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United States District Court, D. Kansas.

RAYMARK INDUSTRIES, INC., a Connecticut Corporation, Plaintiff,
v.
Gordon A. STEMPLE, Richard F. Gerry, Clara V. Gelbard, B. Rama Rao, and Krishan Bharadwaja, Defendants.

No. 88-1014-K.

May 30, 1990.

William L. Myers, Jr., James C. Coleman, William A. Slaughter, Dexter Hamilton, of Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa., for plaintiff Raymark.

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William S. Boggs, David E. Monahan, Jeff L. Mangum, Robert A. McGregor, of Gray, Cary, Ames & Frye, San Diego, Cal., for defendant Gerry.

William H. Ginsburg & Harry Rebhuhn, of Wood, Lucksinger & Epstein, Los Angeles, Cal., Turner and Boisseau, Wichita, Kan., for defendant Gelbard.

Ara Aghishian, of Aghishian & Danielian, Hollywood, Cal., for defendant Rao.

Bob Gans, of Gans & Blackmar, San Diego, Cal., for defendant Bharadwaja.

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

***1** In this action, plaintiff Raymark Industries, Inc. ("Raymark") alleges that the named defendants defrauded Raymark in connection with its class action settlement, *Wells v. Raymark Industries, Inc.*, No. 87-1016-K (D.Kan.1989), which was administered by this court ("the *Wells* settlement"). Defendants Stemple and Gerry are California attorneys responsible for filing approximately 6,000 claims against Raymark on behalf of certain tire workers who were allegedly injured due to exposure to asbestos products manufactured by Raymark. The claimants were diagnosed by defendant doctors Clara V. Gelbard, B. Rama Rao, and Krishan Bharadwaja ("the medical defendants").

Raymark alleges that the manner in which the claims were contrived and processed was fraudulent, and that the claims themselves were false. Raymark's claims against these five defendants arise from common law fraud and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* Additionally, Raymark asserts a claim for negligence against the medical defendants and a claim for rescission of the settlement with the tire workers against all the named defendants.

This court has previously addressed the sufficiency of the plaintiff's complaint in *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 (D.Kan.1988) ("*Raymark I*"), tracing the facts and procedural history which gave rise to these claims. Reference is made to those findings as if they were set forth herein.

Now the matter is before the court on defendants' motions for summary judgment. In sum, the attorney defendants assert that they are entitled to summary judgment on the fraud claim because (1) the alleged representations were true; (2) no material facts were concealed from Raymark; and (3) Raymark relied upon its own investigation and desire for settlement benefits, not upon any alleged fraud by defendants. The attorney defendants also assert that since Raymark's fraud claim fails, its RICO claim must necessarily fail. Finally, the attorney defendants assert that Raymark's claim for rescission against the defendants fails either because Raymark's fraud claim fails or the defendants were not parties to the settlement agreement.

In addition to joining with the attorney defendants' asserted grounds for summary judgment, the medical defendants assert that they are entitled to summary judgment on the negligence claim. The medical defendants base their request for summary judgment in part on the asserted ground that the medical

procedures utilized, and the results therefrom, were reasonable and consistent with the prevailing standard of care, either because the screening protocol met reasonable medical standards and/or the results were valid. The medical defendants also argue that no damages to Raymark could arise as a proximate result of their actions either because Raymark independently investigated the methodology and protocol utilized, or Raymark knew the strengths and weaknesses of the subject claims and decided to settle for business purposes. Moreover, in their reply briefs and at oral argument, counsel for the doctors argued that they did not owe any duty to the plaintiff.

***2** Raymark's response to the defendants' claims is, in sum, that the attorney defendants devised and controlled a nationwide asbestos claim- generating scheme which involved the unethical solicitation of tire worker clients by said defendants. Raymark asserts that the medical defendants were part of the claim-generating scheme in that they either fraudulently or negligently diagnosed many of the tire workers as having asbestos-related injuries, when, in fact, they did not.

Hearing on defendants' motions was taken up on April 23, 1990, at which time the court announced that it was prepared to deny defendants' motions for summary judgment on the fraud claims. The court additionally indicated that it had not as yet had an adequate opportunity to fully review the other issues raised by the defendants' summary judgment motions, and that such findings would be set forth in its formal findings of fact and conclusions of law. In this, the court herein adopts its findings and conclusions announced at oral arguments, and sets forth additional reasons for denying the defendants' motions for summary judgment on the fraud claim. In addition, the court finds that the defendants' motions for summary judgment on the RICO claim should be denied, but the defendants' motions for summary judgment on the rescission and negligence claims against the medical defendants should be granted.

As pertains plaintiff's claim in fraud, while fully discussed hereafter, the facts before the court clearly suggest that neither Raymark nor this court could have known the extent of defendants' fraudulent schemes, nor could Raymark have timely digested the relevant facts necessary to demonstrate the defendants' fraudulent schemes at the time it allowed--and the court permitted--these attorneys to process the tire worker claims in *Wells*. For all purposes, Raymark and this court reasonably assumed, given the defendant attorneys' professional responsibilities and Rule 11 compliance, that they would only submit claims of at least some merit, but surely would not recklessly acquiesce in the filing of a constant, steady flow of faulty claims. As this opinion will demonstrate, such is apparently the case. As stated at the time of hearing on the motions, this claim process appears to be a "professional farce!" The process makes a mockery of the practices of law and medicine! Indeed, if this court were now to acquiesce in any of them it would make a "laughingstock" of the court!

This opinion is intended to say that the only way this court will ever approve the claims process or any of the remaining claims processed by these defendant attorneys is when a jury, having heard all of the evidence, concludes that the plaintiff has failed with its burden of persuasion.

STANDARD OF REVIEW

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An issue of fact is "genuine" if the evidence is significantly probative or more that merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id.* at 249.

***3** In considering a motion for summary judgment, this court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir.1988). Further, the party moving for summary judgment must demonstrate its entitlement beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir.1985).

However, in resisting a motion for summary judgment, the nonmoving party may not rely upon mere allegations, or denials, contained in its pleadings or briefs. Rather, the party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegations. *Burnette v. Dresser Industries, Inc.*, 849 F.2d 1277, 1284 (10th Cir.1988). Moreover, the moving party need not disprove plaintiff's claim, but rather, must only establish that the factual allegations have no

legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir.1987).

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). That is, if in any part of the *prima facie* case there is insufficient evidence to require submission of the case to a jury, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex*, 477 U.S. at 323-24.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. *Background*

The settlement agreement at issue in this case is dated December 4, 1986. The agreement is between Raymark and "those individuals who (1) were represented by the law firm of Blatt & Fales and/or the law firms which will be listed, on or before December 31, 1986, on Exhibit A hereto [hereinafter "associated law firm"], (2) have claims against Raymark for asbestos-related injuries and (3) are desirous of settling those claims with Raymark." (Pltf.'s Ex. C(34), p. 731.)

The settlement agreement contemplated that approximately 13,000 Blatt & Fales clients would submit their pending or to be filed asbestos cases under the agreement (the agreement does not contain an estimate of the number of associated law firm claims that might be submitted), and that it would be effectuated through the mechanism of a class action settlement. [FN1] (*Id.*, p. 733.) In addition, the agreement recognized that the participation of Raymark's asbestos insurers was essential. As a result, all participants agreed to cooperate to obtain the participation of Raymark's asbestos insurers in the settlement agreement. (*Id.* p. 738.)

The agreement also recognized that if Raymark's asbestos insurers did agree to participate in the settlement, then Raymark would "authorize and direct the Raymark Insurers to pay, into a court supervised trust fund, the sum of $2,821.00 for each Blatt & Fales Client who elects to remain in the tentative settlement class and who establishes a likelihood of exposure to a Raymark asbestos-containing product and a diagnosis of an asbestos-related injury...." (*Id.* p. 736.) In furtherance of the settlement agreement, a class action complaint was filed against Raymark on January 12, 1987, and Raymark filed an answer thereto.

*4 Among the claims submitted in the *Wells* settlement were approximately 6,000 employees and former employees of various tire manufacturing facilities throughout the United States (the tire worker claims). The tire worker claimants were represented by defendants Stemple and Gerry (they qualified as an "associated law firm" under the settlement agreement).

In May, 1987, Raymark requested and was granted permission to conduct an audit of the tire worker claims. The audit was limited in scope, that is, expected by all parties to be completed within two weeks and intended to verify that the attorney files contained the required exposure and medical *documentation.* (Defs.' Initial Brief, Boggs Aff., Ex. 22 (this court's order granting Raymark's request for a limited audit)). In most of the cases, the audit revealed that the attorney files contained a medical report [FN2] and a health questionnaire, which at first glance, appear to meet the exposure and medical documentation requirements. A few cases were found that did not have the required documentation and they were dismissed by agreement of the parties. (Defs.' Initial Brief, Boggs Aff., Ex. 19, ¶ 16.) The remaining cases were submitted to the court under the *Wells* settlement agreement. Thereafter, the court at various times authorized the release of the settlement funds to counsel for the various *Wells* claimants, including counsel for the tire workers.

On or about September 18, 1987, Raymark filed 12 class action complaints against defendants herein, and others, in the federal district courts of Alabama, California Connecticut, Georgia, Indiana, Iowa, Ohio, Oklahoma, Kansas, Pennsylvania, Tennessee and Texas. Raymark also requested this court to schedule a hearing to determine the appropriate disposition of funds earmarked for payment of the tire worker claims and staying the disbursement of those funds in the meantime. Raymark's motion was granted, and on November 20, 1987 a hearing was held. In a memorandum and order filed December 30, 1987, this court granted Raymark's motion to stay disbursement of the tire worker settlement funds and further ordered that such funds be transferred to a separate interest-bearing account pending the resolution of Raymark's claims. The court also enjoined Raymark from prosecuting the 12 separate

actions brought by Raymark, requesting the district courts in those actions to place the cases on their inactive lists, and directed Raymark to file its complaint against the defendants in this court.

Raymark filed its current complaint on January 12, 1988. On or about March 13, 1988, defendants Stemple and Gerry moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b). On April 4, 1988, defendant Gelbard joined in such motion. In a memorandum and order filed August 10, 1988, the court denied such motions, except as to Raymark's claim that defendants engaged in unfair business practices. *Raymark I,* 714 F.Supp. 463-66.

On March 1, 1989, Stemple and Gerry filed their current motion for summary judgment and moved the court to stay any further discovery against them pending the resolution of the motion. Defendants Rao, Bharadwaja, and Gelbard thereafter joined in that motion and further moved for summary judgment as to Raymark's negligence claim against them.

