal investigation. Jay Weaver, *Fraud Pollutes BP Oil-Spill Compensation Fund for Gulf Coast Victims from Florida to Louisiana*, MIAMI HERALD (Aug. 19, 2012, 5:00 AM), <http://www.miamiherald.com/latest-news/article1942087.html> [https://perma.cc/SBE9-484D]. Federal officials followed up and ultimately brought numerous indictments. See generally U.S. DEP’T OF JUSTICE, DISASTER FRAUD TASK FORCE: REPORT TO THE ATTORNEY GENERAL FOR FISCAL YEAR 2011 (2011) (summarizing disaster-related fraud investigations and prosecutions).

57. *NYC Sees Fraud in Some 9/11 Health Claims*, CBS NEWS (Feb. 17, 2010, 7:50 PM), <http://www.cbsnews.com/news/nyc-sees-fraud-in-some-9-11-health-claims> [https://perma.cc/4TTP-BB9Q] (reporting on “several instances in which . . . people who claimed to have been sickened by World Trade Center ash were already ill before the attacks”).

58. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635–36 (S.D. Tex. 2005); *id.* at 632 (concluding that the silicosis “epidemic” was “largely the result of misdiagnosis”).

59. Robert Lenzner & Michael Maiello, *The \$22 Billion Gold Rush*, FORBES (Mar. 24, 2006, 8:20 PM), <http://www.forbes.com/forbes/2006/0410/086.html> [https://perma.cc/2K4W-ML6G] (quoting class counsel Michael Fishbein); see also Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-Phen a Disaster of a Mass Tort*, AM. LAW., Mar. 2005, at 91 (calling fen-phen “a veritable catalogue of ignominy”).

60. Lenzner & Maiello, *supra* note 59 (quoting Dr. Joseph Kisslo). For more on Kisslo’s involvement and conclusions, see Emilie Lounsberry, *Federal Authorities Targeting Fraud in Fen-Phen Claims*, PHILLY.COM (Sept. 18, 2005), [http://articles.philly.com/2005-09-18/news/25428608\\_1\\_fen-phen-pondimin-heart-valve-disease](http://articles.philly.com/2005-09-18/news/25428608_1_fen-phen-pondimin-heart-valve-disease) [https://perma.cc/NM69-D6EB].

wryly noted that one physician—who reviewed more than 10,000 echocardiograms to make relevant diagnoses—had “a mass production operation that would have been the envy of Henry Ford.”<sup>61</sup>

Meanwhile, asbestos litigation—described in more detail in Part II—has put all three types of oversubscription on vivid display. Misdiagnosis has been a recurring problem, both in litigated claims and claims resolved via mass settlements.<sup>62</sup> Misdiagnoses have also repeatedly bedeviled asbestos trusts. For example, the Johns-Manville trust, which was created following the company’s 1982 bankruptcy, has been perpetually strapped for cash and overrun by claims that rely for documentation on the opinions of a small cohort of radiologists and pulmonologists who have offered qualifying diagnoses under highly suspicious circumstances.<sup>63</sup>

At the same time, some other asbestos claimants have engaged in defendant manipulation, as some defendants (typically those who have not yet declared bankruptcy) make far more appealing targets than others.<sup>64</sup> One notorious example of apparent defendant manipulation is found in the

61. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 236 F. Supp. 2d 445, 455 n.11, 457 (E.D. Pa. 2002) (describing Dr. Linda Crouse); Reed Abelson & Jonathan D. Glater, *Tough Questions Are Raised on Fen-Phen Compensation*, N.Y. TIMES (Oct. 7, 2003), <http://www.nytimes.com/2003/10/07/business/tough-questions-are-raised-on-fen-phen-compensation.html?pagewanted=all&r=0> (on file with the *Michigan Law Review*). The fen-phen Trust, created to pay class members’ claims, ultimately initiated a RICO claim against Dr. Crouse alleging that she “intentionally defrauded the Trust by certifying that thousands of claimants had serious valvular heart disease (‘VHD’) when she had no reasonable basis for certifying that they did or, even worse, knew that they did not.” Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss Complaint at 1, *Castle v. Crouse*, No. Civ.A. 03-5252 (E.D. Pa. Dec. 22, 2003), 2003 WL 24851754. According to the Trust, this misconduct caused it to “pay out millions of dollars to persons who never had VHD.” *Id.*

62. See, e.g., *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 WL 72588, at \*1–2, \*11 (D. Kan. May 30, 1990) (concluding that the procedures that supported some 6000 tire workers’ claims reflected “indifference” as to “professional standards” and amounted to a “professional farce!” that made “a mockery of the practices of law and medicine!”); Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 843 (2004) (considering 492 x-rays and finding that, while B Readers hired by plaintiffs’ counsel found asbestos-related lung abnormalities in 95.9 percent of the sample, independent B Readers found abnormalities in 4.5 percent of the sample, a difference “too great to be attributed to interobserver variability”); R. B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. OCCUPATIONAL MED. 1088, 1088–89 (1990) (reviewing 439 filed asbestos claims and finding that, at most, 3.6 percent of claimants actually had conditions consistent with asbestos exposure).

63. See ABA COMM’N ON ASBESTOS LITIGATION, REPORT TO THE HOUSE OF DELEGATES 8 (2003) (reporting that 49.6 percent of the “tens of thousands of non-malignancy claims” received by the Trust were the work of “just ten doctors” and that certain physicians’ diagnoses “failed independent review more than 50% of the time”); STEPHEN J. CARROLL ET AL., THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA 17 (2009) (noting that the now-discredited Dr. Ray Harron—whose work will be discussed at length in Part II—had, by 2005, “submitted documents in support of at least 53,724” of the Manville Trust claimants).

64. See Patrick M. Hanlon & Elizabeth Runyan Geise, Commentary, *Asbestos Reform—Past and Future*, MEALEY’S LITIG. REP.: ASBESTOS, Apr. 4, 2007, at 3 (bemoaning the “rampant fraud and misrepresentation in . . . product identification testimony”).

Baron & Budd memorandum entitled “Preparing for Your Deposition.” A twenty-page document that ignited a firestorm when it was inadvertently produced, the memo coaches clients to “remember” contact with asbestos from only certain manufacturers. Among other instructions, the memo exhorts clients:

\* Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case.

. . . .

\* You must be able to pronounce the product names correctly and know WHICH products are pipecovering, WHICH are insulating cements and WHICH are plastic cements, for instance. Many of the product names sound very similar to each other . . . but they might be different products entirely! Have a family member quiz you until you know ALL the product names listed on your Work History Sheets by heart.

. . . .

\* You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!

. . . .

\* Keep in mind that these [defense] attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO RECORDS to tell them what products were used on a particular job, even if they act like they do.<sup>65</sup>

Another, perhaps less vivid, example came to the fore in a 2014 bankruptcy opinion concerning Garlock, a producer of asbestos-containing gas-kets. In a withering opinion, Bankruptcy Judge George Hodges noted that, though “Garlock was a relatively small player in the asbestos tort system,” the company had been named as a defendant in 20,000 mesothelioma cases before its resources ran dry.<sup>66</sup> Why? The court chalked up Garlock’s outsized liability to the fact that “the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers,” who aimed their fire at (the then-solvent) Garlock rather than the actually culpable (but bankrupt and therefore far less appealing) tortfeasors.<sup>67</sup>

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65. S. REP. NO. 108-118, Attach. B, at 109–31 (2003). Once the memo came to light, Baron & Budd lawyers denied knowledge of its use, and a paralegal signed an affidavit in which she took sole responsibility for its contents. The firm also stressed its honesty and emphasized that the memo had to be considered in context. Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 PEPP. L. REV. 175, 187–88 (2004). The Baron & Budd firm apparently represented more than 12,000 asbestos claimants. See Roger Parloff, *The \$200 Billion Miscarriage of Justice Asbestos Lawyers Are Pitting Plaintiffs Who Aren’t Sick Against Companies That Never Made the Stuff—and Extracting Billions for Themselves*, FORTUNE (Mar. 4, 2002), [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2002/03/04/319093/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2002/03/04/319093/index.htm) [<https://perma.cc/CA2Z-MUFA>].

66. *In re Garlock Sealing Techs., LLC.*, 504 B.R. 71, 82 (Bankr. W.D.N.C. 2014).

67. *Id.*

Finally, double dipping has also bedeviled the asbestos ecosystem.<sup>68</sup> Some double dippers (some 6,000, in fact) sought funds from *both* silica and asbestos manufacturers and therefore claimed (in separate filings) that they were suffering from silicosis or, alternatively, asbestosis, despite the fact that the two diseases have different sources of exposure, on x-rays look “vastly different,” and are very rarely found in the same individual.<sup>69</sup> (Indeed, in her famous *Silica* opinion, Judge Jack concluded that finding a person genuinely suffering from both maladies was rarer than hitting “a hole-in-one.”<sup>70</sup>)

Others have double dipped by seeking funds from both the tort system and from one of the roughly sixty asbestos bankruptcy trusts.<sup>71</sup> For example, in the midst of the Garlock litigation (described above), the court permitted the company to engage in full discovery of fifteen randomly selected claims.<sup>72</sup> This discovery revealed that each claim contained suspicious exposure evidence, which served to inflate Garlock’s share of responsibility for plaintiffs’ injuries.<sup>73</sup> Specifically, prior to settling with Garlock, “on average plaintiffs disclosed only about 2 exposures to [bankrupt] companies’ products, but *after* settling with Garlock [plaintiffs] made claims against about 19 such companies’ Trusts.”<sup>74</sup> A second example came to light recently in Delaware in the case *In re Asbestos Litigation*.<sup>75</sup> There, the weekend before the

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68. It bears emphasis that, as a matter of law, it is perfectly reasonable for a plaintiff to assert claims against multiple tortfeasors. This is particularly true in the asbestos context, where many manufacturers’ products often contribute to a given plaintiff’s impairment. (Asbestosis, in particular, is a cumulative disease.) It is neither reasonable nor ethical, however, for the plaintiff to lie about these payments, to submit irreconcilably different exposure information to different funds, or to seek to recover more than full compensation for a single injury.

The extent of double dipping is a matter of debate. Some suggest that it is quite common, while others insist that any improprieties are isolated and anomalous. *See, e.g.*, Elihu Inselbuch & Andrew J. Sackett, Commentary, *A Critique of RAND’s Three Reports on Asbestos Trusts and Asbestos Litigation*, MEALEY’S ASBESTOS BANKR. REP., Sept. 2015, at 2–3; *The Double-Dipping Legal Scam*, WALL ST. J. (Dec. 25, 2014, 2:31 PM), <http://www.wsj.com/articles/the-double-dipping-legal-scam-1419535915> (on file with the *Michigan Law Review*). Interestingly, the GAO conducted a 2011 study of asbestos trusts and, as part of the study, interviewed trust officials that had conducted audits. According to the GAO, *none* of these officials “indicated that these audits had identified cases of fraud.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 23 (2011) [hereinafter GAO, TRUST STUDY]. That finding may indicate that double dipping is indeed very rare, but it is far from definitive, as it may say more about audits’ rigor, than about the actual level of impropriety.

69. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 595, 603, 628–29 (S.D. Tex. 2005); *id.* at 628 (“[A]t least 6,000 MDL Plaintiffs previously made asbestosis claims.”).

70. *Id.* at 603.

71. GAO, TRUST STUDY, *supra* note 68, at 3. This double dipping has been facilitated by the fact that defendants traditionally had trouble obtaining trust filings because these filings have been characterized as confidential settlement material. *See id.* at 26. As noted *infra* at notes 72–80, that view is fading, and this material is increasingly accessible.

72. *In re Garlock*, 504 B.R. at 85.

73. *Id.* at 82.

74. *Id.* at 84 (emphasis added).

75. No. 09C-11-217-ASB, 2011 WL 7652979 (Del. Super. Ct. Sept. 28, 2011).

trial against one asbestos defendant was set to start, it was revealed that the plaintiffs, June and Arthur Montgomery, had previously submitted claims to twenty asbestos trusts and had pocketed “significant sums” therefrom, even while steadfastly withholding that information from the instant defendant. Indeed, at a pretrial conference held just days before the revelations, plaintiffs’ counsel assured the court that no such claims had been filed.<sup>76</sup> *Kananian v. Lorillard Tobacco Co.*<sup>77</sup> provides a third exemplar. There, Harry Kananian’s estate sought damages from Lorillard Tobacco Co. contending that Kananian was exposed to asbestos as a smoker of Lorillard’s Kent cigarettes in the 1950s, when asbestos was used in the brand’s filters.<sup>78</sup> Kananian subsequently contracted mesothelioma (a telltale sign of asbestos exposure) and died.<sup>79</sup> A problem arose, however, when it was revealed that Kananian’s estate had also filed claims with a number of asbestos trusts, claiming variously that he had been exposed to asbestos during his work on a World War II vessel, while working as a pipe welder, and while toiling in a shipyard—and, from those trusts, had already pocketed as much as \$700,000.<sup>80</sup>

### C. Mapping: Where Fraudulent Claims Are Apt to Be Found

The above inventory suggests that two very different areas of the tort litigation ecosystem are particularly beset with fraudulent claims. The first overrepresented area is the auto accident realm, and in particular, the soft-tissue auto accident realm, where many injury victims are asserting relatively small claims (of roughly \$2,000 to \$6,000) for minor injuries—like sprains, strains, contusions, and whiplash—that are either wholly fabricated, substantially exaggerated, or that predate the accident at issue.<sup>81</sup> Empirical evidence bears this out: a 1995 RAND report concluded that “59% of the costs

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76. Peggy L. Ableman, *A Case Study from a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Claims*, 88 TUL. L. REV. 1185, 1192 (2014).

77. No. CV-01-442750 (Ohio Ct. Com. Pl., Cuyahoga Cnty., Feb. 7, 2007); see also *Kananian v. Lorillard Tobacco Co.*, 878 N.E.2d 34 (Ohio 2007) (unpublished table decision) (showing appeal being denied review).

78. Lee Blanton Ziffer, *Bankruptcy Trusts and Asbestos Litigation*, AM. BAR ASS’N (June 11, 2012), <http://apps.americanbar.org/litigation/committees/products/articles/spring2012-bankruptcy-trusts-asbestos-litigation.html> [https://perma.cc/CRF4-3ZSV].

79. *Id.*

80. Daniel Fisher, *Double-Dippers*, FORBES (Sept. 4, 2006), [http://www.forbes.com/free\\_forbes/2006/0904/136.html](http://www.forbes.com/free_forbes/2006/0904/136.html) [https://perma.cc/X68L-39CR]; McCarty, *supra* note 36, at B1; Kimberley A. Strassel, Commentary, *Trusts Busted*, WALL ST. J. (Dec. 5, 2006, 12:01 AM), <http://www.wsj.com/articles/SB116527814374340591> [https://perma.cc/P5UR-58HG]. Kananian’s estate subsequently filed a legal malpractice action alleging that its firm, Brayton Purcell LLP, “submitted the claim forms with actual or constructive knowledge that the claims were not grounded in fact and were fraudulent in nature.” *Kananian v. Brayton Purcell, LLP*, No. 1:07 CV 3188, 2008 WL 926061, at \*1 (N.D. Ohio Apr. 3, 2008). For additional examples of double dipping, see H.R. REP. NO. 112-687, at 12–13 (2012).

81. See CARROLL ET AL., *supra* note 7, at 10, 18.

submitted in support of soft injury [auto accident] claims is excess,”<sup>82</sup> while a Massachusetts study found that “[f]or claims that involve only stains [sic] or sprains, only 46.8 per cent were judged apparently valid.”<sup>83</sup> This is not trivial. As noted above, most tort cases are auto cases, and of auto claims, soft-tissue claims eclipse claims for “hard” injuries in certain states.<sup>84</sup> The second overrepresented area is the mass tort realm. There, owing to oversubscription, some victims are asserting relatively large claims for relatively serious injuries—such as heart damage and lung disease—that are either nonexistent, grossly exaggerated, or (once again) unrelated to the instant defendant’s conduct.<sup>85</sup>

Seemingly from opposite ends of the claim continuum, the two claim types are actually strikingly similar, and their similarities yield some tentative generalizations concerning *where* fraudulent claiming is most apt to proliferate. Specifically, fraudulent claiming is apt to proliferate when: (1) injuries are hard to discern, (2) specific causation is contestable, (3) defendants have a diminished incentive or capacity to scrutinize claims prior to payment, (4) claim rates are unusually high, and (5) restraints generally imposed by the contingency fee are relaxed or altogether inoperative.

First, both the soft-tissue auto cases and the heart and lung claims that have vexed the mass tort world present similar (and similarly challenging) questions of injury verification. In the former, soft-tissue injuries do not show up on x-rays, impeding efforts to say for sure whether an asserted impairment is real or fake.<sup>86</sup> In the latter, meanwhile, some damage can (at least theoretically) be proven with x-rays or echocardiograms.<sup>87</sup> But reliably interpreting these scans has proved difficult, generating frequent disputes as to whether a given impairment does or does not exist.<sup>88</sup> The generalizable

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82. See *id.* at 22–23; see also INS. RESEARCH COUNCIL, FRAUD 1996, *supra* note 40, at 3 (concluding that “claims involving sprain and strain injuries” are “associated with the . . . appearance of fraud and buildup”).

83. Herbert I. Weisberg & Richard A. Derrig, *Fraud and Automobile Insurance: A Report on Bodily Injury Liability Claims in Massachusetts*, 9 J. INS. REG. 497, 537 (1991).

84. Carroll & Abrahamse, *supra* note 8, at 246 (reporting that a sample of 9,689 California auto claims included 2,755 claims for “hard injuries” as against 6,934 claims for “soft injuries”); *id.* at 237 (offering a ratio of the relative frequency of claims for soft and hard injuries in various states).

85. See *supra* text accompanying notes 54–63.

86. As insurance executives lamented more than a half-century ago: “No one can say that some ‘whiplash’ claims are not genuine. This is the sad part of our plight for there appears to be no absolutely sure way of separating the fake from the real.” E. A. Cowie, *The Economics of “Whiplash,”* in THE CONTINUING REVOLT AGAINST “WHIPLASH” 35, 35 (James D. Ghiardi ed., 1964); accord CARROLL ET AL., *supra* note 7, at 10 (“Soft injuries . . . are not usually objectively verifiable; hence, they present an opportunity to exaggerate their existence or seriousness.”).

87. There are exceptions. For example, breast implant litigation involved certain impossible-to-verify complaints, exacerbating the above difficulties. See generally MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996).

88. This was true of asbestosis, where, as leading expert Dr. John Parker explained, the diagnosis “is in the eye, the retina, and the brain of the person classifying the film who reaches the ultimate decision, and there is disagreement between readers.” Joint Appendix at 1132,



takeaway is that it is easier to manufacture or exaggerate a claim if the defendant cannot disprove the injury's existence or its severity. Ambiguous diagnoses facilitate deception.

Second and relatedly, in both the soft-tissue and mass tort realms, specific causation is often contestable and unclear. Because soft-tissue injuries are not visible, it is difficult to establish not only *whether* an injury was sustained but also *when* it was sustained. In particular, it is nearly impossible to say whether the claimant's asserted injury predated, postdated, or resulted from the accident at issue. Raising the same concern, illnesses in the mass tort realm often have complex and contestable etiologies.<sup>89</sup> Thus, for example, many seeking fen-phen payments alleged mitral valve damage, even though many Americans display some mitral valve irregularities absent fen-phen exposure.<sup>90</sup> Certain asbestos claimants sought compensation for lung abnormalities that are relatively common conditions.<sup>91</sup> And silica claimants sought compensation for silicosis, though "[r]adiographic findings consistent with silicosis may be caused by a host of other diseases," including tuberculosis, rheumatoid arthritis, lupus, and obesity.<sup>92</sup> The upshot is that uncertain specific causation fuels deception.<sup>93</sup>

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CSX Transp., Inc. v. Peirce, No. 13-2235 (4th Cir. filed June 20, 2014) [hereinafter Peirce JA] (testimony of Dr. John Parker). It was true of the heart disease, attributed to fen-phen, where patients' echocardiograms were very frequently "open to divergent interpretations." Lenzer & Maiello, *supra* note 59. And, it was true in *Silica*, where Judge Jack emphasized that "shadows" on x-rays consistent with silicosis may or may not give rise to a positive diagnosis. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 625, 630–31 (S.D. Tex. 2005) (quoting Dr. John Parker).

89. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 147–48 (2007) ("The latent diseases implicated in mass tort litigation typically are not 'signature' diseases in the sense of arising exclusively or overwhelmingly from the underlying product in question.").

90. See William H. Gaasch, *Patient Education: Mitral Regurgitation (Beyond the Basics)*, <http://www.uptodate.com/contents/mitral-regurgitation-beyond-the-basics> [https://perma.cc/H7X7-WUAW] (reporting that up to 70 percent of adults have trivial mitral regurgitation, while roughly 2 percent of adults have significant mitral regurgitation); *Mitral Valve Regurgitation*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/mitral-valve-regurgitation/symptoms-causes/dxc-20121850> [https://perma.cc/W2PB-DSQP] (listing fen-phen as just one of many "risk factors" that "can increase your risk of mitral valve regurgitation").

91. For example, pleural thickening may indicate an asbestos injury, but other causes include tuberculosis, rib injury, infection, radiation therapy, or chemotherapy. See *Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 30–31 (2002) (statement of Steve Kazan, Managing Partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons and Farris) ("[W]ell over 50 percent of the American adult population, if you took x-rays, would demonstrate changes that meet the requirements today to justify an asbestos lawsuit. That doesn't mean they have changes in their lungs that have anything whatsoever to do with asbestos.").

92. *In re Silica*, 398 F. Supp. 2d at 592.

93. Lester Brickman and Gary Schwartz have made similar observations when discussing workers' compensation fraud and mass tort claims fraud, respectively. Brickman, *Screenings*, *supra* note 20, at 1231 (observing that mass tort fraud is more common if a medical condition, that exists in the population as a whole, can "be attributed" to a toxic substance, particularly if

A third commonality between the soft-tissue injury and mass tort contexts is that, in both, defendants (or their insurers) have a reduced incentive or capacity to scrutinize claims. Most of the time, defendants demand particularized evidence to support a plaintiff's claim, minimizing the plaintiff's capacity to fabricate facts or exaggerate injuries.<sup>94</sup> But soft-tissue auto and mass tort claims stand as exceptions to the rule. As noted, soft-tissue claims tend to be small, often resolved for a few thousand dollars. Facing such nuisance-value demands, insurers would be foolish to fund full investigations into each claim's validity—and traditionally most insurers haven't.<sup>95</sup> Meanwhile, the mass tort context tends to feature sizable payouts. But the sheer number of claims may overwhelm a defendant's limited investigatory resources.<sup>96</sup> Illustrating this challenge, Judge Hodges in the Garlock litigation found that, prior to declaring bankruptcy, the asbestos company had been inundated with some 20,000 claims, many of which were highly dubious. Still, believing that settling would be cheaper than fighting, Garlock had for years resolved these cases "in groups of large numbers . . . without real analysis of the 'liability' to any individual claimant."<sup>97</sup> Similarly, in fen-phen, after some 50,000 claimants opted out of the class action settlement, Wyeth settled scores of claims while "hardly paus[ing] to consider the strength of individual cases."<sup>98</sup>

Fourth, the auto and mass tort realms are distinctive in that both display abnormally high rates of claiming. In most areas of the tort law ecosystem, only a very small fraction of those accidentally injured seek third-party compensation.<sup>99</sup> Mass tort and auto accident claims, however, are again exceptional. Whether due to publicity, pervasive attorney advertising focused on

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the condition is "not capable of objective verification"); Schwartz, *supra* note 20, at 994 (discussing the dubious "bad-back" claims that inundated California's workers' compensation system in the early 1990s and noting that these suspicious claims were complicated by the fact that "back pain occurs for all kinds of reasons" and is "difficult to corroborate or verify").

94. See Carroll & Abrahamse, *supra* note 8, at 233–34 (noting that most injuries "attract attention from claims agents").

95. See *id.* at 234 ("[B]ecause [soft-tissue injuries] are often not costly . . . claims based on them may not attract close attention or generate demands for verification. Hence, they present an opportunity to pursue a claim for a nonexistent injury."). Note, though, that this may be changing. In the 1990s, some insurers, fed up with perceived abuse surrounding soft-tissue claims, began to refuse to tender reasonable settlements. For more on those efforts, see *infra* text accompanying note 172.

96. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 23 (2005) (discussing this dynamic). Alternatively, if claims are paid after a global settlement is reached, the defendant, with its exposure now circumscribed, will have little interest in policing the fund's division.

97. *In re Garlock Sealing Techs., Inc.*, 504 B.R. 71, 87 (Bankr. W.D.N.C. 2014).

98. Frankel, *supra* note 59, at 96.

99. Overall, only about 10 percent of Americans seek redress when accidentally injured, and only about 2 percent of injury victims actually file suit. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURY IN THE UNITED STATES 122 fig.5.2 (1991). Within some areas, most notably medical malpractice, that proportion is lower still. See, e.g., David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250, 255 (2000).

these areas (which may “normalize” the act of claiming or educate the public about compensatory opportunities), or lawyers’ less stringent screening of these cases (as explained below), mass tort and auto injury cases feature unusually high rates of claim initiation.<sup>100</sup>

Fifth and finally, soft-tissue auto and mass tort cases are similar because they are brought in contexts where the typical restraints imposed by the contingency fee are either wholly inoperative or substantially relaxed. This, too, is critically important.

Most personal injury lawyers are paid via contingency fees. As such, lawyers are paid—and also typically reimbursed for out-of-pocket expenses—if and only if the case is won. This gives lawyers a strong incentive to rigorously evaluate cases prior to acceptance. And consistent with expectations, evidence shows that in most areas of practice, plaintiffs’ attorneys are choosy. They vet cases carefully and reject most would-be claimants who seek their services.<sup>101</sup> This screening typically serves as a formidable check on fraudulent claiming.<sup>102</sup>

There are, however, two corners of the personal injury marketplace that upend typical screening patterns. The first is the soft-tissue auto accident realm, where my past research on settlement mills—high-volume, heavy-advertising law firms—shows that some lawyers are *not* particularly selective.<sup>103</sup> Settlement mill lawyers operate a volume business and process mostly low-dollar, soft-tissue car wreck cases on an assembly line. In the words of one lawyer, they “stack ‘em deep and settle ‘em cheap.”<sup>104</sup> Or, in the words of another, there is an incentive to “get whatever you can because there’s such a volume . . . even if you’re getting \$1,000 on 500 cases, that’s half a million dollars.”<sup>105</sup> Cognizant that they are investing very little (whether

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100. For comparatively high rates of claiming in mass torts, see THOMAS E. WILLGING, *MASS TORT PROBLEMS & PROPOSALS* 20 (1999). For auto accidents, see HENSLER ET AL., *supra* note 99, at 119–20, which reports that roughly half of those injured in car wrecks attempt to claim third-party compensation, compared to roughly 3 percent of those injured in nonwork, non-motor-vehicle accidents. (Recognize, Hensler’s study did not parse the claiming behavior of those with “soft” versus “hard” injuries; nor did it distinguish between those who were tortiously versus nontortiously injured.)

101. See, e.g., HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS* 67–68, 71–76 (2004) (finding, in a survey of Wisconsin contingent fee practitioners, that respondents accepted approximately 34 percent of potential clients).

102. See Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 *JUDICATURE* 22, 27 (1997) (reported that plaintiffs’ lawyers pointed to “lack of liability” as the dominant reason for claim rejection).

103. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 *N.Y.U. L. REV.* 805, 834–35 (2011) [hereinafter Engstrom, *Sunlight*]; Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO. J. LEGAL ETHICS* 1485, 1499, 1522–23 (2009).

104. Telephone Interview with J.K. (May 15, 2008).

105. Telephone Interview with G.V. (Apr. 7, 2008).

measured in time, effort, or out-of-pocket investment) in a claim's development, settlement mill lawyers engage in only the most cursory of pre-retention reviews, and, not surprisingly, represent at least some claimants with dubious entitlements to relief.<sup>106</sup>

The mass tort realm similarly deviates from the typical model. There, once the mass tort has reached maturity, any additional client added to the lawyer's inventory is essentially all upside, since the marginal client poses little if any risk, demands little in the way of out-of-pocket investment, offers the possibility of a substantial fee, and—because defendants often feel more “pressure” to settle when up against a lawyer with a “volume of cases”—might even strengthen the lawyer's hand in settlement negotiations.<sup>107</sup> In such an environment, lawyers, again, have little reason to be selective, and, instead, what Judge Jack Weinstein calls the “vacuum cleaner” effect takes hold: many firms “suck up good and bad cases, hoping that they can settle in gross.”<sup>108</sup>

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The takeaway of all this is that one who scours the tort law landscape for specious claim activity is unlikely to see much of this activity in traditional areas of tort practice, such as premises liability, medical malpractice, or one-off product liability lawsuits, particularly if the plaintiff is complaining of a signature disease or a visible, traumatic, “bright blood” injury. In those cases, the lawyer—paid on a contingency fee and investing her own time and money in the case's development—has a powerful incentive to screen prior to initiation; the defendant will typically scrutinize the claim prior to settlement; and, because the injury is visible, there is little chance it is fabricated or that it actually predated or postdated the accident at issue.

In contrast, the areas of the tort ecosystem most apt to contain high levels of spurious activity are those areas where restraints generally imposed by the contingency fee are substantially relaxed or wholly inoperative, claim rates are abnormally high, defendants have a reduced incentive or capacity to investigate claims, specific causation is uncertain, and where it is difficult to know whether the claimed impairment is real or imagined. If concerned about fraudulent claiming, it is *there* that defendants, insurers, judges, and policymakers ought to train their collective gaze.

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106. See, e.g., Telephone Interview with T.R. (Apr. 16, 2008) (“A lot of these people aren't hurt. . . . [Y]ou should have screened the malingerers from the people who had legitimate injuries.”); see also Engstrom, *Sunlight*, *supra* note 103, at 834–85 (discussing the fraud problem and concluding, “there are indications that settlement mills may, more often than most, blur ethical boundaries and bend to the temptations of fraud”).

107. See Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1732 (2002).

108. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 494–95 (1994); accord Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575, 586 (2008) (highlighting “The Fraud Problem” in aggregate litigation and explaining the various reasons why “the class action lawyer has an incentive to include fraudulent victims in the class”).

## II. RICO'S RISE, RETRENCHMENT, AND RECENT USE AS A RETALIATORY TOOL

Part I offered an inventory and typology of fraudulent claims. Part II now pivots to consider RICO. Below, I provide historical background on the statute and also show that, traditionally, civil RICO has been used by plaintiffs' lawyers against corporate entities, while corporate entities have decried RICO as a source of vexatious litigation. I then offer two case studies to show that corporate defendants have recently turned the tables and have started deploying RICO as a retaliatory tool.

### A. Background on Civil RICO

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970.<sup>109</sup> At the time Congress enacted the statute, organized crime—what J. Edgar Hoover called “the personification of every lawless evil”—was seen as a problem spinning out of control, and legislators warned that such activity threatened to “destroy the social, political, economic, and moral heart of our Nation.”<sup>110</sup> Further, Congress was influenced by a sense that traditional criminal laws—which nibbled at the edges of organized crime by prosecuting various individuals one-by-one—were woefully insufficient. Instead, a “new approach[ ]” was needed.<sup>111</sup> Pursuant to this new approach, prosecutors were to attack not just mobsters themselves, but, instead and more broadly, the economic base through which “professional, full-time gangsters, hoodlums, mobsters and racketeers” operated.<sup>112</sup>

So directed, RICO had (and has) three key provisions. First, the statute defines “racketeering activity.” So defined, “racketeering activity” includes a wide array of offenses, ranging from murder, kidnapping, gambling, arson, and extortion, to other more generalized and malleable predicates, including embezzlement, obstruction of justice, mail fraud, and wire fraud.<sup>113</sup> Second, the statute targets certain repetitive or institutionalized racketeering activities. Specifically, the statute makes it unlawful to: (1) invest income derived from a “pattern” of racketeering activity in any enterprise engaged in interstate commerce; (2) acquire or maintain control of such an enterprise

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109. Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941–48 (1970) (codified as amended at 18 U.S.C. §§ 1505, 1961–68, 2516–17 (2012)).

110. For the Hoover quotation, see 113 CONG. REC. 17,997 (1967) (remarks of Sen. Roman L. Hruska upon the introduction of S. 2048 and S. 2049). For the “moral heart” quotation, see *Organized Crime Control: Hearings on S. 30 and Related Proposals Relating to the Control of Organized Crime in the U.S. Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong 86 (1970) (statement of Sen. John L. McClellan).

111. S. REP. NO. 91-617, at 79 (1969).

112. *Oversight on Civil RICO Suits: Hearings on Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c) Before the S. Comm. on the Judiciary*, 99th Cong. 7 (1986) [hereinafter *RICO Oversight Hearings*] (statement of Hon. Roman L. Hruska).

113. 18 U.S.C. § 1961(1) (2012). At enactment, only thirty crimes were identified, while today, roughly 150 crimes qualify. Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 217 (2013).

through a “pattern” of racketeering activity; (3) conduct or participate in the conduct of such an enterprise’s affairs through a “pattern” of racketeering activity; or (4) conspire to engage in any of the foregoing activities.<sup>114</sup> Third and finally, the statute enforces these prohibitions with far-reaching criminal and civil penalties. Criminal penalties include significant jail time (of up to twenty years), stiff fines, and the forfeiture of ill-gotten gains.<sup>115</sup> On the civil side, RICO entitles “[a]ny person injured in his business or property by reason of a [RICO] violation” to treble damages, litigation expenses, and attorneys’ fees.<sup>116</sup> Modeled on our antitrust laws and added at the eleventh hour, this treble damages provision was intended to compensate the victims of organized crime and also to augment scarce prosecutorial resources by inducing private plaintiffs to root out nefarious conduct.<sup>117</sup>

There is no doubt that Congress created RICO chiefly to combat organized crime.<sup>118</sup> Nor is there doubt that, as so directed, RICO has had tremendous success: the precipitous drop in organized crime over the past four decades stands as a powerful testament to the statute’s effectiveness.<sup>119</sup> By its terms, though, RICO sweeps much further. And the Act’s capacious and malleable language, coupled with its offer of treble damages and attorneys’ fees, has long been a site of bitter controversy.

#### B. *The Controversial Rise of Civil RICO*

The power of RICO’s civil liability provision wasn’t fully appreciated during the statute’s first decade. In the early 1980s, however, plaintiffs’ lawyers “discovered” the statute and started to use it against a wide array of non-organized-crime defendants essentially for garden-variety fraud.<sup>120</sup> By the late 1980s, these civil RICO lawsuits had been initiated in myriad situations, including landlord-tenant disputes, domestic relations skirmishes, and intrachurch conflicts.<sup>121</sup> And RICO suits had also been lodged against many legitimate businesses, including such American mainstays as Merrill Lynch,

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114. 18 U.S.C. § 1962.

115. *Id.* § 1963.

116. *Id.* § 1964(c).

117. For the provision’s purpose, see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487–88, 493 (1985). For RICO’s antitrust law lineage, see S. REP. NO. 91-617, at 80–81 (1969). For the fact that the provision was an eleventh-hour addition, see the statement of Stephen S. Trott in *RICO Oversight Hearings*, *supra* note 112, at 123.

118. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245 (1989) (“Organized crime was without a doubt Congress’ major target . . .”).

119. Samuel A. Alito, Jr., *Racketeering Made Simple(r)*, in *THE RICO RACKET* 1, 11 (Gary L. McDowell ed., 1989) (“RICO has achieved spectacular success in direct assaults on organized crime, particularly in the 1980s.”).

120. Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. LEGIS. 1, 1–2 (1993) (offering this history).

121. Motion to Leave to File a Brief and Brief for the Alliance of American Insurers et al. as Amici Curiae in Support of Respondents, *Sedima*, 473 U.S. 479 (No. 84-648), 1985 WL 669655, at \*9 [hereinafter Brief of American Insurers] (collecting citations).

American Express, Citibank, Wells Fargo, Allstate, State Farm, Boeing, and GM.<sup>122</sup>

Unsurprisingly, the business community did not much like its new role on the receiving end of civil RICO and, throughout the period, business groups responded by assailing these filings as, variously, “a tool for harassment,” a “perversion” of RICO’s purpose, and, most ominously, a “means of waging ‘legal terrorism.’”<sup>123</sup> Channeling this discontent, corporate interests adopted a two-prong strategy to tame this assertedly now-too-powerful tool. First, they filed a series of lawsuits, some of which ultimately made their way to the U.S. Supreme Court, advocating a narrow interpretation of the statute; essentially, they sought a ruling that, properly construed, RICO penalizes only traditional mobster activity.<sup>124</sup> Second, they took the fight to Congress, where, throughout the late 1980s and early 1990s, corporate-backed legislation to restrict civil RICO was periodically considered.<sup>125</sup>

This campaign, however, paid only modest dividends. As a result of the business community’s intense efforts, Congress and the Supreme Court did ultimately impose some new restrictions on civil RICO, including a bar on suits alleging fraud “in the purchase or sale of securities,” a limit on liability for certain professionals, and the imposition of demanding proximate cause and standing requirements.<sup>126</sup> But these restrictions stopped miles short of the encompassing constraints the corporate community initially sought. Indeed, reflecting that these restrictions still leave plenty of room for RICO to operate, today, civil RICO filings are down a peg from their heyday of the mid-to-late 1980s, but, with roughly 600 to 900 RICO lawsuits filed annually, they remain at healthy levels.<sup>127</sup>

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122. Brief Amicus Curiae of the Chamber of Commerce of the United States of America, *H.J. Inc.*, 492 U.S. 229 (No. 87-1252), 1988 WL 1025665, at \*4 n.9 [hereinafter Brief of Chamber] (identifying defendants); Brief of American Insurers, *supra* note 121, at \*2–3 (same).

123. Brief for the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae Supporting Respondents, *H.J. Inc.*, 492 U.S. 229 (No. 87-1252), 1988 WL 1025675, at \*1 (describing RICO as a “tool for harassment”); Brief of American Insurers, *supra* note 121, at \*2 (describing certain RICO filings as a “perversion”); Brief of Amicus Curiae of the Washington Legal Foundation in Support of Respondents, *H.J. Inc.*, 492 U.S. 229 (No. 87-1252), 1988 WL 1025683, at \*10 [hereinafter Brief of WLF] (describing the filings as facilitating “legal terrorism”).

124. *E.g.*, Brief of Chamber, *supra* note 122, at \*4–5 (“[T]he Chamber and its members believe that legitimate enterprises should not be subject to RICO liability . . .”).

125. Howard Kurtz, *Businesses Fight RICO Antifraud Law*, WASH. POST, Oct. 16, 1985, at A21 (describing corporations’ legislative efforts “to make triple damage suits nearly impossible”); *see, e.g.*, RICO Amendments Act of 1991, H.R. REP. NO. 102-312 (1991).

126. *See* Private Securities Litigation Reform Act of 1995, 109 Stat. 737, 758 (codified in relevant part at 18 U.S.C. § 1964(c) (2012)) (describing the securities exemption, which includes exceptions); *Reves v. Ernst & Young*, 507 U.S. 170, 183–84 (1993) (discussing limits on certain professionals’ liability); *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992) (delineating the proximate cause requirement); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (discussing standing requirements).

