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The RICO Trend in Class Action Warfare

Briana Lynn Rosenbaum*

ABSTRACT: Aggregate litigation, including class-actions and mass actions, have been under attack for decades. Recent Supreme Court cases have further weakened class actions, and the current Congress is considering numerous aggregate litigation and tort reform efforts. Recently, defendants in aggregate litigation have employed an additional tactic by filing civil RICO cases against plaintiffs' counsel. In a number of these cases, defendants' primary allegation is that plaintiffs' counsel are fraudulently inflating the value of lawsuits by filing baseless lawsuits as part of aggregate litigation. In some of these cases, the predicate acts consist solely of litigation filings: the filing of complaints and related litigation documents in aggregate litigation. Members of the defense bar have made no secret of the fact that these RICO cases are part of a larger strategy to prevent plaintiffs' attorneys from bringing large-scale litigation. Despite the rich literature on aggregate litigation, there is little scholarship exploring this recent aggressive use of RICO by the defense bar and corporate interest groups to punish plaintiffs' attorneys for the alleged fraudulent filing of aggregate litigation.

This Article pulls together several previously unassociated areas of law—including RICO, Rule 11, complex litigation, SLAPP motions, and asbestos litigation—to develop a model for defendants' use of RICO as a tool of reprisal. It argues that holding plaintiffs' attorneys liable under civil RICO solely for litigation activities is illegal, results in the lamentable federalization of state common law, and leads to improper forum shopping. The RICO reprisal also avoids legitimate state protections for litigation activity and is a thinly veiled attempt by the defense bar to further weaken aggregate litigation by targeting the plaintiffs' attorneys themselves. This use of RICO punishes

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the aggregate litigation device itself, rather than the underlying fraudulent conduct; as a remedy for frivolous aggregate litigation conduct, it is both over- and under-inclusive. The Article concludes by proposing several alternatives, including effectively barring any civil RICO action targeting attorneys' pure litigation activities without a showing of malicious intent—a proposal that draws on existing common law litigation privilege doctrine.

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I. INTRODUCTION

Many plaintiffs would be shocked to learn that a law firm could file a mass action consisting of over 5300 claims on behalf of asbestos victims and then be forced to pay over \$7 million dollars to the opposing party because 11 of the plaintiffs—or just 0.2%—did not actually suffer the alleged harms. Yet that is precisely what happened in *CSX Transportation, Inc. v. Gilkison*, in which the defendants in a mass-action case aggressively and unconventionally used

the federal Racketeer Influenced and Corrupt Organizations (“RICO”) statute against their opponents.¹

The CSX decision reflects a broader trend in which corporate defendants are fighting back—seeking to punish plaintiffs’ attorneys by bringing RICO claims alleging that plaintiffs’ attorneys have brought baseless lawsuits mixed in with their clients who actually suffered an injury.² Members of the defense bar have made no secret about the fact that these RICO cases are part of a larger strategy to stamp out large-scale aggregate litigation.³

1. See generally 18 U.S.C. § 1962 (2012) (RICO statute); 3 *Defendants in Asbestos Fraud Conspiracy Agree to \$7.3 Million Settlement*: CSX Trans. v. Peirce, 37 NO. 3 WESTLAW J. ASBESTOS 4 (Nov. 21, 2014). CSX Transportation, Inc. v. Gilkison is a civil RICO case by a railroad company against attorneys at the now-defunct law firm, Peirce Raimond & Coulter PC (“the Peirce firm”), for collaborating with a plaintiff-friendly expert to hide baseless lawsuits among thousands of asbestosis claims against CSX. See generally Amended Complaint, CSX Transp., Inc. v. Gilkison, No. 5:05-cv-202 (N.D.W. Va. July 5, 2007). Despite the fact that CSX identified only 11 “baseless” claims out of the Peirce firm’s over 5300 total asbestosis claims, CSX obtained a jury verdict of about \$430,000 in its favor, which was automatically tripled under RICO to roughly \$1.3 million. 3 *Defendants in Asbestos Fraud Conspiracy Agree to \$7.3 Million Settlement*: CSX Trans. v. Peirce, *supra*, at 4. This verdict also made the Peirce firm liable for potentially \$10 million in costs and attorneys’ fees, as RICO liability triggers automatic shifting of both the costs of the underlying litigation and the costs and attorney’s fees of the civil RICO action. The Peirce firm understandably settled the case for \$7.3 million dollars. Emily Field, CSX, *Asbestos Attys End 4th Circ. RICO Fight with \$7.3M Deal*, LAW360 (Nov. 6, 2014, 7:20 PM), <http://www.law360.com/articles/594159/csx-asbestos-attys-end-4th-circ-rico-fight-with-7-3m-deal>. As one of the lawyers for CSX boasted, this is “believed to be the first civil verdict in history to find lawyers in violation of federal racketeering laws for the filing of fraudulent lawsuits.” See Samuel L. Tarry, Jr., *Ethical and Professional Lessons from CSX Transp. Inc. v. Peirce et al.*, DRI ASBESTOS MED. SEMINAR PUBLICATIONS 535, 539 (2013), <https://www.thelibrarybook.net/pdf-ethical-and-professional-lessons-from-csx-transp-inc-v-peirce-et-al.html>. For a full case study of CSX, see *infra* Part II.

2. Tiger Joyce, *How Business Can Fight Fraudulent Lawsuits: Trial Lawyers May Increasingly Feel the Sting of the Racketeer Influenced and Corrupt Organizations Act*, WALL STREET J. (Mar. 6, 2014, 7:28 PM), <http://www.wsj.com/articles/SB10001424052702304815004579419600026911302>. In this Article, I use the term “aggregate litigation” to mean any category of large-scale litigation in the judicial system involving multiple parties. Other authors have used the term “group litigation” to describe this same category of litigation. See, e.g., JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 1–7 (2015). The term aggregate litigation includes a number of different devices, many of which this Article will reference. These include: (1) class actions, or litigation where representative plaintiffs litigate on behalf of numerous absent class members, 1 NEWBERG ON CLASS ACTIONS § 1:1 (William B. Rubenstein ed., 5th ed. 2016); (2) mass actions, a nebulous term broadly meaning a non-representative action in which numerous claims are tried jointly, *id.* § 6:24; and (3) multidistrict litigation (“MDL”), or groups of separate cases that are consolidated and temporarily transferred to one state or federal court, usually for determination of limited pretrial common questions, see DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION §§ 20.13–14 (4th ed. 2016).

3. Tiger Joyce, President of the American Tort Reform Association (“ATRA”), argued that RICO “could become a powerful tool in the hands of companies that are tired of lawsuit shakedowns.” See Joyce, *supra* note 2. Darren McKinney, also of the ATRA, declared that “[c]ompanies are watching” suits like CSX “because they’re sick and tired of unfair mass-tort verdicts.” Paul M. Barrett, *Chevron’s \$19 Billion Day in Court: It’s Battling a Massive Judgment by Targeting a Plaintiffs’ Lawyer*, BLOOMBERG BUSINESSWEEK (Oct. 17, 2013, 4:36 PM), <http://www.bloomberg.com/bw/articles/2013-10-16/chevrons-day-in-court>. According to Mr.

In this Article, I analyze and evaluate the defense bar's recent aggressive use of RICO against plaintiffs' attorneys. I argue that this practice, which I have labeled "the RICO reprisal," is illegal on several grounds, most notably under the Rules Enabling Act and the RICO statute. It is also normatively undesirable because it results in federalization of state common law that will lead to improper forum shopping and avoidance of legitimate state protections for litigation activities. The defense bar's use of RICO also threatens a principle at the core of our justice system: the right to petition the courts for redress. It does this by over-penalizing the harm at issue, specious claiming, and by punishing the aggregate litigation device itself, rather than the proven fraudulent conduct.

Further, it is unclear that the RICO reprisal is necessary to address specious claiming, as there are several remedial alternatives—such as malicious prosecution and Rule 11—already built into our legal system. These remedial alternatives all incorporate some consideration of the historical balance of competing interests involved in prosecuting frivolous litigation: access to justice, efficiency, and reduction of waste in the judicial system. The RICO reprisal is entirely lacking this type of measured policy consideration.

Aggregate litigation, including the class-action and mass action devices, have been under attack for decades. From the Private Securities Litigation Reform Act of 1995 ("PSLRA")⁴ and the Class Action Fairness Act of 2005 ("CAFA")⁵ to Supreme Court decisions like *Wal-Mart Stores, Inc. v. Dukes*,⁶ our justice system has slowly begun "closing the courthouse doors" to class actions.⁷ And this trend continues. Congress is currently considering additional class action and tort reform measures, including one aimed at

McKinney, these cases are "providing a model for how to fight back." *Id.* Gibson, Dunn & Crutcher LLP, one of the firms representing Chevron in another civil RICO case against plaintiffs' attorneys, touts on its website that it works with clients to create an "affirmative strategy to ultimately end the litigation." Press Release, Gibson, Dunn & Crutcher LLP, Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group (Dec. 15, 2010), <http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignJudgmentsPracticeGroup.aspx>.

4. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

5. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

6. See generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

7. See generally Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317 (2012). See also, e.g., COFFEE, *supra* note 2, at 125-32; COFFEE, *supra* note 2, at 2 ("[I]f the invention and development of the class action was the dominant judicial innovation of the late twentieth century, its dismantling appears to be the major procedural project of the conservative majority of the contemporary Supreme Court in the twenty-first century."); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 729 (2013) ("Starting in the mid-1990s, courts began expressing concern about the pressure on defendants to settle after a decision certifying a class."); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296-305 (2014) (detailing the "sharp reaction" against class action practice starting in the 1990s in the courts, public opinion, and legislature).

sending more class actions to federal courts⁸ and one which would require asbestos-bankruptcy trusts to make claimants' details public.⁹

The defense bar's motivation for reform is understandable. Class actions and other aggregate devices have sometimes yielded fraud and deceit. There is a common perception that certain aspects of aggregate litigation procedure lead plaintiffs' attorneys to over-zealously litigate to ensure lucrative fees.¹⁰ Plaintiffs' attorneys in the mass tort context have been specifically subject to censure for filing frivolous litigation. In particular, defendants and defense groups have routinely accused mass tort plaintiffs' attorneys of a particular practice called specious claiming—namely, for knowingly filing meritless claims among mass actions in an effort to inflate settlements.¹¹ Legislators, defense groups, and some scholars have heaped significant criticism on plaintiffs' attorneys for this practice, accusing them of “cash[ing] in on . . . national traged[ies]” in their own self-interest.¹²

Whether there is a problem with specious claiming in the mass tort context, or more broadly in aggregate litigation, is far from clear. In fact, scholars have long debated the issue. But, in several high-profile mass torts cases, judges have publicly called out plaintiffs' attorneys for egregious practices resulting in the filing of a significant number of meritless claims.¹³ Enterprising defendants are exploiting the perception that these cases create by bringing civil RICO cases against their opposing counsel. And defense groups are urging them on, arguing that existing remedies against frivolous lawsuits—like Rule 11 sanctions—“provide little solace to defendants who spend millions of dollars to defend against frivolous or fraudulent claims.”¹⁴

8. See Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong.

9. See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong.

10. See, e.g., Paul M. Barrett, *Judge Finds Fraud and Deceit by Plaintiffs' Lawyers in Asbestos Cases*, BLOOMBERG BUSINESSWEEK (Jan. 13, 2014, 9:57 AM), <http://www.bloomberg.com/bw/articles/2014-01-13/garlock-asbestos-claims-cut-90-percent-because-of-plaintiffs-lawyers-deceit> (stating that “asbestos insulation, worker injury, and courtroom excess has reached a truly repulsive phase”). For a more general discussion of the critiques of class actions and other aggregate devices, see COFFEE, *supra* note 2, at 133–53.

11. Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. COOLEY L. REV. 721, 727 (2009) (discussing some State Supreme Court efforts to remove the “economic incentive[s]” inherent to mass claiming); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 35 (2003) (describing the “malignant enterprise” of “specious claiming in asbestos litigation”).

12. Brickman, *supra* note 11, at 35.

13. See, e.g., Behrens, *supra* note 11, at 727; S. Todd Brown, *Specious Claiming and Global Settlements*, 42 U. MEM. L. REV. 559, 582 (2012); Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. (forthcoming 2017); 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>.

14. VICTOR E. SCHWARTZ & CARY SILVERMAN, U.S. CHAMBER INST. LEGAL REFORM, LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS AND PLAYERS 117 (2014), <http://www.instituteforlegalreform.com/research/lawsuit-ecosystem-ii-new-targets-trends-and-players>.

But, even if there may be a need to reform either aggregate litigation devices or the remedies against frivolous litigation,¹⁵ civil RICO actions against aggregate litigation attorneys is not the proper method to achieve this reform. In addition to over-penalizing the conduct, civil RICO actions have a significant impact upon filing, painting RICO defendants as not just fraudsters, but mobsters and racketeers. As the First Circuit has explained, “Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device. The very pendency of a RICO suit can be stigmatizing and its consummation can be costly.”¹⁶

Improper conduct in litigation is not a new issue, and attorneys have long been subject to civil liability and other penalties for filing frivolous litigation. Historically, parties subjected to such conduct have used a number of options for recourse, including requesting Rule 11 or other sanctions, filing abuse-of-process or malicious-prosecution claims, and filing complaints with the state bar association. Defendants have used these tools in the past, including in asbestos and other related mass tort litigation.¹⁷ Some critics have even argued that the defense bar and corporate interests have used these tools so effectively that they have succeeded in building a narrative of the plaintiffs’ attorneys as “ethically-challenged” bounty-hunters.¹⁸

But cases like *CSX* take that narrative to a new extreme. Actions like *CSX* do more than penalize specious claiming—they penalize plaintiffs’ attorneys for their decisions to file complaints in aggregate litigation. Civil RICO claims targeting plaintiffs’ lawyers usually rely in whole, or in large part, on mail or wire fraud as predicate acts. In fact, using mail fraud as a RICO predicate act is a popular choice because it is fairly easy to plead: a plaintiff need not show that the mailings themselves were fraudulent if they were part of an overall scheme to defraud. It is not hard to see how this can easily impact attorneys in aggregate litigation. Any defendants in aggregate litigation sue their opposing counsel under civil RICO with a simple formula: identify a few bad

15. The purpose of this Article is not to debate the need for class actions or mass actions, nor is it to detail the failings of those devices. For thorough discussions of the competing narratives on the desirability, merit, and efficacy of class actions and other aggregate litigation and citations to primary contributors in the aggregate litigation discussion, see generally Alexandra D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939 (2011); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 *EMORY L. J.* 399, 406–17 (2014).

16. *Miranda v. Ponce*, 948 F.2d 41, 44 (1st Cir. 1991); see also Melvin L. Otey, *Why RICO’s Extraterritorial Reach is Properly Coextensive with the Reach of its Predicates*, 14 *J. INT’L BUS. & L.* 33, 36 (2015) (“Both the potential financial rewards for plaintiffs, and the stigma that may attach to RICO defendants, make the statute a powerful weapon for aggrieved parties.” (quoting *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010))).

17. See *infra* Part IV.

18. Mullenix, *supra* note 15, at 417; *id.* at 413 (describing “the darker counternarrative” against class actions); see also Brooke D. Coleman, *The Efficiency Norm*, 56 *B.C. L. REV.* 1777, 1793–95 (2015) (discussing the rhetoric promoted by the media and lobbyists largely blaming plaintiffs’ lawyers for the increased cost in the litigation system).

claims, tie that to a wider “scheme” to undermine the defendants, and broad swaths of conduct may be swept into the net of liability.

The implications for this expanded scope of liability are severe. Notably, unlike traditional remedies for frivolous litigation like malicious prosecution and Rule 11, civil RICO includes automatic treble damages and fee-shifting provisions that allow victorious RICO plaintiffs to shift the costs of litigating *both* the underlying aggregate litigation and the RICO claim onto the opposing counsel. These treble damages and fee-shifting provisions transformed a \$429,240.47 case in *CSX*—as reflected in the jury verdict—to a \$7.3 million dollar settlement.¹⁹

There is a danger that the result of such judgments will be to undercut the legitimate use of aggregate procedural devices like class actions, mass actions, and multi-district litigation.²⁰ This is because private attorneys are expected to take on the enormous risks and costs associated with filing aggregate litigation. The onerous penalties of RICO, coupled with the risks and uncertainty necessarily involved in aggregate litigation, mean that applying RICO to specious lawsuits in such contexts might easily “chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to courts.”²¹ In light of this, RICO reprisals become just what the defense bar has threatened: a thinly veiled attempt to further weaken aggregate litigation by targeting the plaintiffs’ attorneys themselves.²²

There is a rich literature developing the concept of, and debating the wisdom of, the role of the plaintiff attorney in the context of aggregate litigation. Earlier literature written by scholars like Judge Jack Weinstein contains a vibrant discussion of the complexities of that role and, in particular, of the ethical strains that are placed on public law attorneys as a result of their dual roles as fiduciary and entrepreneur.²³ Since that time, however, the scholarship has largely gone the way of popular opinion, often

19. See *supra* note 1 and accompanying text.

20. One court rejecting this very use of civil RICO warned: “If any litigant’s or attorney’s pleading and correspondence in an unsuccessful lawsuit 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.” *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 173 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011).

21. *Curtis & Assocs.*, 758 F. Supp. 2d at 173.

22. Judge John W. Wade made a similar argument about the retaliatory use of state common law torts to discourage meritorious traditional two-party actions, “not just those that are frivolous.” John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 436 (1986).

23. See generally, e.g., Geoffrey C. Hazzard Jr., *Reflections on Judge Weinstein’s Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 569 (1994); Thomas W. Henderson & Tybe A. Brett, *A Trial Lawyer’s Commentary on One Jurist’s Musing of the Legal Occult: A Response to Judge Weinstein*, 88 NW. U. L. REV. 592 (1994); Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

focusing on a smaller subset of ethical issues related to perceived egregious plaintiff lawyering in aggregate cases. Examples include studies of conflicts of interest,²⁴ discussions of frivolous or fraudulent litigation in mass tort litigation,²⁵ and financial matters, such as settlements and *cy pres* remedies perceived as funneling monies to plaintiff attorneys.²⁶

But despite the wide array of current scholarship on aggregate litigation, there is relatively little analyzing the tort and procedural mechanisms that private parties may utilize to combat perceived misconduct by plaintiffs' attorneys in the mass tort context.²⁷ Specifically, no legal scholar has considered whether this recent aggressive use of RICO by the defense bar and corporate interest groups to punish plaintiffs' attorneys for the alleged fraudulent filing of aggregate litigation is a proper method of regulation.²⁸ The question becomes particularly weighty when one takes into account the complexities involved in the attorney general role. Specifically, this author accepts the fact that plaintiffs' attorneys act in a semi-official capacity in aggregate litigation when they pursue rights that would go otherwise unredressed—including in some mass tort litigation.²⁹ Furthermore, it is assumed that this capacity carries with it added private burdens—such as hiring experts, the costs of identifying, diagnosing, and managing thousands

24. See generally, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519; Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 EMORY L.J. 451 (2014).