***5** On May 2, 1989, the court stayed discovery in this case pending resolution of an involuntary petition in bankruptcy filed against Raymark in February, 1989 in the Eastern District of Pennsylvania. In September, 1989, the stay was lifted and this court set discovery, briefing and hearing schedules with respect to the motions for summary judgment.

B. *Representations Made to Raymark*

In relevant part, the members of the *Wells* settlement were defined as persons "who have been exposed to an asbestos-containing product manufactured by Raymark and have suffered an asbestos related injury." (Defs.' Initial Brief, Boggs Aff., Ex. 22, p. 2.) In addition, Raymark and its insurers only intended to pay meritorious claims in connection with the *Wells* settlement. (Pltf.'s Ex. J, p. 1163.) Furthermore, to assure the participation of Raymark's insurers and to assure that all claimants met the class definition, it was agreed that all claimants participating in the settlement must meet certain exposure and diagnosis criteria. To establish that claimants met such criteria, Raymark required the claimants' attorneys to submit Raymark settlement information forms and attorney certifications.

The following representations are made in the attorney certifications forms:

I, [attorney's name], attorney for the claimants reflected in the attached claimant list, certify that there is information obtained from my clients in my files that supports the answers to the questions on the Raymark Settlement Information Form, including, but not limited to, that any symptoms checked in response to question 14 were caused by exposure to asbestos.

(Pltf.'s Ex. C(36), p. 794.) Both Stemple and Gerry signed and submitted attorney certifications.

Before one can fully appreciate the significance of this certification, one needs to recall the following commentary made in *Raymark I:*

Specifically, Raymark alleges that sometime in 1986 defendants Stemple and Gerry and the medical defendants founded an organization called the "National Tire Workers Litigation Project" ("NTWLP"), ostensibly to promote employee safety and awareness. The group funded the purchase of vans equipped with x- ray equipment, known as "examobiles". The NTWLP contacted union representatives in order to arrange massive employee examinations in tire manufacturing plants throughout the country. It was understood that if any adverse findings were noted, the tire worker would become a client of attorneys Stemple and Gerry and would file a claim for his or her asbestos-related injuries. Raymark further asserts that local attorneys were utilized to submit the claims.

According to the complaint, the medical defendants possessed, at best, the most limited of credentials--Bharadwaja was not licensed in the United States, Rao was a radiologist and not qualified to diagnose asbestos disease, and Gelbard had been previously sued for misrepresenting her qualifications and for submitting incompetent medical reports. These medical defendants were paid $50.00 for each two-page diagnosis they prepared. Their diagnoses were based solely on information supplied by the x-rays obtained in the examobile in an assembly line fashion (100-150 tire workers were "examined" each day); the medical defendants performed no personal examinations.

***6** Raymark alleges that the NTWLP's rate of diagnosis of asbestos disease among these tire workers was 3 to 4 1/2 times greater than among shipyard workers who are known to have the greatest risk.

Raymark I, 714 F.Supp. at 464-65.

Each of the settlement information forms made several representations about the named claimant.

For instance, at question 11 the form indicates that the claimant has a "diagnosis" of either pleural disease, fibrosis, mesothelioma, lung cancer, or other cancer. At question 12 the form indicates the date of the diagnosis and at question 13 the doctors' names. At question 14 it is represented that during one or all of the years from 1973-1982, one of the following asbestos-related symptoms was manifested: shortness of breath, weight loss, cough, chest pain, or fatigue. At question 15 it is represented that the claimant had exposure to Raymark products during the years May 1973 to May 1974, May 1976 to May 1978, or 1982. The location of exposure is indicated at question 16. Question 17 indicates whether the claimant has ever smoked cigarettes, a pipe, or cigars; the date the claimant began and stopped smoking; and whether the claimant is currently smoking. In addition, the claimant or the claimant's attorney is required to sign the settlement information form. (*See* Pltf.'s Ex. C(37), p. 811.)

Both Stemple and Gerry understood the criteria for inclusion in the *Wells* settlement. Stemple admitted that it was his understanding that the diagnoses were to be made by individuals "qualified to make the diagnoses." (Pltf.'s Ex. B(4), p. 196.) In addition, Gerry admits that he represented to Raymark's attorney, Jeffrey Lewin, during Raymark's audit of the tire worker cases, that he knew the qualifications of the diagnosing doctors and that in his belief they were well qualified to do the work. (Defs.' Exs., Gerry Aff., ¶ 35.)

However, Drs. Rao and Bharadwaja admit that they had no idea what their medical reports were going to be used for and Dr. Rao further admits he did not care. (Pltf.'s Ex. B(12), pp. 424-27 (Rao); and B(15), p. 463 (Bharadwaja).) In addition, Bharadwaja was not intending to make even a probable diagnosis of asbestos-related disease. (Pltf.'s Ex. B(17), pp. 495-96.) Bharadwaja also contends that he was relying on Dr. Rao to make any diagnoses, but Rao understood that he was not in a position to diagnose asbestosis. (Pltf.'s Ex. B(16), p. 487 (Bharadwaja); and B(14), p. 448 (Rao).) Furthermore, there are many mistakes in Dr. Gelbard's medical reports. All of the medical defendants were paid very low prices for each tire worker evaluation they performed.

In addition, Dr. Rao testified in his deposition that he considered pleural plaques and pleural thickening to be the same thing. (Pltf.'s Ex. B(14), pp. 457-58.) However, pleural plaques and pleural thickening are different in both appearance and etiology. Plaques generally are attributed to asbestos exposure, while pleural thickening has many causes, including pneumonia, tuberculosis and trauma to the chest.

*7 With the foregoing in mind, the attorneys' certifications and the physicians' diagnoses are somehow intended to "pass muster." Not with this court!

In an authoritative statement of the necessary criteria for the clinical diagnosis of disease related to asbestos without a direct examination of the lung tissue, the American Thoracic Society (ATS), in a 1986 article entitled "The Diagnosis of Non-malignant Disease Related to Asbestos," says it is *necessary* that there be:

1. A reliable history of exposure.

2. An appropriate time interval between exposure and detection. [FN3]

(Pltf.'s Ex. E(2), p. 1043.) That article also stated that the following criteria have recognized value in making a diagnosis of asbestosis:

1. Chest roentgenographic evidence of type "s," "t," "u," small irregular opacifications of a profusion of 1/1 or greater.

2. A restrictive pattern of lung impairment with a forced vital capacity below the lower limit of normal.

3. A diffusing capacity below the lower limit of normal.

4. Bilateral late or pan inspiratory crackles at the posterior lung bases not cleared by cough.

Id. Of these remaining ATS criteria, the most important is a chest x-ray showing sufficiently profuse fibrosis. (Pltf.'s Ex. E, p. 1029.) The x-ray should show fibrosis with a profusion of 1/1 or greater on the International Labour Organization (ILO) 12-point scale. (Pltf.'s Exs. E, p. 1029, and E(3).) On the ILO scale a reading of 1/0 is only a "suspect" finding of fibrosis, and is not sufficient to diagnose asbestosis. *Id.*

Although the medical defendants do recognize that there are latency periods associated with asbestos-related diseases and that the intensity as well as the duration of asbestos exposure is important in making a diagnosis, the medical defendants did not have enough information to determine whether or not the latency periods had run as to the workers.

For instance, the health questionnaire designed by

Dr. Gelbard, after asking the tire workers how many years they worked in the tire and rubber industry and what company they worked for, asked only the following questions:

	yes	no	years
Have you worked at the banbury?			
Have you worked at the mill?			
Have you worked curing rubber?			
Have you worked in the cement house?			
Have your worked in the tire room?			
Have your worked close to lined "hot pipes"?			
Have you been a forklift or tractor operator?			
Have you done janitorial work?			
Have you worked in the warehouse?			
Have you worked with or close to:			
Soapstone?			
Talcum powder?			
Asbestos?			
Do you smoke cigarettes?			
How many packs per day?			
Did you stop smoking?			
If so, when?			
Are you short of breath?			
Can you climb stairs?			
How many flights?			
Do you cough in the mornings?			
Do you cough up anything?			

*8 (Pltf.'s Ex. C(8), p. 644.)

It appears many of the tire workers did not fill in the number of years they worked at a particular place or job and did not fill in the number of years they "worked with or close to" soapstone, talcum powder or asbestos. Since these health questionnaires did not ask any other information about the intensity of the tire workers' exposure or the duration of exposure, it appears these questionnaires do not provide sufficient information to determine whether the latency period has lapsed. Furthermore, Dr. Rao testified at his deposition that he did not know what the latency period for asbestosis was.

The health questionnaire's inadequacy is further evidenced by the fact that the tire workers were not asked whether they were exposed to any potentially lung-damaging chemicals, fumes, dusts or gases other than asbestos, either at prior or subsequent employers or even at the tire factories themselves.

Furthermore, it appears the information received from the health questionnaires was substantially less than Dr. Gelbard had used in her prior practice in making diagnoses of asbestos-related disease. She had previously made such diagnoses in her clinical practice and for lawyer referrals of shipyard asbestos cases. In this prior practice, Dr. Gelbard took a detailed medical history and employment history. (Pltf.'s Ex. B(9), pp. 336-41, 355- 60.)

It appears that the medical defendants placed much weight on x-ray results in making a diagnosis that a tire worker had an asbestos-related disease. However, they also admitted that the x-rays detect fibrosis and that there are as many as 150 causes of fibrosis, only one of which is asbestos. In addition, it appears that many of these 150 causes of fibrosis are indistinguishable from asbestosis on x-rays. Furthermore, contrary to the ATS criteria for diagnosing asbestosis (that a doctor should consider only fibrosis with a profusion of 1/1 or greater), both Gelbard and Rao reported the tire workers to have asbestos-related injuries where the fibrotic profusion was only 1/0 (only a "suspect" finding of fibrosis on

the ILO scale).

The medical defendants have testified that their impairment findings were based upon the American Medical Association (AMA) Guides. (*See* Pltf.'s Ex. E(8).) However, the health questionnaires do not provide the doctors with the detailed information of the tire workers' work and exposure history and do not ask about exposure to dusts, gases, vapors and fumes as directed by the AMA Guides. [FN4] (*Id.* at p. 1095.) Furthermore, the medical defendants did not have independent knowledge of such information. (Pltf.'s Exs. B(9), pp. 309-13; B(13), p. 440; B(15), p. 466.) The health questionnaires also do not provide the doctors with the detailed information of the tire workers' respiratory impairment symptoms (if any) or the tire workers' decreased physical exertion abilities (if any), as called for in the AMA Guides.