127. In the 1980s, it was widely reported that federal courts received more than 1,000 filings per year. *See RICO Reform Act of 1989: Hearings on H.R. 1046 Before the Subcomm. on Crime, H. Comm. on the Judiciary*, 101st Cong. 449 (1989) (statement of Robert L. Chiesa,

### C. RICO as a Retaliatory Tool

Above, I described how traditionally (though controversially), plaintiffs' lawyers used civil RICO as a sword against corporate entities. In the words of Public Citizen, a consumer rights advocacy group, civil RICO has been "an indispensable consumer-protection statute."<sup>128</sup> Corporate entities, on the other hand, have traditionally decried the statute as a source of vexatious litigation, or as one commentator put it, part of "the liability-broadening, deep-pocket-picking trend in American law."<sup>129</sup>

Below, I show that these traditional battle lines are now in flux. In a remarkable turnaround, corporate entities are now harnessing civil RICO, the tool they once despised. And they are using this weapon, once dubbed the "Darling of [the] Plaintiffs' Bar," as a bludgeon against those who initiate suits.<sup>130</sup> Below, I offer two recent, and successful, examples of RICO's retaliatory use.

#### 1. *Feld Entertainment, Inc. v. ASPCA*

The *Feld* case involved an extraordinary fourteen-year odyssey that pitted some of the nation's foremost animal rights groups against Feld Entertainment, owner of the Ringling Brothers and Barnum & Bailey Circus, "the greatest show on earth." The lawsuit began on July 11, 2000, when a handful of animal rights nonprofits sued Feld in federal court. The suit alleged that Ringling Brothers' treatment of its Asian elephants—and specifically, the circus's use of bullhooks and prolonged chaining—violated the Endangered Species Act (ESA).<sup>131</sup> Of course, though, lawsuits need a plaintiff, that plaintiff must have Article III standing, and elephants do not qualify. This is where the trouble began.

To overcome this obstacle, the animal rights groups enlisted Tom Rider to join their cause. A former "barn man," Rider worked for Ringling Brothers from 1997 to 1999, during which time he cared for several of the circus's

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Chairman, RICO Coordinating Committee, representing the American Bar Association). For contemporary estimates, see Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523, 544 (2013).

128. *RICO Reform: Hearings on H.R. 2517, H.R. 2943, H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445 Before the Subcomm. on Criminal Justice, H. Comm. on the Judiciary*, 99th Cong. 904 (1986) (statement of Priscilla Budeiri, Staff Attorney, Public Citizen's Congress Watch; Shirley Yates; Donna Millsaps; and Pamela Gilbert, Staff Attorney, U.S. Public Interest Research Group); *accord id.* at 936 (statement of Priscilla Budeiri, Staff Attorney, Public Citizen's Congress Watch) (celebrating civil RICO as a tool that "facilitate[s] victims' suits filed to redress the harm they suffered").

129. L. Gordon Crovitz, *RICO: The Legalized Extortion and Shakedown Racket*, in *THE RICO RACKET*, *supra* note 119, at 15, 29. For more on these battle lines, see David Lauter & Fred Strasser, *Holding Pattern: Civil RICO*, NAT'L L.J., Dec. 30, 1985–Jan. 6, 1986, at S-9.

130. Weissman, *supra* note 24.

131. *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff'd*, 659 F.3d 13 (D.C. Cir. 2011).



allegedly mistreated elephants.<sup>132</sup> In joining the suit (and ticking off *Lujan*'s three jurisdictional requirements), Rider alleged that he had suffered an aesthetic injury based on his exposure to the mistreated elephants, that he left his job at the circus because of the mistreatment, and that he would "like to visit the elephants, but cannot do so without being injured from seeing the animals and detecting their mistreatment."<sup>133</sup>

In anchoring their suit to the testimony of Tom Rider, however, the animal rights groups gravely erred. After years of discovery, one visit to the D.C. Circuit, and a six-week bench trial during which several plaintiffs abandoned their claims to relief, the court ultimately dismissed the suit in late 2009 when Judge Emmet Sullivan ruled that Rider was essentially fabricating his testimony.<sup>134</sup> Indeed, in an opinion that identified dozens of inconsistencies between Rider's words and documented actions, Judge Sullivan concluded that Rider "failed to prove either a strong and personal attachment to the seven elephants at issue or that [Feld's] treatment of those elephants caused . . . aesthetic or emotional injury."<sup>135</sup> Without a representative who had suffered a cognizable injury-in-fact, any hope plaintiffs had to prevail on the merits quickly evaporated.

From this point for the animal rights groups, things went from bad to worse. In the course of his 2009 decision, Judge Sullivan not only identified numerous apparent fabrications, but also noted that over the course of the litigation, Rider had received cash and other benefits from the animal rights activists—benefits about which the groups had been "less than forthcoming."<sup>136</sup> Subsequently, these payments—of roughly \$190,000—took center stage.<sup>137</sup> Zeroing in on these monies, Feld initiated a civil RICO action against the American Society for the Prevention of Cruelty to Animals

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132. As a "barn man," Rider was tasked with keeping the elephants fed and watered, cleaning up after them, and generally "watching over them." *Id.* at 58.

133. *Id.* at 67–70. *Lujan* teaches that the "irreducible constitutional minimum" of Article III standing is: (1) a "concrete and particularized" injury in fact (2) that is fairly traceable to the defendant's conduct and (3) that is capable of judicial redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

134. *Am. Soc'y*, 677 F. Supp. 2d at 55–62 (detailing the case's procedural history). Specifically, the court ruled "that Mr. Rider is essentially a paid plaintiff and fact witness who is not credible, and therefore affords no weight to his testimony." *Id.* at 67. For the fact that several plaintiffs abandoned their claims during trial, see *id.* at 66 n.10.

135. *Id.* at 67, 72.

136. *Id.* at 72, 82; see also *Animal Welfare Inst. v. Feld Entm't, Inc.*, 944 F. Supp. 2d 1, 6 (D.D.C. 2013) ("Rider, the organizational plaintiffs, and plaintiffs' counsel sought to conceal the nature, extent and purpose of the payments . . . during the litigation . . .").

137. Feld alleged that these payments totaled over \$190,000, plus noncash compensation, including a van, hotel room, cell phone use, a video camera, and laptop. First Amended Complaint of Feld Entertainment, Inc. para. 21, *Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288 (D.D.C. 2012) (No. 1:07-CV-01532), 2010 WL 2519285 [hereinafter First Am. Compl.]. For their part, the animal rights groups insisted that these payments were either earned (for a time, Rider worked as a security guard protecting one of the plaintiffs) or were intended to defray Rider's expenses while he advocated on behalf of humane treatment for elephants. Memorandum and Points of Authorities in Support of Motion of Defendants to Dismiss Plaintiff's Amended Complaint at 8–9, *Feld*, 873 F. Supp. 2d 288

(ASPCA), the Animal Welfare Institute, and the Humane Society of the United States and their counsel, among others.<sup>138</sup> Identifying over 1,300 predicate acts of bribery, mail fraud, wire fraud, money laundering, and obstruction of justice, Feld's RICO action alleged, among other things, that plaintiffs and their counsel "knew that the factual assertions underlying Rider's claims . . . were false," paid Rider for his fabricated testimony, and "sought to conceal the payments" by providing false or evasive answers in interrogatories and depositions.<sup>139</sup> Using these mechanisms, Feld claimed, the animal rights groups sought to "unjustly enrich themselves"<sup>140</sup> and deprive the company of \$20 million, which it spent defending "itself from a case with no real plaintiff."<sup>141</sup>

After surviving a motion to dismiss, Feld's retaliatory RICO suit was ultimately settled when the ASPCA offered up \$9.3 million in 2012, and the Humane Society and other animal rights groups agreed to pay a combined \$15.75 million two years later.<sup>142</sup> At the time the latter settlement was announced, the *Wall Street Journal* applauded it as a "cautionary tale about the consequences of making an allegation in federal court that you have trouble backing up," while Kenneth Feld, Chairman and CEO of Feld Entertainment, declared: "We hope this settlement payment, and the various court decisions that found against these animal rights activists and their attorneys, will deter individuals and organizations from bringing frivolous litigation like this in the future."<sup>143</sup>

## 2. CSX Transportation v. Peirce

The second exemplar, this time involving oversubscription, is rooted in the fading days of asbestos litigation. The so-called "magic mineral," asbestos is responsible for the deaths of more than a quarter-million Americans.<sup>144</sup> It has also been the catalyst for a seemingly endless tide of litigation.

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(No. 1:07-CV-01532). In addition, the animal rights groups insisted that the payments had been openly disclosed, a point at least partially supported by the evidence. *Id.*

138. See First Am. Compl., *supra* note 137.

139. *Feld*, 873 F. Supp. 2d at 302–03. In addition to RICO, Feld also asserted claims under the Virginia Conspiracy Act and for common law abuse of process, malicious prosecution, maintenance, and champerty. *Id.* at 300. The RICO action was actually initiated prior to the bench trial on August 28, 2007, but was stayed pending a final judgment on the ESA action. *Id.* at 304. Before that, Feld had sought to bring its RICO claim as a counterclaim to the ESA action. *Id.* at 303.

140. *Id.* at 302.

141. Plaintiff's Opposition to Motion of Defendants to Dismiss Plaintiff's Amended Complaint at 14, *Feld*, 873 F. Supp. 2d 288 (No. 1:07-CV-01532).

142. Jacob Gershman, *Animal Rights Group Pays Circus Producer Millions to Settle Suit*, WALL ST. J. (May 15, 2014, 3:21 PM), <http://blogs.wsj.com/law/2014/05/15/animal-rights-groups-pay-circus-producer-millions-to-settle-suit/> (on file with the *Michigan Law Review*).

143. *Id.*

144. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1385 (1995) ("[E]stimates as high as an additional 250,000 to 500,000 deaths from asbestos exposure have been responsibly made.").

Asbestos litigation began nearly half a century ago when individual plaintiffs, alongside their imaginative and gutsy lawyers, notched their first hard-fought and well-deserved victories against asbestos manufacturers.<sup>145</sup> As years ticked by, however, the litigation lost much of its original David-versus-Goliath appeal. By the 1990s, professional screening companies, hired by plaintiffs' firms and performing x-rays in hotel rooms, union halls, and parking lots, were rounding up plaintiffs by the thousands. Partly owing to these recruitment efforts, suits initiated by asymptomatic claimants started to eclipse suits by claimants with obvious impairments. Then, as adverse judgments and settlements plunged the clearly culpable asbestos manufacturers into bankruptcy (a fate that has, so far, met nearly 100 corporations), plaintiffs started targeting ever-more-peripherally-involved players.<sup>146</sup> Indeed, by 2002, then-prominent Mississippi plaintiffs' lawyer Richard Scruggs wryly described the litigation as the "endless search for a solvent bystander."<sup>147</sup>

These dynamics came to a head in the CSX litigation. Beginning in the mid-1990s, the Pennsylvania law firm Robert Peirce & Associates began filing thousands of Federal Employers Liability Act (FELA) claims against CSX Transportation, one of the nation's largest railroad companies.<sup>148</sup> These suits alleged that the firm's clients, former railroad workers, were injured when they were exposed to asbestos while working for CSX. Adding to CSX's woes, most of the suits were initiated in West Virginia—a state that, at the time, used particularly liberal aggregation procedures to speed asbestos cases to settlement.<sup>149</sup> Coupled with the sheer volume of claims then facing the company, these procedures induced CSX to settle incoming FELA claims in a routinized manner, apparently without subjecting the plaintiffs' demands to particularized scrutiny. In CSX's words, the company "had neither the ability nor the incentive to conduct an extensive examination of each claim."<sup>150</sup>

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145. See generally PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985).

146. For the bankruptcy figure, see GAO, *TRUST STUDY*, *supra* note 68, at 2. For additional context, see generally CARROLL ET AL., *supra* note 96; Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525 (2007).

147. Scruggs continued: "Most of the companies that were culpable in promoting the sale of asbestos-containing products have been held accountable and most of them have gone bankrupt. Now, the companies that are peripherally related to the bankrupt defendants are being seized . . ." *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, MEALEY'S LITIG. REP.: ASBESTOS, Mar. 1, 2002, at 5–6.

148. Third Amended Complaint at para. 89, *CSX Transp., Inc. v. Peirce*, 974 F. Supp. 2d 927 (N.D. W. Va. 2013) (No. 5:05CV202), 2011 WL 9698685. FELA is essentially the railroad version of workers' compensation, though unlike workers' compensation, liability hinges on the employer's negligence. Rich Lord, *CSX Claims Racketeering in Law Firm Legal Tactics*, PITTSBURGH POST-GAZETTE, July 31, 2011, at A-1.

149. Hanlon & Geise, *supra* note 64, at 5 (discussing the state's consolidation procedures).

150. Brief of Plaintiff-Appellant at 8, *CSX Transp., Inc. v. Gilkison*, No. 09-2135 (4th Cir. Dec. 30, 2010), 2010 WL 97462 [hereinafter CSX 4th Cir. Brief].

In time, however, CSX came to believe that many of the claims it was routinely compensating—or at least those claims coming from Robert Peirce & Associates—were dubious. Specifically, CSX realized that nearly 99 percent of the Peirce firm’s claims were generated via mass screenings.<sup>151</sup> Further, CSX learned that many of these claims were based on chest x-rays taken by unlicensed x-ray technician James Corbitt, a convicted felon who used an imaging device mounted to the back of his GMC Truck.<sup>152</sup> Worse, the chest x-rays were then typically read—and asbestosis was more-often-than-not diagnosed—by West Virginia radiologist, Dr. Ray Harron,<sup>153</sup> the very same doctor who had gained notoriety in 2005 when Judge Jack excoriated him for his lung diagnoses in the *Silica* MDL. (In that litigation, where recall, Judge Jack concluded that plaintiffs’ claims were “manufactured for money,” Dr. Harron was “involved in the diagnosis of approximately 6,350 Plaintiffs.”<sup>154</sup>) Further digging revealed that, for the Peirce firm, much as he had in the *Silica* litigation, Dr. Harron made thousands of suspicious diagnoses (in some days reading literally all reviewed x-rays as positive for asbestosis) without ever ordering more powerful or reliable scans, conducting physical exams, taking medical histories, or meeting the patients at issue.<sup>155</sup>

Unhappy with the above, CSX turned the tables—or, in the words of one journalist, the “quarry . . . turned on the hunter.”<sup>156</sup> In 2007, the company filed a civil RICO lawsuit against the Peirce firm—then “one of Pittsburgh’s most prominent trial law firms”—as well as Dr. Harron, several of the firm’s attorneys, and its principal investigator.<sup>157</sup> Relying on the RICO predicates of wire and mail fraud, CSX’s suit alleged that the Peirce firm had “orchestrated an asbestosis screening process deliberately intended to result in false positive diagnoses and then knowingly prosecuted claims against CSX[ ] with no basis in fact.”<sup>158</sup> The firm “carried out this scheme,” CSX

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151. See Peirce JA, *supra* note 88, at 899 (testimony of Louis A. Raimond).

152. *Id.* at 282–83 (testimony of James R. Corbitt, acknowledging his felonies and lack of licensure). Corbitt took perhaps 16,000 x-rays for the Peirce firm and was paid some \$1.8 million for his efforts. *Id.* at 881, 883.

153. *Id.* at 1320–21 (testimony of Robert N. Peirce, Jr. attesting to the firm’s utilization of Dr. Harron); *id.* at 943 (testimony of Louis A. Raimond regarding Dr. Harron’s diagnostic rate); *id.* at 1193–94 (testimony of Dr. John Parker).

154. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 606, 635 (S.D. Tex. 2005); see also *id.* 625–29, 637–40, 676. Specifically, Judge Jack described Dr. Harron’s diagnoses as a “distressing and disgraceful procedure [that] does not remotely resemble reasonable medical practice,” and she ultimately concluded that “Dr. Harron [found] evidence of the disease he was currently being paid to find.” *Id.* at 638 (internal quotation marks omitted).

155. Peirce JA, *supra* note 88, at 1045–46 (testimony of Dr. Harron); CSX 4th Cir. Brief, *supra* note 150, at 41.

156. Lord, *supra* note 148, at A-1.

157. *Id.* The Peirce firm was ultimately dropped as a defendant.

158. Amended Complaint at para. 3, CSX Transp., Inc. v. Peirce, 974 F. Supp. 2d 927 (N.D. W. Va. 2013) (No. 5:05CV202), 2007 WL 7074610 [hereinafter CSX Amended Complaint]. CSX first filed suit against defendants on December 22, 2005, alleging claims for fraud and negligence. See Complaint, CSX Trans., Inc. v. Gillkison, No. 5:05cv202, 2009 WL 2357142 (N.D. W. Va. July 30, 2009). The RICO claim was added on July 5, 2007, after the court

asserted, “by using an x-ray technician who produced low-quality films; having the x-rays read by a doctor [Dr. Harron] who provided positive reads at an impossibly high rate; and then overwhelming CSX[ ] with thousands of resulting claims.”<sup>159</sup> According to CSX, all this caused the company “to expend substantial money and resources to defend and settle the deliberately fabricated claims . . . that should never have been filed in the first place.”<sup>160</sup>

Following substantial procedural wrangling capped off by an eight-day trial, on December 20, 2012, a jury in Wheeling, West Virginia essentially agreed. After deliberating for less than three hours, the jury found that lawyers Robert Peirce Jr. and Louis Raimond, along with Dr. Ray Harron, had indeed run afoul of civil RICO and awarded CSX \$429,240 in damages.<sup>161</sup> The following year, as permitted under the RICO statute, Judge Frederick Stamp trebled the jury’s award.<sup>162</sup> Peirce and the others appealed, but ultimately—with the appeal pending in the Fourth Circuit and the defendants’ obligation to reimburse CSX for its attorneys’ fees (estimated at nearly \$10 million) unresolved—on November 6, 2014, the parties agreed to settle the dispute, with the lawyers and Dr. Harron’s estate paying CSX a hefty \$7.3 million.<sup>163</sup>

At the time, ATRA President, Tiger Joyce, praised CSX for pursuing the case, stating “CSX deserves a great deal of credit for its courage in turning the tables on these perpetrators of fraudulent asbestos litigation.”<sup>164</sup> “This successful RICO litigation,” Joyce declared, “now serves as a model for other corporate defendants that have been plagued by such fraud for decades.”<sup>165</sup>

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granted CSX leave to amend its complaint. *See* CSX Amended Complaint, *supra*, at paras. 89–95.

159. CSX 4th Cir. Brief, *supra* note 150, at 5–6.

160. CSX Amended Complaint, *supra* note 158, at para. 88.

161. Verdict at para. 6, *Peirce*, 974 F. Supp. 2d 927 (No. 5:05CV202), 2012 WL 6677272. The jury exited the courtroom at 3:13 PM, and at 5:29 PM advised the court that it had reached a verdict. *Peirce* JA, *supra* note 88, at 1626–28. As the text indicates, there was substantial wrangling. Over the course of three complaints, multiple summary judgment motions, and one trip to the Fourth Circuit, the lawsuit narrowed considerably. Among other things, various defendants were dropped, and the trial focused not on the lawyers’ case-processing system writ large, but rather on their handling of eleven particular claims. *See* Memorandum Opinion and Order Confirming the Pronounced Rulings of This Court Relating to Lawyer Defendants’ Motions in Limine at para. 1, *Peirce*, 974 F. Supp. 2d 927 (No. 5:05CV202) (granting Motion in Limine by defendants Robert N. Peirce, Jr., and Louis A. Raimond, which sought to preclude CSX from presenting further claims); *cf.* Rosenbaum, *supra* note 23, at 44 (emphasizing that, at the end of the day, CSX proved the existence of “only eleven ‘baseless’ claims out of the 5,300 claims filed by the Peirce law firm over the course of eight years”).

162. Memorandum Opinion and Order Granting CSX’s Motion to Amend the Judgment to Reflect Statutorily-Mandated Trebling of RICO Damages, *Peirce*, 974 F. Supp. 2d 927 (No. 5:05CV202).