25. See, e.g., Peggy L. Ableman, *The Garlock Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 AM. J. TRIAL ADVOC. 479, 488 (2014) (blaming secrecy in bankruptcy process in part for resulting “widespread . . . deceptive practices”); Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071, 1150–51 (2014) (documenting the practice of double-claiming against bankruptcy and tort); S. Todd Brown, *How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 557–58 (2013); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 537 (2001) (arguing that the focus on judicial efficiency results in inequities in the courts, including incentivizing plaintiffs' lawyers to file thousands of claims that lack merit).

26. See generally, e.g., Howard Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. (forthcoming) (arguing that settlement class actions benefit both defendants and plaintiffs' attorneys at the expense of plaintiffs); Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

27. One exception to this is the asbestos litigation symposium article of Keith N. Hylton, who considers principles of optimal deterrence, repetitive public harm, and resource-allocation in analyzing the problem of fraudulent claiming and ultimately proposes a sanction on plaintiffs' attorneys in mass tort cases tied to “the revenue anticipated from the [knowingly] fraudulent claims divided by the probability of detection.” Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575, 590 (2008).

28. But see generally Engstrom, *supra* note 13 (using RICO reprisal cases to develop a definition and categorization of fraud in the mass tort litigation system).

29. See COFFEE, *supra* note 2, at 4–5, 156; Henderson & Brett, *supra* note 23, at 599–600; Weinstein, *supra* note 23, at 472–74.

of plaintiffs, filing cases, etc.—all with uncertain rewards.³⁰ Given these facts, there remain unanswered questions about how aggregate lawyers should be regulated, including whether any remedial scheme aimed at deterring improper conduct properly considers issues of access to justice, efficiency, and reduction of waste in the judicial system without threatening the private attorney general device as a whole.

To explain this problem and possible solutions, this Article proceeds as follows. Part II explores the landscape of regulation of frivolous claiming in aggregate litigation by outlining several alternative remedies for frivolous litigation practices and corresponding protections for attorneys. As part of that analysis, Part III draws on the existing aggregate litigation literature and highlights how aggregation can both exacerbate the problem of frivolous litigation and enhance the need for access to justice protections. Part IV then provides a brief background of the civil RICO statute and explains how it is being deployed by defendants against plaintiffs' attorneys in aggregate litigation. It provides a case study of *CSX*, the only case known to go to trial and result in a verdict for civil RICO violations as a result of over-aggregation. Next, it explores the use of civil RICO in other litigation against plaintiffs' attorneys, and draws a distinction between *CSX* and cases involving allegations of either systemic or external wrongdoing.

Part V analyzes the doctrinal, policy, and structural implications of the RICO reprisal. It argues the RICO reprisal is illegal and results in the lamentable federalization of state common law. More importantly, the RICO reprisal punishes the aggregate-litigation device itself, rather than the underlying fraudulent conduct, and this is an excessive penalty for the harm of over-aggregation. To remedy these problems, Part VI offers several proposals, including effectively barring any civil RICO action targeting attorneys' pure litigation activities without a showing of malicious intent—a proposal that draws on one of the existing common law protections for attorneys: the litigation privilege doctrine. The mere act of filing a few complaints in court should not justify RICO liability for an entire aggregate litigation. Instead, courts should require proof of a broader intended scheme to harm.

II. REMEDIES FOR FRIVOLOUS CLAIMS IN AGGREGATE LITIGATION

Unfortunately, improper conduct in litigation—both in traditional two-party actions and aggregate litigation—is not a new issue. As a result, attorneys have long been subject to regulation for legal malpractice. Courts have held lawyers civilly liable to former adversaries for their actions in bringing frivolous litigation on a number of theories, including Rule 11 or other state

30. See Weinstein, *supra* note 23, at 502–06 (analyzing potential conflicts of interest raised, in particular, by the fact that “[u]sually the attorney has a financial stake in the litigation greater than that of any single litigant”).

sanctions, abuse of process or malicious prosecution claims, and complaints with the state bar association.

Defendants and defense interest groups have complained of a wide variety of bad conduct by attorneys in aggregate litigation—and specifically in mass torts cases—including: “withholding crucial evidence,” “unjustly tarnishing [a] company’s reputation in the press,” and even “manipulating the legal system.”³¹ But one of the most common allegations in the recently filed RICO actions against aggregate attorneys is that plaintiffs’ attorneys are filing frivolous claims among aggregate actions in an effort to inflate the value of the overall aggregate litigation. Some have characterized this phenomenon—at alternative times called specious claiming, oversubscription, and overaggregation—as a particular feature in mass tort litigation, brought about almost entirely by the perverse incentives raised when plaintiffs’ attorneys must both finance extremely costly litigation through contingency-fee arrangements and represent a large number of clients with often diverse claims.³²

Of course, the term frivolous litigation is itself a murky term.³³ This is so in part because it can include broad categories of conduct, from simply “bringing . . . a lawsuit that has no merit” to bringing a lawsuit with bad faith.³⁴ It is also in part due to the difficulty of finding agreement on what litigation is frivolous and what sanctions should apply. For example, it is clear that a plaintiffs’ attorney who knowingly lies when filing a claim has acted “fraudulently” and should be subject to sanctions, it is less obvious what should happen to a plaintiffs’ attorney who brings a claim that has little merit but raises a novel legal claim. In short: without a precise definition, it is hard to determine exactly when a plaintiffs’ attorney crosses the line between sanctionable misconduct and zealous advocate.

But, as this Part articulates, there are a series of doctrines that have developed precisely for this reason: to categorize, target, and, over time, define sanctionable conduct. Remedial doctrines like Rule 11 and malicious prosecution achieve these objectives by incorporating some consideration of the historical balance of competing interests involved in prosecuting frivolous litigation. They primarily include: access to justice, efficiency, and reduction of waste in the judicial system.

31. Schwartz & Silverman, *supra* note 14, at 117.

32. See Behrens, *supra* note 11, at 727; Brickman, *supra* note 11, at 36.

33. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529–33 (1997) (offering a model of frivolous litigation in the context of Rule 11 sanctions); Brown, *supra* note 13, at 586–91 (defining specious claims in the context of mass torts litigation); Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1195–96 (2014) (discussing definitions of frivolous and differentiating between frivolous and meritless litigation as a means of determining how to manage ongoing litigation).

34. Wade, *supra* note 22, at 437 n.11, 438.

This Part first articulates the context of frivolous litigation regulation, including the remedial goals underlying various sanctions and torts and the particular concerns such regulation plays in the aggregate-litigation context. Next, it examines the existing remedial alternatives that litigants like CSX have when faced with potentially frivolous litigation, as well as models others have suggested for enhancing the effectiveness of these alternatives. Considering the full range of alternatives, the expanded use of RICO—and therefore, the potential dampening of access to the courts in aggregate litigation—is a mistake.

A. *ACHIEVING A BALANCE: GOALS OF REGULATION OF MERITLESS LITIGATION*

Whether in the traditional two-party litigation or aggregate-litigation context, any scheme aimed at deterring frivolous litigation must balance two competing goals: preservation of “free access to the courts” and providing “an effective means with which to redress litigation abuse.”³⁵ One party’s right to be free from frivolous, baseless, or abusive litigation competes with another party’s right to use the justice system for legitimate purposes to settle grievances or report crimes. Any statutory or common-law scheme aimed at frivolous litigation must be “carefully circumscribed”³⁶ to reach both goals, while recognizing that they might be in competition.

A review of the torts and remedies designed to combat frivolous litigation—described more fully below—shows a purposeful design with these competing interests in mind. These torts, and the common-law litigation immunities that have developed alongside them, have evolved over time to include precise elements and burdens of proof designed to address one or both of these policy goals.

Generally, courts have disfavored malicious prosecution actions because they discourage litigation.³⁷ The American legal system is designed to settle disputes primarily via litigation, and, as a result, the right to seek legal redress is guarded “zealously.”³⁸ The idea that “[o]ne who believes that he has been aggrieved should be entitled to approach the courts for relief without having to guarantee that he is correct” is an important characteristic of the right of redress in the American system of justice.³⁹ Many procedural aspects of our court system are designed to permit potential plaintiffs to use the courts “to

35. Byron C. Keeling, *Toward A Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1125 (1994); see also John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available?*, 36 ALA. L. REV. 927, 928–31 (1985); 4-34 ROGER E. WARIN, BUSINESS TORTS § 34.01 (2015) (LEXIS).

36. WARIN, *supra* note 35, § 34.01.

37. See *id.*; Wade, *supra* note 22, at 434 (“Because of their jealous protection of the position that they should always be open for the public to use, the courts have frequently declared that they do not favor the action.”).

38. Johnson & Cassady, *supra* note 35, at 928–29.

39. Wade, *supra* note 22, at 433.

find out how they had been injured and how they could prove their case.”⁴⁰ This includes procedures like notice pleading, class actions, and wide discovery practice.⁴¹ The fear is that if plaintiffs have too high of a burden to access the courts, wrongs will go unaddressed, particularly for underprivileged classes of people.⁴² But access to the courts serves more than simply to help resolve disputes; it is also a critical aspect of our democracy. Litigation by private parties “affirm[s] transparency in law-making and participation in the development of law,” and provides “an additional avenue for citizen participation in government.”⁴³

If malicious prosecutions actions potentially cut out underprivileged petitioners, aggregate litigation specifically empowers those kinds of petitioners to redress their wrongs. As such, access to aggregate litigation is essential as a valuable “tool of regulatory policy.”⁴⁴ The device does more than merely join claims—it also “advances substantive law values such as deterrence, compensation, fairness, and efficiency.”⁴⁵ For many types of claims, aggregate litigation is the only effective means of offering redress to litigants and deterring bad actors. This includes cases in the mass tort context.⁴⁶ As scholar Samuel Issacharoff noted, “[l]egal rights cannot exist in a vacuum. Without an effective enforcement strategy, legal rights risk becoming ceremonial declarations that invite disrespect.”⁴⁷ Of course, commentators have also argued that various aggregate litigation devices, including class actions and mass actions, have negative effects, such as overcompensation, over-deterrence, and over-aggregation.⁴⁸ Thus, the literature contains hundreds of proposals for reforming these devices to better achieve their goals.⁴⁹ Regardless of whether it could or should be reformed, aggregate litigation has a valuable place in our current system of procedural justice in providing compensation and deterrence in some

40. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 104 (2008).

41. *Id.* But see *id.* at 105 (arguing that recent Supreme Court jurisprudence has made it “harder for a plaintiff to enter the courts”).

42. *Id.* at 106 (quoting Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 44 (2000)).

43. *Id.*

44. Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387, 1390 (2015).

45. *Id.* at 1392; see also *id.* at 1390 n.15 (collecting sources that describe the importance of aggregate litigation as a tool of regulatory policy).

46. Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1774 (2005) (discussing how mass torts can proceed even absent class certification).

47. Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135, 150 (1999).

48. See, e.g., John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1536 (2006) (proposing that individual corporate defendants be held directly liable in securities class actions in order to better promote deterrence).

49. See *infra* notes 298–310 and accompanying text.

contexts where there is no other practical and available alternative in the U.S. system of justice to meet these ends.⁵⁰

While access to the courts—including through aggregate litigation—cannot be questioned as a valuable goal, such access need not be unlimited. An equally important goal is to deter litigation abuse, and prevent frivolous filings. At various times, courts, legislatures, and scholars have identified different purposes for sanctions and attorney-litigation-misconduct regulation, including: “(1) deterring frivolous filings, (2) punishing lawyers and litigants who pursue frivolous filings, and (3) compensating the victims of frivolous filings.”⁵¹ The various methods of regulating frivolous lawsuits discussed below have one or more of these goals in mind.

Any discussion of frivolous litigation in the aggregate litigation context must take into account the complex and often competing interests that have developed among the various actors in the legal system. Indeed, aggregate litigation is practically defined by the multiple conflicts inherent in the devices.⁵² These include the tension between the need for individualized justice, which is rooted deeply in our system of justice, and the need to employ effective aggregative techniques to settle certain types of claims.⁵³ There is also the tension inherent in the role of class counsel, who necessarily must act both as a “public servant” and as a self-interested entrepreneur.⁵⁴ Any remedial scheme targeting lawyers in representative litigation must take these issues into account. The plaintiffs’ attorney is a public servant when she “furthers the deterrent effect of the law by harnessing the power of representative litigation.”⁵⁵ Essentially, the aggregate-litigation plaintiffs’ attorney acts as a “private attorney general,” by righting wrongs in society that will otherwise go unaddressed.⁵⁶ This can happen, for example, when the stakes in the cases are too low or the cost of the litigation is too high to justify individual actions.⁵⁷

50. Government regulation, self-regulation, and non-judicial resolutions are three other recognized ways of regulating aggregate wrongs. The literature casts doubt on the effectiveness of these alternatives, at least when considering low-value, high impact claims. See Issacharoff, *supra* note 47, at 150.

51. Keeling, *supra* note 35, at 1135 (footnotes omitted).

52. For an excellent discussion of the character of aggregate litigation and the tensions that define it, see Lahav, *supra* note 15, at 1948. See also generally Hazzard, *supra* note 23; Mullenix, *supra* note 23; Weinstein, *supra* note 23.

53. Weinstein, *supra* note 23, at 490, 493–95.

54. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 888–89 (1987) (describing lawyers as a type of entrepreneur); Lahav, *supra* note 15, at 1948 (describing attorneys as public servants).

55. Lahav, *supra* note 15, at 1948.

56. *Id.*

57. Some critics might call this type of action “negative-value.” This author avoids using the term so broadly, as it paints an inaccurate picture of the reality of modern aggregate litigation. See Linda Sandstrom Simard, *A View from Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, 47 IND. L. REV. 739, 740 n.5 (2014) (collecting sources presenting differing definitions of the term and efforts to identify types of aggregate claims).

Despite this “public service” role, American aggregate litigation devices are also set up to require plaintiffs’ attorneys in mass action litigation to be self-interested entrepreneurs. The way this litigation works is by “creating incentives for lawyers to bring private enforcement actions.”⁵⁸ When individual lawsuits have damages that are too small or too complex to make individual litigation worthwhile, pooling these claims can create an incentive pot large enough to cover reasonable attorneys’ fees. But this procedure also requires that the plaintiffs’ attorney be the one to make the investment, and take the risk, in the litigation.⁵⁹

These tensions have led to critiques of the practice of aggregate litigation—particularly how that system exacerbates the problem of frivolous litigation.⁶⁰ Aggregate litigation is so costly that plaintiffs’ attorneys develop perverse incentives to litigate claims—even weak claims—overzealously, knowing the litigation may prompt either verdicts or valuable settlements. This structural characteristic can lead to specious claiming; that is, when plaintiffs bring weak cases in the same litigation as strong ones.⁶¹ Because aggregate cases are often settled on a lump-sum basis, this allows potential illegitimate recoveries, and allows the strong claims to subsidize the weak ones. Specious claiming—or the hiding of 11 bad cases among 5300—was CSX’s primary complaint against the Peirce firm.⁶²

B. ALTERNATIVE REGULATION OF LITIGATION CONDUCT

Apart from RICO, there are many existing methods of regulating attorney conduct in frivolous litigation. These methods can be broken up into tort and procedural remedies.⁶³ Tort remedies include malicious prosecution and abuse of process.⁶⁴ Procedural remedies include sanctions under Rule 11

58. Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presentation at the Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland 2 (July 21, 2000), <http://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>; see also Erichson, *supra* note 46, at 1774–75 (explaining the same concept in the context of mass tort practice).

59. For a description of the mass tort plaintiffs’ lawyer’s law practice, including the economic characteristics of aggregate litigation and plaintiffs’ attorneys’ cost-exposure see Erichson, *supra* note 46, at 1774.

60. For a summary of common criticisms relating to frivolous litigation, especially in aggregate litigation see COFFEE, *supra* note 2, at 1–7; Valerie P. Hans & William S. Lofquist, *Jurors’ Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC’Y REV. 85, 93–96 (1992); Wade, *supra* note 22, at 433–36; John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 26–28 (1998).

61. For a discussion of specious claiming—defined as overaggregation and overvaluation of weak cases in aggregate litigation—see *supra* note 11 and accompanying text.

62. See *supra* note 1 and accompanying text.

63. In describing methods of regulating frivolous litigation conduct, I am borrowing the taxonomy of Professor John Wade, formerly of Vanderbilt. Wade, *supra* note 22, at 434–35.

64. Defendants have other options in tort for bringing actions against frivolous litigators, including fraud. 1 RONALD E. MALLEN & ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* § 8:31

or other specified statutes, cost-shifting statutes, and disciplinary sanctions. Unlike in tort, where there are specific elements that must be proven, procedural remedies give the court greater discretion to decide when and how to impose a given sanction. For example, a court may invoke Rule 11 to discipline an attorney and/or party after a single improper discovery action.

The torts of abuse of process and malicious civil prosecution—which I refer to as the abusive litigation torts—are the primary remedies for baseless litigation at common law.⁶⁵ Because the RICO reprisal represents, in essence, frivolous litigation lawsuits, these torts will be my starting point. The elements of malicious prosecution vary state by state, but generally require that a person (1) initiate a proceeding (2) with “malice” (3) for which he had no “probable cause” (4) that terminated in the plaintiff’s favor.⁶⁶

As each jurisdiction has developed its malicious prosecution action, whether through the legislature or the courts, it also makes choices between the competing interests of access to courts and deterrence of litigation abuse. And, in the context, these policy choices are usually quite clear. As an example, one established element of malicious prosecution is termination of the prior proceedings in favor of the accused. This requirement has developed for two reasons. First, it ensures that there will not be “conflicting resolutions arising out of the same or identical transaction,”⁶⁷ which would happen if a plaintiff won its malicious prosecution lawsuit—therefore, having proven that the underlying litigation was without probable cause—, but later lost as a defendant in the underlying litigation—meaning that a judge or jury found probable cause. Second, courts have long seen the favorable termination requirement as protecting justifiable claims: “for ‘no man can say of an action still pending that it is false or malicious,’”⁶⁸ and “unfavorable termination is conclusive as to the existence of probable cause.”⁶⁹

Another example of a purposeful—and clear—policy choice is a “special damages” element, which has been adopted in a minority of jurisdictions.⁷⁰ In those states to require this additional element, malicious prosecution plaintiffs must also prove damages in addition to the normal cost of defending the lawsuit.⁷¹ The stated purpose of this rule is to shift the balance even further toward protection of court access by preventing fee-shifting.⁷²

(2016). Indeed, the plaintiff in *CSX* pled, and successfully proved, common law fraud in addition to its RICO claims. However, the analysis here will be limited to those torts most directly targeted toward groundless litigation conduct.

65. See *Wade*, *supra* note 22, at 437–53; see also generally Matthew Spohn, *Combating Bad-Faith Litigation Tactics With Claims for Abuse of Process*, 38 COLO. LAW. 31 (2009).

66. See *Wade*, *supra* note 22, at 438.

67. *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

68. *Gordon v. West*, 59 S.E. 232, 233 (Ga. 1907) (quoting *Parker v. Langley*, 10 Mod. 209).

69. 4-34 WARIN, *supra* note 35, § 34.02.

70. *Wade*, *supra* note 22, at 442.