The AMA Guides set forth a system of four distinct classes of impairment: Class 1 (no impairment); Class 2 (10 to 25% mild impairment); Class 3 (30-45% moderate impairment); and Class 4 (50-100% severe impairment). Under the AMA Guides, if a patient has normal pulmonary function studies, he is to be placed into Class 1, and any impairment present is to be attributed to nonrespiratory reasons or as consistent with the circumstances of activity. (Pltf.'s Ex. E(8), p. 1095.)

***9** However, contrary to this direction by the AMA Guides, if a patient had completely normal pulmonary function test results, Drs. Rao and Bharadwaja agreed to automatically assign the tire worker to an impairment rating *between* Class 1 and Class 2 (a rating which does not exist under the AMA Guides) if the tireworker had a "positive x-ray finding." (Pltf.'s Ex. B(17), pp. 490-92.) Dr. Bharadwaja admitted that he had never seen any AMA document that authorized a physician to assign a rating between Class 1 and 2 on the basis of x-rays alone and that he was not aware of any other medical association or society that approved of the approach used by him and Dr. Rao. (*Id.*) In addition, the screening protocol established by Gelbard was both contrary to the AMA Guides she was purportedly following and the procedures used by her in her own prior practice in making a diagnosis of an asbestos-related disease.

C. *Concealment*

Although there is very little evidence which would show that anyone actively tried to conceal what actually took place in this case, the evidence clearly indicates that Raymark did not have knowledge of many of the material facts which are the basis of its current fraud claim.

There has been much controversy and publicity about Stemple and Gerry's "fight" against the big asbestos companies. In fact, the National Tire Worker Litigation Project (NTWLP), [FN5] which was created by Stemple, received a host of press coverage. From some of the nationally published articles and through its continued controversy with Stemple and Gerry, Raymark must have known that Stemple and Gerry founded and financed the NTWLP. Raymark also must have known that the NTWLP sent examobiles to examine tire workers in many different companies in several states and that the examobiles could test numerous tire workers in one day.

However, neither the limited audit conducted by Raymark in May of 1987, nor Stemple and Gerry, nor the newspaper articles revealed to Raymark all the facts now available and which are necessary to show a scheme to defraud. As an example, neither Raymark nor the court knew any of the following:

(a) That the NTWLP had hired Harry Gamotan, a former local president of the United Rubber, Cork, Linoleum and Plastic Workers of America (URW), as a full- time employee.

(b) That Gamotan made unsolicited calls, wrote unsolicited letters to local union leaders and flew around the country, at the expense of the NTWLP, setting up meetings and talking with local union members.

(c) That the NTWLP had hired another former local president, Joe Daniele, to act as membership coordinator.

(d) That on at least one occasion, Stemple paid for a TV which was to be given out at a local union picnic or party.

(e) That the NTWLP had paid monies to local union members who assisted with the NTWLP.

(f) That at the meetings with local union members, NTWLP attorneys offered to represent them in lawsuits.

(g) That the NTWLP invited and paid for seven local URW officials to travel to California, where Stemple informed them of the potential for litigation and workmen's compensation actions, and the possibility of representing them.

***10** (h) That Stemple would meet with large groups of tire workers and former tire workers at one time, and that money drawings were advertised to induce local union members to attend at least one meeting.

(i) That at these group meetings, Stemple gave many of the tire workers a handout entitled "INFORMATION SHEET--TIRE WORKERS' LITIGATION PROJECT" which said that 64% of the first tire workers x-rayed showed positive for asbestosis, and in the next group studied 94% had asbestosis. Included in the handout materials was a sheet entitled "*BENEFITS AND OBLIGATIONS OF MEMBERSHIP IN THE NATIONAL TIRE WORKERS' LITIGATION PROJECT.*" (Pltf.'s Ex. C(10), pp. 654-56 (emphasis original).) Also included in the handout materials was a membership application form for the NTWLP.

(j) That at these group meetings, the tire workers were shown graphic slides of what asbestos does to human lungs.

(k) What Stemple discussed with the tire workers at these group meetings (was and is claimed to be privileged).

(l) That if a tire worker tested positive under the NTWLP screening program, he was sent the following ("unfortunately yours") letter signed by Stemple:

Dear Project Member:

We have recently received your medical screening results which, unfortunately, indicate that you *do have* an asbestos-related disease.

A meeting is set for you and all others who have recently tested positive, which is scheduled as follows:

* * *

Your written reports will be given to you at the door when you enter. We will discuss the results with you at the meeting and will also complete the necessary paperwork so that your law suit can be promptly filed....

(Pltf.'s Ex. C(22), p. 676 (emphasis original).)

(m) Finally, the procedures used by the medical defendants in making their "diagnoses" were not disclosed, nor was the amount the medical defendants were paid for such "diagnoses".

Thus, while Raymark must have known several facts about the NTWLP which are important to its fraud claim before entering into the settlement agreement, it is only when the known facts are put together with some of the above facts, which were not known to Raymark, that a scheme to defraud becomes evident.

D. *Raymark's Reliance on Defendants' Misrepresentations*

1. *Raymark's Reliance Not Displaced By Its Limited Audit*

The referenced limited audit conducted by Raymark was apparently prompted by some disparaging remarks about the tire worker cases made to Raymark's president, Craig Smith, by certain plaintiff attorneys who were not participating in the *Wells* settlement (hereinafter the intervening attorneys). The intervening attorneys indicated that, in their opinion, the tire worker cases were "junk" or of low quality or value, and that one of the intervening attorneys had declined to handle the cases. In Smith's opinion the intervening attorneys were merely expressing their anger that Raymark was paying more to settle the *Wells* cases, including the tire worker cases, than it was offering to settle the intervening attorneys' cases, which the intervening attorneys felt to be of superior quality. (Pltf.'s Exs. B(1), pp. 30-34; J, pp. 1149-55.)

***11** In addition, at no time did the intervening attorneys disparage the integrity of either Stemple or Gerry. Nor did they state or imply that Stemple or Gerry engaged in unethical or deceptive practices in obtaining the tire worker cases. Nor did the intervening attorneys mention or remark upon the credentials of Gelbard, Rao or Bharadwaja, or otherwise state or imply that the process by which those doctors made their diagnoses was in any way suspect or flawed. (*Id.*)

Furthermore, it appears the intervening attorneys' remarks did not cause Smith to actively doubt or disbelieve that the tire worker cases on the whole were other than completely bona fide. Their comments apparently did not raise any suspicion in Smith's mind concerning the integrity of defendants Stemple and Gerry, or lead him to think that Stemple and Gerry may have engaged in unethical or deceptive solicitation practices. Nor did the intervening attorneys' comments raise a suspicion in Smith's mind concerning the credentials or qualifications of the doctors who diagnosed the tire workers or of the process by which they reached their

diagnoses. (*Id.*)

However, to placate the intervening attorneys and to see whether there were any particular tire worker claims which were not legally viable, that is, did not have the required medical or exposure evidence or documentation, Smith directed Raymark's attorney to request this court's permission to review the tire worker files for the presence of medical reports and evidence of exposure. (Pltf.'s Ex. J, p. 1152.) Smith did not ask the attorney to conduct a full-scale investigation into the details of Stemple and Gerry's representation of the tire workers, the credentials or qualifications of the doctors, or the process by which the doctors reached their diagnoses.

At a hearing before this court on May 8, 1987, Raymark raised its desire to conduct the audit. During the hearing, the audit was discussed in a perfunctory and optimistic manner. There was no hint that the audit or its results were viewed by anybody as a major stumbling block in the *Wells* settlement. In fact, all parties anticipated that the audit would be completed within two weeks.

Furthermore, Raymark apparently did not, in fact, conduct a full-scale investigation into the methods by which the tire workers' attorneys obtained their clients, the credentials and qualifications of the diagnosing doctors, or the process by which those doctors made their diagnoses. In fact, Smith states in his affidavit dated November 4, 1987 that with a few exceptions, which were dismissed by consent of the parties because of insufficient documentation, "each file contained a medical report diagnosing an asbestos- related injury." (Defs.' Initial Brief, Boggs Aff., Ex. 19, ¶ 16.)

In reliance on such documentation, Raymark's counsel advised Smith that the claims could probably withstand a summary judgment motion in most jurisdictions. Thus, it appears that Raymark merely conducted a limited audit--as directed by this court, to "inspect the medical and exposure documentation." (Defs.' Initial Brief, Boggs Aff., Ex. 22 (order by this court granting Raymark request to conduct the limited audit).)

***12** Moreover, the audit produced some documentation (i.e., a medical report) which seemed to support the defendants' representations. Each medical report prepared by the medical defendants appears on its face to be a valid diagnosis of asbestos-related injury. (Pltf.'s Ex. E, p. 1031.) In addition, Stemple admits that it was his understanding that the diagnoses were to be made by individuals "qualified to make the diagnoses." (Pltf.'s Ex. B(4), p. 196.). Furthermore, Gerry admits that he told one of Raymark's attorneys during the audit that he knew the qualifications of the diagnosing doctors and believed them to be well qualified to do the work. (Defs.' Initial Brief, Gerry Aff., ¶ 35.)

The audit also revealed what Raymark admits it already knew--that many, if not most, of the tire worker claims were "weak", but nonetheless probably were able to survive summary judgment. (Pltf.'s Ex. D, ¶ 18, p. 892.) However, this "knowledge" which Raymark admittedly did possess only shows that it knew that many, if not most, of the tire worker claims it was settling in the *Wells* settlement were relatively less severe in nature and worth (both sides admit the severity of the claims is not at issue in this case).

Thus, it appears that the audit did not reveal many of the facts which Raymark claims support its fraud claim. For instance, the audit did not reveal how the attorney defendants conducted their unethical, nationwide solicitation process, that the medical defendants may have violated accepted medical criteria in making their "diagnoses", and that as a result, many of the tire worker claims were without merit. Therefore, Raymark was justified in relying on the defendants' representations (i.e., the Raymark settlement information form, the attorney certifications and the medical reports) even after the audit was completed.

2. *Raymark's Reliance Not Supplanted By Its Status as an Experienced Asbestos Litigant*

Raymark's experience in asbestos litigation before the *Wells* settlement was primarily in defending shipyard and construction cases--not tire worker cases. Furthermore, as the defendants themselves admit, there was very little, if any, information in the medical literature concerning asbestos-related disease among tire workers. Thus, the defendants' argument that Raymark could not have reasonably relied on their representations because Raymark had superior knowledge is unpersuasive.