163. *See* *Peirce* JA, *supra* note 88, at 1792–94 (reproducing CSX’s Motion for Attorneys’ Fees and Litigation Expenses, filed Jan. 21, 2013); 3 *Defendants in Asbestos Fraud Conspiracy Agree to \$7.3 Million Settlement*, WESTLAW J. ASBESTOS, Nov. 21, 2014, at 4.

164. *Id.*

165. *Id.*

## III. CONVENTIONAL FRAUD-FIGHTING MECHANISMS

In the 1980s, as civil RICO was used to target legitimate businesses and business interests worked feverishly to curtail the statute, those in the corporate community frequently argued that RICO was not needed because it was duplicative. In the words of the Chamber of Commerce in a 1989 brief, “[t]here already exists adequate state and federal criminal laws,” both to curb bad behavior and to provide victims adequate relief.<sup>166</sup> Fast forward to the present day, however, and some of those same interests have changed their tune, as the turn toward RICO to fight fraudulent litigation is fueled, quite explicitly, by assertions concerning the inadequacy of “conventional” mechanisms.<sup>167</sup>

This begs a few questions. What mechanisms already exist to target fraudulent filings? How do those mechanisms operate? And, when it comes to the fraud problem, how do these mechanisms fare? It is these questions Part III seeks to address. Section A catalogs the many formal and informal *ex ante* mechanisms designed to identify and weed out specious claims prior to the formal initiation of suit. Section B then identifies various procedural mechanisms designed to extinguish dubious lawsuits early in the litigation process. Then, Section C chronicles in somewhat greater detail the remedial measures that are equipped—like RICO itself—to punish and deter the filing of fraudulent claims after such suits are initiated. Finally, Section D offers three insights we can draw from the foregoing exercise.

A. *Ex Ante Mechanisms*

Myriad *ex ante* mechanisms exist to identify and dispose of specious claims even prior to the initiation of suit. Often informal and funded by private parties (typically insurers), these mechanisms are especially prevalent in the automobile sector. Thus, nearly all auto insurers use fraud-detection software, which can analyze social networks, deploy predictive analytics, and draw on public records to single out claims meriting more scrutiny.<sup>168</sup> In addition, many insurers strategically—and increasingly—utilize other

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166. Brief of Chamber, *supra* note 122, at \*5 n.10.

167. See Joyce, *New Way*, *supra* note 16.

168. Using this software, insurance companies can analyze social networks (finding, for example, if various claimants all use the same home address or provide the same phone number), deploy predictive analytics (by, for instance, training a robot to spot red flags within adjuster-written reports), and integrate data (by, for example, running the claimant’s name and social security number through public databases to see if the claimant has filed for bankruptcy, has a criminal record, is the subject of an adverse judgment, or has “address change velocity to indicate transient behavior”). RUCHI VERMA & SATHYAN RAMAKRISHNA MANI, USING ANALYTICS FOR INSURANCE FRAUD DETECTION 3 (2013), <http://www.the-digital-insurer.com/wp-content/uploads/2013/12/53-insurance-fraud-detection.pdf> [<https://perma.cc/NU6A-6CUT>]; ACCORD COAL. AGAINST INS. FRAUD, THE STATE OF INSURANCE FRAUD TECHNOLOGY: A STUDY OF INSURER USE, STRATEGIES AND PLANS FOR ANTI-FRAUD TECHNOLOGY 1 (2014) (reporting on a survey of forty-two insurers, which found that 95 percent of insurer-respondents use antifraud technology).

layered fraud-fighting mechanisms, including “paper reviews” (reviews of the claimant’s medical records), index bureau checks (inquiries into the claimant’s prior claims history), independent medical exams (physical exams by insurer-selected medical professionals), and, if warranted, referrals to special investigative units (SIUs) specially trained to ferret out fraud.<sup>169</sup> Starting in the 1990s, most insurers also started using computer programs—including Colossus, Claims Outcome Advisor, and Claims IQ—to more rigorously evaluate bodily injury claims.<sup>170</sup> Likened to Turbo Tax for auto accidents, these programs promise to minimize payout variance and improve adjusters’ investigative questioning.<sup>171</sup> Finally, some insurers—most prominently, Allstate—have started to play the long game, opting to fight soft-tissue claims through vigorous litigation, rather than tendering routinized payments, as they had in the past.<sup>172</sup>

Some of these *ex ante* strategies have substantial drawbacks and have drawn withering criticism.<sup>173</sup> But if they are judged narrowly on whether they help curtail payments on fraudulent claims, the scorecard seems positive. Most notably, there is evidence that insurers’ payments on claims displaying signs of fraud and exaggeration have dropped as a proportion of claimed expenses. One study, for example, shows that, for claims with an appearance of fraud, the recovery-to-claimed-economic-loss ratio is only 1.17 (meaning the claimant gets only \$1.17 for each dollar of claimed economic loss), compared to the comparatively generous 1.59 for claims that look “clean.”<sup>174</sup>

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169. For more on these and other techniques, see FEINMAN, *supra* note 37, at 96–99, 106, 110–12, 179–83; Richard A. Derrig et al., *Behavioral Factors and Lotteries Under No-Fault with a Monetary Threshold: A Study of Massachusetts Automobile Claims*, 61 J. RISK & INS. 245, 267–72 (1994).

170. Jerry Guidera, “Colossus” at the Accident Scene—Insurers Use a Software Program to Pay out Claims for Injuries, But Law Suits Claim It’s Misused, WALL ST. J., Jan 2, 2003, at C1 (reporting that twelve of the top twenty auto insurers in North America used Colossus by 2002).

171. Tony Bartelme, *Storm of Money: Insider Tells How Some Insurance Companies Rig the System*, POST & COURIER (Dec. 2, 2012, 12:29 AM), <http://www.postandcourier.com/article/20121202/PC16/121209871> [<https://perma.cc/3C36-T6QR>]. For more on these systems, see generally MARK ROMANO & J. ROBERT HUNTER, *LOW BALL: AN INSIDER’S LOOK AT HOW SOME INSURERS CAN MANIPULATE COMPUTERIZED SYSTEMS TO BROADLY UNDERPAY INJURY CLAIMS* (2012).

172. See Michael Maiello, *So Sue Us*, FORBES (Feb. 7, 2000, 12:00 AM), <http://www.forbes.com/forbes/2000/0207/6503060a.html> (on file with the *Michigan Law Review*) (discussing Allstate).

173. See, e.g., FEINMAN, *supra* note 37, at 96–99 (raising objections); ROMANO & HUNTER, *supra* note 171, at 14–18 (charging that, though Colossus ostensibly targets variance, it really seeks to reduce payouts, irrespective of claim legitimacy).

174. Richard A. Derrig et al., *Auto Insurance Fraud: Measurements and Efforts to Combat It*, 9 RISK MGMT. & INS. REV. 109, 122 (2006); see David S. Loughran, *Deterring Fraud: The Role of General Damage Awards in Automobile Insurance Settlements*, 72 J. RISK & INS. 551, 570–71 (2005) (presenting evidence “consistent with the hypothesis” that insurers decrease general damages when special damages exceed their expected value); see also INS. RESEARCH COUNCIL, *FRAUD AND BUILDUP IN NEW YORK AUTO INJURY INSURANCE CLAIMS* 55–62 (2006)

### B. *Extinguishing Dubious Suits Early On*

After a claim is actually filed in court and formal litigation is underway, additional procedures exist—and, indeed, increasingly exist—to flush out dubious suits early in the litigation life cycle. In standard litigation, these mechanisms take the form of heightened pleading standards (following the Supreme Court’s rulings in *Twombly* and *Iqbal*), expanded use of summary judgment (post-*Celotex*), and, under *Daubert* and its progeny, more rigorous standards for the admission of party-supported expert testimony. Indeed, it was a *Daubert* motion Judge Jack used to uncover fraud in the *Silica* MDL, which brought that potentially costly litigation to an early end.<sup>175</sup>

Additional mechanisms have also sprung up around particular areas of practice. For example, these days medical malpractice cases often must overcome the additional hurdles of certificate-of-merit requirements and professional screening panels.<sup>176</sup> Anti-SLAPP (strategic lawsuits against public participation) legislation, enacted in some form in the majority of states, imposes tough restrictions on lawsuits (such as those alleging defamation, slander, and libel) that would “target[ ] the defendants’ lawful exercise of free speech, petition, or association.”<sup>177</sup> Under Federal Rule of Civil Procedure 9(b), claims alleging fraud or mistake must be pled with special particularity in order “to safeguard defendants against spurious charges of immoral and fraudulent behavior.”<sup>178</sup> Enacted in 1995, the Private Securities

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(same). Of course, it is difficult to say that observed payment patterns were *caused* by insurers’ use of the above antifraud strategies. Further, while deterrence theory would predict that fraudulent filings will ultimately drop as the benefits of such filings diminish, there is not yet evidence of a reduction in suspicious filings.

175. Brown, *supra* note 53, at 580.

176. In medical malpractice cases, roughly half of states impose an affidavit or certificate-of-merit requirement, while approximately seventeen states demand that cases be heard by a screening panel prior to trial. See Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NAT’L CONFERENCE STATE LEGISLATURES (June 24, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx> [https://perma.cc/ZX2S-ZPKG]; Heather Morton, *Medical Liability/Malpractice ADR and Screening Panels Statutes*, NAT’L CONFERENCE STATE LEGISLATURES (May 20, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-adr-and-screening-panels-statutes.aspx> [https://perma.cc/Q2GN-99X2].

177. Laura Lee Prather & Justice Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH L. REV. 725, 731, 734–36 (2015). Approximately thirty states have some type of anti-SLAPP legislation, which generally requires expedited dismissal and payment of attorneys’ fees if an action arises from protected petitioning, unless the plaintiff can succeed in making out a prima facie case when put to an early and onerous test. *Id.* (collecting citations).

178. *State Farm Mut. Auto. Ins. Co. v. Makris*, No. CIV.A. 01-5351, 2003 WL 924615, at \*4 (E.D. Pa. Mar. 4, 2003) (quoting *McHale v. NuEnergy Grp.*, No. CIV.A. 01-4111, 2002 WL 321797, at \*3 (E.D. Pa. Feb. 27, 2002)).



Litigation Reform Act (PSLRA) subjects securities cases to stringent requirements.<sup>179</sup> Finally, some jurisdictions' local rules impose special pleading requirements on those asserting claims under civil RICO.<sup>180</sup>

Especially in recent years, mass tort claimants also face enhanced scrutiny. *Lone Pine* orders offer one example. Increasingly in use in mass tort cases, *Lone Pine* orders require each allegedly impaired plaintiff to produce a diagnostic report from his or her physician soon after filing.<sup>181</sup> The order's purpose, as one court explained, is to "identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants" as expeditiously as possible.<sup>182</sup> Building on the *Lone Pine* concept, in the World Trade Center Disaster Site Litigation, Judge Alvin K. Hellerstein developed a sophisticated database of claimants and their identified ailments.<sup>183</sup> Through this database, the court was quickly able to discern that "less than 25 percent of the claimants had suffered serious injury and that almost a third suffered no injury at all."<sup>184</sup>

Worried about junk science, other judges in mass torts have turned to independent experts (specifically authorized by Federal Rule of Evidence 706 and state counterparts) and have tasked these experts with assessing claimants' conditions.<sup>185</sup> Thus, in one case involving sixty-five tire workers who claimed to be suffering from asbestos injuries, the court appointed an independent expert to review all pertinent material. That expert found that forty-two of the sixty-five plaintiffs "were found to be free of any condition giving rise to a cause of action," which streamlined the litigation considerably.<sup>186</sup> Likewise, in the litigation over silicone-gel breast implants, transferee

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179. For more on the PSLRA and its effect, see generally Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489 (2006).

180. See Darrel C. Menthe, *Avoiding the Pitfalls of Pleading Civil RICO*, PRAC. LITIGATOR, May 2007, at 55, 56.

181. See *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (suggesting that, in recent years, "*Lone Pine* orders have been routinely used by courts to manage mass tort cases"); James P. Muehlberger & Boyd S. Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation*, 71 DEF. COUNS. J. 366, 366, 368 (2004) (noting that the use of *Lone Pine* orders "appears to be spreading" and that these orders "eliminate frivolous claims quickly").

182. *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 WL 315346, at \*1 (S.D. Ohio Jan. 30, 2007).

183. See Alvin K. Hellerstein et al., *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653 (2013).

184. *Id.* at 659. Judge Eduardo C. Robreno, the transferee judge presiding over the asbestos product liability MDL, has also expanded on the *Lone Pine* concept in an effort to streamline this long-running litigation. For a detailed description of his efforts, see Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 137-38 (2013).

185. Most states have adopted provisions akin to Rule 706. Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Medical Diagnosing*, 48 WM. & MARY L. REV. 2043, 2045 n.18 (2007) (compiling authority). For more on Rule 706, see WILLGING, *supra* note 100, at 55-57.

186. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39 (1991).

Judge Sam C. Pointer famously used Rule 706 to appoint a “National Science Panel,” and the Panel’s conclusion that implants did not cause autoimmune disease helped bring that sprawling litigation to its ultimate end.<sup>187</sup>

Going a step further, a handful of states have recently enacted “medical criteria” laws specifically targeting one kind of mass tort: asbestos legislation. Among other things, these laws impose substantial (and probably insuperable) burdens on lawyer-funded mass screenings and require plaintiffs to make an early, credible prima facie showing of a genuine impairment.<sup>188</sup> Other states have recently enacted legislation to crack down on double dipping; these new laws, among other things, require asbestos victims seeking tort compensation to reveal to defendants *all* asbestos claims they have previously filed and all material pertaining thereto, under penalty of perjury.<sup>189</sup> And, even without supporting legislation, several jurisdictions have adopted standing Case Management Orders compelling the timely production of such material.<sup>190</sup>

Last but not least, settlement funds and bankruptcy trusts increasingly conduct audits to identify fraudulent filings.<sup>191</sup> The importance and utility of audits were on full display in the fen-phen litigation. There, once people began to suspect that bogus claims were inundating the \$3.75 billion settlement trust, Judge Harvey Bartle ordered an audit of *all* claims, ultimately resulting in many denials.<sup>192</sup> Similarly, in the asbestos context, audits of the Manville Trust helped to identify ten diagnosing doctors with abnormally high failure rates.<sup>193</sup>

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187. Laura L. Hooper et al., *Assessing Causation in Breast Implant Litigation: The Role of Science Panels*, LAW & CONTEMP. PROBS., Autumn 2001, at 139, 179 n.211 (discussing the Panel’s impact); Joseph Sanders, *Science, Law, and the Expert Witness*, LAW & CONTEMP. PROBS., Winter 2009, at 63, 78 n.79 (same). This is not to suggest that the Panel’s appointment was without controversy. For further context, see generally Peter J. Gross et al., *Clearing Away the Junk: Court-Appointed Experts, Scientifically Marginal Evidence, and the Silicone Gel Breast Implant Litigation*, 56 FOOD & DRUG L.J. 227 (2001).

188. See, e.g., GA. CODE ANN. §§ 51-14-1 to -10 (2007); KAN. STAT. ANN. §§ 60-4901 to -4911 (2006); S.C. CODE ANN. §§ 44-135-30 to -110 (2006); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001 to .012 (West 2005). For more on these laws, see Hanlon & Geise, *supra* note 64, at 3–5.

189. See ARIZ. REV. STAT. ANN. § 12-782 (2015); OHIO REV. CODE ANN. §§ 2307.951 to .954 (West 2013); OKLA. STAT. tit. 76, §§ 8189 (2013); W. VA. CODE ANN. §§ 55-7F-1 to -11 (2015); WIS. STAT. § 802.025 (2014). Similar bills have been introduced in a number of other states, as well as in the U.S. House and Senate. Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071, 1140–45 (2014) (detailing various efforts).

190. See Peggy L. Ableman, *The Time Has Come for Courts to Respond to the Manipulation of Exposure Evidence in Asbestos Cases*, MEALEY’S LITIG. REP.: ASBESTOS, Apr. 8, 2015, at 1, 7.

191. See GAO, TRUST STUDY, *supra* note 68, at 22–23 (reporting that 98 percent of studied asbestos trusts contained a provision requiring audits). For more on audits, see Hylton, *supra* note 108, at 591.

192. Under the original settlement, the trust was allowed to audit no more than 15 percent of claims. See *In re Diet Drugs Prods. Liab. Litig.*, 226 F.R.D. 498, 505–07 (E.D. Pa. 2005); Brickman, *Screenings*, *supra* note 20, at 1263–64.

193. Frederick C. Dunbar et al., *Institutional Response to Tort System Breakdown: Asbestos Enters a New Phase* 3–5, 3 n.6 (July 21, 2006) (unpublished manuscript) (on file with the

C. *Ex Post Remedial Mechanisms*

Finally, once a lawsuit is in full swing or even after it has been resolved, there are a slew of mechanisms to penalize lawyers and litigants who have submitted fraudulent claims. These include penalties pursuant to: Federal Rules of Civil Procedure 11 and 60(b)(3) (and state court counterparts), 28 U.S.C. § 1927 (and state court counterparts), courts' inherent authority, lawsuits for malicious prosecution, bar disciplinary proceedings, and criminal prosecution. Table 2 offers a brief synopsis. Then, each mechanism is explored in more depth.

TABLE 2  
REMEDIAL MEASURES

Measures	Description
Federal Rules of Civil Procedure	Rule 11 – authorizes sanctions, subject to certain restrictions, if a lawyer or party files a frivolous claim or paper Rule 60 – authorizes relief from judgment, subject to certain restrictions, upon the grounds of perjury, misrepresentation, misconduct, or fraud
State Court Counterparts	Numerous states have provisions that mirror or mimic Rules 11 and 60.
28 U.S.C. § 1927	An attorney who unreasonably and vexatiously multiplies a proceeding in federal court may be required to pay the excess costs that result from such conduct.  By statute, numerous states flip the American rule when the initiation or defense of an action, or part thereof, is frivolous, groundless, vexatious and/or conducted in bad faith.
State Counterparts	
Inherent Authority	Courts may impose a full range of penalties for bad faith litigation conduct.
Malicious Prosecution Lawsuit	This is a tort claim subject to strict limits, including that the (instant) plaintiff must show the original proceeding was initiated with malice and without probable cause, it was terminated in her favor, and she sustained an injury therefrom, despite her foregoing victory.
Bar Disciplinary Proceedings	Model Rule 1.2(d) – bars lawyers from counseling or assisting clients in the commission of a crime or fraud Model Rule 3.1 – forbids attorneys from initiating a proceeding unless there is a nonfrivolous basis for doing so Model Rule 3.3 – forbids attorneys from making material false statements to tribunals, failing to correct false statements already made, or offering evidence that the lawyer knows to be false Model Rule 3.4 – forbids attorneys from falsifying evidence, counseling a witness to testify falsely, or assisting with such testimony Model Rule 4.1 – forbids attorneys from knowingly making false statements of material fact or law to a third person Model Rule 8.4 – forbids attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or engaging in conduct that is prejudicial to the administration of justice
Criminal Prosecution	A number of state and federal criminal statutes are potentially implicated, including insurance fraud, conspiracy, mail fraud, wire fraud, obstruction of justice, perjury, and criminal RICO.

*Michigan Law Review*). This process was aided by Judge Jack's *Silica* order, as that order also identified physicians with dubious diagnoses. *Id.* at 5–7.