71. *Id.*

72. *Id.* at 443. Special damages have been proven in the aggregate context by interference

Malicious prosecution covers the improper initiation of lawsuits. The tort of abuse of process, by contrast, covers the use of an individual legal process for an improper purpose.⁷³ This tort “emphasizes the plaintiff’s subjective intent—not the objective merits of his claim.”⁷⁴ Accordingly, a claimant need not prove that the underlying process used was without probable cause.⁷⁵

Just like malicious prosecution, abuse of process requires a showing of malice.⁷⁶ This means that a claimant cannot prevail unless she shows that the defendant used either the process or the litigation “to accomplish a purpose for which it is not designed.”⁷⁷ For abuse of process, this is a narrow test, asking whether the process was used primarily for an ulterior purpose. Malicious prosecution is similarly focused on the motive, but asks whether the entire litigation was brought for some reason other than “for the purpose of giving the person exercising the right an opportunity to determine whether his claim is legally justified and, if it is, to obtain a remedy that the law provides.”⁷⁸ Although an ulterior motive for the litigation can be proven in various ways, it is often expressed as “knowledge that there is no probable cause for the proceeding.”⁷⁹

In addition to tort liability, lawyers who bring frivolous or vexatious lawsuits may face a host of statutory or procedural consequences. One example is 28 U.S.C. § 1927, which provides that “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”⁸⁰ Courts have also recognized their own inherent powers to sanction parties and their

with person or property and repeated civil actions that amount to harassment. See *Feld Entm’t, Inc. v. Am. Soc’y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 332 n.25 (D.D.C. 2012) (denying motion to dismiss malicious prosecution claim and holding that “where multiple unconscionable suits were filed or where the unconscionability of the lawsuit was particularly egregious, the courts have found that the costs of defending the suit may satisfy the special injury requirement”). For example, in *Feld*, the court held that the special injury requirement was met by “alleg[ations] that [Feld] was forced to defend a litigation which spanned nine years, was not only baseless, but fraudulent from its outset, and was premised on bribery and other alleged criminal activity.” *Id.*

73. Abuse of process is defined in the Restatement of Torts as an act in which “one . . . uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed.” RESTATEMENT (SECOND) OF TORTS § 682 (AM. LAW INST. 1977).

74. Leah J. Pollema, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107, 1122 (2007).

75. Jeffrey J. Utermohle, *Look What They’ve Done to My Tort, Ma: The Unfortunate Demise of “Abuse of Process” in Maryland*, 32 U. BALT. L. REV. 1, 7 (2002).

76. WARIN, *supra* note 35, § 34.02 (malicious prosecution); *id.* § 34.04 (“ulterior motive requirement” for abuse of process).

77. RESTATEMENT (SECOND) OF TORTS § 682 (AM. LAW INST. 1997).

78. Wade, *supra* note 22, at 448.

79. MALLIN & RHODES, *supra* note 64, § 6:42.

80. 28 U.S.C. § 1927 (2012); see also Kenneth Lasson, *Lawyering Ashew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 758 (1994) (discussing remedy).

attorneys for acting “in bad faith, vexatiously, wantonly, or for oppressive reasons.”⁸¹ A required showing for each of these sanctions—and a key distinction from a civil RICO claim—is bad faith.

Just as with the malicious-prosecution and abuse-of-process torts, to justify sanctions under section 1927 and a court’s inherent powers to sanction, a litigant must show that the “the attorney intentionally act[ed] without a plausible basis.”⁸² This requirement is influenced by the same policy consideration as the requirement of malice for malicious prosecution: the need to protect access to courts.⁸³

In addition to section 1927 and inherent powers, there are sanctions against frivolous lawsuits under Rule 11 of the Federal Rules of Civil Procedure. Rule 11 requires attorneys who file cases in the federal courts to certify that their claims, allegations, and arguments are made in good faith and have some basis in law and fact.⁸⁴ It forbids a party from filing any litigation documents with the court that are “presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”⁸⁵ Furthermore, by presenting to the court a litigation document, attorneys represent that the legal arguments contained therein are “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”⁸⁶

Unlike sanctions under section 1927 and inherent powers, Rule 11 does not require a showing of subjective bad faith.⁸⁷ Rule 11 sanctions are still carefully circumscribed to protect litigants’ right to petition. First, the remedy is limited to a sanction that suffices to deter repetition of the conduct or comparable conduct by others similarly situated.⁸⁸ Accordingly, when monetary sanctions are granted under Rule 11, they usually must be paid to the court.⁸⁹ A court will require the violating party to compensate the aggrieved party for the costs of defending a frivolous claim only in unusual circumstances, including when sanctions aimed at deterrence may be ineffective.⁹⁰ Second, the Rule includes a safe-harbor provision that allows a

81. Wade, *supra* note 22, at 469 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258–59 (1975)).

82. *Id.* at 472 n.179 (quoting *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir. 1984)); see also MALLEN & RHODES, *supra* note 64, § 11:7.

83. MALLEN & RHODES, *supra* note 64, § 11:7.

84. FED. R. CIV. P. 11.

85. *Id.* 11(b)(1).

86. *Id.* 11(b)(2).

87. 1 MALLEN & RHODES, *supra* note 64, § 11:6.

88. FED. R. CIV. P. 11 advisory committee’s notes to 1993 amendment. For available sanctions under the Rule, see *id.* 11(c)(4); 1 MALLEN & RHODES, *supra* note 64, § 11:6.

89. FED. R. CIV. P. 11 advisory committee’s notes to 1993 amendment; HERR, *supra* note 2, § 10.154.

90. For this reason, Rule 11 has been described as both a sanction and a fee-shifting procedural device. Michael P. Stone & Thomas J. Miceli, *The Impact of Frivolous Lawsuits on*

litigant the option to withdraw a challenged filing without sanction within 21 days after a challenge.⁹¹ The Advisory Committee stated that the purpose of this rule is to allow litigants the freedom to “abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”⁹²

Defendants have used these tools in the past, including in asbestosis and other related mass-tort litigation. Here the CSX case proves instructive. As noted above, just six months before CSX filed its civil RICO action against the Peirce law firm, Judge Jack issued sanctions in a federal silica MDL under section 1927 for one law firm’s vexatious and “unreasonable multiplication of the proceedings.”⁹³ Specifically, Judge Jack sanctioned the plaintiffs’ attorneys because they kept prosecuting several cases even when it became clear to the firm that the underlying diagnoses of their experts were unreliable.⁹⁴ While Judge Jack recognized that an \$8,250 fine was “substantially less than the total amount of damages—some calculable and some not—Plaintiffs’ counsel have caused by their filing of thousands of claims without a reliable basis for believing that every Plaintiff has been injured,” the court nonetheless found this amount “sufficient to serve notice to counsel that truth matters in a courtroom no less than in a doctor’s office.”⁹⁵

Attorneys practicing before the courts are also highly aware of potential disciplinary proceedings which could be brought against them if they violate the Rules of Professional Conduct. Attorneys have been disciplined in a number of instances for misconduct in bringing frivolous or unwarranted civil litigation.⁹⁶ Model Rule of Professional Conduct 3.1 specifically prohibits lawyers from making frivolous claims⁹⁷ and Model Rule 3.3 imposes a duty of candor to the tribunal, which requires that an attorney make no knowingly false statements of fact or law to the court.⁹⁸

The foregoing review of the primary remedies available to combat frivolous litigation reveals several insights. First, these remedies appear to balance the competing interests at stake—access to courts versus deterring frivolous litigation—primarily through employing both subjective and objective elements of frivolousness and fraud. For most of these remedies, it is not enough that the litigation was actually frivolous, but instead the plaintiff must prove some type of bad faith. The obvious exception to this dual objective/subjective requirement is Rule 11 sanctions, which only require a

Deterrence: Do They Have Some Redeeming Value?, 10 J.L. ECON. & POL’Y 301, 328 (2014).

91. Fed. R. Civ. P. 11(c)(2).

92. FED. R. CIV. P. 11 advisory committee’s notes to 1993 amendment.

93. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 676 (S.D. Tex. 2005).

94. *Id.*

95. *Id.* at 679.

96. See generally Susan L. Thomas, *Bringing of Frivolous Civil Claim or Action as Ground for Discipline of Attorney*, in 85 AM. L. REPS. 4TH 544 (1991) (compiling cases).

97. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2015).

98. *Id.* r. 3.3.

showing of objectively improper conduct. This makes Rule 11 a strong tool for judges to use to regulate the conduct in their courts. However, Rule 11 sanctions recognize the dangers inherent in any procedure that penalizes litigation conduct without a showing of bad faith and have their own protections built in.

This element—bad faith, or actual malice—is so intrinsic to the concept of abusive litigation and attorney litigation conduct that a corresponding attorney immunity has evolved to ensure protection for attorneys in precisely these circumstances. In most jurisdictions under the common law, lawyers are absolutely immune from liability for conduct or communications “which may injure or offend an opposing party during the litigation process.”⁹⁹ One of the few narrow exceptions to have grown from this rule is liability for the torts of abuse of process and malicious prosecution, which require more than a mere showing of lack of truth, or slander, or misleading statements.¹⁰⁰ The aim of the litigation privilege is the same as that behind the effort to narrowly craft the tort of malicious prosecution: to protect speech and the right of petition, as “a contrary rule . . . would unduly stifle attorneys from zealously advancing the interests of their clients.”¹⁰¹

Another insight resulting from research into these various methods of preventing frivolous lawsuits is that perhaps none is, in isolation, adequate to the task.¹⁰² Each has been subject to criticism. For example, critics have accused Rule 11’s safe-harbor provision of destroying the deterrent effect of its sanctions.¹⁰³ Despite this, there is still some teeth in the remedy, as courts have their own discretion to impose sanctions and may waive the safe-harbor requirements. And, as the silica litigation example shows above, the Rule 11 sanction can do more than simply offer compensation: it can also serve an important role in detecting frivolous and specious claiming in mass tort litigation.

The torts of malicious prosecution and abuse of process are subject to even more critical commentary. Of primary concern are the onerous restrictions state legislatures and courts have intentionally placed on the tort, which result in “comparatively few cases in which it has been successfully

99. Louise Lark Hill, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, 44 HOFSTRA L. REV. 401, 401 (2015); see also Douglas R. Richmond, *The Lawyer’s Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 284 (2007).

100. 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, 1086 (1992).

101. T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 920 (2001) (quoting *Surace v. Wuliger*, 495 N.E.2d 939, 944 (Ohio 1986)).

102. Johnson & Cassady, *supra* note 35, at 928 (stating that “no single device exists that provides the defendant in a frivolous lawsuit with adequate relief”).

103. See Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court’s 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 101 (1993) (arguing that the safe harbor provision incentivizes bad conduct by allowing bad actors the chance to fix their bad conduct).

maintained.”¹⁰⁴ Commentators often protest that, in the balance between the policies of “freedom from harassment through vexatious proceedings” and “open access to the courts,” courts and legislatures have overwhelmingly chosen to “weigh[] the balance on the side of encouraging lawsuits.”¹⁰⁵ The most controversial requirements are the dual subjective and objective elements and special damages.¹⁰⁶ Furthermore, the fact that the malicious-prosecution action requires termination of the underlying lawsuit means that a victim of vexation litigation must wait until the entire lawsuit—and corresponding costs associated with its defense—is over before he can begin to recover. A vexatious-lawsuit victim also has fewer options for ending the prior action, as settlement and other resolutions not on the merits will preclude a malicious-prosecution action.¹⁰⁷ When such a large percentage of mass tort litigation ends in settlement, this can pose a significant hurdle.¹⁰⁸

Ultimately, whether existing tort and procedural mechanisms designed to controlling frivolous actions are adequate to that task is open to question.¹⁰⁹ It is especially unclear whether those remedial options are effective in the aggregate litigation context. But the above analysis suggests, at least, that there is a strongly perceived gap. Defendants seek to fill this gap by creating a new remedy for frivolous litigation conduct in the context of aggregate litigation—an action under civil RICO.

III. CIVIL RICO BACKGROUND

This Part provides a brief background of the civil RICO statute. The next Part explains how it is being deployed by defendants against plaintiffs’ attorneys in aggregate litigation.

Critics both laud and malign RICO, a statute that uses both criminal and civil remedies to combat criminal organizations. Many authors have recounted RICO’s legislative and judicial history,¹¹⁰ but a brief overview of the

104. Wade, *supra* note 22, at 454.

105. See, e.g., T. Leigh Anenson, *Creating Conflicts of Interest: Litigation As Interference with the Attorney-Client Relationship*, 43 AM. BUS. L.J. 173, 206–07 (2006).

106. See *id.* at 208.

107. Wade, *supra* note 22, at 439.

108. See, e.g., Anenson, *supra* note 105, 206–10 (arguing that these requirements have resulted in little reduction of frivolous lawsuits).

109. Compare Wade, *supra* note 22, at 490 (“[A]lthough there are many different approaches, no single one is fully adequate for the purpose. They are all incomplete and imperfect, needing substantial improvement to become properly effective.”), with Saami Zain, *Antitrust Liability for Maintaining Baseless Litigation*, 54 SANTA CLARA L. REV. 729, 756 (2014) (reviewing “justifications for imposing antitrust liability for continuing to litigate a baseless action for anticompetitive purposes”).

110. See generally, e.g., G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of RICO?”*, 43 VAND. L. REV. 851 (1990); Pamela Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523 (2013).

statute and its expansion is necessary for an informed understanding of this Article.

Since Congress enacted RICO in 1970 as Title IX of the Organized Crime Control Act, critics have described it as “complex” and “amorphous.”¹¹¹ It is both a criminal and a civil cause of action. The United States Department of Justice may bring a civil enforcement action, or it may prosecute offenders criminally,¹¹² while private actors may sue for damages. Although the RICO statute targets various types of conduct,¹¹³ plaintiffs bring “virtually all” RICO claims against professionals, including attorneys, under § 1962(c).¹¹⁴ That section states that it is “unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”¹¹⁵

Those found civilly liable face tough sanctions. The civil provision grants victorious RICO plaintiffs treble damages.¹¹⁶ In addition, civil RICO contains a fee-shifting provision—a rare exception in American jurisprudence. Accordingly, prevailing RICO plaintiffs are also entitled to “the cost of the suit, including a reasonable attorney’s fee.”¹¹⁷ Both cost and attorneys’ fees-shifting and treble damages are mandatory upon a finding of liability. To put this in the context of a RICO action claiming abusive litigation—plaintiffs usually, at a minimum, seek damages of the attorneys’ fees and costs to prosecute the underlying abusive action. Not only would a losing defendant have to pay these costs, times three, but it would also have to pay the prevailing plaintiff its costs (including attorneys’ fees) of prosecuting the entire federal RICO claim—a notoriously complicated and costly action.

To prevail on a civil RICO claim, injured persons must prove that the defendant: (1) conducted (2) “an enterprise” (3) “through a pattern” (4) “of racketeering activity.”¹¹⁸ The RICO statute lists a number of specific criminal acts that constitute “racketeering activity.”¹¹⁹ This list is exhaustive.¹²⁰ Mail and

111. Pierson, *supra* note 110, at 526.

112. Persons convicted of RICO violations may face up to 20 years in jail, forfeiture of property “acquired or maintained in violation of” RICO, and fines. 18 U.S.C. § 1963(a)(1) (2012).

113. Such as investing, acquiring, or conspiracy. 2 RONALD E. MALLEN & ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* § 12:2 (2016).

114. *Id.*

115. 18 U.S.C. § 1962(c).

116. 18 U.S.C. § 1964(c).

117. *Id.*

118. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

119. 18 U.S.C. § 1961(1); *see also* GREGORY P. JOSEPH, *AM. BAR ASS’N, CIVIL RICO: A DEFINITIVE GUIDE* 134–37 (4th ed. 2015).

120. 18 U.S.C. § 1961(1)(2012).

wire fraud are two common predicate offenses, especially in cases involving professionals.¹²¹

A “pattern of racketeering activity” is defined in the statute as requiring “at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.”¹²² The Supreme Court has further narrowed the definition of a pattern by holding that the two predicate acts must be “related, *and* that they amount to or pose a threat of continued criminal activity.”¹²³ As the Fourth Circuit has explained, this “continuity” requirement is meant to reflect Congress’s desire to limit RICO’s application to “ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.”¹²⁴

In addition to the basic elements, a person alleging civil RICO must also prove the elements of the underlying predicate acts that make up the racketeering pattern. RICO plaintiffs must also prove injury to business or property—not to their person.¹²⁵ In *Sedima, S.P.R.L. v. Imrex Co.*, the Supreme Court held that RICO plaintiffs must prove proximate cause because they may only recover damages caused by the predicate acts, not incidental harms.¹²⁶

There is little debate about the immediate impetus for the RICO statute: to combat organized crime.¹²⁷ Despite this original intent, Congress left the door open for the expansion of RICO by mandating that RICO is to “be liberally construed to effectuate its remedial purposes.”¹²⁸ Critics debate the reason Congress included this “liberal construction” clause. Some argue that Congress meant for RICO to apply beyond organized crime, to any type of complex crime, including commercial and other fraud,¹²⁹ while others

121. See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997) (noting that mail and wire fraud are alleged as predicate acts in a “high percentage” of civil RICO claims).

122. 18 U.S.C. § 1961(5).

123. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). Continuity is not a well-defined rule. For more on the definition, including the meaning of open-ended and closed-ended continuity, see *id.* at 237–43; JOSEPH, *supra* note 119, at 134–52.

124. *Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000) (internal quotations and citation omitted).

125. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

126. *Id.*

127. See Blakey, *The RICO Civil Fraud Action in Context*, *supra* note 110, at 265–70 (citing legislative history). But see G. Robert Blakey & Michael Gerardi, *Eliminating Overlap, or Creating A Gap? Judicial Interpretation of the Private Securities Litigation Reform Act of 1995 and RICO*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 435, 443 (2014) (“[T]he contention that RICO is limited to ‘organized crime’ finds no support in the Act’s text, and . . . is at ‘odds with the tenor of its legislative history’” (quoting *H.J. Inc.*, 492 U.S. at 244)).

128. Act of Oct. 15, 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

129. One of the leading proponents of RICO expansion and its author, Professor G. Robert Blakey takes this view. See Blakey, *supra* note 110, at 280 (asserting that “Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud”); Blakey & Gerardi, *supra* note 127, at 445; see also Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 221 (2013) (citing committee reports and hearing transcripts to argue that Congress intended civil RICO to be “used

suggest Congress merely left the statute vague to avoid potential constitutional and vagueness challenges.¹³⁰

Regardless of its intent, however, Congress allowed for expansion of the RICO statute, and, with few exceptions, the Supreme Court has refused to limit RICO's expansion.¹³¹ Although the Court has recognized that plaintiffs are using RICO "in situations not expressly anticipated by Congress,"¹³² the Court's position is that "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."¹³³

As a result, plaintiffs have expanded RICO well beyond the Congressional scope of combatting organized crime. "[C]ivil RICO claims have been raised in actions relating to divorce, trespass, legal and accounting malpractice, inheritance among family members, employment benefits, and sexual harassment by a union."¹³⁴ A recent study shows that most often, businesses use civil RICO against other businesses, with a significant majority of these involving either "business deals gone bad—disagreements between former business collaborators"—or lawsuits between business competitors.¹³⁵ Anecdotal reports support this finding.¹³⁶ Only 10% of civil RICO cases "involve allegations of systemic wrongdoing by an organization or organizations."¹³⁷

Numerous academics, courts, and some Supreme Court justices have criticized the expansion of RICO. They point to the overuse of the statute in areas that do not fit Congress's intent, and argue that Congress needs to reform RICO so that plaintiffs and the courts apply it uniformly to its originally intended—or at least its primary—target. Many have highlighted the deleterious effects such expansion has on access to courts, federalism, state common law, and the American system of justice. To the extent that some of these arguments are relevant to aggregate litigation, they appear below. Despite this chorus of RICO criticism, Congress has largely left in place

to combat sophisticated business frauds").