Moreover, the defendants had far greater access to the details of how the tire workers were solicited and how the medical defendants prepared their medical reports. At the time of the *Wells* settlement, the record indicates that the defendants, not Raymark, knew the following: how local union officials and the attorney defendants had co-opted; how much local tire workers were paid for assisting with the NTWLP; what the "unfortunately yours" letter said; that letters had been sent to the tire workers strongly

encouraging them not to submit to other testing and instructing the tire workers to mistrust their employers, the government and even their own union; that the tire workers were shown graphic slides depicting diseased human lungs caused by asbestos, and what other means were used at the initial group meetings to "encourage" the tire workers to become "members" of the NTWLP; and that the diagnosis process used by the medical defendants was a departure from accepted medical standards.

***13** 3. *Raymark's Reliance Not Supplanted By News Accounts*

Although many of the news articles cited by the defendants do reveal many facts about the NTWLP, such articles do not evidence a scheme by the defendants to defraud Raymark.

For example, an article in the February 27, 1987 *Wall Street Journal,* says the following:

Mr. Stemple quickly set vans offering free chest x-rays to tire-workers union halls in 25 states. Should a worker's x-ray indicate lung damage, the lawyer urges him to sue. If workers use another lawyer, Mr. Stemple charges them $250 for the test. Most chose Stemple.

(Quoted from Defs.' Reply Brief, p. 62.) Although such an article may suggest unethical conduct on the part of Stemple, it does not reveal or suggest that the medical defendants' diagnoses were in any way fraudulently prepared; that the medical defendants may have violated accepted diagnostic criteria in reaching their diagnoses; that Gelbard's protocol may have violated standards set by her own prior practice; or that Rao and Bharadwaja did not know or care what these medical reports were being used for. In addition, such an article does not reveal any detail of the alleged unethical solicitation program.

Furthermore, to assume that Raymark possessed the accumulated knowledge of all the articles cited by the defendants and that such articles reveal any fraudulent intent or a scheme by the defendants is simply unreasonable.

E. *Knowing Intent or Reckless Disregard for the Truth*

No judge can complain as to an attorney's reasonable compensation, even his enrichment. A requisite intent for fraud by these defendants is evidenced, however, by their desire to enrich themselves from the NTWLP. Moreover, the defendants' blatant disregard of professional and ethical obligations, and their arrogant disregard of all scientific findings inconsistent with their own findings, coupled with their open animus toward asbestos companies, also evidence the requisite fraudulent intent. In sum, it appears that this unusual, distasteful and disappointing case emanates from the attorneys' greed, which has clouded their professional judgment, i.e., their indifference as to whether any of the 6,000 claims meet professional standards or not.

The attorney defendants' desire to make lots of money from the NTWLP is evidenced by statements they made to news reporters. For instance, one paper says, "Stemple readily admits he'll make lots of money from the lawsuits against Firestone and other tire manufacturers." (Pltf.'s Ex. C(2), p. 617.) Another article says, "Stemple is the first to admit that he isn't an 'angel fallen from heaven. If I can't make a buck I can't do it.' " (*Id.* at 620.) In yet another article Stemple says " 'I make no bones about it. I plan to make money out of this.' " (*Id.* at 621.) In addition, an article captioned, "Attorney Richard F. Gerry in his office with a zebra rug--one of his noncorporate trophies," says the following:

The trophies Gerry is proudest of, however, hang on the walls of his uptown office. *They are framed newspaper stories about the money he's won on behalf of some of his clients,* people whose lives and health have been destroyed by what he sees as the most challenging predator of all--corporations that run roughshod over the environment.

***14** (Pltf.'s Ex. C(4), p. 627 (emphasis added).)

Furthermore, the medical defendants' intent to make lots of money from this venture is evidenced by their willingness to accept a very low amount for each diagnosis in exchange for the opportunity to do many diagnoses. For instance, Dr. Gelbard previously had done some medical/legal consultation work for Stemple in diagnosing asbestosis among shipyard workers. For her efforts, Dr. Gelbard received $600.00-800.00, or more, per report. (Pltf.'s Ex. B(9), pp. 355-56.) In contrast, once the NTWLP was under way, Gelbard received $150.00 per report initially (part of that money went to pay the technicians) and $35.00 per report thereafter. (*Id.* at 342-43.) In addition, for each review he made, Dr. Rao received $18.00. Of this, $5.00 would go to Dr. Bharadwaja to read the pulmonary function test, if necessary, and $3.00 would go to the transcriptionist (Bharadwaja's sister). (Pltf.'s Exs. B(13), p. 439; B(15), p. 473.)

Now, due to the fact that the doctors were able to do a high volume of tire worker reviews, they received a substantial income for their efforts. For instance, Stemple reports in his deposition that Dr. Gelbard received more that $400,000.00 for her efforts and had accepted a note for $250,000.00 more. (Pltf.'s Ex. B(4), pp. 202, 204.) In addition, Dr. Rao received approximately $225,000.00 for his efforts. (Pltf.'s Ex. B(6), p. 292.)

In addition, the medical defendants' reckless disregard for the truth is evidenced, in part, by the doctors' willingness to compromise their professional duty. [FN6] A willingness to compromise their professional duty is shown by the following: the screening protocol established by Gelbard was contrary to the procedures used by her in her own prior practice; the screening protocol was contrary to the AMA Guides which the doctors were purportedly following; Rao and Bharadwaja admit they had no idea what their medical reports were going to be used for; Rao admits he did not care what the medical reports were going to be used for; there seems to be some confusion between Rao and Bharadwaja over who was making the diagnosis; the many mistakes that have been found in the medical reports; the doctors' willingness to accept a low per patient diagnosis payment in exchange for the opportunity to do a large number of diagnoses; and Gelbard's acceptance of a lien for the remainder owed.

While sensitive to defendant attorneys' expressions of indignancy with regard to the court's findings in the August, 1988 order, in this court's view the attorney defendants' reckless disregard of the truth, or their knowing intent to defraud, is clear. It is evidenced in part by their willingness to violate their own professional and ethical duties. There is evidence in this case which indicates that Stemple and Gerry violated ethical obligations by conducting a contrived and deceptive solicitation program.

Stemple and Gerry allegedly began their solicitation process by co-opting Harry Gamotan, an ex-president of the URW local who was hired as a liaison between the union people and Stemple's office, and who was paid $36,000.00 per year. Stemple and Gerry used Gamotan to initiate contact with other local URW officials.

***15** In addition to Harry Gamotan, defendants hired two other ex- representatives of the URW local--Joe Daniele and Joe Glissen. Defendants also paid a substantial amount of money to several union members who helped them conduct the medical testings. Moreover, Stemple invited seven local union officials to California and paid all the expenses in connection with their trip.

The defendants' deceptive and coercive solicitation process is evidenced by, among other things, the following: herding large numbers of tire workers and former tire workers into meeting halls and rooms; showing them graphic slides depicting the effects of asbestos on human lungs; showing them local television news coverage concerning the NTWLP; providing the tire workers with frightening notices which informed the tire workers of a "serious health risk within our industry;" stating that some union members will need medical examinations; informing them of the possibility of lawsuits; and offering to represent them.

In addition, after the tire workers had been herded through the examobiles for their medical screening tests, the defendants sent letters to the tire workers receiving a "positive" test result. The letter was addressed to "Dear Project Member," and informed the tire worker that "[w]e have recently received your medical screening results which, unfortunately, indicate that you *do have* an asbestos-related disease." (Pltf.'s Ex. C(22), p. 676 (emphasis original).) The letter then invites the tire worker to another group meeting with Stemple where the tire worker would be given the actual results of his physical exam and would again be solicited to retain the NTWLP.

The attorney defendants' *knowing* violation of rules against solicitation is evidenced, in part, by Gerry's open hostility toward such rules. For instance, it is reported that in a speech given to the California Trial Lawyers Association entitled "The New Ethics," Gerry said, "I think that we ought to bite the bullet and say, 'Look, there's nothing wrong with solicitation.' " (Pltf.'s Ex. C(5), pp. 632, 640.) In time, the propriety of this statement may well be addressed by the California Committee on Professional Responsibility. For purposes here, such conduct is professionally inexcusable, and again, it simply suggests that if any attorney is so indifferent to his professional responsibilities, he most certainly will be indifferent to those responsibilities which pertain to the filing of such claims.

Furthermore, there is evidence which indicates that the defendants may have violated other ethical obligations to their clients. For instance, the attorney defendants entered into fee-splitting arrangements with other attorneys without their clients' prior consent and may have entered into the *Wells* settlement agreement without their clients' prior

consent.

Moreover, deceptive solicitation practices by the attorney defendants are also evidenced by newsletters sent by the defendants to the tire workers which imply that the NTWLP is a "blue collar coalition" of "workers, doctors and lawyers" banding together to fight for justice. (Pltf.'s Ex. C(27-28), pp. 680-85.) The newsletters arguably attempt to instill mistrust by the tire workers of their own employers, the government, and even their own international union. In addition, as will be more specifically set forth hereafter, the newsletters deceptively represented the track record of the NTWLP.

***16** The requisite intent for fraud is also evidenced by Stemple and Gerry's arrogant disregard of all scientific findings inconsistent with their own. For instance, in the summer of 1986, Firestone offered free testing of its tire workers through independent testing facilities at the Community Hospital of the Monterey Peninsula in California, and the Carle Clinic in Urbana, Illinois. In response to this offer of free testing, Stemple sent an impassioned newsletter to the tire workers warning them not to submit to the *"DEFENSE MEDICAL"* exam. (Pltf.'s Ex. C(28), pp. 845-48 (emphasis original).) The newsletter also suggests that the Firestone testing is part of a conspiratorial effort by Firestone to cover up the known asbestos problem in the tire industry, and in conjunction with Goodyear, the RMA and the URW International, to cast doubt on the NTWLP medical findings *"WHOSE EXPERTISE HAS ALREADY BEEN PROVEN THROUGH YEARS OF SHIPYARD ASBESTOS LITIGATION."* (*Id.* (emphasis original).) In the media, Stemple vigorously attacked the Firestone testing and stated that "our testing results have been standing up in California and other states for the last eight years." (Pltf.'s Ex. C(2), p. 624.)

Such statements misrepresent the track record of the NTWLP by implying that the medical detection procedure used in the tire worker cases had been affirmed by the results of eight years of litigation success in the shipyard cases. However, the facts indicate that the medical procedures used in shipyard cases were very different than those used by the medical defendants in the NTWLP.

The attorney defendants' arrogant disregard of all scientific findings inconsistent with their own is also evidenced by their reaction to the interim report from the U.S. governments' National Institute for Occupational Safety and Health (NIOSH). In February, 1987, NIOSH released an interim report evaluating the x-rays of 795 tire workers. Of those cases, only two had any signs of parenchymal change and only 19 showed pleural abnormalities. Upon receiving the interim NIOSH report, Gerry and Stemple reflexively questioned everything about the report, including its methodology, the source of the x- rays, the source of the request to do the report (the URW International), and the persons who had done the report.