## 1. Rule 11

First, a complaint based on manufactured evidence can be sanctioned under Rule 11. Applicable to nearly every paper filed in federal court, Rule 11 provides that by presenting a filing, an attorney certifies, to the best of his or her knowledge, that the filing: (1) “is not being presented for any improper purpose,” (2) contains factual contentions that have evidentiary support (or, if specifically identified, are likely to have evidentiary support upon further investigation), and (3) contains claims and contentions that “are warranted by existing law or by a nonfrivolous argument” for the law’s extension, modification, or reversal.<sup>194</sup> The Rule further specifies that “[i]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated,” it may impose appropriate sanctions on the attorney, law firm, or party “responsible for the violation.”<sup>195</sup>

Of course, Rule 11 is subject to certain limits. Most notably, it (and its many state court counterparts) applies only once a lawsuit is filed.<sup>196</sup> Thus, Rule 11 cannot penalize those who file false demands for payment (with an auto insurer or trust administrator, say) without actually initiating suit. After its 1993 amendment, it includes a twenty-one-day safe harbor provision, which softens some of its bite.<sup>197</sup> Finally, though penalties can be hefty, it is now clear that Rule 11’s primary purpose is to deter rather than to compensate.<sup>198</sup> Consistent with that purpose, courts are advised to err on the side of leniency and to impose the least severe sanction they can, sufficient to deter misconduct.<sup>199</sup>

## 2. Rule 60

Next, Federal Rule of Civil Procedure 60 authorizes relief from a final judgment in limited circumstances. In particular, Rule 60(b)(3) authorizes relief for “fraud . . . misrepresentation, or misconduct by an opposing

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194. FED. R. CIV. P. 11(b). Attorneys can also be sanctioned for advocating a position after it becomes clear that the position is untenable. *E.g.*, *Turner v. Sungard Bus. Sys.*, 91 F.3d 1418, 1421–22 (11th Cir. 1996).

195. FED. R. CIV. P. 11(c)(1).

196. *See* *Ali v. Tolbert*, 636 F.3d 622, 329–30 (D.C. Cir. 2011); *Lamboy-Ortiz v. Ortiz-Vélez*, 630 F.3d 228, 245 (1st Cir. 2010). Numerous states have provisions that mirror or mimic Rule 11, in either its 1983 iteration or its current guise. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 382, 385–86 (2003) (compiling authority).

197. FED. R. CIV. P. 11(c)(2) (providing that, when a party moves for sanctions, the party against whom sanctions are sought has twenty-one days to withdraw or correct the challenged paper without adverse consequences).

198. *Id.* 11(c)(4) (“A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”).

199. WILLIAM H. FORTUNE ET AL., *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK* 80 (2d ed. 2001). As such, monetary penalties are rarely imposed, and even when imposed, are typically paid to the court, rather than to the aggrieved party, though an exception can be made for “egregious violations.” VAIRO, *supra* note 31, at 521–23.

party”—but only if the moving party seeks relief within one year of the court’s judgment.<sup>200</sup> Additionally, Rule 60(d)(3) provides that in the case of (subtly different and more serious) “fraud on the court,” a judgment can be set aside at any time.<sup>201</sup>

When applying Rule 60, however, courts have proceeded cautiously. As the Fifth Circuit has advised: “The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of *res judicata*, and the incessant command of the court’s conscience that justice be done in light of *all* the facts.”<sup>202</sup> Exhibiting this caution, courts have consistently ruled that the moving party—the party seeking to open a judgment—carries a “heavy burden,” must prove the fraud’s existence by clear and convincing evidence, and “must show not only that ‘the adverse party engaged in fraud or other misconduct, [but also] that his conduct prevented the moving party from fully and fairly presenting his case.’”<sup>203</sup> Furthermore, if the moving party cannot show “fraud on the court,” Rule 60(b)(3)’s one-year time limit is exactly applied.<sup>204</sup>

### 3. 28 U.S.C. § 1927

Title 28 U.S.C. § 1927 offers a third mechanism to punish fraudulent filings. Originally enacted in 1813 and substantially revised in 1980, the statute provides:

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200. FED. R. CIV. P. 60(b)(3), (c)(1). Though not described in detail here, other mechanisms are also potentially implicated. If a party engages in discovery abuse, Federal Rules of Civil Procedure 26(g), 30, and 37 authorize penalties. For certain pretrial misconduct, Rule 16(f) comes to the fore. If a party files a frivolous or unwarranted appeal, Rule 39, Federal Rule of Appellate Procedure 38, and 28 U.S.C. § 1912 come into play. Finally, courts may authorize a range of sanctions for the spoliation or destruction of evidence. For more on these mechanisms, see generally David F. Herr & Nicole Narotzky, *Sanctions in Civil Litigation: A Review of Sanctions by Rule, Statute, and Inherent Power*, SN009 A.L.I.-A.B.A. 1741 (2007).

201. FED. R. CIV. P. 60(d)(3). Parsing the difference, one commentator explains that

[a] fraud on the court claim hinges on the conduct’s effect on the judicial process—the fraud alleged must involve injury to more than a single litigant and must seriously affect the integrity of the adjudication process. Examples include bribery of a judge, jury tampering, or hiring an attorney whose sole value to the case is the attorney’s intimate or criminal relationship with the judge. These types of claims are distinguishable from fraud between parties, which, even if involving perjury, do not constitute fraud on the court.

Hollee S. Temple, *Raining on the Litigation Parade: Is It Time to Stop Litigant Abuse of the Fraud on the Court Doctrine?*, 39 U.S.F. L. REV. 967, 974–75 (2005).

202. *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970) (emphasis added).

203. *Kiburz v. Sec’y, U.S. Dep’t of the Navy*, 446 F. App’x 434, 436–37 (3d Cir. 2011) (alteration in original) (quoting *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983)); see also *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995) (advising that the “clear and convincing” requirement is “well-settled”).

204. 12 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE*, § 60.65[2][a] (3d ed. 1997) (describing the one-year limit as “absolute”).

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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.<sup>205</sup>

Section 1927 is a formidable fraud-fighting instrument, even as compared to Rule 11. While Rule 11 depends on “a writing,” § 1927 broadly encompasses any misconduct.<sup>206</sup> In addition, while a Rule 11 motion must be made before a case is over, § 1927 motions can be made postresolution.<sup>207</sup> Finally, unlike Rule 11—which is aimed at deterrence rather than compensation—§ 1927 explicitly authorizes monetary penalties that flow to the party aggrieved.<sup>208</sup>

Even so, § 1927 has limits. First, § 1927 applies only to attorneys; parties or experts fall outside its parameters.<sup>209</sup> Second, while § 1927 explicitly authorizes monetary sanctions, this sanction is limited to “excess costs” incurred as a consequence of the misconduct—and calculating precisely which costs are “excess” sometimes proves difficult.<sup>210</sup> Third, in keeping with Congress's explicit command that the provision should “in no way . . . dampen the legitimate zeal of an attorney in representing his client,” courts have long held that § 1927 ought to be strictly construed and have typically predicated the imposition of sanctions on a showing of intent, recklessness, or bad faith.<sup>211</sup> Finally, § 1927's reach is circumscribed. Applicable only to federal actions, it does not sanction state court conduct or the filing of fraudulent claims outside official tribunals. As Table 2 indicates, however, numerous states have enacted similar statutory provisions that authorize or direct judges to award attorneys' fees to the aggrieved party upon a finding that litigation was frivolous, groundless, vexatious, or not initiated in good faith (or some combination thereof).<sup>212</sup>

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205. 28 U.S.C. § 1927 (2012).

206. VAIRO, *supra* note 31, at 761 (drawing this distinction).

207. *Id.* at 762 (collecting authority).

208. *Id.* at 760.

209. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 21(C)(1) (5th ed. 2013) (discussing this limit).

210. *Id.* § 24(B). Indeed, in the *Silica* litigation, Judge Jack imposed sanctions pursuant to § 1927, but partly because of this “excess” requirement, the sanctions' dollar value (\$8,250) bordered on the trivial. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 676–79 (S.D. Tex. 2005).

211. H.R. REP. NO. 96-1234, at 8 (1980) (Conf. Rep.); accord 2 ALBA CONTE, ATTORNEY FEE AWARDS § 7:58, at 407 (3d ed. 2004).

212. *E.g.*, CAL. CIV. PROC. CODE § 128.5(a) (West 2015) (“Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous . . . .”); see also John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 457–68 (1986) (compiling state authority).

#### 4. Inherent Authority

Next, both state and federal judges have “inherent authority” to punish those who file fraudulent claims.<sup>213</sup> This inherent sanctioning power is, in one commentator’s words, “staggeringly broad.”<sup>214</sup> A “consummate gap-filler,” a court’s inherent authority can be used to target not just lawyers, but all those complicit in the vexatious litigation effort.<sup>215</sup> Judges can use their inherent authority to sanction actors for the full run of litigation abuse. And they can impose a wide range of penalties, including everything from awarding attorneys’ fees, to entering a default judgment, to enjoining further litigation, to vacating a past judgment, to reprimanding or even disbaring offending counsel.<sup>216</sup>

Still, there are limits. Once again, the ability to sanction depends on the actual initiation of suit; thus, claims just submitted to insurers, funds, or trusts aren’t covered. In addition, because this authority is “shielded from direct democratic controls,” the Supreme Court has held that lower courts must exercise their inherent authority “with restraint and discretion.”<sup>217</sup> Following that command, courts typically impose sanctions pursuant to their inherent authority only when an actor’s conduct is egregious and no other adequate basis for sanctions exists.<sup>218</sup>

#### 5. Malicious Prosecution

A fifth mechanism litigants can use to penalize filing fraudulent claims is the common law tort variously called “malicious prosecution,” “malicious civil prosecution,” or “wrongful use of civil proceedings.”<sup>219</sup> Subject to onerous requirements because, it is said, a freewheeling civil action would chill litigation, wrongfully curtail court access, and—potentially even worse—trigger adversarial combat without end, a malicious prosecution action can be initiated only if a party satisfies at least four requirements.<sup>220</sup> The court must find:

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213. See JOSEPH, *supra* note 209, § 1(E). According to the Supreme Court, federal courts’ inherent powers are those which “are necessary to the exercise of all others.” *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

214. JOSEPH, *supra* note 209, § 1(E).

215. Gregory P. Joseph, *Rule 11 Is Only the Beginning*, A.B.A. J., May 1988, at 62, 64.

216. JOSEPH, *supra* note 209, §§ 1(E), 28(A) (collecting sources).

217. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

218. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (“[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power.”); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472–73 (D.C. Cir. 1995); *Martin v. Brown*, 63 F.3d 1252, 1265 (3d Cir. 1995).

219. Wade, *supra* note 212, at 437–38.

220. See, e.g., *Babb v. Superior Court*, 479 P.2d 379, 382–83 (Cal. 1971) (“[M]alicious prosecution is a cause of action not favored by the law . . . . The additional risk [of liability] . . . may deter poor plaintiffs from asserting bona fide claims.”); *Schwartz v. Schwartz*, 8 N.E.2d

- (1) the proceeding at issue was initiated without probable cause;
- (2) the proceeding was terminated in favor of the defendant (although there may be an exception if the plaintiff's victory was obtained by fraud);
- (3) the proceeding was initiated with "malice" (which exists, it is commonly said, when a plaintiff files a suit he does not believe is meritorious); and
- (4) the proceeding injured the defendant, despite his foregoing victory.<sup>221</sup>

Seeking to further curtail the action, a large minority of states impose a fifth prerequisite—namely, that the defendant (now seeking relief via the tort system) must show he suffered some *special* injury as a result of the initial proceeding, beyond the fact that the suit's defense was costly or burdensome.<sup>222</sup> Lastly, many states top off the above requirements with an additional hurdle: a statute of limitations of only one year.<sup>223</sup>

For a party who can clear the above obstacles, though, these suits have several advantages. They can be initiated for actions that originated in either state or federal court and against the original plaintiff, his attorney, or both, assuming adequate malice.<sup>224</sup> And, unlike some remedial measures, successful malicious prosecution actions can come with sizable awards, including punitive and noneconomic damages.<sup>225</sup> At the same time, however, the party must file and litigate a collateral action, which can be costly.

## 6. Bar Disciplinary Activity

A sixth remedial mechanism is the bar disciplinary system. A lawyer who assists a client in filing a manufactured claim almost certainly violates at least one of a several Model Rules of Professional Conduct (as set forth above in Table 2), and, of course, lawyers who violate their states' rules of conduct are subject to professional discipline.<sup>226</sup>

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668, 670 (Ill. 1937) (noting that malicious prosecution suits are subject to exacting requirements because "courts should be open to litigants for the settlement of their rights without fear of prosecution"); *Penwag Property Co. v. Landau*, 388 A.2d 1265, 1266 (N.J. 1978) (per curiam) ("Malicious prosecution . . . is not a favored cause of action because of the policy that people should not be inhibited in seeking redress in the courts.").

221. See RESTATEMENT (SECOND) OF TORTS § 676 cmt. b (AM. LAW INST. 1977); accord *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 120 (5th ed. 1984); Wade, *supra* note 212, at 437–50.

222. See KEETON ET AL., *supra* note 221, § 120, at 890–92. Where this requirement is imposed, it is said to "virtually abrogate[ ] the use of this theory." Jerome M. Janzer, Comment, *Countersuits to Legal and Medical Malpractice Actions: Any Chance for Success?*, 65 MARQ. L. REV. 93, 116 (1981).

223. See *von Bulow ex rel. Auersperg v. von Bulow*, 657 F. Supp. 1134, 1144 & n.7 (S.D.N.Y. 1987).

224. Wade, *supra* note 212, at 446.

225. See *id.* at 444.

226. All states save California have rules of professional conduct fashioned after the Model Rules. For detail, see Charts Comparing Professional Conduct Rules, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/charts.html](http://www.americanbar.org/groups/professional_responsibility/policy/charts.html) [https://perma.cc/8EFZ-RL2R].



Bar disciplinary sanctions offer, at least theoretically, a potent and sensible tool to penalize attorneys who assist in the filing of fraudulent claims: The system can punish lawyers even for out-of-court conduct. Disciplinary tribunals, which determine whether any Rules have been violated, are often comprised of specialists. As such, they come with the efficiency, uniformity, and quality advantages generally thought to accompany specialized courts.<sup>227</sup> Bar prosecutors should theoretically *learn* of relevant misconduct, as lawyers and judges are duty-bound to report serious abuses to “appropriate authorit[ies].”<sup>228</sup> And adjudicators can impose stiff penalties (including disbarment) but, unlike in criminal cases, they need not be persuaded beyond a reasonable doubt.

Yet, for all those advantages, this layer of the regulatory architecture has serious limitations. While we might debate *why* disciplinary committees have seemingly stood by, even in the face of serious attorney wrongdoing—the evidence that they’ve done so is quite plain.<sup>229</sup> Illustrating this lassitude, though a grievance was filed concerning the Baron & Budd deposition-preparation memo discussed above, disciplinary counsel in Texas reportedly “brushed off the grievance, apparently accepting the law firm’s unsworn

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227. See LAWRENCE BAUM, *SPECIALIZING THE COURTS* 32–33 (2011) (dubbing increased efficiency, quality, and uniformity the “neutral virtues” of judicial specialization).

228. See MODEL CODE OF JUDICIAL CONDUCT R. 2.15 (AM. BAR ASS’N 2011) (obligating judges to report conduct that “raises a substantial question regarding the lawyer’s honesty, trustworthiness or fitness” to “the appropriate authority”); MODEL RULES OF PROF’L CONDUCT R. 8.3 (AM. BAR ASS’N 2008) (same for lawyers).

229. What explains this? A partial answer is that bar counsel might not learn of lawyers’ transgressions. Detection is tricky because, though (as noted) judges and lawyers are formally obligated to alert authorities when they come across certain unethical conduct, in reality, many shirk on their whistle-blowing responsibilities. This leaves ex-clients to file most grievances. See Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 *FORDHAM L. REV.* 2761, 2766 (2012) (reporting that lawyers and judges account for only “10 percent of the complaints to disciplinary bodies”). But ex-clients, who may be complicit in lodging fraudulent filings, are, in this instance, particularly unlikely to act. Part of the answer, too, is that, perhaps out of respect for a (kind of) coordinate branch of government, bar counsel tends to defer to courts whenever in-court conduct is at issue. Because some frauds involve in-court activity, this deference takes a constellation of conduct off the table. See *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 110 cmt. b (AM. LAW INST. 2000) (“Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse.”).

Further, in many of these cases, proof is difficult. In particular, many Model Rules predicate liability on the lawyer’s *actual* knowledge of fraud. See MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (AM. BAR ASS’N 2016) (defining “known” and “knowingly”). Yet, some lawyers in the business of generating dubious claims carefully compartmentalize responsibility (between x-ray technicians, diagnosing physicians, and paralegals, say), which makes it difficult to *prove* that any given lawyer had requisite knowledge. See Brown, *supra* note 53, at 610 (calling compartmentalization an “effective ‘getaway car’”). Finally, it is worth noting that disciplinary committees’ apparent inactivity in this context is not particularly exceptional. A common refrain is that the disciplinary system is *generally* too slow to bring serious charges and impose stiff penalties. Thus, what we are bemoaning is potentially not an aberration—but rather the rule. See Rhode & Woolley, *supra*, at 2767 (reporting that “[o]nly about 3 percent of cases brought to disciplinary authorities result in public sanctions”).

statements at face value and not conducting an independent factual investigation.”<sup>230</sup> No lawyer suffered severe penalties in the wake of the *Silica* debacle.<sup>231</sup> And though in *fen-phen*, Judge Harvey Bartle forwarded to the New York bar his finding that certain firms had engaged in “highly questionable” diagnostic practices, no formal charges were filed.<sup>232</sup>

## 7. Criminal Prosecution

Last but not least, those who assert fraudulent claims are subject to criminal prosecution, whether for perjury, obstruction of justice, conspiracy, bribery, mail fraud, wire fraud, or insurance fraud—and whether by state or federal authorities.<sup>233</sup> Criminal proceedings offer several obvious advantages over other available remedies. Namely, penalties are steeper, public prosecution underscores the gravity of the offense, and prosecutors, with prosecutorial discretion, are publicly accountable. Beyond that, a criminal conviction may estop the insured from contesting the fraud in a subsequent civil action, generating judicial efficiencies.<sup>234</sup> Restitution is possible, as most states, as well as the federal government, have laws under which sentencing courts can compel felons to compensate the victims of their crimes.<sup>235</sup> Finally, the prospect of prison time can induce the cooperation of otherwise reluctant witnesses who can, in turn, help to reveal the full extent of specious activity.

On the other hand, there are limits. The “beyond a reasonable doubt” standard carries substantial problems of proof. Reliant on state or federal prosecutors, victims cannot personally get the wheels of justice to turn. And state and federal prosecutors may be reluctant to become embroiled in

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230. Cramton, *supra* note 65, at 179 n.16, 187 (“A referral by a Dallas County judge to Texas disciplinary authorities resulted in a letter to Fred Baron stating that bar counsel had dismissed a grievance against him ‘since it does not state, on its face, a violation of a disciplinary rule.’” (footnote omitted)). Some ethicists have defended disciplinary counsel’s restraint, maintaining that the memo, considered in context, was wholly defensible. *See, e.g.*, W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343 (1999).

231. CARROLL ET AL., *supra* note 63, at 18 (“In the end, only one of the plaintiffs’ firms involved in the silica litigation ended up paying a penalty . . . . And the sanction levied against that firm was small.”); *accord* Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove, 965 So. 2d 1041 (Miss. 2007) (declining to impose sanctions against a plaintiffs’ firm involved in the *Silica* litigation).

232. *Trust Amends Suit Against New York Doctor, Adding RICO Claims*, MEALEY’S LITIG. REP.: FEN-PHEN/REDUX, Aug. 12, 2004, at 9.

233. Notably, many states’ conspiracy statutes specifically make the filing of a fraudulent action a criminal offense. *See, e.g.*, CAL. PENAL CODE § 182(a)(3) (2016) (rendering it a criminal offense to conspire to “[f]alsely to move or maintain any suit, action, or proceeding”).

234. *See* Gray v. Comm’r of Internal Revenue, 708 F.2d 243, 246 (6th Cir. 1983).