130. See, e.g., Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 693 (1990) (citing legislative history).

131. Caroline N. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning RICO to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 34 (2008).

132. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (quoting *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984)).

133. *Id.*

134. Chief Justice William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 11 (1989).

135. Pierson, *supra* note 129, at 221 (internal quotation marks and citation omitted).

136. Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 680–81 (1990) (relying on author's years of personal experience as a judge and litigator to observe that disputes involving only predicate acts of mail fraud "are nothing more than commercial disagreements, well suited to resolution under state laws in state courts").

137. Pierson, *supra* note 129, at 221 (citation omitted).

the liberal-construction clause and far-reaching predicate offenses, even though some of its members have attempted to reform the statute several times.¹³⁸

IV. THE CURRENT LANDSCAPE

This Part articulates and analyzes the use of civil RICO as a tool against frivolous lawsuits in aggregate litigation. It examines the civil RICO reprisal through the lens of illustrative cases. Two of these cases, *CSX Transportation, Inc. v. Gilkison*¹³⁹ and the *Garlock Sealing Technologies, LLC*¹⁴⁰ litigation, invoke as predicates only allegations of fraudulent-litigation mailings and filings—i.e., mail and wire fraud to support some type of specious claiming scheme. Other cases, which the next Part analyzes, involve other allegations of either systemic or external wrongdoing. These cases show how civil RICO is being deployed against plaintiffs' attorneys in aggregate litigation. They also provide insight into the magnitude of the problem of frivolous litigation in the aggregate context, and help to define the RICO reprisal.

The *CSX* case was chosen as a model for several reasons. It is the only case known to go to trial and result in a verdict for civil RICO violations solely based on allegations of specious claiming. Further, because the case resulted in a jury verdict, there is an extensive record, allowing in-depth analysis of the legal arguments and evidence in the case. But *CSX* is not the only case to bring RICO claims based on allegations of frivolous claiming by aggregate lawyers. As will be explored more fully below, it is instead the case that has changed the game, fully realizing an expanded scope of liability under civil RICO that is not only unlawful but also has the potential to chill access courts.

A. *CSX AND THE RICO REPRISAL MODEL*

In December 2012, a jury returned a verdict in favor of *CSX* against attorneys at Peirce Raimond & Coulter PC—a now-defunct law firm—for common-law fraud and violations of civil RICO. According to *CSX*'s allegations, the Peirce firm filed thousands of claims in state courts over an eight-year period against the rail carrier *CSX* on behalf of *CSX* employees or

138. See, e.g., H.R. 5111, 101st Cong. § 5 (1990) (proposing a gatekeeper approach that would have required courts to dismiss a RICO lawsuit except upon a prima facie showing of appropriateness of relief, the extent of the defendant's participation, and the need for deterrence); S. 438, 101st Cong. § 4 (1989) (proposing an amendment of the RICO statute to eliminate automatic treble damages unless the defendant was convicted under criminal RICO); see also Getzendanner, *supra* note 136, at 685–89 (cataloging and discussing recent legislative efforts at RICO reform); Richard L. Grubb, *Attorney Liability Under the Federal Rico Statute: A Call for Awareness in the Absence of Reform*, 96 DICK. L. REV. 257, 268–72 (1992) (analyzing various legislative proposals to amend the RICO statute). Consequently, RICO's overbreadth is at least partly the result of Congress's failure to place limits on the statute. See Reed, *supra* note 130, at 694–95.

139. *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2012 WL 1598081 (N.D.W. Va. May 3, 2012).

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

former employees, alleging asbestos-related personal injury and occupational illness, such as asbestosis. In the RICO lawsuit, CSX accused the Peirce firm of collaborating with co-defendant Dr. Ray Harron (“Dr. Harron”) in a scheme to produce false-positive diagnoses of asbestosis, which the firm then used to support legal claims against CSX.¹⁴¹ Discovery in a different case had exposed weaknesses in Dr. Harron’s diagnostic technique, including his practices of conducting “mass screenings” composed of two-minute physical examinations, relying on medical histories taken by non-medical screening companies, and using untrained staff to prepare and “stamp his signature” on his medical reports based on his notes.¹⁴²

At least in the context of asbestos litigation, many of the activities of Dr. Harron and the Peirce firm are not unique. Indeed, “the use of mobile screening units and the filing of ‘mass lawsuits’ are neither unlawful nor unusual.”¹⁴³ Because of the unique nature of asbestos injuries and asbestos litigation, these procedures are often the only realistic means of both making workers exposed to asbestos aware of the harm done to them, and providing access to the courts for compensation. Asbestos is a mineral made of rock that was mass produced and mass consumed in America throughout the 20th century.¹⁴⁴ Because of its unique characteristics—it is strong, durable, fire retardant, and waterproof—asbestos use in manufacturing was widespread; manufacturers incorporated it “in[to] everything from hair dryers to missile silos, home gardening products, and children’s modeling clay.”¹⁴⁵ Unfortunately, asbestos can be lethal. It is the only known cause of both mesothelioma, “a deadly cancer of the lining of the chest or abdomen,”¹⁴⁶ and asbestosis, “a progressive and potentially fatal scarring of the lungs.”¹⁴⁷ Researchers have also linked it with other diseases, such as lung and larynx cancer.¹⁴⁸

Academics and scientists have described the scope of the asbestos crisis as “staggering”¹⁴⁹ and “the worst occupational health disaster in U.S. history.”¹⁵⁰ During its peak years of consumption—from 1940 to 1979—“tens

141. See generally Brief of Amicus Curiae American Ass’n for Justice in Support of Defendants-Appellants & Reversal, *CSX Transp., Inc. v. Peirce*, No. 13-2235, 2014 WL 882782 (4th Cir. Mar. 3, 2014).

142. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 602, 606 (S.D. Tex. 2005).

143. Brief of Amicus Curiae American Ass’n for Justice in Support of Defendants-Appellants & Reversal, *supra* note 141, at 2.

144. JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM 16–19 (2011); STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 11 (2005).

145. BARNES, *supra* note 144, at 17.

146. CARROLL, *supra* note 144, at xix.

147. BARNES, *supra* note 144, at 17.

148. *Id.*

149. *Id.* at 19.

150. CARROLL, *supra* note 144, at 12 (quoting Dennis Couchon, *The Asbestos Epidemic: An Emerging Catastrophe*, USA TODAY 4 (Feb. 8, 1999)).

of millions of workers in high-risk industries and occupations . . . were exposed.”¹⁵¹ This includes the railroad industry,¹⁵² of which CSX is a primary member.

Furthermore, as with other cancer-causing agents, asbestos-related diseases often have long latency periods—about 40 years.¹⁵³ Some individuals who have developed asbestos-related diseases may exhibit either low levels of symptoms or be asymptomatic, even though they may develop more serious symptoms later.¹⁵⁴ Accordingly, it is often difficult to identify asbestos victims and to predict the number of people with injuries. But “widely cited reports estimate that asbestos-related cancers have caused between 55,000 and 77,000 deaths in the past thirty years.”¹⁵⁵

Doctors usually identify asbestos-related injuries via a combination of X-rays, documented occupational exposure review, and clinical and physiologic evaluation.¹⁵⁶ However, when the disease is asymptomatic—as asbestosis is in its mildest form—only a chest X-ray can detect it.¹⁵⁷ “B-readers” are doctors certified to review X-rays for signs of asbestosis or other asbestosis-related diseases¹⁵⁸ Reading X-rays for lung impairment is an inherently subjective exercise: “[i]n any given case or even a set of hundreds of cases involving the X-ray detection of pleural plaques or very mild asbestosis, medical experts can and do differ in their interpretations of the X-rays.”¹⁵⁹ This is both because the quality of X-rays varies and because doctors must search the X-ray to detect “the number of abnormalities (termed ‘opacities’) in a given area of the chest film.”¹⁶⁰ What is an “abnormality” to one doctor may look normal to another.

Whether these types of B-reader variations are due to “inherent inter-reader variability,” to ethical improprieties, or to other factors is hotly contested.¹⁶¹ The heart of the controversy—and the potential for abuse in

151. BARNES, *supra* note 144, at 17.

152. CARROLL, *supra* note 144, at 76.

153. *Id.* at 15.

154. *Id.*

155. BARNES, *supra* note 144, at 19.

156. See CARROLL, *supra* note 144, at 14.

157. Brickman, *supra* note 11, at 47–48.

158. As explained by the court in the Silica multi-district litigation,

A “B-reading” is a physician’s report of findings from a patient’s chest radiograph (i.e., an ‘x-ray’). This report is entered on a standardized form using a classification system devised by the International Labour Office (“ILO”). [The National Institute for Occupational Safety and Health] issues “B-reader” certifications for physicians in the United States. There are approximately 500–700 certified B-readers currently practicing in the United States.

In re Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 581 n.28 (S.D. Tex. 2005).

159. Brickman, *supra* note 11, at 42.

160. *Id.* at 47.

161. *Id.* at 96.

litigation—comes from the subjective nature of the B-reader diagnosis. Naturally, plaintiffs’ attorneys filing mass actions tend to hire B-readers who generate a higher percentage of lung-impaired diagnoses.¹⁶² The fact that there is some variation is not only natural, but expected. Even harsh critics of these mass screenings agree.¹⁶³ It is only natural that, given some variation in results, plaintiffs’ attorneys will act as zealous advocates and choose doctors who tend to find more instances of harm.

That said, some B-readers generate numbers so far outside the normal, that critics—with good reason—have questioned both their findings and the attorneys’ choice to employ them. The B-reader involved in CSX—Dr. Harron—had a positive asbestosis diagnosis rate three to four times higher than the Peirce firm’s previous B-readers—a fact that evidence at trial showed the Peirce firm was well aware of.¹⁶⁴ Furthermore, Dr. Harron had a history suggesting reasons to doubt his ethics. As noted above, in 2005, just six months before CSX filed its civil RICO action, a U.S. District Court Judge in a federal MDL in the Southern District of Texas had issued sanctions against a different law firm for using overly favorable experts to diagnose silicosis—Dr. Harron was one of these experts.¹⁶⁵ The court called Dr. Harron’s diagnoses “unreliable” and his procedures “distressing and disgraceful” and “not remotely resemble[ing] reasonable medical practice.”¹⁶⁶

Judge Janis Graham Jack’s opinion shook the foundation of asbestos litigation.¹⁶⁷ It was also the catalyst that led CSX to file its RICO claim against the Peirce firm.¹⁶⁸ CSX alleged that, just as in the Texas MDL case, the Peirce firm knowingly and intentionally hired Dr. Harron in order to falsely identify asbestos victims.¹⁶⁹ The specific allegations of the fraudulent scheme included the following: (1) deliberately picking and paying experts—including Dr.

162. See *id.* at 96–97.

163. See *id.* at 42.

164. See Joint Appendix at 1297–330, *CSX Transp. v. Peirce*, 974 F. Supp. 2d 927 (N.D.W. Va. 2013) (No. 5:05-CV-202); see also Joint Pre-Trial Order at 71, *CSX Transp., Inc. v. Peirce*, 974 F. Supp. 2d 927 (N.D.W. Va. 2013) (No. 5:05-CV-202) (evidencing Dr. Harron’s rate of positive diagnosis as 65%–70% overall).

165. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 638, 675 (S.D. Tex. 2005).

166. *Id.* at 638.

167. See Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 513 (2009) (describing *In re Silica Products Liability Litigation* as a “landmark ruling”); Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008) (stating that judges are now alert for fraud by attorneys as a result of *In re Silica*).

168. See *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2013 WL 85140, at *3 (N.D.W. Va. Jan. 7, 2013) (noting CSX’s assertions to the court that “Judge Jack’s opinion in the silicosis case is the single most important fact in this litigation and pervades every aspect of it” and that it “triggered” CSX to bring this civil action”); Amended Complaint, *supra* note 1, at 11–13; Third Amended Complaint at ¶ 62, *CSX Transp., Inc. v. Peirce*, No. 5:05CV00202 (N.D.W. Va. 2013) (“Defendant Harron’s misconduct in occupational illness cases was revealed for the first time by the Honorable Janis G. Jack in the federal multidistrict silica litigation . . . on June 30, 2005.”).

169. Amended Complaint, *supra* note 1, at 7.

Harron—known to have impossibly high positive diagnosis rates; (2) sending plaintiffs back for further screenings when their results came back “negative” for asbestosis; (3) filling out forms and declarations for unknowledgeable plaintiffs to sign (often without review); (4) soliciting plaintiffs through mass advertising and screening; (5) filing “mass actions” that joined hundreds of plaintiffs, presumably in part to increase leverage in the litigation; (6) repeatedly filing motions in order to delay discovery in the litigation; and (7) filing the plaintiffs’ claims using the same vague, boilerplate complaints in the same overburdened court system.¹⁷⁰

It is critical to note that much of this activity is quite legal. Despite its grand claims of fraudulent activities, CSX identified only 11 “baseless” claims out of the 5300 claims filed by the Peirce law firm over the course of eight years—or 0.2%.¹⁷¹ It also admitted in court that it could prove no other actual instances of illegal conduct.¹⁷² Nevertheless, these 11 claims formed the basis of CSX’s civil RICO complaint against the Peirce law firm and Dr. Harron. Specifically, CSX alleged that the Peirce firm committed mail fraud each time it filed a complaint that included these 11 baseless claims and filed a document in court or sent a letter to opposing counsel related to these claims.¹⁷³

A review of the case’s Third Amended Complaint reveals that all the alleged acts of mail or wire fraud are either communications to the court about the 11 claims (including both pleadings and letters to the court regarding scheduling, mediation, and other matters) or communications with opposing counsel about those claims.¹⁷⁴ Importantly, most of these “were not even alleged to be fraudulent.”¹⁷⁵ For example, one of the “predicate acts” of mail fraud alleged by CSX is a letter mailed to opposing counsel that forwards Plaintiffs’ Motion to Refer Cases to Mediation.¹⁷⁶ Another example is a Petition to the Supreme Court for a Writ of Certiorari that the Peirce firm filed on behalf of plaintiffs in one of the underlying mass actions, challenging

170. See generally *id.*

171. See *supra* note 1 and accompanying text.

172. See Motion in Limine No. 7 by Defendants Robert N. Peirce, Jr. & Louis A. Raimond to Limit CSX’s Damage Claims & Evidence to Alleged Damages Specifically Related to the Eleven Claims at Issue at 2, CSX Transp., Inc. v. Peirce, No. 5:05CV00202 (N.D.W. Va. 2013).

173. Third Amended Complaint, *supra* note 168, at ¶¶ 90, 94, 105, 112, 125, 129, 134, 159. “In this case, the predicate acts alleged are instances of mail and wire fraud, which include the filing and service of mass lawsuits, as well as all of the actions taken by the lawyer defendants to generate medical evidence in support of the fraudulent claims.” CSX Transp., Inc. v. Gilkison, No. 5:05CV202, 2012 WL 1598081, at * 10 (N.D.W. Va. May 3, 2012).

174. *Id.* at *14 (citing Third Amended Complaint, *supra* note 168, at ¶¶ 105, 112, 125, 129, 134, 147, 159–60).

175. Brief of Amicus Curiae American Ass’n for Justice in Support of Defendants-Appellants & Reversal, *supra* note 141, at 8.

176. Third Amended Complaint, *supra* note 168, at ¶¶ 119, 158, 160.

the lower court's dismissal of the action for improper venue.¹⁷⁷ In other words, routine litigation documents, such as a simple letter providing a courtesy copy of a request to mediate and an effort to appeal an unfavorable procedural motion, served as a partial basis for transforming this lawsuit from a run-of-the-mill malicious-prosecution action to federal racketeering.

There are several doctrinal problems with CSX's RICO allegations. First are the issues of relatedness and continuity. Eleven instances of mail fraud over the course of eight years is a dubious foundation for the relatedness and continuity that the Supreme Court requires to assert a RICO claim. For predicate acts to be related, they must not be "isolated events."¹⁷⁸ It is impossible to imagine a scenario where filing mass actions with 0.2% error rate can qualify as more than "isolated" errors.

Even the district court acknowledged this in CSX.¹⁷⁹ Nevertheless, the court refused to dismiss CSX's RICO claims, holding that the predicate acts of racketeering were not the 11 fraudulent individual cases, but instead were "the mass suits themselves."¹⁸⁰ The court held that these mass suits, along with "numerous other acts of mail and wire fraud" were alleged to be "part of a grander plan to conceal the fraudulent claims."¹⁸¹ CSX alleged that the Peirce firm "deliberately filed . . . mass lawsuits in overburdened courts to deprive CSXT of access to meaningful discovery, which in turn concealed fraudulent claims and leveraged higher settlements based on the threat of mass trials."¹⁸² By acknowledging that the continuity and relatedness issues hinged on the court's expanded definition of the predicate acts,¹⁸³ the district court effectively conceded that the 11 lawsuits themselves were not sufficient to establish a pattern of racketeering.¹⁸⁴ As amicus noted, "[w]hat turned the 11 isolated false claims into a pattern, CSXT [successfully] alleged, was the filing of a large number of entirely legitimate cases as part of a system of fraud."¹⁸⁵

CSX faced another problem with the issue of damages. As noted above, after *Sedima*, the recoverable RICO injury must "flow from the commission of the predicate acts."¹⁸⁶ Thus, the lower court's decision to expand the predicate acts to include the entire mass actions, rather than just the 11 baseless claims, drastically expanded the injury that could be compensated in that case. Specifically, it provided the opening CSX needed for claiming

177. *Id.* at ¶¶ 128, 158, 160.

178. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

179. *CSX Transp. Inc.*, 2012 WL 1598081, at *13.

180. *Id.*

181. *Id.* at *13-14.

182. *Id.* at *11 (quoting Third Amended Complaint, *supra* note 168, at ¶ 19).

183. *Id.* at *13.

184. Brief of Amicus Curiae American Ass'n for Justice in Support of Defendants-Appellants & Reversal, *supra* note 141, at 7-8.

185. *Id.* at 8.

186. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).

damages for the cost of defending not just the 11 allegedly fraudulent claims, but the cost of defending the entire mass actions—times three.¹⁸⁷

Recognizing this issue, the Peirce firm filed a motion in limine requesting that the court limit the damage claims and evidence at trial to “alleged damages specifically related to the 11 claims at issue.”¹⁸⁸ CSX had admitted in a prior hearing that the 11 specific claims were “the only claims from which we can attempt to prove fraud and from which we can attempt to prove damages.”¹⁸⁹ Therefore, the Peirce firm argued, CSX could prove neither causation nor reliance in order to peruse the cost of the full mass actions because those costs “would have been incurred by CSX regardless of the presence of the 11 claims.”¹⁹⁰ By trying to put on evidence of the full cost of the mass actions, the Peirce firm asserted, CSX was attempting to “improperly pad its recoverable damages and then try and triple those padded damages.”¹⁹¹

The court denied the motion in part and granted in part.¹⁹² The court granted the motion as to the common law fraud claims, acknowledging that CSX did, “by its admissions,” limit its claims for damages under common law fraud.¹⁹³ However, the court denied the motion related to CSX’s federal RICO claim. As to that, the court held that CSX would be allowed the opportunity at trial “to assert claims under RICO and damages that might possibly arise from proof of predicate acts.”¹⁹⁴ The obvious take-away from the court’s ruling is that, while state fraud claims need a direct tie between the intended fraud and liability/recovery, federal RICO claims have a potentially larger reach, allowing recovery for actions far beyond the proven fraudulent conduct.

Considering the devastating impact this ruling had on the Peirce firm’s exposure to liability, it should be unsurprising that just nine days after the court issued this order, and four days into the eight-day trial, the Peirce firm stipulated to the amount of attorneys’ fees and costs incurred by CSX in defense of the 11 asbestosis claims as \$429,240.47,¹⁹⁵ just under the \$463,111.47 CSX initially indicated it would seek at trial.¹⁹⁶ After the jury

187. See Amended Complaint, *supra* note 1, at ¶¶ 57, 75, 84, 99, 113–14, 121.

188. Motion in Limine No. 7 by Defendants Robert N. Peirce, Jr. & Louis A. Raimond to Limit CSX’s Damage Claims & Evidence to Alleged Damages Specifically Related to the Eleven Claims at Issue, *supra* note 172, at 1.

189. *Id.* at 2.

190. *Id.* at 3.

191. *Id.*

192. Memorandum Opinion & Order Confirming the Pronounced Rulings of this Court Relating to Lawyer Defendants’ Motions in Limine at 13–14, *CSX Transp., Inc. v. Peirce*, No. 5:05CV00202 (N.D.W. Va. 2013).

193. *Id.* at 14.

194. *Id.*

195. Stipulation Regarding Damages at 1, *CSX Transp., Inc. v. Peirce*, No. 5:05-CV-202 (N.D.W. Va. Dec 22, 2005).

196. Motion in Limine No. 7 by Defendants Robert N. Peirce, Jr. & Louis A. Raimond to

returned a verdict in favor of CSX, the court trebled this amount to \$1.3 million as required by RICO.¹⁹⁷ The jury's verdict also opened the door to CSX's motion to obtain the over \$10 million in attorneys' fees and expenses it had incurred in prosecuting the RICO action, as required under RICO.¹⁹⁸ Before this motion could be heard, the parties settled the case for \$7.3 million.¹⁹⁹

In summary, the CSX case is unique in that many aspects turned entirely on the Peirce firm's choice to bring its clients' claims through a mass action device. If, instead, the firm had somehow filed the claims individually—an impossible reality given the costs of litigation—it is highly unlikely that the RICO claims would have survived. But, as the Peirce firm argued, “[u]tilizing the procedural device of a mass suit is not fraud.”²⁰⁰ This theme—the use of RICO to attack aggregate litigation itself—will be explored more fully below.

*B. OTHER EXAMPLES OF USE OF RICO AGAINST AGGREGATE-LITIGATION
PLAINTIFFS' ATTORNEYS*

CSX is part of a small but rising number of cases by defendants using RICO against plaintiffs' attorneys based on litigation activities in aggregate litigation. A strikingly similar example is a series of RICO actions filed by gasket maker Garlock Sealing Technologies, LLC (“Garlock”) against several law firms for their alleged scheme to inflate asbestos claims artificially against the company prior to its 2010 bankruptcy. After Garlock suffered significant losses in asbestos litigation brought by multiple plaintiffs represented by different law firms, it commenced bankruptcy proceedings.²⁰¹ In those proceedings, United States Bankruptcy Judge George R. Hodges held a hearing to estimate Garlock's future liabilities related to asbestos victims.²⁰² To support an estimation of future liability, the judge ordered discovery of 15 closed cases against Garlock.²⁰³ After the hearing, Judge Hodges determined Garlock was only liable for \$125 million in asbestos claims, about one-tenth of the total sought by plaintiffs' attorneys for outstanding asbestos claimants.²⁰⁴ The judge ruled that the settlement of all 15 cases had been “infected with the impropriety of some law firms.”²⁰⁵ Although the judge did

Limit CSX's Damage Claims & Evidence to Alleged Damages Specifically Related to the Eleven Claims at Issue, *supra* note 172, at 2.

197. 3 Defendants in Asbestos Fraud Conspiracy Agree to \$7.3 Million Settlement: CSX Trans. v. Peirce, *supra* note 1, at 4; see also 18 U.S.C. § 1964(c) (2012) (treble damages provision).

198. See 18 U.S.C. § 1964(c) (allowing recovery of attorney's fees).

199. Field, *supra* note 1.

200. Motion in Limine No. 7 by Defendants Robert N. Peirce, Jr. & Louis A. Raimond to Limit CSX's Damage Claims & Evidence to Alleged Damages Specifically Related to the Eleven Claims at Issue, *supra* note 172, at 4.

201. *In re* Garlock Sealing Techs., LLC., 504 B.R. 71, 73 (Bankr. W.D.N.C. 2014).

202. See *id.* at 73.

203. See *id.* at 84.

204. See *id.* at 73.

205. *Id.*

not name the firms, he made findings that some plaintiffs' attorneys had concealed evidence of exposure to asbestos products other than Garlock's in discovery responses in order to "unfairly inflat[e] the recoveries against Garlock."²⁰⁶ Although the court took pains to note it "ma[de] no determination of the propriety of that practice," it did call the practice "sufficiently widespread to render Garlock's settlements unreliable as a predictor of its true liability."²⁰⁷

The day before Judge Hodges issued his order, Garlock brought five separate RICO actions against five plaintiffs' firms—Waters & Kraus LLP, Stanley-Iola LLP, Belluck & Fox LLP, Simon Greenstone Panatier Bartlett PC, and Shein Law Center Ltd.—accusing each of a fraudulent scheme "to inflate settlements paid by Garlock and other asbestos manufacturers."²⁰⁸ Just as in *CSX*, the predicate racketeering acts alleged were mail fraud, based purely on the filing of litigation documents in the underlying aggregate state tort litigation—specifically, the law firms' service of responses to discovery that failed to disclose their clients' exposure to non-Garlock asbestos products.²⁰⁹

Similar to *CSX*, the fact that the plaintiffs' firms brought these asbestos claims as part of an aggregate litigation strategy is vital to the RICO claims in *Garlock*. Although Garlock used individual cases as examples of the alleged concealment of evidence in each Complaint, the RICO allegations in fact target the broader "scheme" to use the parallel bankruptcy and tort procedures "to create a high cost/high risk litigation environment for Garlock."²¹⁰ Garlock alleges that, "[b]y concealing many of their individual clients' exposures" to non-Garlock potential asbestos products, "Defendants created the prospect of enormous aggregate defense costs for Garlock."²¹¹

206. *Id.* at 86.

207. *Id.* at 87.

208. Plaintiff's Opposition to Motion to Dismiss of Defendants Shein Law Center, Ltd., Benjamin P. Shein, Esquire & Bethann Schaffzin Kagan, Esquire at 1, *Garlock Sealing Techs. LLC v. Shein Law Ctr., LTD.*, No. 3:14-CV-00137-GCM-DSC (W.D.N.C. Nov. 24, 2014). Garlock has entered into a preliminary settlement of its RICO claims with Simon Greenstone and the other plaintiffs' firms contingent on the resolution of the Garlock bankruptcy matter; accordingly, at the time of publication, the cases have been stayed. *See generally* Joint Motion for Stay of All Proceedings Pending Approval & Consummation of Settlement in Connection with Consensual Plan, *Garlock Sealing Techs. LLC v. Simon Greenstone Panatier Bartlett, P.C.*, No. 3:14-CV-116-GCM-DSC (W.D.N.C. Mar. 21, 2016); Jessica Karmasek, *Federal Judge Agrees to Stay RICO Cases Against Asbestos Plaintiffs Firms*, LEGAL NEWS LINE (Mar. 29, 2016, 12:39 PM), <http://legalnewsline.com/stories/510704392-federal-judge-agrees-to-stay-rico-cases-against-asbestos-plaintiffs-firms>. However, at least two of these plaintiffs' firms—Simon Greenstone and Shein Law—have since been subject to RICO lawsuits from another company based on similar theories. John O'Brien, *Despite Garlock Settlement, Asbestos Lawyers Can't Shake Racketeering Claims Yet*, LEGAL NEWS LINE (June 8, 2016, 9:20 AM), <http://legalnewsline.com/stories/510793115-despite-garlock-settlement-asbestos-lawyers-can-t-shake-racketeering-claims-yet>.

209. *See generally* Complaint, *Garlock Sealing Techs. LLC v. Shein Law Ctr., LTD.*, No. 3:14-ap-03035 (Bankr. W.D.N.C. Jan. 9, 2014).

210. *Id.* at ¶ 58.

211. *Id.*

The firms also allegedly “created the illusion of liability risk across multiple claims”²¹² and used that leverage to “compel Garlock to enter into group settlements in which Garlock paid higher amounts to large numbers of their clients than it would have paid in the absence of the Scheme.”²¹³ In short, Garlock accuses the firms not only of misrepresenting the value of claims in individual cases—and thus falsely inflating the value of those cases—but doing so in order to further a scheme to inflate the value of *all* tort cases brought against Garlock.²¹⁴

This strategy mirrors the accusations in *CSX*. Most importantly, Garlock’s allegations suggest that, like *CSX*, Garlock will seek to prove and obtain damages for not just the inflated settlements in the individual cases that it can prove contained misrepresentations, but for other damages related to the broader “scheme,” perhaps including all of the others it settled as a result of the alleged “illusion of liability risk across multiple claims.”²¹⁵ United States District Judge Graham C. Mullen appears willing to endorse this approach. In his orders denying the motions to dismiss the RICO claims,²¹⁶ Judge Mullen noted that Garlock accused the defendants of “rampant fraud,” and quoted from the bankruptcy judge’s decision that this fraud “appears to have been sufficiently widespread to have a significant impact on Garlock’s settlement practices and results.”²¹⁷ Should Judge Mullen follow the *CSX* court’s lead and define the predicate acts as the wider scheme to manipulate the bankruptcy trust and state tort cases, a significant amount of money could be at stake.

Despite these similarities, subsequent developments in the *Garlock* case suggest that the attorneys in *Garlock* have been watching cases like *CSX* and are developing new defense strategies. For example, one of the defendants in the *Garlock* case—Simon Greenstone—recently filed a counterclaim against Garlock, alleging its own claims for RICO, abuse of process, and fraudulent inducement.²¹⁸ The firm alleges that Garlock filed its RICO claim as part of a scheme to defraud Simon Greenstone in order to “gain improper leverage against Simon Greenstone in the *Garlock* bankruptcy by putting Simon Greenstone at financial risk with threats of economic harm through the damages pled in the RICO lawsuit and by damaging Simon Greenstone’s

212. *Id.*

213. *Id.*

214. For a thorough study of the asbestosis litigation and arguments about the fraud and manipulation of the same, see generally Brickman, *supra* note 25.

215. Complaint, *supra* note 209, at ¶ 58.

216. Only Shein and Simon filed motions to dismiss. At least one of the defendant law firms—Simon Greenstone—is pursuing an aggressive defensive strategy that might throw a wrench into this. Simon Greenstone’s motion includes a SLAPP claim. Simon Greenstone also filed a counterclaim for RICO, abuse of process, and fraudulent inducement.

217. Order at 5, *Garlock Sealing Techs. LLC, v. Shein*, No. 3:14-cv-137 (W.D.N.C. Sept. 02, 2015) (denying Defendants’ Motion to Dismiss for Failure to State a Claim).

218. See generally Answer, Affirmative Defenses, and Counterclaims, *Garlock Sealing Techs. LLC v. Simon Greenstone Panatier Bartlett, P.C.*, No. 3:14-cv-00116 (W.D.N.C. Nov. 16, 2015).

reputation.”²¹⁹ Simon Greenstone has not hid its motives in filing this counterclaim: it stated in its complaint that it was acting “to protect its rights against Garlock in the event that it is determined that Garlock’s own representations in litigation constitute RICO predicate acts.”²²⁰

CSX and *Garlock* represent a new trend—a trend by defendants in aggregate litigation to “punish” aggregate litigation abuse by plaintiffs’ attorneys through civil RICO. But the use of civil RICO against plaintiffs’ attorneys is not new. *Chevron Corp. v. Donziger* exemplifies a more traditional use of RICO to regulate plaintiffs’ attorneys.²²¹ In an environmental class-action lawsuit based in Ecuador, plaintiffs’ attorneys secured an historical \$9.5 billion judgment against Chevron based on its subsidiary’s actions in causing oil pollution in the Ecuadorean Amazon.²²² To avoid enforcement of that Ecuadorian judgment in the United States, Chevron filed a civil RICO action in the Southern District of New York, arguing that the plaintiffs’ attorneys used bribes to influence several court orders and ghostwrite a pivotal court expert’s report.²²³ Judge Lewis A. Kaplan of the Southern District of New York agreed, issuing an injunction against enforcing of the Ecuadorian judgment in the United States, and holding that the plaintiffs’ attorneys’ actions amounted to extortion, mail and wire fraud, money laundering, witness tampering, and obstruction of justice, all predicate acts under the RICO statute.²²⁴ The judge also ordered a constructive trust, requiring plaintiffs’ attorneys to “pay over and assign to Chevron all fees and other payments, property, and other benefits that they have received or hereafter receive, directly or indirectly, in consequence of the Judgment.”²²⁵ Finally, as required under RICO, the court ordered the plaintiffs’ attorneys to pay Chevron’s costs to prosecute the RICO action, which allegedly run to \$32 million.²²⁶

Chevron, like *CSX* and *Garlock*, involved an action against plaintiffs’ attorneys seeking the extraordinary remedies allowed under RICO based on their underlying conduct in aggregate litigation. Commentators have suggested that these cases should be viewed together as part of the new

219. *Id.* at 64.

220. *Id.* at 23 n.1.

221. *See generally* *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

222. *See Texaco/Chevron Lawsuits (re Ecuador)*, Bus. & Hum. Rts. Resource Ctr., <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (last visited Sept. 14, 2016).

223. *See Chevron*, 974 F. Supp. 2d at 468.

224. *See generally id.*

225. *Id.* at 641. The *Chevron* case has received significant attention in the press and in the literature. For in-depth discussions by scholars and practitioners, see generally Symposium, *Lessons from Chevron*, 1 STAN. J. COMPLEX LITIG. 199 (2013). For literary and journalistic views, see generally PAUL M. BARRETT, *LAW OF THE JUNGLE* (2014); MICHAEL D. GOLDBABER, *CRUDE AWAKENING: CHEVRON IN ECUADOR* (2014).

226. *See generally* Judgment as to Donziger Defendants & Defendants Camacho & Piaguaje, *Chevron Corp. v. Donziger*, No. 1:11-cv-00691-LAK-JCF (S.D.N.Y. Mar. 4, 2014). The judge has deferred Chevron’s motion for costs and attorney’s fees pending appeal. *See generally id.*

strategy to “fight back” against abuses in aggregate litigation conduct. But there is an important difference between *CSX* and *Garlock*, on the one hand, and *Chevron*, on the other. In *CSX*, the procedure that plaintiffs’ attorneys used in the underlying litigation—that is, a mass action—served as the foundation for the RICO elements. Without the mass action, it is unlikely that there would have been a sufficient “pattern” of racketeering activity because the very decision to bring a few baseless claims as part of a mass action was the racketeering activity in the case. That also appears to be true for *Garlock*, where *Garlock* alleges that inadequate discovery responses infected an entire system of asbestos tort and bankruptcy litigation.

But there is less of a connection between the aggregate litigation device and the RICO cause of action in *Chevron*. Unlike *CSX* and *Garlock*, the underlying racketeering conduct in *Chevron* included more than simply litigation activities, such as filing complaints or documents; it also included activities like extortion, bribing, and witness tampering. This kind of conduct provides strong evidence of bad faith on the part of the attorneys involved in the litigation and thus raises a different set of questions about the propriety of holding attorneys accountable under RICO.

This difference also shows that cases like *Chevron* are, in fact, not “new.” Courts have long grappled with the application of RICO to attorneys, and have historically held that attorneys may be liable under RICO for the actions in furtherance of a pattern of unlawful racketeering activity.²²⁷ In the past, courts have limited attorneys’ liability under RICO for litigation conduct to cases involving systemic wrongdoing and cases like *Chevron* that involve wrongdoing “external to, and independent of” the underlying disputes.²²⁸ One example is *United States v. Eisen*, a Second Circuit case involving criminal RICO convictions of lawyers and law firm employees for their participation in their firm’s scheme to litigate and settle fraudulent personal injury lawsuits.²²⁹ In addition to staging accidents and exaggerating injuries, the defendants committed numerous predicate acts of both bribery and mail fraud, including routinely bribing and paying witnesses to testify falsely, paying unfavorable witnesses not to testify, and creating false evidence for use before and during trial.²³⁰ Although the court in *Eisen* noted the “understandable reluctance” on

227. See 2 MALLEN & RHODES, *supra* note 113, § 12:8–17 (describing attorneys’ exposure under RICO); 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) (analyzing the “recent and increased use of malpractice claims” against attorneys).

228. *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 174–76 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011); see also Fiebach, *supra* note 227, at 1316 (summarizing one judge’s test for requiring additional “nefarious conduct” as an “I know it when I see it” test).

229. *United States v. Eisen*, 974 F.2d 246, 251 (2d Cir. 1992); see also Arnold H. Lubasch, *Jury Finds Law Firm Ran Racket*, N.Y. TIMES (Mar. 5, 1991), <http://www.nytimes.com/1991/03/05/nyregion/jury-finds-law-firm-ran-racket.html> (reporting on evidence at *Eisen* trial).

230. *Eisen*, 974 F.2d at 251. “The four-month trial . . . [included] evidence showing that the

the part of Congress “to use federal criminal law as a back-stop for all state court litigation,” it nevertheless found liability, noting that the RICO “scheme” was based not on “perjuries alone.”²³¹

Even though courts permitted RICO actions against attorneys, they consistently held that litigation activities, by themselves, could not constitute predicate acts under RICO before *CSX*.²³² They have rejected RICO actions based solely on “litigation” activities—such as serving litigation documents, mailing letters to opposing counsel, filing memoranda in opposition to motions, and filing “unjustified,” “phony,” or “malicious” suits—characterizing them as more properly malicious prosecution or abuse of process actions.²³³

V. THE RICO REPRISAL—ANALYSIS

Having fully examined the RICO reprisal, frivolous litigation—both in general and in the context of aggregate litigation—and the primary existing remedies for frivolous litigation, this Article now turns to the RICO reprisal’s implications. This Part argues that the RICO reprisal avoids legitimate state protections for litigation activity and threatens to overpenalize state-common law torts, including by allowing claimants to label their litigation opponents as “mobsters” and avoid stringent pleading requirements and particularized elements. The reprisal also results in the lamentable federalization of state common law and leads to improper forum shopping. Finally, this use of RICO threatens to elevate Rule 11 violations to federal tort, and punishes the aggregate litigation device itself.

defendants had smashed a tire rim with a sledgehammer to exaggerate an automobile accident, used a pickax to enlarge a pothole and bribed a witness to give the same testimony in two different cases.” Lubasch, *supra* note 229.