Finally, the requisite intent for fraud by Stemple and Gerry is evidenced by their admitted personal animosity toward asbestos companies. Stemple has said that, "we want to make it so expensive for the asbestos industry that they no longer find profits in making asbestos products." (Pltf.'s Ex. C(3), p. 626.) Gerry has admitted that, "I'd like to see them dead. A corporation that produces asbestos and introduces it into the environment and knows it is harmful has no right to existence and should be driven from the market." (Pltf.'s Ex. C(4), p. 629.) While counsel's statement in a proper setting might be well taken, indeed there are ways--professional ways--to proceed in behalf of injured claimants against the tortfeasor. The concept embodied in the NTWLP should not be one of them!

CONCLUSIONS OF LAW

***17** The court has already determined that the substantive law of the State of Kansas is to be applied in this case and that Raymark has stated a claim for which relief may be granted. *Raymark I*, 714 F.Supp. 460. Thus, the motions for summary judgment will be addressed with those findings in mind.

A. *Litigation Privilege*

The defendants argue in their reply brief that a "litigation privilege" precludes attacking any material misrepresentations made in the furtherance of the settlement. In support of such argument, the defendants assert that Kansas has recognized that statements made by a party in court are protected from suits of libel, slander, perjury, conspiracy and invasion of privacy. *Clear Water Truck Co., Inc. v. M. Bruenger & Co., Inc.*, 214 Kan. 139, 519 P.2d 682 (1974); and *Hokanson v. Lichtor*, 5 Kan.App.2d 802, 626 P.2d 214 (1981). The defendants argue that if such an exception is not recognized, the court will chill the zeal and advocacy necessary to preserve the integrity of administration of justice, and that this concern led the California Supreme Court to shield all torts except malicious prosecution behind the litigation privilege. *Silberg v. Anderson*, 50 Cal.3d 205, 786 P.2d 365 (1990).

Kansas only recognizes a privilege for communications and statements made during the course of "judicial proceedings" from subsequent actions for "slander, libel, or one of the invasion of privacy torts involving publication." *Clear Water Truck Co,* 214 Kan. at 142 (quoting *Froelich v. Adair,* 213 Kan. 357, 516 P.2d 993 (1973)). In the present suit, most of the representations at issue were probably not made during the course of "judicial proceedings" as that term is used in the referred to cases--they were made during the course of settlement negotiations between the parties. But more importantly, the primary cause of action at issue in this case, fraud, is not one of the enumerated excluded torts. Furthermore, although the Kansas Court of Appeals in *Hokanson* held that no civil cause of action exists for perjury or conspiracy to commit perjury, it recognized that Kansas may allow an actionable tort that is independent of the alleged perjury. *Hokanson,* 5 Kan.App.2d at 808. In fact, the court said that "pleadings alleging more than mere perjury and encompassing fraud and deceit by false and fraudulent acts and conduct may state a cause of action since the action is not based on perjury alone." *Id.* at 809. Thus, since the court has already determined that Raymark has stated a claim for fraud, 714 F.Supp. at 466-68, and since such claim is not even arguably based on perjury alone, the defendants' claim of a litigation privilege for their misrepresentations is without merit.

Furthermore, this argument is a clear example of a common thread throughout defendants' arguments--that they should have *carte blanche* to do anything under the guise of their "ethical" zealous advocacy requirement. What the defendants fail to recognize is that ethical requirement must be balanced with their other ethical duties. For example, "while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case *he perpetrates a fraud upon the court.*" 7 MOORE'S FEDERAL PRACTICE ¶ 60.33, p. 60-359 (emphasis added). *See also U.S. v. Associated Convalescent Enterprises, Inc.,* 766 F.2d 1342 (9th Cir.1985) (upholding a California district court's sanctions on an attorney--an attorney does not simply act as an advocate for his client, but is also an officer of the court; as such, attorneys have a duty of good faith and candor in dealing with the judiciary).

***18** In addition, Fed.R.Civ.P. 11 requires that sanctions be assessed when a complaint is frivolous, legally unreasonable, or without factual foundation, and thus creates and imposes upon counsel an affirmative duty of investigation both as to law and fact before filing. *Zuniga v. United Can Co.,* 812 F.2d 443, 452 (9th Cir 1987); and *Golden Eagle Distrib. Corp. v. Burroughs Corp.,* 801 F.2d 1531, 1536 (9th Cir.1986). The Honorable Dale Saffels from this district has recently said that the "standard for determining whether a Rule 11 violation has occurred is objective reasonableness-- whether a reasonable attorney admitted to practice before this court would file such a document." *Cordell and L.S.P., Inc., d/b/a Drug Emporium v. Scott and DEA Ind., Inc.,* No. 88-2537-S, slip op. at 2 (D.Kan. Feb. 1, 1990). Counsel also has a duty not to assert or continue to press a claim or defense once he knows he no longer has evidence to support it. *Rood v. Kansas City Power & Light Co.,* 243 Kan. 14, 755 P.2d 502 (1988).

Furthermore, "an attorney owes a duty to his adversary not to engage in fraudulent or malicious conduct." *Allied Financial Services, Inc. v. Easley,* 676 F.2d 422, 423 (10th Cir.1982) (applying Colorado law). *See also Nat. Savings Bank of Dist. of Columbia v. Ward,* 100 U.S. 195, 205-06 (1879) (recognizes that in an action against an attorney, "[w]here there is fraud or collusion, the party will be held liable, even though there is no privity of contract"); *Arthur Pew Const. v. First Nat. Bank of Atlanta,* 827 F.2d 1488, 1493 (11th Cir.1987) (acknowledging that an attorney may be sued by an adversary for fraud under Georgia law); and *Young v. Hecht,* 3 Kan.App.2d 510, 515, 597 P.2d 682 (1979) (implying that an attorney could be liable to an opposing party for fraud). Thus, Raymark had every right to assume the attorney defendants were acting in accordance with these legal duties and to rely on that assumption. Conversely, there was no need to contemplate at the time of filing of these claims that the lawyers and claimants may have never met or that the claimants were solicited by third parties and were the product of an assembly line process! Moreover, why should such conduct be tolerated? Surely, if any lawyer elects to proceed with the judicial filing of any claim procured as these defendants procured these cases, and at a time when they have to know that Rule 11 is being constantly violated, that same lawyer can scarcely be concerned if his claim is faulty or not.

Furthermore, although the issue has not been raised by the parties, the court notes that given the facts as they appear in this motion, the defendants probably committed a fraud on the court. *See Kupferman v. Consolidated Research & Mfg. Corp.,* 459 F.2d 1072,

1074 n. 1 (2d Cir.1972) ("a finding of fraud on the court empowers the district court to set aside the judgment *sua sponte* "). *See also Virgin Islands Housing Authority v. David,* 823 F.2d 764 (3rd Cir.1987) (held an attorney's misrepresentation to the court could constitute a fraud on the court).

***19** It has long been recognized that "[t]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 246 (1944). Furthermore, the Supreme Court in *Hazel-Atlas* found that if a "deliberately planned and carefully executed scheme to defraud" the court is conclusively established, that the court has the duty and the power to vacate its own prior judgment. *Id.* at 245-46 and 249-50. [FN7]

Moreover, in a well reasoned decision by the Honorable Earl E. O'Connor, the court found that although the defendants' acts if viewed in isolation may not rise to the level of fraud on the court, when such acts are "viewed together in the context of a single lawsuit," that "a pattern of false testimony, fabrication, and nondisclosure of relevant information in a systematic effort to mislead a court" is revealed, and that "the type of corrective action described in *Hazel-Atlas* must be applied." *United Business Communications, Inc. v. Racal-Milgo, Inc.,* 591 F.Supp. 1172, 1187 (D.Kan.1984). Thus, since there is evidence of a pattern of fabrication and nondisclosure of relevant information in this case, *Racal-Milgo* seems to mandate that this case go to the trier of fact to determine if such a scheme to defraud is present.

It should also be noted that the Tenth Circuit has stated the applicable rule as follows:

Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function--thus where the impartial functions of the court have been directly corrupted.

Bulloch v. U.S., 721 F.2d 713, 718 (10th Cir.1983), *aff'd on rehearing,* 763 F.2d 1115, 1121 (10th Cir.1985), *cert. denied,* 474 U.S. 1086 (1986) (citation omitted). [FN8]

In the case at bar, the court did not have any knowledge of, nor did it acquiesce in, the payment of claims which were without merit. Furthermore, since the attorney defendants were officers of this court, the court reasonably relied on them being truthful with the court. To be sure, if the court had known then what it knows now, none of these claims would ever have been allowed to be a part of the *Wells* settlement. The tire worker attorneys would have been directed to file their suits wherever they chose, in any court in this country, state or federal, with every certainty that each would give rise to consideration of Rule 11 sanctions, if not disbarment of the attorneys daring to prosecute such a case.

Thus, it follows that if the trier of fact does eventually find that most of the defendants' claims were without merit and that the attorney defendants either knowingly or with reckless disregard represented by their attorney certifications that they were meritorious, then the prerequisites for fraud on the court would be present.

***20** This court believes there is evidence in this case which would support the same conclusion that the *Hazel-Atlas* court reached. In other words, the court finds there is evidence which indicates the following:

This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-acquired evidence, is believed possibly to have been guilty of perjury. Here ... we find a deliberately planned and carefully executed scheme to defraud [the court].

Hazel-Atlas, 322 U.S. at 245. Thus, the court believes there is evidence which would support a finding that "the impartial functions of the court have been directly corrupted," *Bulloch,* 763 F.2d at 1121, and that this case must have a full factual inquiry.

B. *Common Law Fraud*

Although the requirements for stating a common law fraud have been extensively discussed in *Raymark I,* the court believes some of the general rules bear repeating here. First, the general rule is that "[a]ctionable fraud includes an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or recklessly made with disregard for the truth, where another party justifiably relies on the statement and acts to his injury or damage." *Nordstorm v. Miller,* 227 Kan. 59, Syl. ¶ 6, 65, 605 P.2d 545 (1980); *see also Goff v. American Savings Association,* 1 Kan.App.2d 75, 81,

561 P.2d 897 (1977) (the reliance must be reasonable). Fraud also includes " 'anything calculated to deceive, including all acts, omissions, and concealments involving a breach of legal or equitable duty, trust or confidence resulting in damage to another.' " *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 465, 738 P.2d 1210 (1987) (quoting *Goben v. Barry*, 234 Kan. 721, Syl. ¶ 8, 676 P.2d 90 (1984)). It has also often been said that fraud is ordinarily a question of fact to be determined by the trier of fact. *See, e.g., U.S.D. No. 490 v. Celotex Corp.*, 6 Kan.App.2d 346, 629 P.2d 196 (1981).