235. Guy E. Burnette, Jr., *Practice Tips: Defending Against Insurance Fraud*, BRIEF, Summer 1989, at 43, 47 (discussing restitution). In addition, more than half of states authorize additional civil or administrative fines if a defendant is convicted of defrauding an insurer. For more on these fines, see INS. RESEARCH COUNCIL, FIGHTING FRAUD IN THE INSURANCE INDUSTRY 37 (2d ed. 1997) [hereinafter IRC, FIGHTING FRAUD].

seemingly “private skirmishes.” Indeed, this last point has become a rallying cry for those advocating for retaliatory RICO, as ATRA’s president has complained that state and federal officials have mostly “ignore[d] fraud perpetrated by the lawsuit industry.”<sup>236</sup>

Yet, it’s not clear that, these days, such assertions ring true.<sup>237</sup> Granted, traditionally, there have been relatively few criminal prosecutions for fraudulent claiming activity. In recent years, however, states have substantially stepped up their enforcement activities. Cognizant of the complexity of fraud prosecutions, nearly all states have created dedicated fraud bureaus to assist with—or, in some states, quarterback—detection, investigation, and prosecution efforts. (Only eight states had such bureaus in 1990.<sup>238</sup>) In recent years, numerous states have amended their formal law to make the filing of false insurance claims a felony. (Previously, such convictions were met with a mere slap on the wrist.<sup>239</sup>) And, to help insurers overcome their longstanding reluctance to refer suspicious claims to public authorities, the majority of states now make such referrals compulsory.<sup>240</sup> Perhaps as a consequence, fraud referrals are up, and criminal convictions are also sharply on the rise.<sup>241</sup>

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236. Joyce, *New Way*, *supra* note 16; accord Brickman, *Screenings*, *supra* note 20, at 1228–29, 1313–14 (lamenting that mass tort fraud has been mostly “prosecution-less”).

237. Granted, we cannot *begin* to know if there is “enough” prosecutorial activity without a sense of the numerator or denominator—just how many prosecutions there are, as against the total amount of fraudulent claiming. Currently, we know neither with any precision.

238. COAL. AGAINST INS. FRAUD, A STATISTICAL STUDY OF STATE INSURANCE FRAUD BUREAUS 6 (2001), [http://www.insurancefraud.org/downloads/fb\\_study.pdf](http://www.insurancefraud.org/downloads/fb_study.pdf) [https://perma.cc/AH7B-Y3ZS]. Funding for fraud bureaus increased 47 percent from 1998 to 2000. *Id.*

239. As of 2008, forty-eight states made the filing of a false claim with an insurer a felony, up from thirty-five states in 1999. Compare Aviva Abramovsky, *An Unholy Alliance: Perceptions of Influence in Insurance Fraud Prosecutions and the Need for Real Safeguards*, 98 J. CRIM. L. & CRIMINOLOGY 363, 364 n.2 (2008), with Hoyt et al., *supra* note 14, at 433–34.

240. Abramovsky, *supra* note 239, at 378–79; see FLA. INS. RESEARCH CTR., *supra* note 28, at 122, 180 (noting that, historically, “many insurance companies” were “hesitant” to refer fraud cases for criminal prosecution).

241. See COAL. AGAINST INS. FRAUD, *supra* note 238, at 5 (“Total convictions from fraud bureau investigations were 2,123 in 2000, more than double the total in 1995.”); KEVIN M. MCCARTY, FLA. OFFICE OF INS. REGULATION, REPORT ON REVIEW OF THE DATA CALL PURSUANT TO HOUSE BILL 119—MOTOR VEHICLE PERSONAL INJURY PROTECTION (PIP) INSURANCE 35 (2015) (reporting that, from 2008 to 2013, convictions for no-fault auto fraud in Florida more than doubled); Abramovsky, *supra* note 239, at 379 (discussing referrals). Tellingly, some of the fraud discussed above has been successfully prosecuted. Richard Mark Swimm of soda pop slip-and-fall fame was sentenced to a prison term of ten years. *State v. Swimm*, 328 S.E.2d 307, 308 (N.C. Ct. App. 1985), *aff’d as modified*, 340 S.E.2d 65 (N.C. 1986). In the wake of the diet drug debacle, as the fen-phen settlement trust was beset by dubious claims, indictments flew and convictions followed. See, e.g., Lenzner & Maiello, *supra* note 59. In September 2012, for example, Dr. Abdur Razzak Tai, an Orlando cardiologist who reviewed the echocardiograms of more than 1,100 claimants and falsely certified that the tests showed compensable heart damage, was convicted of thirteen separate counts of mail and wire fraud and, at age seventy-nine, was sentenced to six years in prison. *Fen-Phen Fraud Doctor Convicted*, FED. BUREAU OF INVESTIGATION (Sept. 14, 2012), <http://www.fbi.gov/philadelphia/press-releases/2012/fen-phen-fraud-doctor-convicted> [https://perma.cc/8ARE-ZWZ9]. And bogus auto

#### D. *Concluding Thoughts on Conventional Mechanisms*

In light of the assertion that RICO is warranted because conventional anti-fraud mechanisms are insufficient, I have inventoried the various tools already in place to deter and punish fraudulent filings. This investigation revealed that numerous tools do exist, and they take a dizzying array of forms. Some are formal, others informal. Some target lawyers, others litigants. Some are *ex ante*, others *ex post*. Some are paradigmatically public, while others are private, and still others (notably, bar disciplinary proceedings) straddle the space in between. Some measures—such as a *Daubert* review that disallows dubious expert testimony—seek to subtly deter suspicious filings. Other measures, such as sanctions pursuant to 28 U.S.C. § 1927, malicious prosecution lawsuits, and bar disciplinary proceedings, focus quite explicitly on punishing egregious activity.

Beyond showing the expansive scope and varied nature of the current regulatory regime, the foregoing exercise surfaces three important insights that ought to inform future analyses.

The first insight is that the past ten or twenty years have witnessed a surge in anti-fraud activity. Insurers are doing more: whereas in 1989 it was said that “insurers have assumed an ostrich-like position, burying their heads in the sand by discounting fraudulent claims as a somewhat insignificant problem to be generally disregarded,”<sup>242</sup> these days, the vast majority of property and casualty insurers are investing heavily in the creation and maintenance of layered and sophisticated fraud-fighting systems.<sup>243</sup> Legislators have acted: between 1988 and 1999, forty-three states enacted 124 new antifraud statutes—and since 2004, more than a dozen states have enacted another round of antifraud legislation specifically to curb asbestos claims.<sup>244</sup> Courts are involved: especially in the mass tort realm, judges are experimenting with numerous new procedures to snuff out fraudulent filings, including mandating audits, appointing independent experts, and issuing *Lone Pine* orders. And finally, prosecutors, long resistant to spending too much time or effort punishing fraudulent filings, have by all accounts grown “increasingly aggressive” and secured a number of high-profile convictions.<sup>245</sup>

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claims have also been aggressively targeted—in recent years, the FBI has investigated and brought down numerous staged-car-wreck rings all across the United States. See Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 918 n.39 (1992). Indeed, federal authorities have prominently prosecuted a number of auto-accident-fraud rings under criminal RICO. *Id.* at 937.

242. Burnette, *supra* note 235, at 43.

243. See IRC, *FIGHTING FRAUD*, *supra* note 235, at 5 (reporting that insurers’ spending on fraud control more than tripled between 1992 and 1996); Lesch & Byars, *supra* note 37, at 418 (reporting that, of 150 surveyed insurers, 98 percent had fraud control programs by 1997, up from 50 percent in 1983).

244. See Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 505–06 (2009) (discussing asbestos-specific legislation); Hoyt et al., *supra* note 14, at 428 (cataloging the statutes enacted between 1988 and 1999).

245. DORNSTEIN, *supra* note 13, at 331. For successes, see *supra* note 241.

Moreover, although evidence is limited, it appears that many of these efforts are working.<sup>246</sup> If we focus, for example, on asbestos litigation (which has been the site of so much controversy), we see that within the past decade claim volumes have plummeted.<sup>247</sup> And even those who have been sharply critical of asbestos litigation in the past acknowledge that “[m]ass medical screenings are now in abeyance,”<sup>248</sup> and “the litigation is re-focused on people with mesothelioma . . . and other serious conditions.”<sup>249</sup> Thus, to the extent there *was* a wave of fraud in the 1990s and early 2000s, it appears that the wave has crested, and the tide has turned.

Second, the above analysis reveals that most fraud-fighting mechanisms only operate once a lawsuit is actually initiated. This means that, to the extent gaps continue to exist in the multifaceted regulatory architecture, they are far more likely to exist when it comes to unfiled, rather than filed, claims. Whether in state or federal court, the act of formally initiating a lawsuit invites an additional, searching layer of scrutiny.

Third, the above analysis reveals that courts and policymakers have long struggled with how to respond to improper filings. They have long sought to strike the proper balance between implicitly condoning malicious filings and going too far in the other direction—which would inevitably discourage honest litigants from seeking justice, erode the finality of judgments, and open the floodgates to retaliatory litigation, theoretically without end. So far, in striking this balance, courts have erred on the side of restraint. Whether permitting tort actions for malicious prosecution; meting out sanctions pursuant to Rule 11, 28 U.S.C. § 1927, or their inherent authority; or setting aside final judgments pursuant to Rule 60, courts have, again and again, proceeded cautiously. They have, repeatedly and in different contexts, imposed sanctions only sparingly and subject to careful safeguards. And they have been *especially* cautious when sanctions are sought after-the-fact and by the targeted party’s adversary or former adversary, rather than, say, a neutral prosecutor. This suggests that permitting an unbridled retaliatory RICO action would (for better or worse) represent a stark departure from the delicate balance that’s been constructed and cultivated over centuries.

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246. Indeed, they are arguably working too well and creating too many obstacles to impede the initiation and prosecution of even meritorious suits. As noted *supra* note 25, however, a discussion of other mechanisms’ drawbacks falls outside the scope of this Article.

247. Elise Gelinas, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 189 (2009) (“Since 2001, large defendant companies have reported an 80% reduction in asbestos filings . . .”).

248. 3 TOD I. ZUCKERMAN, *Interview with Professor Lester Brickman*, in ENVIRONMENTAL INSURANCE LITIGATION: LAW AND PRACTICE app. 26A (2d ed. 2016).

249. Behrens, *supra* note 244, at 502; accord Hanlon & Geise, *supra* note 64, at 7 (stating, in 2007, that “[c]ertainly any asbestos defendant that compares the state of the litigation today with 2001 or 2002 must be astonished at the sea change that has taken place”).

## IV. PROBLEMS WITH RICO'S RISE

On one level, the simple question this Article aims to address is whether—or when—retaliatory RICO suits should be added to the above menu. Admittedly, the argument that fraudulent litigation does as a textual matter give rise to RICO liability is straightforward and uncontroversial. Mail and wire fraud are RICO's most common predicates, and the elements of mail and wire fraud are (1) a scheme to defraud another of money or property and (2) the use of the mails or wires for the purpose of executing the scheme.<sup>250</sup> Thus, if one litigant seeks to defraud another litigant and uses the mail or wires to do so, the mail or wire fraud statutes are presumably tripped.<sup>251</sup> Further, each mailing or phone call can count toward RICO's "pattern" requirement; a RICO injury to one's "business or property" exists whenever money is lost; and to constitute an "enterprise," one needs just a lawyer and client. This means that even a single fraudulent lawsuit can, theoretically, give rise to RICO liability.<sup>252</sup>

Yet, mindful of RICO's elasticity, courts have tended to do more than rote recite the above requirements when applying the statute. Explicitly or implicitly, courts have routinely, and in my view correctly, considered the broader policy implications of particular statutory interpretations.<sup>253</sup> Following their lead, to determine whether aggrieved litigants like Feld or CSX *should* be able to bring RICO suits against their adversaries, we must consider the potential drawbacks of such litigation. Below, I identify three main problems. The first implicates both fit and federalism: if left unchecked, retaliatory RICO suits threaten to distort other carefully tailored federal and state remedies. The second involves overdeterrence: because of the risk of error in application, such suits are bound to chill even socially desirable litigation conduct. The third and final problem involves collateral consequences: unbridled retaliatory RICO suits are apt to impose costs on courts, the legal profession, and the broader civil litigation environment.

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250. 18 U.S.C. § 1343 (2012); *Pereira v. United States*, 347 U.S. 1, 8–9 (1954).

251. See Parrish, *supra* note 26, at 343 (“[E]very time an insurance company pays a claim which is grounded in the dishonesty of either the insured or one who victimized the insured a mail fraud occurs.”).

252. Accord Fiebach, *supra* note 23, at 1319 (recognizing that, without some court-imposed limit, many “commonplace aspects of litigation,” such as filing “an unsuccessful lawsuit,” could expose a lawyer to RICO liability, given the breadth of the statute’s language).

253. See *DirectTV, Inc. v. Lewis*, No. 03-CV-6241-CJS-JWF, 2005 WL 1006030, at \*8 (W.D.N.Y. Apr. 29, 2005) (explaining that courts have rejected certain interpretations of the mail fraud statute on “policy grounds”); *infra* notes 260–261 (offering myriad examples). In bringing criminal RICO charges, the Department of Justice has kept a similarly tight rein on the statute’s use. No U.S. Attorney’s Office can file a RICO complaint without the Criminal Division’s prior approval, and the Division has made clear that it will not approve “every proposed RICO charge that meets” RICO’s “technical requirements.” In particular, the Division has emphasized that it “will not approve ‘imaginative’ prosecutions” that stray “from the congressional purpose of the RICO statute.” 1 U.S. DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL §§ 9-110.200 (3d ed. 2016).

### A. Distortion of Existing Remedies

The first problem with retaliatory RICO is that such actions threaten to distort narrowly tailored remedies carefully crafted by courts, state legislatures, and Congress.<sup>254</sup> Here, recall that Part III revealed that, across different systems and over many years, courts have imposed liability for litigation-related conduct only warily, subject to careful safeguards and stringent limitations.<sup>255</sup>

Beyond that, courts and legislatures have also fashioned additional safeguards to shield practitioners and parties from liability for past litigation conduct, including the judicial privilege (which insulates parties from liability for certain acts and statements related to judicial proceedings),<sup>256</sup> the *Noerr-Pennington* doctrine (which generally immunizes “those who petition government for redress”),<sup>257</sup> and anti-SLAPP statutes (which restrict lawsuits that would chill the exercise of certain constitutional rights).<sup>258</sup>

All of these protections are, at bottom, similar. All are rooted in the desire to guarantee open access to the courts, promote zealous advocacy, and protect the finality of judgments. All are grounded in the belief that after-the-fact liability for litigation conduct would undercut those core values. And, all reflect a considered judgment that those values are sufficiently precious that their protection justifies leaving even serious wrongs “unredressed.”<sup>259</sup> Granted, for complicated reasons, no existing safeguard necessarily rules out the prospect of retaliatory RICO liability.<sup>260</sup> Nevertheless, to broadly authorize retaliatory RICO suits is to chip away at the principles on which various time-honored doctrines are based.

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254. Business interests raised this same concern in the mid-1980s when they were on the receiving end of civil RICO. *E.g.*, Brief for the National Association of Manufacturers as Amicus Curiae in Support of Respondents, *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) (No. 87-1252), 1988 WL 1025679, at \*3 (complaining that, to permit broad use of the “private treble-damages provision” threatens to “distort[ ] . . . other . . . remedies that Congress and the courts have carefully formulated”).

255. See *supra* notes 194–218 and accompanying text.

256. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983); Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and a Breath of Fresh Air for the Attorney Discipline System*, 24 ARIZ. ST. L.J. 1069 (1992).

257. *Profl Real Estate Inv'rs v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

258. For more on anti-SLAPP statutes, see *supra* note 177 and accompanying text.

259. *Briscoe*, 460 U.S. at 345 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *Fiebach*, *supra* note 23, at 1314 (recognizing that the judicial privilege is premised upon the “need to encourage forceful and zealous advocacy free of any exposure to possible liability”).

260. Applied to retaliatory RICO, the judicial privilege runs into two impediments: (1) courts have been reluctant to extend the privilege to restrict statutory (and especially federal statutory) causes of action, and (2) many states hold that the privilege does not protect petitions containing deliberate misrepresentations. See, e.g., *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074 (7th Cir. 1998); *U.S. Gen., Inc. v. Schroeder*, 400 F. Supp. 713, 717 (E.D. Wis. 1975). *But cf.* *Sellers v. Gen. Motors Corp.*, 590 F. Supp. 502 (E.D. Pa. 1984). Likewise, courts have held that the *Noerr-Pennington* doctrine does not protect “sham” litigation—namely suits that were, from their inception, objectively baseless and intended to abuse the judicial process. *Cf.*

RICO's strength in comparison to traditional remedies also raises a federalism concern. This concern arises because litigants will have strong incentives to bring federal RICO suits (rather than state malicious prosecution actions, say), as long as they are broadly permissible, and particularly as long as they offer litigants greater rewards than traditional remedies, while requiring them to jump through comparatively fewer hoops. Even state court litigants will be tempted to head to federal court to complain about litigation misconduct—sometimes even before the state court action is complete—impinging upon state prerogatives and raising serious questions of comity.<sup>261</sup>

### B. *Overdeterrence*

Relatedly, because RICO is a “sledgehammer,” there is a risk that the prospect of RICO liability will dampen attorney advocacy and chill the initiation of valid, as well as invalid, claims. Overdeterrence is likely because the risk of error in RICO's application means that law-abiding plaintiffs and counsel will sometimes face RICO suits (if not, often, actual RICO liability). And this possibility, however remote, will reduce, however marginally, the expected value of lawsuits.<sup>262</sup> A reduction in expected value will, in turn, limit case initiation and affect case prosecution. Or, as a federal court has concluded: “If any litigant's or attorney's pleading . . . could lead to drastic RICO liability in a private right of action, litigants might hesitate to avail themselves of the courts and available legal remedies or be unable to find representation to help vindicate their rights.”<sup>263</sup>

When it comes to the risk that retaliatory RICO will affect litigation conduct, we need not merely speculate. Past experience from the 1983

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United States v. Philip Morris USA Inc., 566 F.3d 1095, 1123–24 (D.C. Cir. 2009) (per curiam). Finally, anti-SLAPP statutes offer no shelter because, as a creature of state law, anti-SLAPP legislation cannot encumber a federal cause of action. *E.g.*, *In re Bah*, 321 B.R. 41, 46 (B.A.P. 9th Cir. 2005).

261. *See, e.g.*, *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 568 (6th Cir. 2013) (rejecting plaintiffs' interpretation of RICO because it would result in a broad “redistribution of power” between the state and federal systems); *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 173–74 (E.D.N.Y. 2010) (dismissing a retaliatory RICO action because, inter alia, “allowing the federal RICO statute to usurp underlying legitimate state court litigation as proposed by plaintiffs here would inappropriately bypass the state tribunal where the action is pending and which properly controls that proceeding”), *aff'd sub nom.* *Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011).

262. *Cf.* *Bone*, *supra* note 31, at 589 (discussing this dynamic in the Rule 11 context); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 97 (1996) (same, while noting that “the more stringent the sanction, the greater the percentage of potentially successful cases that will never be filed”). For a classic discussion of how “excessive damage awards” influence behavior, see John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 986 (1984).