231. *Eisen*, 974 F.2d at 254. See also *Fireman’s Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1019 (9th Cir. 2001) (holding that an attorney could be held civilly liable under RICO for masterminding a network of attorneys designed to defraud insurance companies where the defendant created and controlled an “alliance” of attorneys on both sides of major lawsuits, thereby ensuring “that plaintiffs would not settle until late in the litigation” and “enabling defense lawyers to accumulate substantial attorneys’ fees”).

232. See *Curtis & Assocs.*, 758 F. Supp. 2d at 174–76.

233. Of course, the line between “solely litigation activities” and “something more” is far from clear. As an example, in denying the Peirce Firms’ motion to dismiss *CSX*’s RICO claims, the court distinguished the RICO claims by noting that *CSX* alleged “more than mere claims for abuse of process or malicious prosecution,” because it involved the “generat[ion of] medical evidence in support of the fraudulent claims.” *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2012 WL 1598081, at *6, *10 (N.D.W. Va. May 3, 2012). But this makes this case no different from other RICO contexts, where courts have struggled to determine when a case deserves the special remedy of RICO, and when it, conversely, is reflective of a garden variety wrong. Any confusion on this point is further evidence that courts require guidance on the issue.

A. EXPANSION OF RICO TO COVER GARDEN-VARIETY WRONGS

The expansion of civil RICO to transform it into a malicious-prosecution action threatens to over-penalize garden-variety wrongs. Although critics have made this argument in other RICO-expansion contexts, applying it to the RICO reprisal reveals that the reprisal allows plaintiffs to bring a federal abusive litigation tort in the aggregate litigation context that is characterized by weaker pleading and burdens of proof, and yet significantly higher damages.

Because CSX involves a dispute between opposing parties, it is illustrative of the broader trend in the competitive use of civil RICO. As former Judge Susan Getzendanner observed, business competitors routinely use mail- and wire-fraud predicates to characterize discrete acts of wrong as part of a larger scheme to defraud.²³⁴ CSX utilized its litigation opponent's everyday exchanges in litigation—including courtesy mailings of routine litigation documents and service of pleadings—to transform what is in essence a malicious-prosecution action into a federal action. It is easy to see why litigation opponents—like business competitors—can be particularly vulnerable to RICO claims based on mail and wire fraud. With the widespread use of mail and telephones in everyday business actions, including in litigation, almost any fraud can be easily transformed into a RICO action.²³⁵

There are serious repercussions to this reality. One of the most oft-cited criticisms of the civil RICO action is that it improperly paints people who commit garden-variety wrongs as “mobsters” and “racketeers.” As the First Circuit explained, “[c]ivil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device. The very pendency of a RICO suit can be stigmatizing and its consummation can be costly.”²³⁶ Another court observed that “[b]oth the potential financial rewards for plaintiffs, and the stigma that may attach to RICO defendants, make the statute a powerful weapon for aggrieved parties.”²³⁷ In the aggregate-litigation context, a plaintiffs’ attorney thinking of taking on a case will have to consider the cost of the stigma of being labeled a “racketeer” by a follow-up RICO action as part of the cost-benefit analysis.

Furthermore, because of RICO’s treble damages, attorneys’ fees, and costs provisions, the use of RICO to usurp state common-law claims also inflates the potential damages available to plaintiffs able to repackage their claims as federal RICO claims. This is particularly troubling when common-

234. Getzendanner, *supra* note 136, at 680–81.

235. “Given the prevalence of mail and wire use in commercial transactions, RICO’s provision for a private cause of action predicated on violations of the mail and wire fraud statutes virtually federalizes common law fraud.” *Tabas v. Tabas*, 47 F.3d 1280, 1290 (3d Cir. 1995) (quoting Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1105 (1982)).

236. *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

237. *DLJ Mortg. Capital v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010).

law torts like malicious prosecution are specifically tailored to address the harm at issue. In state court, CSX could have obtained, at most, the underlying cost and attorney's fees CSX expended in defending itself against the 11 baseless claims. But, since CSX brought the lawsuit as a federal RICO reprisal, that amount is trebled, plus CSX is entitled to the costs and attorneys' fees it took to defend itself in the RICO lawsuit. The civil RICO claim therefore inflates the damages considerably in excess of the amount considered appropriate by state policymakers to remedy this very type of conduct.

Not only are the potential damages significantly higher, but they are automatic. Treble damages, costs, and attorneys' fees are mandatory once the plaintiff establishes liability and the extent of the harm. Unlike at common law, once the RICO plaintiff proves the underlying damages, the jury, the judge, or the parties have no discretion to take into account discrete policy issues or varying levels of culpability. RICO's mandatory damages are especially dangerous, because courts hold the prevailing view that the jury cannot be informed of the fact that RICO damages will be trebled.²³⁸ Therefore, a jury attempting to determine "reasonable" damages will not know the full extent of the defendant's ultimate liability stemming from its decision.

The CSX case clearly demonstrates this concept. CSX pled and proved common-law fraud in addition to civil RICO liability. The jury found in favor of CSX on both counts, but only granted CSX compensatory damages on the RICO claim.²³⁹ This was likely because the court had instructed the jury to consider a single amount—a maximum of \$429,240.47 in damages—should it find in favor of CSX on "any or all counts."²⁴⁰ Although it is unclear why the jury chose to award the damages under the RICO claim, as opposed to the common-law fraud claim,²⁴¹ the impact cannot be overstated. Not only did this decision lead to the automatic right to treble damages and cost-shifting, but these consequences were also likely unknown to the jury. The CSX jury instructions made no mention of the fact that the court would treble any damages awarded under the RICO claims, nor did they discuss cost shifting.²⁴²

238. JOSEPH, *supra* note 119, at 256.

239. See generally Verdict, CSX Transp., Inc. v. Peirce, No. 05-CV-00202 (N.D.W. Va. Dec. 20, 2012).

240. Final Civil Jury Instructions at 35, CSX Transp., Inc. v. Peirce, No. 05-CV-00202 (N.D.W. Va. Dec. 20, 2012). The parties stipulated to this amount prior to trial.

241. One possibility is that the jury did not believe that CSX proved the necessary causation element for the 11 claims at issue. This is a real possibility because, as noted above, the court ruled *in limine* that CSX could not seek damages for the full mass actions under its common law fraud claim, but it could seek the broader scope of damages at trial under its civil RICO claims. See *supra* notes 188–94 and accompanying text. If this is true, that the jury awarded CSX damages under RICO without believing that any particular damages could be attributable to the predicate acts, then it would clearly fly in the face of Supreme Court precedent and raise troubling due process concerns.

242. See generally Final Civil Jury Instructions, *supra* note 240.

Parties like CSX that bring their malicious-prosecution claims as civil RICO actions in federal court are also able to circumvent the usual pleading requirements of malicious prosecution and other state torts. For example, to prevail on a malicious-prosecution claim under state law, CSX would have had to prove that the 11 underlying “baseless” asbestosis cases terminated in CSX’s favor.²⁴³ But CSX could not meet such a requirement; it acknowledged in its Third Amended Complaint that most of these claims were either still pending at the time of the initial suit²⁴⁴ or were terminated for jurisdictional reasons.²⁴⁵ Some even resulted in settlement.²⁴⁶ None of these dispositions constitute “favorable termination” under the law.²⁴⁷ CSX’s ability to avoid this pleading requirement is especially troubling because it is designed to provide protections for litigants like the Peirce firm who have sought redress in the courts. As explained above, the favorable-termination requirement was crafted as part of the larger state effort to ensure the proper balance between access to courts and prevention of frivolous litigation by providing extra protection for meritorious claims.²⁴⁸ Any arbitrary deletion of one of these requirements threatens to upset this balance.

By bringing its state malicious prosecution action as a federal RICO action, CSX also avoided a potential statute of limitations time bar. CSX had only one year to bring a state malicious-prosecution action under West Virginia state law,²⁴⁹ but it had four years to bring its RICO action.²⁵⁰ Despite obvious forum-shopping concerns, federal courts have permitted plaintiffs to bring RICO claims that mirror state-law claims that would be time barred under state law.²⁵¹

Choosing to bring a civil RICO claim in federal court not only bypasses more stringent pleading requirements and provides higher damage awards than state tort law, in some circumstances it allows for a lower burden of proof. For example, plaintiffs who bring state-court fraud cases must meet a clear

243. See *supra* text accompanying notes 55–56.

244. The claims of “Miledge Hill, James Petersen, A. Lewis Schabow, Aubrey Shelton and Donald Wiley . . . remained pending until June 14, 2010,” five years after CSX filed its original complaint. Third Amended Complaint, *supra* note 168, at ¶ 147b.

245. The claim of Charles Abbott was dismissed for venue reasons. *Id.* at ¶ 128.

246. Morris Collier settled his claim with CSX two years before the CSX RICO litigation. *Id.* at ¶ 147a.

247. See generally Vitauts M. Gulbis, *Nature of Termination of Civil Action Required to Satisfy Element of Favorable Termination to Support Action for Malicious Prosecution*, 30 AM. L. REPS. 4TH 572 (1984).

248. See *supra* text accompanying notes 68–69.

249. W. VA. CODE § 55-2-12 (2008); *Snodgrass v. Sisson’s Mobile Home Sales, Inc.*, 244 S.E.2d 321, 325 (W. Va. 1978) (noting malicious prosecutions have a one-year statute of limitations).

250. JOSEPH, *supra* note 119, at 307.

251. See, e.g., *Warnock v. State Farm Mut. Auto. Ins. Co.*, Civil Action No. 5:08cv01-DCB-JMR, 2008 WL 4594129, at *10 (S.D. Miss. Oct. 14, 2008) (dismissing abuse of process as time barred, but allowing RICO claim based on same conduct).

and convincing evidence standard.²⁵² This higher burden is meant to prevent the “moral stigma” that accompanies fraud allegations from attaching erroneously.²⁵³ Conversely, RICO plaintiffs need only prove their allegations by a preponderance of the evidence.²⁵⁴ This is so even for fraud-based predicate acts, which normally would require a heightened burden of proof in civil cases.²⁵⁵ The result here is counterintuitive. If CSX brought an identical claim against the Peirce firm, but alleged only one fraudulent lawsuit, it would have had to prove its claims by clear and convincing evidence. But when CSX alleged more widespread harm, the burden of proof is lessened. As one former judge has opined in a different RICO context, this lower burden of proof “skews the balance developed under state law and gives RICO plaintiffs a super-plaintiff status.”²⁵⁶

B. ELEVATION OF RULE 11 VIOLATIONS TO FEDERAL TORT

Even if heightened civil liability for repeated mail and wire fraud is normatively desirable, the CSX verdict—and by extension the RICO reprisal—nonetheless suffers from doctrinal flaws. Allowing representations made in federal litigation filings to serve as the only predicate acts, and therefore the sole basis for liability, under civil RICO is directly contrary to unanimous precedent holding that Rule 11 does not create a private right of action.²⁵⁷ At best, the RICO reprisal is ill-advised and contrary to precedent, at worst it threatens an illegal expansion of Rule 11 under the Rules Enabling Act.²⁵⁸

To support its claim that the mass complaints filed by the Peirce firm each constituted mail fraud, CSX had to prove that those complaints contained fraudulent misrepresentations that CSX justifiably relied on to its detriment.²⁵⁹ CSX could not accomplish this by pointing to inaccurate

252. Getzendanner, *supra* note 136, at 681.

253. *Id.*

254. *Id.*; MALLEN & RHODES, *supra* note 64, § 12:69. The Supreme Court expressly declined to address the burden of proof issue in *Sedima, Id.* But multiple references in the legislative history of the RICO Act show that Congress intended to impose this lower standard. See Leigh Ann MacKenzie, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566, 582 (1985) (citing legislative sources).

255. JOSEPH, *supra* note 119, at 234.

256. Getzendanner, *supra* note 136, at 681.

257. See 1–2 GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 17(A)(8) (5th ed. 2015) (citing cases); see also *Schatz v. Rosenberg*, 943 F.2d 485, 492 (4th Cir. 1991), *cert. denied sub nom. Schatz v. Weinberg & Green*, 503 U.S. 936 (1992) (“Courts have consistently refused to use ethical codes to define standards of civil liability for lawyers.”).

258. See *supra* text accompanying note 138.

259. The RICO reliance issue is in a state of flux in the case law. The Supreme Court has held that reliance need not be proven as an element of a RICO charge based on mail fraud, despite the fact that common law fraud includes such an element. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653 (2008). Importantly, mail fraud—a criminal statute—does not require proof of reliance. The crime—use of mails as part of a scheme to defraud—is complete upon the commission of the act. *United States v. Useni*, 516 F.3d 634, 648 (7th Cir. 2008)

allegations in these complaints; no attorney can argue that her client was harmed by assuming that allegations in a complaint are true because such a position is contrary to our adversarial system of justice.²⁶⁰ Instead of relying on the allegations themselves, CSX argued that it relied on the Peirce firm's "representations" that the "that the claims at issue had a good faith basis in fact" under Rule 11 of the West Virginia Rules of Civil Procedure.²⁶¹ CSX argued that because it had relied on these representations of good faith, it was forced "to expend substantial money and resources to process, defend and/or settle the deliberately fabricated claims."²⁶²

These Rule 11 "misrepresentations" were essential to CSX's case because they provided the element of falsity necessary for CSX to prove a "scheme to defraud" under the mail-fraud statute.²⁶³ Accordingly, what CSX did—and the trial court allowed—is to create tort liability out of Rule 11.

How serious the repercussions are for this decision—and for decisions like it—depends in large part on the precise Rule 11—whether state or federal—at issue. If, as is often the case in aggregate litigation, plaintiffs made the underlying representations in federal court, the possibility of Rule 11-RICO tort liability raises constitutional concerns by implicating the Rules Enabling Act ("REA").²⁶⁴ The REA provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right."²⁶⁵ Relying on the REA, the Supreme Court has consistently interpreted Rule 11 to avoid the exact kind of automatic fee shifting between parties that occurred

(finding that mail fraud required proof only that a defendant participated in a scheme to defraud and caused the mails to be used in furtherance of that scheme). *See also generally* 18 U.S.C. § 1341 (2012). Nevertheless, although reliance isn't an element of RICO or mail fraud, the Supreme Court was careful to point out that reliance might still be necessary proof of causation. As the Court noted, "[o]f course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it." *Bridge*, 553 U.S. at 656 n.6. This language has caused significant confusion in the courts. *See* JOSEPH, *supra* note 119, at 115.

260. *See* CSX Transp., Inc. v. Gilkison, 406 F. App'x 723, 737 (4th Cir. 2010) (Davis, J., concurring) ("CSX had the ability, and its lawyers had a duty, to access, examine, and where appropriate, contest the other side's evidence, including, as here, evidence with respect to the sufficiency of [plaintiff's] asbestosis claim. . . . One is left to ponder how a party represented by capable counsel might *reasonably rely* on the allegations made on behalf of its adversary." (alterations in original)).

261. CSX Transp., Inc. v. Peirce, 974 F. Supp. 2d 927, 933, 938 (N.D.W. Va. 2013); *see also* Principal/Response Brief for Appellee/Cross-Appellant at 43-44, CSX Transp. Inc., v. Peirce, Nos. 13-2235(L), 13-2252, 13-2325 (N.D.W. Va. June 30, 2014). West Virginia's Rule 11 mirrors the federal version. *See* W. VA. R. CIV. P. 11.

262. Third Amended Complaint, *supra* note 168, at ¶¶ 164-65.

263. *See* Principal/Response Brief for Appellee/Cross-Appellant, *supra* note 261, at 43-44 (asserting that Rule 11 "defines the nature of the representation that is made when a suit is filed," which gave rise to the claims in its case).

264. 28 U.S.C. § 2072 (2012). For example, although the *Garlock* claims settled before ripening, *Garlock* appeared to base its RICO claims, in part, on certifications made to the bankruptcy courts, which have their own Rule 11 counterpart: Fed. R. Bank. P. 9011. *See* Complaint, *supra* note 209, at 9.

265. 28 U.S.C. § 2072.

in *CSX*. In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, for example, the Supreme Court rejected an REA challenge to an old version of Rule 11 that required sanctions if a party did not conduct a reasonable inquiry before filing a pleading or paper.²⁶⁶ In rejecting the argument that this provision created a federal tort for malicious prosecution, and thus violated the REA, the Supreme Court explained that “[t]he main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses.”²⁶⁷ Any effect on substantive rights—that is, the fact that the opposing party might benefit from sanctions—was merely “incidental.”²⁶⁸ The Court even expressed “confiden[ce] that district courts will resist the temptation to use sanctions as substitutes for tort damages.”²⁶⁹ In light of this precedent, it is difficult to understand how any court is able to allow RICO liability based on predicate conduct that is premised entirely on misrepresentations in litigation filings.

Although *CSX* was not a federal Rule 11 case—and thus didn’t raise these same constitutional REA concerns—the court still should have heeded the Supreme Court’s warning. Regulatory tools like West Virginia’s Rule 11 target parties already before the court, and are specifically aimed at the conduct at issue here: to “discourage groundless proceedings.”²⁷⁰ These sanctions are meant to be the first line of defense, “to compensate wronged parties by means of affirmative relief.”²⁷¹ They incorporate principles of equity, and ensure that access to courts is one factor balanced against imposing sanctions.²⁷² However, it is also universally understood that that these sanctions may not be enough—that tort actions are also needed to further compensate wronged parties and deter wrongful conduct. Critically, courts have consistently held that state torts must fulfill this need in the malicious-prosecution context.²⁷³

266. *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 551 (1991).

267. *Id.* at 553.

268. *Id.*

269. *Id.*

270. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988). West Virginia’s Rules of Civil Procedure are “practically identical to the Federal Rules,” and West Virginia courts “give substantial weight” to federal cases in interpreting them. *Painter v. Peavy*, 451 S.E.2d 755, 758 n.6 (W. Va. 1994).

271. *Port Drum Co.*, 852 F.2d at 150.

272. *Warner v. Wingfield*, 685 S.E.2d 250, 255 (W. Va. 2009) (identifying the purpose of W. VA. RULE 11 in discouraging “unfounded claims or defenses asserted for vexatious, wanton, or oppressive purposes” while still maintaining “unrestricted access to the judicial system”).