1. *Requisite Intent and False Representations*

The defendants initially argue that the requisite scienter element for fraud is absent in this case because they honestly believed in good faith that any representations made were true and that their clients satisfied the *Wells* settlement agreement criteria. In addition, the defendants assert that all that was required to satisfy the *Wells* settlement agreement was that the tire workers' claims be "supported" by "information" in the attorney defendants' files showing that "diagnoses" had been made. The defendants claim that Raymark has not offered any evidence which shows that the plain and reasonable meaning of such terms and the agreement has not been met.

The court will first address the defendants' arguments that there is no evidence to support the assertion that they in fact made any untrue representations.

The attorney defendants represented in the attorney certifications that all the tire workers at issue in this case were their "clients". However, the depositions of some of the tire workers reflect that several were unaware that Stemple and Gerry were their attorneys--they believed that only the local counsel was their attorney. (*E.g.*, Pltf.'s Ex. B(26), pp. 585-86.) Thus, not all of the tire workers may have, in fact, been "clients" as represented by Stemple and Gerry in their attorney certifications. Furthermore, the blatant solicitation which appears to have occurred in this case also indicates that, in fact, many of the tire workers may not have been "clients" of Stemple and Gerry.

***21** Some other representations made by Stemple and Gerry in the attorney certifications and the Raymark settlement information forms were that there was information in their files *supporting* the following: that the tire workers had received *diagnoses* of pleural disease, fibrosis, mesothelioma, lung cancer, or other cancer; that the tire workers manifested some asbestos-related symptoms caused by exposure to asbestos; and that the tire workers were exposed to a Raymark product during a specified time period.

The defendants argue that the court should accept the asserted plain meaning and reasonable interpretation of the term "diagnosis." Although they do not cite any support for their definition, the attorney defendants argue "a 'diagnosis' is a medical doctor's evaluation; an opinion that a given condition exists," which does "*not* require absolute proof that the disease actually exists in the patient." (Defs.' Reply Brief, p. 27.) [FN9] Although the defendants are correct that absolute proof that the disease exists is not required, the court will not evaluate the attorney and medical defendants' representations, that a "diagnosis" was made, in a vacuum.

Given the fact that Raymark knew that the people making these representations were attorneys and doctors, it was reasonable for Raymark to assume they would use their knowledge as attorneys and doctors when making such representations, especially since the attorney defendants represented by their attorney certifications that there was information in their files which *supported* a *diagnosis* of an asbestos-related disease. Thus, the relevant definition of "diagnosis" is what a reasonable attorney or doctor would understand such term to mean when using the term.

Therefore, it will be assumed for purposes of this summary judgment that when the attorney defendants used the term "diagnosis" they meant a "medical term, meaning the *discovery* of the source of a patient's illness or the *determination* of the nature of the disease from a study of its symptoms." BLACK'S LAW DICTIONARY, p. 408 (5th ed. 1979) (emphasis added). The above-underlined language implies a degree of certainty--probably at least a reasonable degree of medical certainty so that the "diagnosis" will be meritorious. *Cf. Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir.1987) (under Rule 11 an attorney has a duty to investigate to insure the claim is not frivolous). (*See also,* Pltf.'s Ex. C(34), p. 731 (the settlement agreement required qualifying law firms to "(2) have *claims* against Raymark for asbestos-related injuries") (emphasis added).) Furthermore, it also will be assumed for purposes of this summary judgment motion that when the medical defendants used the term "diagnosis" they meant "the art of distinguishing one disease from another." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, p. 369 (26th ed. 1985).

[FN10]

The facts indicate that Rao and Bharadwaja were not even intending to make a "probable" diagnosis of an asbestos-related disease and Rao did not know the difference between pleural plaques and pleural thickening. In addition, there are also facts which indicate that the screening protocol established by Gelbard was contrary to her own prior practice of making a diagnosis of asbestosis. Also, the doctors either knew or had reason to know that the medical reports would be used in litigation because they knew the reports were going to the attorney defendants. Furthermore, Gelbard knew what the reports were going to be used for because she placed a lien on the proceeds of lawsuits to pay for a large amount of the services she provided.

***22** In addition, Stemple admitted that it was his understanding that the diagnoses were to be made by individuals "qualified to make the diagnoses." Moreover, Gerry admits that he represented to one of Raymark's attorneys during the audit of the tire worker cases that he knew the qualifications of the diagnosing doctors, and that in his belief they were well qualified to do the work.

However, the evidence indicates that many, if not most, of the tire worker cases are in fact without merit. [FN11] Thus, it appears that most of the tire worker claims could not pass Rule 11 muster, and that the physicians couldn't pass Fed.R.Evid. 703 muster. Is it any wonder that these claims are found to be consistently faulty?

From all of this evidence a jury could reasonably conclude that either the attorney defendants knowingly retained doctors whom they knew would not make a "diagnosis" with a reasonable degree of medical certainty, thus that the cases would be without merit, or that the attorney defendants recklessly disregarded the truth of the type of "diagnoses" the doctors were in fact rendering. In addition, a jury could reasonably conclude that the medical defendants either knowingly did not intend to distinguish one disease from another, and thus misrepresented that they had made a diagnosis, or they reckless disregarded normal medical procedure in making a diagnosis. Furthermore, a jury could reasonable conclude from the evidence in this case that the attorney and medical defendants entered into an agreement or scheme to process as many "diagnoses" as readily and cheaply as possible, with ample gains in mind under the *Wells* settlement agreement.

In addition, as this court previously stated in its prior memorandum and order finding that Raymark stated a claim for fraud:

As the court understands the plaintiff's fraud claim, it is that defendants, by filing claims against Raymark and participating in the class action settlement made certain representations as to the *existence* of an asbestos- related injury. However, in "manufacturing" the claims as they did, the defendants were either submitting claims they knew to be false and frivolous, or submitting such claims with reckless disregard as to their truth. Thus, the factual allegations regarding how the claims were manufactured demonstrate the "intent" or "reckless disregard" on the part of the defendants, ...

Raymark, 714 F.Supp. at 467 (bold emphasis added).

Furthermore, this court reasserts the following about how the defendants manufactured the claims:

According to the allegations, attorneys Stemple and Gerry are the principal instigators of the whole tire worker process: they have encouraged litigation, mobilization of prospective claimants, and the unmistakable solicitation of each; they have designed, financed and engaged the format which includes diagnosis solely by analysis of x-rays by doctors with questionable credentials, and have filed claims based on such diagnoses, having never met their clients....

***23** In any event, *the court is convinced that the entire course of conduct,* as alleged in plaintiff's complaint, *is relevant here. If such lawyers so willingly defy their professional code of conduct, they will hardly be found to take care as to the propriety of their product. Thus, such acts put in place the basis for a fraud claim.* This fraud, as alleged, was not only upon Raymark, but upon this court! A full factual inquiry is clearly necessitated.

Id. at n. 1 (emphasis added). [FN12] Moreover, the court finds that Raymark has now come forward with some evidence which indicates that in fact the attorney defendants willingly defied their professional duty.

Since the attorney defendants are members of the California Bar, the court will assume that such attorneys have knowledge of at least their own state's ethical requirements. During the relevant time, attorneys licensed in California were subject to three standards of ethics: the California Business and Professions Code (CBPC); the 1975 version of the

Rules of Professional Conduct of the State Bar of California (Cal.Bar Rules); and since the attorneys were practicing in the federal court, the court will look to the ABA's Model Rules of Professional Conduct (the Model Rules) to supplement and explicate the state requirements. *See Paul E. Iacona Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 439-40 (9th Cir.1983); *In Re Mortg. Equity Corp.*, 120 F.R.D. 687, 690-91 (C.D.Cal.1988); and *Securities Investor Protection Corp. v. Vigman*, 587 F.Supp. 1358 (C.D.Cal.1984).

A few of the applicable ethical prohibitions for attorneys include the following:

1. Either personally or through an agent, to solicit the business of a potential client in person. CBPC § 6152; Cal.Bar Rule 2-101(B)(C); and Model Rule 7.3(a).

2. Deliver a communication "in person ... to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to retention of counsel." Cal.Bar Rule 1- 101(D). *See also* Model Rule 7.3(b)(1).

3. Cal.Bar Rule 2-101(B) prohibits written advertising of legal services in any manner which tailors the advertisement to a potential client and his or her particular legal concerns; in any format which is false, deceptive or tends to confuse, deceive or mislead the public, Cal.Bar Rule 2-101(A)(4); and in any manner that does not clearly indicate it is an advertisement. Cal Bar Rule 2- 101(A)(4)

4. The transmittal of advertising in any manner which may violate a potential client's right to privacy or may coerce or intimidate the potential client. Cal.Bar Rule 2-101(A)(6); and Model Rule 7.3(b)(2).

The California courts have recognized that one of the reasons in-person solicitations are prohibited is because, "the attendant employment of 'high-pressure' tactics at a time when persons are least able to exercise a free and independent judgment, has an adverse impact on the process of making an intelligent, thoughtful determination as to whether or not counsel will be employed and subsequent selection of the same." *People v. Kitsis*, 77 Cal.App.3d Supp. 1, 143 Cal.Rptr. 537, 539 (1977). *See also Leoni v. State Bar of California*, 39 Cal.3d 609, 704 P.2d 183, 194 (1985) (attorneys' unsolicited letters to debtors, who were defendants in small claims or municipal court actions or owners of real properties in foreclosure, informing recipients of procedural aspects and advising of their legal rights (i.e., "How to Pay Debts Under Court Protection") and remedies condemned as "particularized, misleading and unsolicited" and "almost certain to cause panic and to mislead the recipients").

***24** There are facts in this case which indicate that Stemple and Gerry initiated talks with the tire workers by sending impassioned letters to the tire workers, having former union officials set up meetings and talk with the tire workers, and appearing in person at large group meetings. Furthermore, it appears that during the talks initiated by Stemple and Gerry, they informed the tire workers of the imminent health hazards which many tire workers were going to face because of an industry-wide asbestos problem and offered free medical testing and legal representation. Such action by Stemple and Gerry undoubtedly was unsolicited (not initiated by the tire workers) and misleading (there was no medical evidence to support such an industry-wide problem), and was almost certain to cause panic because of the horrible things asbestosis does to a person.

Furthermore, other ethical violations may have been committed by Stemple and Gerry in this case. For instance, it appears that the attorney defendants may have entered into the *Wells* settlement without their clients' consent. Cal.Bar Rule 5-105, and Model Rule 1.2(a). In addition, attorney defendants entered into fee-splitting arrangements with "local counsel" without the prior consent of their clients. Cal.Bar.Rule 2-108(A)(1), and Model Rule 1.5(e)(2). [FN13] In addition, it appears from several of the tire workers' depositions, that many were unaware that Stemple and Gerry were their attorneys--they believed that only the local counsel was their attorney.