263. *Curtis & Assocs.*, 758 F. Supp. 2d at 173; *see also* Yablon, *supra* note 262, at 68 (noting, in the context of Rule 11, that “the Holy Grail of policymakers in this area, a rule that will deter frivolous litigation without inhibiting meritorious cases, is simply not attainable”).



amendments to Rule 11 provides instructive empirical support. In 1983, the Advisory Committee substantially expanded Rule 11 by, among other things, making sanctions mandatory rather than discretionary and clarifying courts' authority to impose a wide range of penalties, including costs and attorneys' fees.<sup>264</sup> Yet, it's fair to say that the effort backfired. Though the 1983 amendments did, as intended, promote prefilings investigations and certainly generated a raft of filings, the 1983 version of the Rule had numerous unintended consequences, leading to its 1993 revision.<sup>265</sup>

Of the various unintended consequences, the 1983 rule's "chilling effect" was of particular concern. Namely, despite reformers' clear intent that the amended Rule 11 not "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories,"<sup>266</sup> some evidence suggests that the amendment did just that.<sup>267</sup> Indeed, the most comprehensive study of the amended Rule 11—a survey of over 3,000 federal litigators sponsored by the American Judicature Society—found that 20.5 percent of plaintiffs' lawyers reported that fear of Rule 11 liability caused them to withhold asserting a particular claim or defense that they thought had merit.<sup>268</sup> Unleashing retaliatory RICO can be expected to have the same, or an even greater, dampening effect.<sup>269</sup>

Beyond that, if broadly permitted, retaliatory RICO suits will affect not just the *way* cases are litigated—but also *which* cases are brought. Here, once again, Rule 11 serves as a cautionary tale. The 1983 amendments were intended to target only frivolous filings; the Rule-writers did not mean to stifle meritorious suits.<sup>270</sup> But evidence suggests that the amendments nevertheless induced lawyers to decline even some cases that they thought were meritorious.<sup>271</sup>

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264. Georgene Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 597 (1998) (summarizing changes).

265. For increased investigations, see Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 *Nw. U. L. REV.* 943, 960, 964 (1992); Vairo, *supra* note 264, at 621–23. From 1983 to 1993, a whopping 7,000 sanctions decisions were reported; because many decisions are not published, that number likely represents the tip of the iceberg. *Id.* at 625–26.

266. *FED. R. CIV. P.* 11 (discussing this intent with respect to the 1983 amendment).

267. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 *VAL. U. L. REV.* 1, 23 (2002).

268. Marshall et al., *supra* note 265, at 961–63.

269. This is no small thing. In order for our adversarial system to function properly, "the parties must be somewhat equally capable of producing their cases." William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *CARDOZO L. REV.* 1865, 1873 (2002). If one side's advocate is systematically hobbled or restrained, while the other side's advocate is unimpeded, that mismatch might well, over time, affect the direction and evolution of substantive law.

270. *FED. R. CIV. P.* 11 (describing the Advisory Committee's intent).

271. For example, a 1992 survey conducted in the Eastern District of Washington reported that a fear of unjustified Rule 11 sanctions caused 15 percent of lawyers to decline taking an even meritorious case. Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical Comparative Study*, 75 *MARQ. L. REV.* 313, 337 (1992); cf. David B. Owens, *Civil Rights Foe or Frivolous Litigation Enabler? An Empirical Study of Rule 11 Practice Under the 1983 and 1993*

To be sure, some might think this extra caution is, on balance, beneficial. (It is bound to cut down on litigation, and the “litigation explosion” trope is well entrenched.) But for reasons explained below—even apart from the serious constitutional and other concerns with limiting court access—curtailing the initiation of tort claims is potentially undesirable.<sup>272</sup>

To see why, we can place tort claims into one of four boxes, based on whether the tort claim is valid or invalid and whether it is satisfied or unsatisfied (i.e., whether the plaintiff recovers or not). Further, referencing Table 3 below, we can (arguably) stipulate that, as a society, the goal should be to get claims in the boxes that are gray (where claims are resolved in a manner consonant with their merit) and avoid the boxes that are white (where claims are resolved in a manner that is inconsistent with their merit).<sup>273</sup> We don’t, in other words, want good claims to go unpaid, and we similarly don’t want bad claims to be compensated.

TABLE 3  
CLAIM VALIDITY AND SUCCESS

	Valid	Invalid
CLAIM SATISFIED  (Claim results in compensation for plaintiff)	Box 1: Valid Claims – Satisfied  (True Positive)	Box 3: Invalid Claims – Satisfied  (False Positive)
CLAIM UNSATISFIED  (Either claim is lost or claim is never initiated)	Box 2: Valid Claims – Unsatisfied  (False Negative)	Box 4: Invalid Claims – Unsatisfied  (True Negative)

If broadly permitted, retaliatory RICO would predictably shuttle invalid claims from Box 3 down to Box 4, which is salutary. Troublingly, however, it would also predictably shuttle valid claims from Box 1 down to Box 2,

Versions (June 7, 2010) (unpublished manuscript) (on file with the *Michigan Law Review*) (offering empirical analysis, which might be interpreted to complicate the conventional story that the 1983 amendments chilled litigation).

272. In terms of constitutional questions, it bears note that the majority of state constitutions have “open courts” provisions, arguably undermined by retaliatory RICO suits. See John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief Is Available?*, 36 ALA. L. REV. 927, 928 n.8 (1985) (compiling provisions).

273. The matrix is inspired from the matrices set forth in Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2077 (2002), and Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1170 (1992). It is also important to note that some may quarrel with the stipulation, offered above, that society’s goal should be to resolve claims in a manner consonant with their merit, recognizing that gaps in available data make it hard to say what level of litigation is truly optimal from a social welfare perspective. See VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 56 (2000) (“Current empirical data cannot really address the question of how many lawsuits are optimal. Answering the question depends on the litigation rate’s impact on the range of functions of the civil justice system, including compensation, deterrence, and the promotion of safety.”).

which is problematic. Indeed, adding to Box 2 seems doubly problematic because empirical research suggests that, of the various boxes, Box 2 is currently the most densely populated. The tort liability system, in the aggregate, contains more false negatives (individuals entitled to compensation who do not obtain that compensation) as compared to false positives (individuals who receive compensation, even for nonmeritorious claims).<sup>274</sup>

These shifts set up a classic cost-benefit tradeoff. And, of course, to truly weigh relevant costs and benefits we need to know much more: we need a better idea of how many claims are in each category, and we also need a better sense of the size and social cost and utility of the claims themselves. In addition, it is not enough to recognize that RICO would move claims in and out of current categories; we need more information on flow rates—i.e., how many valid versus invalid claims would be suppressed? Still, given the Rule 11 experience, it seems very likely that retaliatory RICO would chill the initiation of even meritorious suits, and it is important to recognize that this chilling could be socially undesirable.

### C. Additional Costs

Finally, beyond the problems above, to green-light retaliatory RICO is apt to unleash several collateral harms. Namely, it would encourage costly satellite litigation, undermine attorney civility, and erode the finality of judgments.

#### 1. Satellite Litigation

First, retaliatory RICO is bound to engender wasteful satellite litigation. Here again, the Rule 11 experience is edifying. Rule 11's 1983 amendments

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274. For statistics, see McGovern, *supra* note 54. Scholars have long viewed this low rate of claiming as the tort system's biggest shortcoming. See, e.g., PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 76 (1993) (discussing false positives and false negatives and concluding, in a rigorous study of medical malpractice litigation, "we found several times as many seriously disabled patients who received no legal redress for their injury as innocent doctors who bore the burden of defending against unwarranted malpractice claims"); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987) ("The real tort crisis is . . . a crisis of underclaiming rather than overclaiming. The tort system does not encourage fraud or display excessive generosity but fails to compensate needy, deserving victims."); Saks, *supra* note 273, at 1226 ("The system's greatest error is that an enormous number of persons who have been negligently injured will not receive the compensation that would be due them if they exercised their right to claim and had been able to find a lawyer willing to represent them."). The above information is, admittedly, contrary to popular perception. But, as Professors Haltom and McCann explain, the gulf between reality and perception makes sense, as Box 2 is populated by the dog that didn't bark: "When the wronged choose to lump injuries, compensation or atonement foregone is almost always a very *private* decision." HALTOM & MCCANN, *supra* note 13, at 84. On the other hand, "[s]ecuring a lawyer or filing suit is a . . . *public* action, about which the press and reformers are even more likely to hear." *Id.* In addition, as Professor Saks points out: "[T]he two types of errors are asymmetrical. False positive errors will have repeated opportunities to be caught and removed from the system without payment. On the other hand, false negative errors are unlikely ever to be corrected." Saks, *supra* note 273, at 1196.

sought to tame excessive litigation. But soon after they took effect, it became clear that they did the opposite—the amendments actually engendered “a new industry of Rule 11 motion practice adding to cost and delay.”<sup>275</sup> Indeed, with some irony given this Article’s focus, some noted that, by the late 1980s, “Rule 11 replaced civil RICO actions as the cottage industry of the litigation bar.”<sup>276</sup> A broad embrace of retaliatory RICO could result in much the same. Indeed, because, unlike Rule 11, retaliatory RICO actions are filed as entirely new lawsuits, sometimes in entirely different courts, and often before judges unfamiliar with the underlying litigation, it seems that, if broadly permitted, RICO suits might impose even higher collateral costs.

## 2. Undermine Attorney Civility

Next, retaliatory RICO suits threaten to undermine attorney civility. Again, the Rule 11 experience is instructive. It is widely believed that the 1983 version of Rule 11 “exacerbated contentious behavior between counsel.”<sup>277</sup> Or, in Judge Jack Weinstein’s words, Rule 11 “infuse[d] our court proceedings with a spirit of meanness and intolerance as parties seek to litigate ancillary questions of lawyers’ conduct having little to do with the merits of the cases.”<sup>278</sup> In fact, at least one respected authority concluded that a “decline in civility” was the *most* significant change wrought by the Rule’s revision.<sup>279</sup>

If broadly permitted, retaliatory RICO would likely cause a similar deterioration. True, the risk is perhaps lower, because even if civil RICO is embraced to ATRA’s liking, RICO claims are *still* likely to be much less common than Rule 11 filings were back in their prime. But, it’s also true that, compared to the bazooka that is RICO, Rule 11 is barely a BB gun. (As of 1992, when complaints about Rule 11 reached a crescendo, the median sanction was a paltry \$2,500.<sup>280</sup>) If retaliatory RICO claims become anything

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275. Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 *LOY. L.A. L. REV.* 563, 566 (2004); see also William W. Schwarzer, *Rule 11 Revisited*, 101 *HARV. L. REV.* 1013, 1017–18 (1988) (“Rule 11 has added substantially to the volume of motions in the district courts and appeals in the circuit courts. This activity leads to waste and delay.”).

276. Vairo, *supra* note 264, at 625 (citing Michael Bates, *The Rule 11 Debate, 4 Years Later*, *NAT’L L.J.*, Oct. 12, 1987, at 3).

277. Letter from Sam C. Pointer, Jr., Chairman, Advisory Comm. on Civil Rules, to Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice & Procedure (May 1, 1992), reprinted in 146 *F.R.D.* 401, 523 (1993). Notably, the Federal Judicial Center reported in 1991 that a majority (50.3 percent) of surveyed federal judges believed that the amended Rule 11 promoted unnecessarily contentious behavior by counsel. Elizabeth C. Wiggins et al., *The Federal Judicial Center’s Study of Rule 11*, *FJC DIRECTIONS*, Nov. 1991, at 3, 33. Lawyers perceived this as well. The best survey of Rule 11 found that 64 percent of litigator-respondents believed that the amended Rule 11 impaired civility. Marshall et al., *supra* note 265, at 964.

278. Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 *BROOK. L. REV.* 827, 836 (1993).

279. Vairo, *supra* note 264, at 628.

280. Marshall et al., *supra* note 265, at 957. Indeed, 44.6 percent of monetary sanctions involved \$1,500 or less. *Id.*

even approaching commonplace, the prospect of RICO filings will exacerbate incivility within the civil justice system.

### 3. Erode the Finality of Judgments

Lastly, as the earlier discussion of Rule 60 motions and malicious prosecution actions suggests, courts have long stressed the importance of finality—and, in both the civil and criminal contexts, have taken pains to prevent parties from rehashing a matter that has been addressed and resolved.<sup>281</sup> They draw this line because, they say, to do otherwise would create a risk of inconsistent judgments, squander scarce judicial resources, undermine the concept of repose, encourage sandbagging (by reducing litigants' incentives to catch and correct errors on a timely basis), and ultimately, subvert the rule of law.<sup>282</sup> One last problem with retaliatory RICO suits, then, is that such suits threaten to undermine judicial finality. Or, as the First Circuit noted while affirming the dismissal of a retaliatory RICO complaint: "In essence, simply by alleging that defendants' litigation stance in the state court case was 'fraudulent,' plaintiff is insisting upon a right to relitigate that entire case in federal court . . . . The RICO statute obviously was not meant to endorse any such occurrence."<sup>283</sup>

## V. A PATH FORWARD: RESTRAINT AND EQUALITY

The above discussion suggests that unfettered retaliatory RICO actions come with substantial risks and would pose substantial costs. These suits are apt to intrude upon state prerogatives and undermine our bedrock commitment to open court access. They are bound to overdetter and, in so doing, chill the initiation—and stymie the prosecution—of even meritorious suits. And, they are destined to impose collateral harms, in that they would engender wasteful litigation, exacerbate incivility, and undermine the finality of judgments. I submit that those are the primary costs, or likely costs, of opening the floodgates to retaliatory RICO.

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281. The drive for finality undergirds res judicata and collateral estoppel—and can also be seen elsewhere including, for instance, in criminal courts' reluctance to reopen guilty pleas and their relative impatience with habeas claims. For a classic discussion, see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149–50 (1970). For finality in the civil context, see DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* 16–17 (2001).

282. See Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality,"* 2013 UTAH L. REV. 561, 563, 568–75 (discussing the conventionally articulated "instrumental benefits to society" thought to come from finality in the criminal-law context).

283. *Gabovitch v. Shear*, No. 95-1055, 1995 WL 697319, at \*3 (1st Cir. Nov. 21, 1995) (per curiam); see also *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 173 (E.D.N.Y. 2010) (dismissing plaintiff's RICO suit because to countenance the suit "would lead to absurd results" because "if routine litigation activities . . . [are] a violation of RICO, then almost every state or federal action could lead to corollary federal RICO actions"), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011).

But even all this does not mean that retaliatory RICO actions are never justified. Part I shows that, although it's wickedly hard to quantify, the problem of fraud in civil litigation is all too real. Identifying witness tampering as a specific act constituting a RICO predicate, the RICO statute itself impliedly supports the notion that prior litigation activity can, at least sometimes, give rise to RICO liability.<sup>284</sup> More broadly, our civil justice system cannot be permitted to become a sanctuary for those who would use it to carry out their own nefarious schemes.

Given these competing considerations, courts should permit retaliatory RICO actions—but only cautiously. As they do, they ought to proceed against a backdrop of *restraint* and *equality*.

#### A. *Restraint*

Restraint is needed to minimize the various risks above—and also because the imposition of retaliatory RICO liability forces courts to walk two very fine and treacherous lines. One marks the gray and murky demarcation between permissible and impermissible advocacy. Our civil justice system tolerates (and often extols) a great deal of aggression, obfuscation, and exaggeration—and, like it or not, lawyers are paid not to “uncover the truth,” but to represent clients. In this setting, the line between acceptably zealous, partisan advocacy and “unacceptable fraud by outright lying” often blurs.<sup>285</sup> Similarly, RICO suits force courts to draw a line separating suits that are merely nonmeritorious from those that are truly tainted. But this line drawing, too, is fraught, especially after-the-fact, with the benefit of hindsight, once witnesses' recollections dim and tensions run high.

Exhibiting appropriate restraint, courts should permit retaliatory RICO suits where the challenged conduct involved a large, far-flung, and orchestrated scheme to commit fraud in the pursuit (or defense) of numerous claims. They should, however, disallow retaliatory RICO actions if the only fraudulent conduct involved routine litigation activity, particularly if that activity pertained to the litigation (or defense) of a single claim.

Applying these principles, the *Feld* case was a poor vehicle for RICO, while *CSX* stands as a reasonable application of this potent weapon. In *Feld*, the complained-of conduct involved unexceptional (even if unlawful) litigation activity.<sup>286</sup> Confronted with this activity, the defendant could have filed

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284. 18 U.S.C. § 1961(1)(B) (2012) (defining racketeering activity as including an act under 18 U.S.C. § 1512, which outlaws witness tampering); *see also id.* § 1961(1)(D) (defining racketeering activity as including “any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title)”).

285. *State v. Marks*, 758 So. 2d 1131, 1136 (Fla. Dist. Ct. App. 2000); *see also Miller, supra* note 14, at 361 (“[T]he line between proper and improper advocacy is, as it has always been, obscure and context dependent.”).

286. Recall, one of *Feld*'s central complaints was that Thomas Rider was a paid fact witness. Yet, that is not altogether exceptional. *Cf.* Paul M. Barrett, *Chevron Calls Star Witness: A Bribe-Taking Former Judge*, BLOOMBERGBUSINESSWEEK (Oct. 24, 2013, 1:56 PM), <http://www.bloomberg.com/news/articles/2013-10-24/chevron-calls-star-witness-a-bribe-taking-former-judge> [<https://perma.cc/3RX7-656E>] (noting that Chevron's star witness in its retaliatory

motions for sanctions pursuant to Rule 11, and if necessary, could have sought a range of penalties (including costs and attorneys' fees), pursuant to the court's inherent authority. Section 28 U.S.C. § 1927 was also available, and indeed, penalties pursuant to § 1927 were ultimately imposed.<sup>287</sup> A malicious prosecution lawsuit was also a possibility, and it too was tried, though it fizzled because the original plaintiffs' claims failed for want of standing (and, thus, jurisdiction), rather than on the merits.<sup>288</sup> Beyond that, because it appears that Tom Rider committed perjury, referral to a U.S. Attorney's office for criminal prosecution was probably in order. And in light of lawyers' suspected assistance in the scheme, Judge Sullivan and Feld's lawyers were also, it appears, duty bound to refer counsel to the D.C. Bar. Feld, in other words, had myriad conventional weapons at its disposal. Given the breadth and apparent sufficiency of these conventional mechanisms, a follow-on RICO action was not warranted. On the other hand, in *CSX*—where the fraud was apparently long-standing, far-flung, and involved numerous actors manufacturing myriad claims, in some instances, outside formal, traditional judicial processes—a retaliatory RICO case was, in my mind, justified.

This proposed line drawing has doctrinal support: in recent years, a number of courts have held that garden-variety litigation activity—including filing or prosecuting a single questionable claim—cannot give rise to RICO liability.<sup>289</sup> But courts have endorsed retaliatory RICO suits when the

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RICO suit against Steven Donziger was former Ecuadorian judge Alberto Guerra—and that, by Chevron's own admission, the company paid “the disgraced ex-jurist tens of thousands of dollars in a deal for his testimony”).

287. Judge Sullivan sanctioned attorney Katherine Meyer and her law firm pursuant to § 1927 upon a finding that, back in 2004, Meyer helped to prepare a false interrogatory response. *Animal Welfare Inst. v. Feld Entm't, Inc.*, 944 F. Supp. 2d 1, 20 (D.D.C. 2013).

288. *Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 332 (D.D.C. 2012) (“Because the termination of the ESA Action as to Rider and API did not reflect on the merits of the underlying litigation, it was not favorable in the legal sense required to support an allegation for malicious prosecution.”).