273. *See, e.g., United States Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 393 (3d Cir. 2002) (holding that, just as Rule 11 doesn’t create a cause of action, so too Rule 11 doesn’t prevent litigants in federal courts from bringing state malicious prosecution); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990) (holding that the Federal Rules of Civil Procedure “do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction”); *see also* FED. R. CIV. P. 11 advisory committee’s notes to 1993 amendment (noting “that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process”); Brief of Amicus Curiae American Ass’n for Justice in Support of Defendants-

Contrary to this weight of authority, the court in *CSX* essentially created federal tort liability out of a lawyer's Rule 11 duty to file complaints and other litigation documents with a good-faith basis for doing so. In addition to the troubling rejection of authority and potential constitutional and legal concerns this raises, allowing litigation representations to suffice as RICO predicate acts would also lead to absurd results. One court warned of this problem in *Curtis & Associates, P.C. v. Law Offices of David M. Bushman, Esq.*,²⁷⁴ a leading case rejecting the use of civil RICO under circumstances similar to *CSX*. In that case, the RICO plaintiff, the Curtis firm, alleged that the attorney defendants participated in a scheme to defraud Curtis by filing baseless malpractice suits against Curtis on behalf of former Curtis clients.²⁷⁵ As in *CSX*, the predicate acts were all the mailing of pleadings and other correspondence related to malpractice cases. The *Curtis* court cautioned that, if litigation activities such as filing a complaint or serving documents could be violations of RICO, "then almost every state or federal action could lead to corollary federal RICO actions."²⁷⁶ Were the court to permit RICO claims based on litigation activity, it explained, "defendants could conceivably countersue plaintiffs for RICO conspiracy violations based upon the many allegations and statements by plaintiffs in this action which defendants might similarly contend are frivolous or false."²⁷⁷

Judge Kiyoo A. Matsumoto's prediction in *Curtis* has come to fruition. Earlier this year, one of the defendants in the *Garlock* case—Simon Greenstone—filed a counterclaim against Garlock, alleging claims for RICO, abuse of process, and fraudulent inducement.²⁷⁸ The essential allegations are that Garlock filed its civil RICO action against Simon Greenstone to threaten Simon Greenstone in order to gain leverage against it in the corresponding bankruptcy proceeding.²⁷⁹ The aggregate-litigation landscape may stand at the edge of the "endless cycle" of civil RICO actions that Judge Matsumoto warned about. This kind of pleading practice has negative implications for the efficiency and legitimacy of the court system.

Appellants & Reversal, *supra* note 141, at 25 ("W. Va. R. Civ. P. 11 carries its own set of sanctions to be administered by West Virginia judges who, as this Court has pointedly observed 'are perfectly capable of handling [any] malfeasance in their own courts.'" (alteration in original) (quoting *Balt. Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 403 (4th Cir. 2001))).

274. *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 172–73 (E.D.N.Y. 2010), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011).

275. *Id.* at 174–75.

276. *Id.* at 173.

277. *Id.*

278. See generally Answer, Affirmative Defenses, and Counterclaims, *supra* note 218.

279. See *id.* at ¶ 107.

C. FEDERALIZATION OF STATE COMMON-LAW MALICIOUS-PROSECUTION
ACTIONS

The use of civil RICO as a malicious prosecution action also results in a usurpation of the state forum. This “federalization of state tort law” is particularly troubling when there are clear state-law remedies available and tailored to address the conduct at issue, where expansion of RICO would result in the usurpation of state law, and where they encourage improper forum shopping.

First, at the present time, the state forum is the natural place for prosecution of these types of torts. In *CSX*, the particular allegations of misconduct—that is, filing claims without probable cause and filing litigation documents to support those claims—mirror the claims that most naturally give rise to malicious prosecution and abuse of process, which are both state claims. As noted above, allowing litigants to bring these claims as federal civil RICO actions allows litigants to bypass more stringent state pleading requirements, provides higher damage awards, and allows for a lower burden of proof—all ignoring the need for a balance between access to courts and prevention of frivolous litigation.²⁸⁰ The state has been the historical forum for hashing out this balance as its courts and lawmakers have designed and refined its frivolous litigation torts and sanctions to balance issues of access to justice, efficiency, and reduction of waste in the judicial system. Of course, lawmakers and courts have also engaged in this kind of thoughtful policy discussion regarding frivolous litigation remedies at the federal level: the result is the Rule 11 sanction. But they certainly have not done so in the context of civil RICO.

Civil RICO is particularly susceptible to over-extension and usurpation of state law—a point that Chief Justice Rehnquist has recognized.²⁸¹ He compared civil and criminal RICO actions to illustrate the point.²⁸² Criminal RICO is “kept under control,” he said, “by the use of prosecutorial discretion by United States attorneys” who “concentrate on the fraudulent schemes which are either too big or too widespread for efficient state prosecution.”²⁸³ Not so for civil RICO, Chief Justice Rehnquist lamented, where there is “no such thing as prosecutorial discretion to limit [its] use Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney’s fees which civil RICO holds out.”²⁸⁴

280. See discussion *infra* Part V.A.

281. Rehnquist, *supra* note 134, at 10.

282. *Id.*

283. *Id.*

284. *Id.*; see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 529–30 (1985) (Powell, J., dissenting) (“[T]hese suits are being brought—in the unfettered discretion of private litigants—in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases.”).

Of course, litigants like *Garlock* and *CSX* argue that the cases at issue, involving an “extensive and broader scheme to defraud,”²⁸⁵ are exactly the types that should be prosecuted in federal court under RICO. There is some support for this argument, especially considering the Supreme Court’s unquestioning endorsement of RICO’s liberal-construction provision. Further support for this view is found in the consensus noted in Part IV.B that existing remedies for frivolous litigation—including malicious prosecution and Rule 11 sanctions—have proven inadequate to the task. But expanding civil RICO is not the answer.

The weight of the evidence suggests that Congress did not intend to usurp state-law malicious-prosecution actions when it enacted civil RICO. One court, in holding that “litigation activities” cannot serve as a predicate acts to civil RICO, explained that “there can be no dispute that ‘Congress did not intend to effect a wholesale preemption of state civil law in its enactment of RICO.’”²⁸⁶ Courts have consistently agreed with this position, refusing to permit pure litigation activities to serve as RICO predicate acts, in part because doing so would permit the federalization of state common law.²⁸⁷ In expanding RICO to cover conduct that is clearly covered by other statutes, including malicious prosecution and abuse of process, cases like *CSX* and *Garlock* do just that.

Critics might further argue that cases like *CSX* and *Garlock* involve some kind of aggravated malicious prosecution that warrant harsher remedies. But, even if that is so, there is still a danger that federalization of such an “aggravated malicious prosecution” action will result in improper forum shopping. Any plaintiffs considering an action against a former opposing party for malicious prosecution will be drawn to the federal forum by the easier burdens of proof, lesser pleading requirements, and higher damages noted above. They will also be drawn by the ability to sidestep state-level procedural tools specially designed to protect litigants and the right to petition.

Anti-Strategic Lawsuit Against Public Participation (“anti-SLAPP”) statutes—are a key example of this. Multiple states have implemented anti-SLAPP statutes to protect individuals from retaliatory lawsuits designed to stifle First Amendment activity.²⁸⁸ Although these procedural tools differ in

285. Page-Proof Principal/Response Brief for Appellee/Cross-Appellant at 57 n.8, *CSX Transp., Inc. v. Peirce*, No. 5:05-cv-00202-FPS-JES (4th Cir. Apr. 28, 2014).

286. *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 174 (E.D.N.Y. 2010) (quoting *von Bulow v. von Bulow*, 657 F. Supp. 1134, 1143 (S.D.N.Y. 1987)), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011).

287. *See id.* at 174–75 (collecting cases); *see also* *United States v. Eisen*, 974 F.2d 246, 254 (2d Cir. 1992) (noting the “understandable reluctance” on the part of Congress “to use federal criminal law as a back-stop for all state court litigation”).

288. For an early authority on the development of SLAPPs, see generally GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* (1996). There are obvious First Amendment issues raised by lawsuits predicated on a person’s decision to file a lawsuit. *See, e.g.*,

each jurisdiction, in the main they create any early-stage procedural mechanism by which a defendant in a SLAPP litigation can, upon a showing that the basis of the plaintiff's lawsuit is protected activity, shift the burden to the plaintiff to establish probable cause for the cause of action.²⁸⁹ The purpose of these statutes is to “protect those engaging in First Amendment activity and deter abusive lawsuits by providing for early termination of the suit and award of the target defendant's fees incurred in achieving early dismissal of the SLAPP.”²⁹⁰

The defendants in *CSX* and *Garlock* argue that those cases are thinly veiled attempts by the defense bar to further weaken class actions by targeting the plaintiffs' attorneys themselves. Accepting for the moment that is the case, then anti-SLAPP motions would be the exact means for uncovering such a scheme. Simon Greenstone, one of the defendant law firms in *Garlock*, has filed a SLAPP motion arguing that because the litigation is targeting First Amendment activity, *Garlock* should be required to establish by a “reasonable probability” and with “clear and specific evidence” that it will prevail.²⁹¹ But there is no federal anti-SLAPP statute,²⁹² and state anti-SLAPP statutes have not been applied in cases in federal court based on federal-question jurisdiction.²⁹³ Furthermore, some states—including West Virginia, where *CSX* filed its civil RICO action—do not have anti-SLAPP procedures.²⁹⁴

Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 69 (1993) (Stevens, J., concurring in the judgment) (“Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case.”). However the First Amendment implications of the RICO reprisal—while of fundamental importance—are beyond the scope of this Article.

289. PRING & CANAN, *supra* note 288, at 188–205.

290. Steven J. André, *Anti-SLAPP Confabulation and the Government Speech Doctrine*, 44 GOLDEN GATE U. L. REV. 117, 119–20 (2014) (citation omitted).

291. Defendant's Memorandum in Support of Motion to Strike &, Alternatively, to Dismiss Pursuant to Rule FRCP 12(6) at 23, *Garlock Sealing Techs. LLC v. Simon Greenstone Panatier Bartlett, P.C.*, No. 3:14-cv-00116 (W.D.N.C. Nov. 3, 2014).

292. A bipartisan group of representatives recently endorsed the SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2016), which would, among other things, create a special motion to dismiss early in a case targeting First Amendment activity. For arguments supporting a federal anti-SLAPP law, see generally Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731 (2003); Marc J. Randazza, *The Need for a Unified and Cohesive National Anti-SLAPP Law*, 91 OR. L. REV. 627 (2012); Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 849 (2010).

293. 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4509 (2d ed. 1996); Robert T. Sherwin, *Clones, Thugs, 'N (Eventual?) Harmony: Using the Federal Rules of Civil Procedure to Simulate a Statutory Defamation Defense and Make the World Safe from Copyright Bullies*, 64 DEPAUL L. REV. 823, 852 n.237 (2015). There is also considerable disagreement in the courts on whether state anti-SLAPP provisions should apply in cases that involve some type of state law claim. See generally Benjamin Ernst, Note, *Fighting SLAPPs in Federal Court: Erie, The Rules Enabling Act, and The Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181 (2015); Tyler J. Kimberly, Note, *A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201 (2015).

294. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your->

As a result, defendants wishing to file retaliatory litigation need only choose to bring a federal RICO action instead of a state malicious-prosecution action to protect themselves from early termination via anti-SLAPP. Even if such a retaliatory lawsuit did not ultimately succeed, the mere ability to bring and sustain a RICO lawsuit for any period of time raises a significant threat to plaintiffs' attorneys. The result of this is a greater danger that defendants will use civil RICO and the federal forum not to remedy legitimate wrongs, but to stifle the use of aggregate litigation.

D. PUNISHMENT OF THE AGGREGATE LITIGATION TOOL SPECIFICALLY

Finally, the RICO reprisal punishes not only fraudulent conduct, but the aggregate-litigation device itself. CSX accused the Peirce firm of more than just filing individual baseless asbestosis claims; it claimed that the defendants filed "mass lawsuits . . . as part of a grander plan to conceal the fraudulent claims."²⁹⁵ Endorsing this approach, the CSX court allowed CSX to attempt to recover at trial the cost of defending not just the 11 allegedly fraudulent claims, but the cost of defending the full mass actions. As shown, *Garlock* has included similar allegations of liability across multiple claims," suggesting that there, too, liability will not be limited to the specific baseless claims.

This practice conflicts with the Supreme Court's holding in *Sedima* that the alleged injury (and thus the potential basis for damages) must be proximately caused by the predicate acts.²⁹⁶ It is telling that this is the only time the Supreme Court has authorized a limitation on the interpretation of RICO, and this holding has led lower courts to recognize the Court's proximate-cause requirement as a deliberate policy choice to "limit . . . the collection of private RICO damages."²⁹⁷ This limitation has successfully served to bar RICO causes of action unless there is some direct tie between the predicate acts and the alleged harm.²⁹⁸

states-free-speech-protection (last visited Sept. 14, 2016) (collecting the pertinent statutes and judicial decisions establishing some type of anti-SLAPP procedure).

295. *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2012 WL 1598081, at *13 (N.D.W. Va. May 3, 2012).

296. *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts." (citation omitted)).

297. *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1215 (5th Cir. 1988).

298. *Compare McDonald v. Schencker*, 18 F.3d 491, 495 (7th Cir. 1994) (rejecting plaintiff's attempt to turn the common law doctrine of conversion into a RICO claim by "simply throwing in several mailings" based in part on the lack of proof that the mailings themselves caused the harm), *with Appley v. West*, 832 F.2d 1021, 1028 (7th Cir. 1987) (finding a scheme to defraud for purposes of the mail fraud statute where each mailing served to conceal the conversion of funds). *See also generally* Howard Adler, Jr. & John A. Francis, *Proximate Cause: A Growing Limitation on Civil RICO Actions*, 13 RICO L. REP. 1443 (1991) (collecting and analyzing cases where the courts upheld the dismissal of civil RICO complaints for failing to prove proximate cause based on mail fraud predicate acts).

There is no such direct tie in *CSX* between the predicate acts and the alleged harm. The predicate acts alleged included: (1) the filing of the 11 fraudulent claims; (2) letters to the court regarding scheduling, mediation, and other matters related to those 11 claims; and (3) communications with opposing counsel about those claims.²⁹⁹ Importantly, *CSX* never alleged, nor argued, that any of the thousands of other claims were fraudulent. In fact, at oral argument on a motion to compel, *CSX* admitted the 11 claims were “the only claims from which we can attempt to prove fraud and from which we can attempt to prove damages.”³⁰⁰ Despite this, the court refused to limit *CSX*’s damage claims and evidence at trial to alleged damages specifically related to the 11 claims at issue, instead accepting *CSX*’s argument that the predicate acts of racketeering were not the 11 fraudulent individual cases, but “the mass suits themselves.”³⁰¹ As amicus noted, “[w]hat turned the 11 isolated false claims into a pattern, *CSXT* [successfully] alleged, was the filing of a large number of entirely legitimate cases as part of a system of fraud.”³⁰²

The RICO reprisal allows any defendant in aggregate litigation who discovers more than one known unjustified claim to allege a “scheme to defraud” and, thereby, to use the federal forum to penalize plaintiffs’ attorneys for the entire action. If, on the other hand, the Peirce firm had represented only one plaintiff in a baseless asbestosis case against *CSX*, it is highly unlikely that a RICO claim would succeed. The low number of illegal acts, the limited time in which those acts took place, or the small number of participants in the “enterprise” would likely foreclose such a claim. Instead, *CSX* would have to use one of the traditional methods for combatting frivolous lawsuits, such as a malicious-prosecution action. However, because these are cases filed by one set of attorneys on behalf of thousands of plaintiffs, the court allowed a RICO claim to proceed, meaning the plaintiffs’ attorneys are faced with treble damages, attorneys’ fees, and costs, and the social stigma of being labeled “racketeers.”

Not only does this inflate the claim against the plaintiffs’ attorneys due to their use of an aggregate-litigation device, it also implies that the litigation form itself (i.e. a mass action) is harmful. This is particularly troubling because it imposes penalties on conduct simply because that conduct occurs in aggregate litigation. The result chills aggregate-litigation activities and access to courts. As the *Curtis* court observed, “[i]f any litigant’s or attorney’s

299. See generally *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2012 WL 1598081 (N.D.W. Va. May 3, 2012).

300. Motion in Limine No. 1 by Defendants Robert N. Peirce, Jr. & Louis A. Raimond Seeking to Preclude *CSX* from Presenting Evidence or Argument that Any Claims, Other Than the Eleven Claims at Issue, Were Allegedly Fraudulent at 1, *CSX Transp. Inc. v. Peirce*, No. 5:05-cv-202 (N.D.W. Va. Nov. 13, 2012) (quoting an admission made by *CSX*’s counsel in court).

301. *CSX Transp., Inc.*, 2012 WL 1598081, at *13.

302. Brief of Amicus Curiae American Ass’n for Justice in Support of Defendants-Appellants & Reversal, *supra* note 141, at 8.

pleading and correspondence in an unsuccessful lawsuit 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.”³⁰³ This is especially so in our adversarial system of justice, where attorneys have a duty to represent their clients zealously. One author articulated the result of this conflict aptly:

[T]he adversary system is impeded when an attorney must worry about whether or not ‘fighting too hard’ will invoke the wrath of opposing counsel and the opposing party. When an attorney’s ability to go all out for his or her client is tempered by concern for eventual liability to that adversary, the adversary process is jeopardized.³⁰⁴

If class actions, mass actions, and other aggregate litigation are valuable procedural tools, then methods to prevent these tools from being used should be strongly questioned.

One counterargument is that the RICO reprisal is an effective regulatory measure, given the flaws of aggregate litigation. There is some support for this position, especially considering that CSX cannot be entirely to blame for failing to prove more than the 11 baseless claims out of the Peirce firm’s thousands of asbestosis claims. As discussed above,³⁰⁵ mass actions are criticized for their ability to “hide” weak claims within the greater mass of stronger claims. The above analysis also recounts the particular weaknesses identified in asbestos litigation, specifically the use of questionable mass screening procedures to identify potential injuries.³⁰⁶ If true, defendants have a legitimate concern that these aspects of aggregate litigation risk unfairly shifting the burden to defendants to disprove plaintiffs’ claims—sometimes thousands of them.

Even if aggregate-litigation devices should be reformed, the RICO reprisal is not the correct remedy because it is both over- and under-inclusive. The RICO reprisal is over-inclusive in that the onerous penalties of the RICO statute, coupled with the uncertainty necessarily involved in aggregate litigation, threaten to “chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts.”³⁰⁷ As noted above, the civil RICO action targets the whole litigation, not just the few bad cases, by allowing defendants in aggregate cases to recover the entire cost of the aggregate litigation. In this way, it threatens the use of the aggregate-litigation device by placing such a high risk on its use. The device—

303. *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 173 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011).

304. Fiebach, *supra* note 227, at 1302.

305. See *supra* Part IV.A.

306. See *supra* Part IV.B.

307. *Curtis & Assocs.*, 758 F. Supp. 2d at 173.

and, indeed, much of the American system of justice—depends on the initiative of attorneys to take on aggregate litigation at a risk to their own private interests.

At the same time, the RICO reprisal is under-inclusive because it provides a remedy for only a small part of what is a much larger, structural problem. Using RICO reprisals to deter frivolous aggregate litigation essentially asks defendants in individual aggregate cases to act as private attorneys general, regulating the conduct of their adversaries. This is a dizzying prospect, and one rife with potential problems, including the obvious conflict issues that arise when adversaries are tasked with regulating their opponents' professional conduct. Further, it is not at all clear that the RICO reprisal would have the effect of deterring frivolous filings in aggregate litigation instead of deterring the device altogether—that would need further study.