Although the above-referenced ethical violations may not create a *per se* private cause of action against the attorney defendants, *see Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980); and *Seldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 765 P.2d 498 (1989), this court still believes the knowing violation of such can be used as evidence tending to prove the required scienter for fraud. Furthermore, this is not the only evidence which indicates that the required scienter may have been present.

For instance, as has already been more fully set forth in the findings of fact, Raymark could establish: the defendants intended to enrich themselves with money from the NTWLP; the medical defendants either

knowingly or with reckless disregard did not follow professional guides; the attorney defendants arrogantly disregarded all scientific findings inconsistent with their own findings; and the attorney defendants had an open animus toward asbestos companies.

Thus, the court finds that the defendants' entire course of conduct evidences the manufacture of claims with either knowledge of their lack of merit or with reckless disregard of their merit. *See* Fed.R.Civ.P. 11 ("The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, ...").

***25** Although the court has not exhausted all the evidence which indicates that the defendants possessed the requisite fraudulent intent or all of the possible misrepresentations and/or concealments by the defendants, the court believes the evidence presented is more than adequate to show that the fraudulent intent issue should not prevent this case from going to the jury. *See U.S.D. No. 490 v. Celotex Corp.*, 6 Kan.App.2d 346, 629 P.2d 196 (1981).

2. *Reliance*

The defendants strenuously argue in their reply brief that Raymark could not have reasonably relied on any misrepresentations made by them because Raymark has admitted it said the tire worker cases were "junk" and a "sham", but decided to pay the tire worker claims anyway because of the big benefits of the settlement agreement. The weakness of this argument is initially apparent from the very premise it rests on.

For instance, the argument assumes Raymark's motivating factor was a business decision to lower its per case costs of disposing of all the asbestos claims against it. However, if, at the time it decided to go ahead and settle the tire worker cases, Raymark knew all the facts which are the basis for its fraud cause of action in this case (i.e, that apparently many, if not most, of the tire worker claims were without merit and could not pass Rule 11 muster, and the solicitation tactics used by the attorney defendants), its "business" decision to go ahead and settle such cases would have been truly unreasonable given the fact it could have recovered the costs to defend such suits under Rule 11.

Another apparent weakness in the defendants' argument is that, for purposes of this summary judgment motion, a reasonable interpretation of what was intended by statements made at the May 27, 1987 meeting of Raymark's national trial team that the tireworker cases are a "sham" and "85% junk cases" is that such counsel were sure they could win these cases if they went to trial. (*See* Defs.' Reply Brief, Aff. of Laurel Summers, Ex. 5., Smith Ex. 22, p. 4.) However, given the representations made by the defendant attorneys in the attorney certifications and the representations made by the doctors in the medical report (and assuming such statements were honestly made), it was reasonable for Raymark's counsel to conclude that the tire worker cases would pass Rule 11 muster and may also pass summary judgment muster. Thus, it is clear that Raymark did in fact rely on such statements being honestly made, and that such reliance was reasonable, since to assume otherwise would mean that Raymark would have had to accuse the defendants of committing a fraud on the court at a time when it did not have sufficient evidence of such.

Furthermore, defendants' argument that Raymark could not have relied on any misrepresentations because of its interest in settling the claims is not persuasive. Given the facts in this case, a jury could easily find that a substantial factor in Raymark's decision to pay the *Wells* tire worker claims was its reliance on the above-referenced representations. *See* RESTATEMENT (SECOND) OF TORTS § 546 ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss."). It does not matter that there are other reasons that induced Raymark into entering into the settlement agreement (i.e., for its own pecuniary gain), so long as a substantial factor was reliance on the representations in question.

***26** In addition, the defendants' arguments that Raymark's reliance on such representations was displaced or supplanted by its limited audit or its experience as an asbestos litigant [FN14] are unpersuasive. In Kansas, the recipient of a fraudulent misrepresentation is justified in relying on it unless he knows or has reason to know of facts which would put him on notice that the misrepresentation is false; mere doubts as to the truth

of the representation do not give rise to a duty to investigate. *Goff v. American Sav. Assoc.*, 1 Kan.App.2d 75, 561 P.2d 897 (1977) (following RESTATEMENT (SECOND) OF TORTS § 540 and comment c (tent. draft)); *Sippy v. Cristich*, 4 Kan.App.2d 511, 609 P.2d 204 (1980); and *KB Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1158 (10th Cir.1985). Furthermore, the RESTATEMENT (SECOND) OF TORTS § 547, comment a (1977), says that "It is only when he relies upon his investigation and does not rely on the false statement that he cannot recover. Whether he does rely upon one or the other or in substantial part upon both (see § 546) is a question of fact and is for the jury to determine, unless the evidence clearly indicates only one conclusion." An example from a couple of Kansas cases should make this point more clear.

In *Slaymaker v. Westgate State Bank*, 241 Kan. 525, 739 P.2d 444 (1987), the plaintiff purchased a 1962 TR-3 sports car which was misrepresented by the defendant to be "original/unrestored," with only 528 miles on the odometer. The plaintiff was admittedly suspicious about the representations because of the low mileage and low price and knew the defendant's representation that this was the last year the car was produced was false. In addition, the plaintiff insisted on a warranty from the defendant to repurchase the car if it was not as represented. Since he insisted on the warranty, it was clear that he relied on the warranty, not the misrepresentations. Therefore, there was ample evidence in *Slaymaker* to support the court's finding that the plaintiff could not have justifiably relied on the misrepresentations. In sum, since the plaintiff in fact did not believe that the representations were true, he was not deceived by the misrepresentations.

In contrast, in *Sippy v. Cristich*, 4 Kan.App.2d 511, 609 P.2d 204 (1980), while inspecting a house before deciding to purchase, the plaintiff noticed a water spot on the ceiling and inquired about the roof. After being assured that the roof had been repaired and was in good shape, the plaintiff purchased the house. However, after the first rain it was apparent that in fact the roof did leak. The *Sippy* court said that a jury could have found that the plaintiff had justifiably relied upon the truth of such representation without further investigation because the plaintiff did not possess facts which would have made his reliance unreasonable. *See also State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 159, 747 P.2d 1326 (1987) (where the defendant had superior knowledge about its product, the plaintiff had the right to rely on the defendant to tell the truth about its product, and had no reason not to so rely).

***27** Thus, since the only evidence Raymark possessed at the time it decided to allow the tire worker claims in the *Wells* settlement was that many, if not most, of the claims were weak and that Raymark would likely win at trial on such cases, it was still reasonable for the plaintiff to assume that the medical defendants had in fact truthfully made a "diagnosis" and that the attorney defendants had also acted truthfully in submitting the attorney certifications to the court. Furthermore, since the evidence indicates that in paying the tire worker claims Raymark continued to rely on the truth of the attorney certificates and the information in its settlement information forms even after the audit, this question must be addressed by the jury. *See* RESTATEMENT (SECOND) OF TORTS § 547, comment a (1976).

C. RICO Claim

Defendants' argument in support of their summary judgment motions on the RICO claim is that Raymark has no evidence of an intent to defraud, and as a result they are entitled to summary judgment on such claim. Since the court has already established herein that Raymark has produced sufficient evidence for a reasonable jury to find the defendants had the requisite fraudulent intent for common law fraud, the defendants' argument in support of summary judgment on Raymark's RICO claim is without merit. Furthermore, since the defendants do not bring into question any of the legal reasoning employed in this court's prior ruling that Raymark had stated a claim under RICO, the court will adopt such reasoning for purposes of the present motions. *Raymark I*, 714 F.Supp. at 468-76.

However, it should be noted that since this court's prior memorandum and order, the Supreme Court has ruled in a RICO action. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In that case, the Supreme Court addressed the "continuous" requirement. The Court held that to establish continuity, the plaintiff must demonstrate either "a closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.*, 109 S.Ct. at 2902; *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273 (10th Cir.1989); and *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 991 (8th Cir.1989). Furthermore, the Court said that closed-end continuity requires "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 109 S.Ct. at 2902. Since there is evidence which indicates that the scheme in question was

conducted over several years, the closed-end continuity requirement could be satisfied on the facts now before the court.[FN15]

D. *Negligence Claim Against the Doctors*

As has already been note in the introduction to this order, the medical defendants state several alternative grounds for their entitlement to summary judgment on the negligence claim asserted against them by Raymark. Since the court finds one of those grounds to be determinative, the court will not address the medical defendants' other arguments.

***28** The well settled rule in Kansas is that "the law favors compromise and settlement of disputes and generally, in the absence of bad faith or fraud, when parties enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it." *In re Estate of Thompson*, 226 Kan. 437, 440, 601 P.2d 1105 (1979). In addition, Kansas has recognized, as an exception to the above general rule, that a settlement agreement may be set aside on grounds of mutual mistake of the parties if it is established that the mistake is based on "the parties' unconscious ignorance and not related to one of the uncertainties of which the parties were conscious and which it was the purpose to the compromise to resolve and put at rest." *Id.* at Syl. 2.

In this case, it is uncontroverted that Raymark knew that three west coast doctors did all the medical reports and that Raymark's counsel believed 85% of the cases were junk. (Defs.' Reply Brief, Declaration of Laural K. Summers, Ex. 5, Attach. p. 4.) Moreover, Raymark knew others disagreed with the NTWLP medical screening findings. In addition, it is not controverted that Raymond H. Modesitt, a Raymark auditing attorney, saw some tire worker x-rays and said that in his opinion "the x-rays showed minimal evidence of asbestos disease" and concluded that "the cases were very weak in terms of evidence of disease, exposure and causation." (Defs.' Initial Brief, Aff. of Boggs, Ex. 17, ¶ ¶ 3- 4.)

Although the above examples are not exhaustive of what Raymark knew at the time it decided to allow the tire workers to participate in the settlement agreement, it is clear from this evidence that the court must conclude Raymark knew that some of the medical examinations or reports may have been negligently done.

Furthermore, since Raymark entered into the settlement agreement with such knowledge, it must be said to have settled the issue of the doctors negligence. [FN16] *See Sutherland v. Sutherland*, 187 Kan. 599, 605, 358 P.2d 776 (1961) ("It is now the settled law in Kansas where one in good faith asserts a claim not obviously invalid, worthless or frivolous, and which might be thought to be reasonably doubtful, the forbearance to prosecute such a claim will furnish a sufficient consideration for a promise of settlement and compromise of such claim."). Therefore, the court will only allow the settlement agreement in this case to be attacked on the basis that it was induced by fraud.