289. See, e.g., *Drobny v. JP Morgan Chase Bank, NA*, 929 F. Supp. 2d 839, 848 (N.D. Ill. 2013) (“[F]iling and prosecuting a complaint is not considered . . . a predicate act under RICO.” (quoting *Carthan-Ragland v. Standard Bank & Tr.*, No. 11 C 5864, 2012 WL 1658244, at \*2 (N.D. Ill. May 11, 2012))); *Nolan v. Galaxy Sci. Corp.*, 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003) (rejecting the notion that “the filing of litigation documents known to contain falsehoods constitute[s] predicate acts under RICO”); *Auburn Med. Ctr., Inc. v. Andrus*, 9 F. Supp. 2d 1291, 1297 (M.D. Ala. 1998) (holding that “engaging in [allegedly fraudulent] litigation . . . does not constitute mail fraud for purposes of supporting a RICO claim”); *Nakahara v. Bal*, No. 97 Civ.2027(DLC), 1998 WL 35123, at \*8 (S.D.N.Y. Jan. 30, 1998) (holding that the filing of fraudulent documents in litigation “fail[s] as a matter of law to establish the requisite predicate acts for purposes of their asserted RICO claim”); *von Bulow ex rel. Auersperg v. von Bulow*, 657 F. Supp. 1134, 1143 (S.D.N.Y. 1987) (holding “a malicious prosecution claim may not serve as the basis for a federal RICO cause of action”); *accord Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 172 (E.D.N.Y. 2010) (“[A]llegations that the state court litigation is frivolous, fraudulent, or baseless—essentially claims of malicious prosecution—without more, cannot constitute a viable RICO predicate act.”), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011); *Kashelkar v. Rubin & Rothman*, 97 F. Supp. 2d 383, 392 (S.D.N.Y. 2000) (“Garden-variety

complained-of conduct involves a large, far-flung, and orchestrated scheme.<sup>290</sup> Then, beyond this doctrinal support, the above line drawing is supported by RICO's statutory language and is also prudent as a matter of policy.

For starters, the delineation is faithful to the RICO statute itself. Most notably, the statute explicitly predicates liability on the existence of a "*pattern*" of racketeering.<sup>291</sup> In determining whether this pattern requirement is satisfied, duration is important.<sup>292</sup> But courts insist that it's not enough to ask how long the fraud lasted; we must also consider how broadly it reached, including "the number and variety of predicate acts . . . the number of victims, the presence of separate schemes and the occurrence of distinct injuries."<sup>293</sup> RICO's pattern requirement is not comfortably satisfied by duplicitous conduct in the litigation of a single case, where (as in *Feld*, for example) there is only an isolated scheme, in one court, with a particular, discrete goal centered on harming one victim or entity.<sup>294</sup> But it may be satisfied (as in *CSX*, say) when the scheme implicates a number of actors fabricating numerous claims over a lengthy period.

Two canons of statutory construction also support the proposed interpretation. First, if retaliatory RICO suits based on illegal conduct in the course of litigating a single claim are permitted, many will (like *Feld*) focus

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pleading errors and the filing of routine motions do not constitute RICO predicate acts. To hold otherwise would turn every state court lawsuit into a predicate for a subsequent federal RICO action."); *Auto Collection Inc. v. Pinkow*, No. 7847/09, 2011 WL 4821628, at \*5 (N.Y. Sup. Ct. Oct. 7, 2011) (dismissing a RICO claim as "merely artfully pleaded claims for malicious prosecution"). *But see* *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 443–44 (5th Cir. 2000) (reversing judgment against an insurer in its retaliatory RICO claim, predicated on a claimant's allegedly staged electrocution).

290. *See, e.g.,* *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992) (endorsing a criminal RICO action premised on litigation activities where the defendants engaged in an extensive and broad scheme); *Garlock Sealing Techs., LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-116, 2015 WL 5148732, at \*5 (W.D.N.C. Sept. 2, 2015) (noting that, while it is true that "some courts have declined to find that routine litigation activities can serve as predicate acts," a RICO claim *can* be asserted where the defendant is "accused of committing rampant fraud over the course of several years and in numerous venues"); *Warnock v. State Farm Mut. Auto. Ins. Co.*, No. 5:08cv01-DCB-JMR, 2008 WL 4594129, at \*7–8 (S.D. Miss. Oct. 14, 2008) (denying a motion to dismiss a RICO action because defendants were allegedly "involved in a larger scheme to defraud multiple people"); *State Farm Mut. Auto. Ins. Co. v. Rosenfield*, 683 F. Supp. 106 (E.D. Pa. 1988) (finding that a RICO action was proper, where the defendants were involved in the filing of numerous fraudulent auto claims over a lengthy period); *see also Curtis & Assocs.*, 758 F. Supp. 2d at 176 (explaining this distinction).

291. 18 U.S.C. § 1962(a) (2012) (emphasis added).

292. As the Supreme Court has explained: "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989).

293. *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 780 (7th Cir. 1994); *see also* *Resolution Tr. Corp. v. Stone*, 998 F.2d 1534, 1543–44 (10th Cir. 1993).

294. *See* *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1266–67 (11th Cir. 2004) (finding that misconduct while litigating one lawsuit lacked sufficient continuity to satisfy RICO's pattern requirement).



mostly on an opposing party's prior perjury. But this is problematic because there is no civil action for perjury; RICO's expansive definition of "racketeering activity" contains no reference to 18 U.S.C. § 1621 (the federal statute that makes perjury a criminal offense); and under the canon *expressio unius est exclusio alterius*, courts should not read in a predicate that Congress opted to exclude.<sup>295</sup> Meanwhile, a second canon of statutory construction concerns the balance of federal-state power. Known as "the clear statement principle," this canon counsels that federal statutes, unless they are clear, ought to be construed to respect state sovereignty.<sup>296</sup> This is relevant because, as noted, the unrestricted use of retaliatory RICO would permit a disappointed and defeated state court litigant to bring an action in federal court to rehash the reasons for his or her defeat.<sup>297</sup> Yet, the RICO statute provides no clear indication that Congress meant to authorize such intrusive oversight.

Finally, the suggested approach—permitting retaliatory RICO suits only where the challenged conduct affects multiple claims and extends far beyond routine litigation misconduct—is prudent as a matter of policy. Most critically, the delineation is sensible because it reserves RICO to target fraud where fraud is most apt to be found—where, in other words, RICO's use would be narrowly tailored to serve beneficial ends. Part I revealed that there is little reason to believe that the tort system is generally awash in fraudulent filings. At the same time, Part I showed that there are two areas of the personal injury environment where fraudulent claims are likely to fester: soft-tissue auto claims and mass torts, where oversubscription poses a real concern. In both contexts, fraudulent conduct very frequently involves large, far-flung, and orchestrated schemes, so retaliatory RICO suits, even under my restrictions, would be permissible.<sup>298</sup>

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295. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005) (describing the "*expressio unius* maxim, under which the inclusion of one term or concept in text suggests the exclusion of . . . alternative terms and concepts not mentioned").

296. See *United States v. Bass*, 404 U.S. 336, 349 (1971), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986). Notably, ATRA made this same argument back when it advocated a narrow construction of civil RICO. Brief of the American Tort Reform Association & Health Insurance Association of America as Amici Curiae in Support of Respondents Leonard Belleza et al., *Beck v. Prupis*, 529 U.S. 494 (2000) (No. 98-1480), 1999 WL 728352, at \*10 ("If Congress had intended to enact a statutory scheme that would, in effect, largely displace an area of law that has been left to the States, one would find evidence of that intent. . . . There is no such meaningful evidence in the statute or RICO's legislative history.").

297. See *supra* note 261 and accompanying text.

298. Many of the most egregious examples of auto accident claims fraud are not one-offs, but rather, involve large rings, typically comprised of chiropractors, physicians, claims brokers, and lawyers who work in tandem. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Makris*, No. CIV.A. 01-5351, 2003 WL 924615, at \*1-4 (E.D. Pa. Mar. 4, 2003) (describing a large auto accident fraud ring, involving a law firm, two attorneys, a physician, and a chiropractor, who all allegedly worked together); McCARTY, *supra* note 241, at 36-37 (discussing large auto accident rings successfully targeted in Florida, including one associated with fraudulent billings in excess of \$18 million); see also *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076, 1084 (S.D.N.Y.

Further, to the extent retaliatory RICO targets mostly soft-tissue auto and mass tort claims, there are two additional benefits. The first benefit stems from the fact that many of these soft-tissue auto and mass tort claims (against auto insurers, asbestos trusts, or settlement funds, say) never ripen into lawsuits.<sup>299</sup> Meanwhile, Part III teaches us that unfiled claims are precisely those that the current system is least able to police; whether in state or federal court, Part III reveals, the act of formally initiating a lawsuit invites an additional, searching layer of scrutiny.<sup>300</sup> This means that layering RICO onto the existing regulatory regime to assure the integrity of *litigated* lawsuits risks being overkill. But layering on extra protection when it comes to unfiled claims may well make sense.

Second, to the extent retaliatory RICO targets mostly the soft-tissue auto and mass tort contexts, the overdeterrence problem identified above is somewhat mitigated.<sup>301</sup> This is because (as discussed in Part I), unlike most areas of the tort system, which are characterized by pervasive under-claiming, the auto accident and mass tort realms display unusually *high* rates of claiming.<sup>302</sup> Thus, to the extent RICO is narrowly targeted on these areas, a reduction in claiming rates is less worrisome.

### B. Equality

The second touchstone that ought to guide retaliatory RICO's use is *equality*. To the extent RICO claims for litigation-related conduct (broadly construed) are permitted, courts, commentators, and policymakers ought to take great care not to employ a double standard, subjecting plaintiffs and their lawyers to harsh penalties for manufacturing claims but only slapping the proverbial wrists of defendants or defendants' counsel, who might take similarly egregious steps to defeat a plaintiff's genuine entitlement to recovery.

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1994) (discussing a workers' compensation fraud ring, allegedly responsible for 600 bogus filings, involving "three unions, a law firm and a doctor"), *aff'd sub nom.* Tribune Co. v. Abiola, 66 F.3d 12 (2d Cir. 1995). Similarly, mass tort fraud typically includes examples like that seen in CSX, where a law firm works with complicit x-ray technicians and physicians to generate numerous fabricated filings. See Brown, *supra* note 53, at 602 (observing that a hallmark of oversubscription is that "multiple participants work[ ] together to generate specious claims in large volumes").

299. Cf. INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS 71–73 & figs.6-15 & 6-16 (1999) (reporting that in 1997 lawsuits were filed to resolve only roughly 16 percent of bodily injury auto claims in tort states and also reporting that a minority of even represented auto claimants file lawsuits); ELIZABETH SPRINKEL, ATTORNEY INVOLVEMENT IN AUTO INJURY CLAIMS 26 (1988) (reporting that in 1986 88.4 percent of households that asserted auto claims saw their claims settled without a lawsuit ever filed).

300. Perhaps reflecting the efficacy of these external screens, lawyers themselves report that, if a lawsuit is filed, they are less willing to engage in duplicitous conduct. See Hinshaw & Alberts, *supra* note 51, at 125, 128, 130, 132 (reporting results of a survey of 734 practicing lawyers).

301. See *supra* notes 262–274 and accompanying text.

302. See *supra* note 100 and accompanying text.

To this point, I have focused on the fraudulent *initiation* of claims. This makes sense: fraudulent claim initiation has captured the public's imagination and has been the site of nearly all recent controversy and criticism. But plaintiffs and plaintiffs' lawyers have no monopoly on egregious or deceptive conduct. To the contrary, there is scant reason to believe that plaintiffs abuse the legal system any more frequently or egregiously than their defense-side counterparts.<sup>303</sup>

Fraud is defined as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right."<sup>304</sup> As such, a plaintiff's perversion of truth that wrongfully induces payment stands on equal footing to a defendant's perversion of truth that wrongfully induces the plaintiff to relinquish a legal right or to accept an inadequate settlement.<sup>305</sup> If it is wrong for a plaintiff to lie in order to receive payment, it is equally wrong for a defendant to lie in order to avoid or minimize payment. Operationalizing this concept, though plaintiffs' egregious acts ought to be taken seriously, egregious acts must be taken just as seriously when orchestrated by those on the opposite side of the "v."

This is important because, in the past, some plaintiffs have filed retaliatory RICO suits against defendants and insurers for their shady conduct in the resolution or litigation of claims. For example, in *Newman v. General Motors Corp.*, five years after a jury found GM liable for injuries a New Jersey man suffered in a car crash, his estate filed a RICO claim accusing the carmaker of withholding evidence which "fraudulently deprived" the estate "of a viable claim for punitive damages."<sup>306</sup> Likewise, in the late 1990s, it came out that, while defending itself against scores of related product liability cases involving Benlate, DuPont had destroyed and concealed critical evidence about the fungicide's risks.<sup>307</sup> Thereafter, a raft of plaintiffs who had

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303. *Potts v. Imlay*, 4 N.J.L. 330, 333 (Sup. Ct. 1816) ("[S]urely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff."); Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 895 (1984) ("Under current conditions, false and baseless defenses affect the litigants and the court system no less than false and baseless suits and, as a practical matter, may be even more pervasive."); see, e.g., David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, PUBLIC CITIZEN (July 1997), [http://www.citizen.org/congress/article\\_redirect.cfm?ID=918](http://www.citizen.org/congress/article_redirect.cfm?ID=918) [<https://perma.cc/WQY2-NW73>] (compiling abuses).

304. *Fraud*, BLACK'S LAW DICTIONARY (5th ed. 1979); see also *Fraud*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining fraud as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.").

305. See *United States v. Porcelli*, 865 F.2d 1352, 1359–62 (2d Cir. 1989) (noting that a fraudulent scheme to deprive a victim of a "chance in action" is cognizable under the mail fraud statute).

306. Plaintiff-Appellee's Brief at 3–8, *Newman v. General Motors Corp.*, 228 F. App'x 245 (3d Cir. 2007) (No. 06-2473); see also *Sellers v. General Motors Corp.*, 590 F. Supp. 502, 503 (E.D. Pa. 1984) (asserting RICO claim against GM for its allegedly "illegal conduct . . . in securing a jury verdict").

307. See, e.g., *Living Designs, Inc. v. E.I. DuPont De Nemours & Co.*, 431 F.3d 353, 357 (9th Cir. 2005); *Fla. Evergreen Foliage v. E.I. Du Pont De Nemours & Co.*, 135 F. Supp. 2d

previously settled with DuPont filed RICO suits, alleging that they wouldn't have settled their product liability suits—or, at least would have held out for higher payments—if DuPont had disclosed, rather than withheld, various damning documents.<sup>308</sup> Or in 2015, class plaintiffs filed a RICO suit against GM and the law firm King & Spalding, claiming, in part, that the two entities “suppressed and withheld information” from past courts and litigants concerning GM's ignition switch defect, leading, as above, to settlements for artificially reduced sums.<sup>309</sup>

With limited exceptions, however, RICO suits initiated by aggrieved plaintiffs against corporate defendants for their allegedly wrongful litigation tactics have failed to gain much traction.<sup>310</sup> Indeed, some courts have summarily dismissed RICO suits based on a defendant's prior litigation activity, seemingly out of hand. In one court's words:

If serving and filing an answer or a motion by any defendant in a federal action could be considered obstruction of justice, this Court would be flooded with motions to amend complaints by plaintiffs seeking to add RICO claims based upon mail fraud and obstruction of justice as soon as an answer was served. Such an interpretation of the RICO statute is untenable.<sup>311</sup>

Now, it is far too soon to say that courts have been uneven in their application of retaliatory RICO. There has only been a smattering of suits, and the suits that have arisen have involved such varied fact patterns as to

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1271, 1283 (S.D. Fla. 2001), *aff'd sub nom.* Green Leaf Nursery v. E.I. DuPont De Nemours & Co., 341 F.3d 1292 (11th Cir. 2003); Kawamata Farms, Inc. v. United Agri Prods., 948 P.2d 1055, 1082–83 (Haw. 1997).

308. *Living Designs*, 431 F.3d at 358 (noting plaintiffs' allegation that “they would have requested more money or refused to settle had they known about the concealed data” (quoting *Matsuura v. E.I. Du Pont De Nemours & Co.*, 73 P.3d 687, 691 (Haw. 2003))).

309. Second Amended Consolidated Complaint at para. 1081, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF) (S.D.N.Y. Aug. 15, 2016), 2015 WL 4988264; *see also id.* ¶¶ 1086, 1023, 1034–80. Also in 2015, the plaintiffs' firm Simon Greenstone Panatier Bartlett, PC, facing a retaliatory RICO suit for its alleged misdeeds while initiating asbestos claims, filed a RICO counterclaim against Garlock for its alleged misdeeds in the defense of those actions. This counterclaim contended that Garlock “knowingly withheld evidence of the dangers of Garlock's products, and Garlock's knowledge of those dangers, in order to depress verdicts and settlements.” Press Release, Simon Greenstone Panatier Bartlett, PC, Simon Greenstone Files RICO Counterclaim Against Garlock Sealing Technologies (Nov. 16, 2015), <http://www.prnewswire.com/news-releases/simon-greenstone-files-rico-counterclaim-against-garlock-sealing-technologies-300179642.html> [<https://perma.cc/6823-XDHP>].

310. *See, e.g., Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d Cir. 1987) (rejecting the plaintiffs' claim that the manufacturer's false answers to interrogatories in a prior product liability lawsuit gave rise to RICO liability). A limited exception came in the Ninth Circuit in the *Benlate* litigation. There, the district court had held that plaintiffs could not state a claim under § 1962(c), but the Ninth Circuit reversed and effectively revived the claim. *Living Designs*, 431 F.3d at 356, 364–65. Likewise, *Newman* survived initial skirmishes, 228 F. App'x 245, only to be extinguished with GM's bankruptcy, *Newman v. Gen. Motors Corp.*, No. 02-135 (KSH) (D.N.J. June 16, 2009).

311. *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).

defeat any apples-to-apples comparisons. But again looking back, most studies suggest that judges' impositions of Rule 11 sanctions *were* biased. Especially when the souped-up 1983 version of Rule 11 was in effect, plaintiffs were more often the target of sanctions motions than their defense-side counterparts,<sup>312</sup> and judges imposed sanctions on plaintiffs at unusually high rates.<sup>313</sup> Absorbing that lesson, to the extent retaliatory RICO actions are permitted, courts should take extraordinary care to ensure that RICO is fairly and equitably applied.<sup>314</sup>

#### CONCLUSION

On one level, this Article's aim has been quite narrow. Responding to recent, prominent calls that RICO ought to be sharpened into a retaliatory tool—and prominent test cases, including *Feld* and *CSX*, where retaliatory RICO claims resulted in multimillion-dollar payouts—I seek to offer courts, litigants, and policymakers guidance as they chart a path forward. Above, I contend that the unbridled use of retaliatory RICO carries substantial danger for federal-state relations, open court access, the legal profession, and the civil justice system writ large. Drawing primarily on our past (mostly unsatisfactory) experience sharpening Rule 11, I have flagged where the largest pitfalls lie, while offering a prescription that is practical, sensible, in keeping with the statute's plain language, and supported by the clear weight of authority.

On another level, though, this Article's aim has been different and substantially more ambitious. This Article seeks to highlight the problem of fraud in the tort litigation environment—a problem that is often discussed and frequently lamented but rarely studied and poorly understood. This Article offers the most comprehensive evaluation of the fraud problem undertaken to date. Still, numerous empirical, theoretical, and conceptual questions about fraud's prevalence and persistence remain. These questions are profoundly important—and, though it is tempting to avert one's gaze from the unseemly underbelly of the tort system, obtaining accurate answers to those questions ought to be a high priority, for the tort system's defenders and critics alike.

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312. See Hess, *supra* note 271, at 338; Marshall et al., *supra* note 265, at 952–54.

313. See Marshall et al., *supra* note 265, at 953–54; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). To be sure, any conclusion concerning judicial bias in the imposition of sanctions pursuant to Rule 11 must be somewhat caveated, as it would be proper for judges to disproportionately sanction plaintiffs if, as compared to defendants, plaintiffs engaged in more litigation abuse. For reasons explained above, however, we lack data concerning the relative incidence of abuse.

314. There is, in fact, an argument that retaliatory RICO actions are *more* proper when they are initiated by aggrieved former plaintiffs against misbehaving defendants (as opposed to vice versa). Namely, the theoretically available tort of malicious prosecution arguably renders defendant v. plaintiff retaliatory RICO actions superfluous. But, for the defrauded former plaintiff, except in New Hampshire, there is no tort of malicious defense. See generally Aranson v. Schroeder, 671 A.2d 1023, 1028–29 (N.H. 1995); Van Patten & Willard, *supra* note 303.