Even if RICO reprisals could, conceivably, motivate plaintiffs' attorneys to ensure that more of the cases they file have evidentiary support, RICO reprisal comes nowhere close to providing the procedure, the structure, or the resources for doing that. While many scholars have identified flaws in aggregate litigation devices,³⁰⁸ some have also proposed reforms of those devices.³⁰⁹ Some of these proposed procedures would allow limited fee-shifting in specific contexts, such as when plaintiffs fail to get past a motion to dismiss.³¹⁰ Many have offered structural "tweaks" on the class-action or mass-action devices themselves, including, for example, greater use of partial certification of class actions which could slow the class action process and put less pressure on defendants to settle.³¹¹ Courts have also embraced the call for reform, and often implement creative case-management techniques to manage—and presumably scrutinize—aggregate litigation.³¹² Examples include the issuance of *Lone Pine* orders, which are orders requiring that individual plaintiffs submit *prima facie* evidence to support their claims for relief before additional, burdensome discovery occurs.³¹³ Other courts have practiced phased or sequenced discovery, where courts target initial discovery at information that "might facilitate settlement negotiations or provide the foundation for a dispositive motion."³¹⁴

308. See *supra* Part IV.A.

309. For a thorough discussion of procedural innovations designed to correct perceived problems in aggregate litigation see generally COFFEE, *supra* note 2 (collecting sources, discussing proposals, and providing critiques).

310. *Id.* at 165–68.

311. Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127, 1128–30 (2005); see also COFFEE, *supra* note 2, at 162–65.

312. See HERR, *supra* note 2, § 11.421–24.

313. See generally David B. Weinstein & Christopher Torres, *Managing the Complex: A Brief Survey of Lone Pine Orders*, 34 NO. 3. WESTLAW J. ENV'T'L. 1 (2013) (collecting cases showing extensive use of Lone Pine order).

314. HERR, *supra* note 2, § 11.422.

Many of these techniques have been applied to reform the asbestosis litigation. A trial-level example can be found in *Garlock*, where the bankruptcy court used a form of targeted discovery by allowing full discovery into 15 claims that the parties previously settled, which *Garlock* argued represented the plaintiffs' attorneys' larger practice of filing baseless claims.³¹⁵ As a result, the court lowered the company's overall outstanding liability to potential asbestos claimants. More systemic reforms have been proposed as well—the United States Congress is considering an asbestos-bankruptcy-trust-reform bill that would require greater transparency for asbestosis claims made against bankruptcy trusts.³¹⁶ This bill is expressly aimed at avoiding the potential double-claiming that allegedly occurred in the *Garlock* case.³¹⁷

Although myriad commentators and courts recognize the need for reform, they also recognize and grapple with the structural nature of the problem. Although over-aggregation is indeed a problem requiring a remedy, the role of the private attorney general must also be preserved. As John C. Coffee has warned, “[a]ny remedy has to be a balanced one—or otherwise plaintiff’s attorneys could be constantly threatened with punitive fee shifting that will deter them from bringing meritorious cases.”³¹⁸ Coffee further counseled that “Draconian response[.]” to the problems in aggregate litigation “could render the private attorney general extinct.”³¹⁹ In the context of asbestos litigation, for example, any attempt to rein in the practice of hiring favorable experts must also take into account the significant burdens private attorneys face in identifying the thousands of victims of asbestosis. Despite the public nature of the asbestos harm—called the “worst occupational health disaster in U.S. history”—the public doesn’t share the cost of this screening: plaintiffs’ attorneys must, at least until the costs can be shifted to defendants through settlements or verdicts or until we find a different structural solution. Consideration of this conflict is entirely missing from the RICO reprisal.

The use of civil RICO in cases like *CSX* is precisely the kind of “draconian” response Professor Coffee warns against. Not only does it effectively create a pure, loser-pays rule for frivolous litigation, it allows defendants in aggregate litigation to be reimbursed for the costs of defending legitimate litigation. Further, the remedy goes beyond “fee-shifting,” and imposes punitive measures. *CSX* sought and received not only the costs to defend the entire underlying aggregate litigation (even those that *CSX* lost), but the costs to bring the RICO action itself.

315. *In re Garlock Sealing Techs., LLC.*, 504 B.R. 71, 84 (Bankr. W.D.N.C. 2014).

316. Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016).

317. *Legislative Digest: H.R. 1927: Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016* (sic), Republican Pol’y Committee (Jan 8, 2016), <https://policy.house.gov/legislative-digest/friday-january-8-2016>; see also discussion *supra* Part IV.B.

318. COFFEE, *supra* note 2, at 165.

319. *Id.*

VI. PROPOSALS

Based on the observations above, I offer several suggestions for responding to the RICO reprisal. Each of these proposals is aimed at reforming the RICO statute or common law to ensure that RICO litigation adequately conforms to the law and protects the right to petition in aggregate litigation.

At a minimum, courts must limit the damages available in RICO claims against attorneys for litigation conduct to the injury proximately caused by the actually frivolous litigation, i.e. the predicate acts only.³²⁰ A plaintiff like CSX is not entitled to damages for the costs to defend against the aggregate litigation when it only proves a small portion of that litigation is baseless. CSX should only have been able to claim damages for the 11 proven baseless claims: the predicate acts of mail fraud alleged in its lawsuit. Such an interpretation of RICO is consistent with Supreme Court precedent.³²¹ It would also minimize the “draconian” nature of the RICO reprisal by making it less likely that cases like CSX and *Garlock* might cause plaintiffs’ attorneys to forego representing legitimate plaintiffs due to the economic risks that this unwarranted fee-shifting raises.

But courts should go further than this and protect the right to petition in aggregate litigation by requiring a showing of malicious intent for RICO reprisal actions against attorneys targeting pure litigation conduct.

This showing of intent is the means by which the application of the RICO doctrine to attorneys’ aggregate litigation conduct may be harmonized with the existing state abusive litigation torts and corresponding litigation privilege doctrine.³²² As explained, in most jurisdictions under the common law, lawyers are absolutely immune from liability for conduct or communications that might offend opposing parties.³²³ Many jurisdictions have carved an exception to this immunity to allow for malicious prosecution and abuse of process litigation. But that exception is a narrow one, requiring proof of malice, which is traditionally articulated as either use of the proceeding for an ulterior motive or with “knowledge that there is no probable cause for the proceeding.”³²⁴

320. See *Evans v. City of Chicago*, 434 F.3d 916, 919 (7th Cir. 2006) (affirming the lower court’s grant of a motion to dismiss RICO claim for attorneys’ fees to defend wrongfully filed criminal charges when defendant had paid an attorney to defend him on several charges). The court determined that it would be hard to tell which portion of the fees were attributable to the wrongfully filed charges. *Id.* at 933.

321. See *supra* Part III.

322. Although no federal court has applied the litigation privilege to a federal statutory claim the legal and policy reasons for doing so abound. See Anenson, *supra* note 101, at 928–29. Anenson also argues how the same rationale that supports the application of the immunity in state courts, including the ability to represent clients without fear of being sued, counsels in favor of application of litigation privilege to statutory claims. See *id.* at 929 & n.79.

323. See *supra* Part IV.B.

324. MALLEN & RHODES, *supra* note 64, § 6:42; see also *supra* Part IV.B.

The historical origins of the litigation privilege additionally reveal that application of this privilege and its limited exceptions to the *CSX* case and the RICO reprisal makes particular sense. The doctrine has its roots in England, evolving to protect lawyers from libel claims based on statements made during trials.³²⁵ The intent is to protect speech, as “a contrary rule . . . would unduly stifle attorneys from zealously advancing the interests of their clients”³²⁶

Under my proposal, the mere act of filing complaints in court—even frivolous complaints—would no longer justify RICO liability for aggregate litigation attorneys. Instead, some broader scheme, linked with (or evidencing) an intent to harm must be shown.

Applying the litigation privilege to statutory RICO claims serves two purposes. It ensures application of the protections historically provided at common law. It also serves as added protection for the plaintiff attorney in aggregate litigation attorney who serves as private attorney general, making multiple filings on behalf of the public and taking upon herself the risks associated with such filings. This is not to say that we should necessarily impose a lesser professional standard on such attorneys; however, application of the existing common law immunity and malicious prosecution standards to aggregate litigation attorneys in the civil RICO context simply recognizes the everyday reality of aggregate litigation, and situates that reality within the existing tort and ethical standards.

Another benefit of this proposal is that it begins to draw a line for determining an acceptable level of liability for frivolous litigation in aggregate litigation. The goal of the civil justice system is not, and cannot be, to have a system absolutely free of frivolous lawsuits. Even the *CSX* standard—11 baseless lawsuits out of 5300—is an unrealistic line considering the modern realities of aggregate litigation practice. Perhaps more importantly, drawing such arbitrary lines would weed out an unacceptable number of meritorious lawsuits in the process.

The question is how many meritorious lawsuits we are willing to deter in order to free the system of frivolous lawsuits. A good starting point for answering this question is to decide that litigation activities, by themselves, cannot constitute predicate acts under civil RICO. By drawing this line, defendants would not be prevented from seeking remedies for wrongs done in litigation, but they would be required to use the techniques already available for doing so, including sanctions and malicious prosecution.

There are three ways to implement the litigation privilege proposal—one judicial and two legislative. The judicial solution is to adopt existing precedent that refuses to extend civil RICO to litigation activities absent systemic or external wrongdoing.³²⁷

325. See Anenson, *supra* note 101, at 919–20 (discussing origins of immunity doctrine).

326. *Id.* at 920 (quoting *Surace v. Wuliger*, 495 N.E.2d 939, 944 (Ohio 1986)).

327. *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153,

The practical benefit of this proposal is that it does not require statutory amendment. Instead, when a civil RICO case involves allegations of wrongdoing in litigation, courts should simply follow the lead of cases like *Curtis*, and limit attorneys' liability to cases involving systemic wrongdoing or wrongdoing "external to, and independent of" the underlying litigation disputes.³²⁸ This would ensure that only the truly widespread cases of fraud would be brought to the federal forum and subject to harsher penalties, and it would bring RICO application in line with what at least one author has argued was Congress's original intent: that the statute be "used to combat sophisticated business frauds."³²⁹ In addition, because tort liability would be based on more than mere "litigation activities," there would be no further danger of the RICO reprisal unlawfully extending Rule 11 under the REA.³³⁰ The judicial solution also accounts for the access to justice, efficiency, and reduction of waste concerns in the aggregate litigation context by ensuring that the proof of malicious intent is more closely aligned with the resulting liability. By requiring that systemic and/or external fraud be proven in addition to the underlying alleged abusive litigation activities, civil RICO's liability—which comes with treble damages, costs and attorneys' fees—may begin to be proportionate.

There are two possible legislative solutions to ensuring that civil RICO cases no longer target attorneys' pure litigation activities: one is to remove mail and wire fraud as predicate acts, and the other is to require that RICO plaintiffs allege some predicate act in addition to mail or wire fraud. These proposals are not new: authors like Judge Susan Getzendanner have offered them in other contexts,³³¹ and they make eminent sense here. Specifically, if litigants were required to allege some predicate act other than mail fraud in cases like *CSX*, a clear line would be drawn between cases that involve only litigation activities—such as mailing documents as part of the litigation—and those that involve "something more."³³² Under these proposals, a case like *Chevron*, which involves allegations of extortion and bribery in addition to the

174–76 (E.D.N.Y. 2010), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011) (collecting cases).

328. *See id.*

329. Pierson, *supra* note 129, at 221 (citing committee reports and hearing transcripts).

330. *See supra* Part V.B.

331. Getzendanner, *supra* note 136, at 685–89 & n.56; *see also* Rehnquist, *supra* note 134, at 11 (calling into question the idea of RICO's creation of a civil counterpart to mail and wire fraud).

332. For an example of a malicious prosecution-type case that would be still be viable under this proposal, *see Feld Entertainment Inc. v. American Society for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 311–12, 332 (D.D.C. 2012) (denying defendants' motion to dismiss RICO claims alleging predicate acts of bribery, illegal witness payments, wire fraud and money laundering, obstruction of justice, and wire and mail fraud based on allegations that animal rights activists conducted "multiple schemes" in part by filing knowingly false litigation in order "to permanently ban Asian elephants in circuses, to defraud [the plaintiff] of money and property, and to unjustly enrich themselves").

mailing of litigation documents, would be able to proceed under civil RICO, while CSX, which involved only allegations of mail fraud, would not.

These legislative solutions have some of the same benefits of the judicial proposal above: namely, they solve the REA problem, they have the same clarity and efficiency benefits, they would also ensure that only wrongdoing external to, and independent of the underlying disputes would be penalized, and only the truly systemic cases of fraud would be both brought to the federal forum and subject to harsher penalties.

Removing mail-fraud as a stand-alone predicate act has an added benefit of ensuring that potential RICO plaintiffs like CSX are unable to easily evade the intent requirement of the malicious prosecution exception to the litigation privilege. As noted above, mail fraud requires proof of a mailing coupled with a scheme to defraud.³³³ Although mail fraud does require proof of intent to harm, it only requires such an intent as to the greater “scheme to defraud,” not as to each mailing.³³⁴ Accordingly, RICO plaintiffs may allege that hundreds of litigation documents are included as predicate acts, merely because they relate to the scheme to inflate the value of the litigation. That is exactly what happened in CSX—CSX pled as predicate acts every document that even mentioned one of the 11 underlying meritless cases, including the entire mass complaints themselves.

Some might argue that there is, in fact, a clear tie between the broader scheme to defraud in cases like CSX and *Garlock* and the wider liability to which the RICO defendants are exposed. Both involve plaintiffs’ attorneys practicing in the asbestos bar, a litigation field that has been subject to a significant amount of criticism. And Judge Jack’s scathing opinion regarding Dr. Harron in the federal MDL gives us strong reason to suspect that Dr. Harron’s misconduct in CSX affected more than the 11 cases that CSX proved were part of the scheme to defraud at trial.

If that is the case, then it may be that RICO application to the Peirce firm would be appropriate in CSX. However, proof of wider fraud is a fact only a jury could decide, and there was no such proof at trial. In fact, CSX admitted it could only prove that the 11 specific cases were fraudulent. Without proof of more, we are left with what we know: that CSX recovered the entire cost of the underlying aggregate litigation—close to \$8 million dollars—because CSX proved that 11 cases were wrongfully filed and the plaintiffs’ attorneys knowingly used a bad doctor to find those 11 cases. These proposals are meant, in part, to prevent such a result.

These legislative solutions could meet similar opposition at the policy-making level. There are staunch RICO advocates on both sides of the political

333. 18 U.S.C. § 1341 (2012).

334. *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 175 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011); *see also* CHARLES DOYLE, MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW 3–4 (July 21, 2011), <https://www.fas.org/sgp/crs/misc/R41930.pdf>.

aisle who might be resistant to changes that would narrow its use. However, the fact that attorneys are now wielding RICO as a weapon against both the defense and plaintiffs' bar might offer some hope for reform on this front. Congress has shown itself willing to reform RICO to prevent its application in areas perceived as sufficiently covered by other remedies. For example, Congress amended RICO through the Private Securities Litigation Reform Act³³⁵ to prohibit the use of un-convicted securities fraud as a predicate act. Congress's stated intent in doing so—to prevent the use of RICO to bypass the development of private civil remedies under the securities laws³³⁶—should resonate in this context as well. Just as in the securities context, the RICO reprisal “virtually eliminates decades of legislative and judicial development of private civil remedies.”³³⁷

VII. CONCLUSION

These solutions would go a long way towards protecting pure litigation activities from over-enforcement, but what is really at issue here is the defense bar's use of RICO to undercut aggregate litigation. Even if frivolous litigation is a genuine problem in aggregate litigation, this Article demonstrates why the RICO reprisal must be rejected as a remedy.

Any solution to the problem of frivolous aggregate litigation must balance conflicting issues of access to justice, efficiency, and reduction of waste in the judicial system. Other remedies exist that are designed precisely to do this, including common-law torts like malicious prosecution and abuse of process, and procedural sanctions like those found in Rule 11. Although there are legitimate complaints that these remedies do not adequately deter frivolous litigation, their inadequacy alone cannot serve as a principled reason for supporting civil RICO as a solution. Instead, efforts should be made to reform devices like Rule 11 and malicious prosecution. Such reform should include consideration of the historical balance of competing interests involved in prosecuting frivolous litigation—a balance that the RICO reprisal fails to incorporate. It is also important that reformers revisit these devices not in isolation, but in a holistic manner. No amount of reforming any one device will suffice. Instead, tort theories, procedural-sanctions rules, and disciplinary rules should be analyzed and refined in conjunction with each other to come up with a coordinated frivolous-litigation scheme.³³⁸

335. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

336. See Regan Gibson & Kevin Homiak, *Racketeer Influenced and Corrupt Organizations*, 50 AM. CRIM. L. REV. 1423, 1429 n.50 (2013) (citing legislative history).

337. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 505 (1985) (Marshall, J., dissenting). For a thorough discussion of the amendment of RICO in securities fraud context, including the competing perspectives on the necessity for such an amendment, see generally Justin D. Weitz, *A Necessary Supplement: Reinvigorating Civil RICO's Securities Fraud Predicate*, 21 WIDENER L. REV. 27 (2015).

338. See Wade, *supra* note 22, at 494 (stating that “[w]hat is needed is a conscious effort to

The specific harms that need to be addressed before a precise remedy or reform can be proposed must also be disaggregated. On the one hand, there are harms caused by the “bad attorney” who makes choices in litigation that are morally wrong, including to bring frivolous cases for an improper purpose. For this type of wrong, remedies like Rule 11 and malicious prosecution have been developed, and if they are flawed, they should be reformed. On the other hand, there are structural harms wrought through the design of the aggregate-litigation devices themselves. These include the specific harm at issue in *CSX*: the fact that weak cases can be lumped in with strong cases by using an aggregate-litigation device. But to the extent that this happens, it is due at least in part to the economic incentives that private plaintiffs’ attorneys have to bring more cases in order to subsidize any losses. To the extent that the flaw is structural, and not individual, the remedy is to change those devices, not to penalize, disincentivize, and threaten private attorneys general as a whole.

In this Article, I offer a proposal that is designed to bring the application of civil RICO in line with legal doctrine, including RICO, the corresponding state common-law torts and immunities, and the REA, and to address normative concerns, like the proper balance of state interests and federal docket regulation. At the same time, these proposals are meant to ensure adequate protection for the public law aggregate-litigation attorney. Such a person is in the unique position of acting in a quasi-governmental capacity, doing a massive amount of work and filing a massive amount of documents and, in the process, taking on a high cost and risk in pursuit of public interest. Critics often overlook these facts in the ethical discussion. It is important to situate the everyday reality of the aggregate-litigation attorney within the existing tort and ethical standards.

As Coffee recognizes, the goal of reform should be to “redirect the private attorney general to serve the public interest.”³³⁹ The procedural and structural reforms I propose for class actions and other aggregate devices are aimed at doing precisely that. Individual wrongdoers can and should be punished, but there are already tools to accomplish that, and regulators must be careful not to adopt new tools like civil RICO that preclude the use of the aggregate-litigation device itself.

coordinate the procedural and tort law, so that the trial can be handled as simply as possible without the interference of frivolous litigation abuses and without inconsistent results in the original and second trials”).

339. COFFEE, *supra* note 2, at 229.