E. *Raymark's Claim for Rescission (Restitution)*

Raymark argues that it is entitled to rescission of the settlements because of "innocent misrepresentations" and "unilateral mistake." However, based on the preceding analysis disposing of Raymark's negligence claim, the court must likewise conclude that Raymark's claim for rescission/restitution must fail.

As has already been stated, Kansas favors settlement of disputes. As one court put it, "when parties enter into an agreement settling and adjusting a dispute neither party is permitted to repudiate it in the absence of *fraud, bad faith or mutual mistake of fact."* Rymph v. Derby Oil Co., *211 Kan. 414, 418, 507 P.2d 308 (1973) (emphasis added). Thus, it is apparent that Kansas does not allow claims of innocent misrepresentation or unilateral mistake as grounds for attacking a settlement agreement.*

***29** Finally, Raymark asserts that it is entitled to relief from the court's judgment ordering payment of funds to the defendants under Fed.R.Civ.P. 60(b) for fraud, accident, mistake or "any other reason justifying relief." The Federal Rules of Civil Procedure do not create substantive rights--substantive rights derive from state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). However, if, in fact, Raymark is able to prove that the defendants did commit a fraud either against Raymark or the court, then Raymark will be entitled to "restitution", being the monies already paid out to the tire workers, and those proceeds now on deposit will be returned to Raymark.

IT IS ACCORDINGLY ORDERED this 30 day of May, 1990, that defendants' motions for summary judgment on plaintiff's fraud and RICO claims are denied.

IT IS FURTHER ORDERED that the defendants' motions for summary judgment on plaintiff's rescission claim and its claim of negligence against

the medical defendants are granted.

As indicated at the time of hearing, the court will now suspend this matter to July 2, 1990, at 2:00 P.M. (CDT), for a status conference. Counsel are at liberty to stand by for a conference call. At that time, the court will take up the remaining requisites of discovery, assuming that same can be accomplished within the following 90 days. The court contemplates scheduling the pretrial conference, a settlement conference, and the jury trial at said status conference.

FN1. The *Wells* settlement represented approximately 20,000 asbestos claims, including the tire workers; approximately $34 million was paid into the court by Raymark; approximately $15 million of this sum has been paid over to the tire workers. The remaining 808 cases have been stayed and approximately $2.2 million is on deposit at this time.

FN2. The medical reports appeared on their face to be a valid diagnosis of an asbestos-related injury by doctors competent to do such. (Pltf.'s Ex. E, p. 1031.)

FN3. That article also says, in relevant part, the following about the necessary time interval between exposure and detection: Evidence of asbestosis has been found many years after relatively brief but extremely heavy exposure. Such exposure often occurred in the asbestos textile industry over 50 years ago and has occurred more recently in workers who have not used respiratory protection while spraying dry asbestos on steel beams. Fortunately, such exposure is rare at this time. *With levels of exposure common in the past few decades, the latent period between the state of the exposure and the discovery of the manifestations of asbestosis is likely to be a minimum of 15 years, and more often considerably longer.* (Pltf.'s Ex. E(2), p. 1041 (emphasis added).)

FN4. Specifically, the AMA Guides note the following (*see* Pltf.'s Ex. E(8), p. 1095):
A detailed history of the patient's employment in chronological order should be obtained. It is easiest to begin with the most recent job and work back to the earliest job. The examiner should ask about the specific activities in each job, rather than about only the job title. An employee should be questioned about exposures to dusts, gases, vapors and fumes. The specific information required involves (1) the year he or she was first exposed to an agent; (2) the extent of the exposure; (3) the total number of years of exposure; (4) his or her estimate of the hazard that the agent posed; and (5) the number of years since exposure ceased.

FN5. The NTWLP is the fictitious business name of the firm of Stemple & Boyajian. (Pltf.'s Ex. C(1).) An information sheet given to tire workers before they became "members" of the NTWLP described the organization as follows:
In mid-1985 a series of lawsuits were commenced by a group of victims' attorneys related to the operations and health practices of the former Firestone plant in Salinas, California. The victims' attorneys call their organization the "*TIRE WORKERS' LITIGATION PROJECT.*"
(Pltf.'s Ex. C(10), p. 654.)

FN6. It should be noted that at oral argument counsel for the attorney defendants admitted that the doctor defendants were the agents of the NTWLP, and thus, Stemple and Gerry. As a result, any misconduct or the requisite intent by the doctor defendants might be imputed to the attorney defendants under a principal/agent theory.

FN7. Although fraud on the court is generally applied to grant a party relief from a final judgment of the court, this court believes that such a remedy is equally applicable where the court must approve the settlement agreement as fair, adequate and reasonable, and that it is not the product of fraud or collusion among the negotiating parties. *In re Dept. of Energy Stripper Well Exemption Lit.*, 653 F.Supp. 108, 115 (D.Kan.1986), *aff'd* 855 F.2d 865 (1988). *See also Smith v. Josten's American Yearbook Co.*, 78 F.R.D. 154, 168 (D.Kan.1878), *aff'd*, 624 F.2d 125 (10th Cir.1980) (in the context of a class action

the court must find the proposed disposition of the case to be in the interest of the whole class). In addition, the Kansas Supreme Court has recently recognized that although a consent judgment (which is very similar to the type of settlement agreement at issue in this case) is construed largely as a contract, it is enforced like an order. *Beaver v. Kingman*, 246 Kan. 145, 148, 785 P.2d 998 (1990).

FN8. It should be noted that the Tenth Circuit in *Bulloch* reversed the district court's finding of fraud on the court. In its original 1956 ruling, the district court found for the government in a Tort Claims Act suit which alleged that the government's atmospheric testing of nuclear devices had caused a sheep rancher major losses. Twenty-five years later, the same district court set aside that judgment pursuant to Rule 60(b) on the ground of fraud. In finding that the district court had abused its discretion in setting aside its prior judgment, the Tenth Circuit noted that no new evidence had been presented, plaintiffs had not shown fraud on the court by clear and convincing proof, and the 25-year delay had not been explained. Thus, *Bulloch* is clearly distinguishable from the present case since there has not been a long period of unexplained delay and the plaintiff now has facts which it did not have before entering into its settlement agreement. Furthermore, since it is a summary judgment motion that is now before the court and the court finds herein that there is factual evidence which would support a claim of fraud, it follows that the plaintiff might be able to come forward with clear and convincing evidence of fraud on the court.

FN9. If the court would accept such a definition of diagnosis, it could be given any meaning which might mean the settlement agreement should fail for indefiniteness.

FN10. It should be noted that defendants' argument that many of the representations in question were statements of opinion is without merit. *See Sparks v. Guaranty State Bank*, 179 Kan. 236, 238, 293 P.2d 1017 (1956) ("statements coming from one who was in position to know were not mere expressions of opinion"); and RESTATEMENT (SECOND) OF TORTS § 538A comment b (a positive assertion that a fact is true implies that the maker has definite knowledge or information which justifies the positive assertion).

FN11. *See* (Pltf.'s Ex. C(42), p. 872), *Slaughter v. Southern Talc Co.*, No W-87-CA-060 (W.D.Tex.) (in granting a partial summary judgment motion against 421 tire worker plaintiffs, the Honorable Walter Smith stated that he "has carefully weighed the reliability and foundation of plaintiffs' experts [Rao and Gelbard] and finds it lacking in all respects"); (Pltf.'s Ex. I, p. 1127) (the Carle Clinic--115 tire workers tested, 6 found to have pleural thickening which "might" be related to asbestos exposure, and only two were found to have asbestosis--23 of the 115 workers tested had been diagnosed as having an asbestos-related disease by the NTWLP, but the Carle Clinic found *no* asbestos-related disease in any of those individuals); (Pltf.'s Ex. I, p. 1125) (the Monterey study--43 former Firestone employees examined--none found to have any asbestos- related injury); (Pltf.'s Ex. C(33), pp. 710-30) (NIOSH Final Report--tire worker sample included 987 tire workers from nine plant locations around the country--only two cases identified parenchymal change (.2%) and pleural abnormalities were identified in only 22 of the 987 films reviewed (2.2%)).

FN12. In citing to the above-referenced footnote, the defendants indignantly argue that "as previously stated by this court, the method of retention of the lawyers is not at issue in this case." (Defs.' Rely Brief, pp. 3 & 54.) The court did not intend to imply, nor does the court believe it is a reasonable interpretation of that footnote to imply, that any unethical conduct by the attorney defendants is not relevant to the issue of fraud. All that was intended is that if, in fact, unethical conduct has occurred in this case, the issue of whether to impose disciplinary sanctions (i.e., disbarment) on such attorneys is not properly before this court, and that such issues are more properly addressed by the state disciplinary authority

(i.e., the California Bar).

FN13. Model Rule 1.5(e)(2), in relevant part, says that a division of fees between lawyers who are not in the same firm may be made only if: "the client is advised of and does not object to the participation of all the lawyers involved."

FN14. Raymark's status as an experienced asbestos litigant did not supplant its reliance on the defendants' misrepresentation. Raymark did not have any superior information on asbestos in the tire worker industry-- this was an uncharted area for both Raymark and medical research. In addition, Stemple and Gerry created and controlled the NTWLP, and only they had the intimate knowledge of its innermost workings. Furthermore, it would be unreasonable to impute to Raymark the cumulative knowledge of what was in every news article about Stemple and Gerry and the NTWLP. Moreover, a few of the facts which the articles did not reveal include: that the doctor defendants violated accepted diagnostic criteria; the protocol set up by Gelbard was vastly different than she had used in her prior practice; that Rao and Bharadwaja did not know or care what these reports were being used for; and the extent and details of the attorney defendants' solicitation scheme.

FN15. It should also be noted that the Tenth Circuit has recently noted that a RICO claim can be supported either by a "scheme to defraud" or a "scheme to obtain money by false or fraudulent pretenses, representations or promises" and that the necessary proof differs for the separate offenses. *U.S. v. Harrison P. Cronic*, No. 88-2939, slip op. at 6 (10th Cir. Apr. 11, 1990).

FN16. It should be noted that such a finding does not in any way bring in doubt the court's previous finding that there is evidence to support a finding that Raymark reasonably relied on the doctor defendants' representations. Even though Raymark may have known or had reason to know that some of the medical exams and reports were negligently done, Raymark still reasonably relied on such doctors truthfully believing they were making a diagnosis and following reasonable medical procedure for such, because if such representations were truthfully made, it meant that the cases would probably pass Rule 11 and possibly summary judgment muster. Furthermore, knowledge of negligence by the doctors does not necessarily evidence a scheme to defraud.

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