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RAND Institute for Civil Justice Report on the Abuse of  
Medical Diagnostic Practices in Mass Tort Litigation:  
Lessons Learned from the “Phantom” Silica Epidemic  
That May Deter Litigation Screening Abuse

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RAND INSTITUTE FOR CIVIL JUSTICE REPORT ON THE  
ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS TORT  
LITIGATION: LESSONS LEARNED FROM THE "PHANTOM"  
SILICA EPIDEMIC THAT MAY DETER LITIGATION  
SCREENING ABUSE

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In June 2005, United States District Court Judge Janis Graham Jack of the Southern District of Texas issued a landmark opinion declaring that all but one of ten thousand cases aggregated for pretrial purposes under Multidistrict Litigation ("MDL") 1553 were based on "fatally unreliable" diagnoses.<sup>1</sup> Judge Jack found that the claims "were driven by neither health nor justice: they were manufactured for money."<sup>2</sup> The broad media reporting of Judge Jack's findings sparked criminal and congressional inquiries in which the suspect doctors "took the Fifth."<sup>3</sup>

The RAND Institute for Civil Justice recently issued a report that carefully examines the MDL 1553 litigation to identify lessons that can be learned about the civil justice system's ability to detect and address abusive medical diagnostic practices in mass personal injury litigation.<sup>4</sup>

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<sup>1</sup> See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 675 (S.D. Tex. 2005).

<sup>2</sup> *Id.* at 635.

<sup>3</sup> See Jonathan D. Glater, *Civil Suits over Silica in Texas Become a Criminal Matter in New York*, N.Y. TIMES, May 18, 2005, at C5; Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3.

<sup>4</sup> See STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, THE ABUSE OF MEDICAL

## I. SILICA LITIGATION: BACKGROUND AND MDL 1553

A. *Knowledge and Regulation*

Silica—quartz in its most common form—is a ubiquitous mineral that covers beaches and fills children’s sandboxes.<sup>5</sup> In its natural form, silica is not especially harmful. When fragmented into tiny particles, however, silica can be dangerous if inhaled in excess of certain levels for a prolonged period. Plaintiffs in silica cases assert that they suffer from a disease—primarily silicosis, or scarring of the lungs—as a result of exposure to silica dust through their occupations in various industries. RAND notes: “Workers in many industries, including mining, quarrying, construction, glass, cement, abrasives, ceramics, and iron and steel mills, can be exposed to silica.”<sup>6</sup>

The risks of silica exposure have been well-known for a long time. For instance, as far back as 1949, the United States Supreme Court noted: “It is a matter of common knowledge that it is injurious to the lungs and dangerous to the health to work in silica dust.”<sup>7</sup>

The Federal Occupational Safety & Health Administration (“OSHA”) has regulated workplace silica exposure since the early 1970s.<sup>8</sup> Today, OSHA provides detailed regulations requiring employers to protect employees from overexposure to silica through the enforcement of permissible exposure limits (“PELs”) for occupational exposure to airborne silica<sup>9</sup> and the OSHA Hazard Communications Standard.<sup>10</sup> States also have acted to protect workers from overexposure. For instance, many states set

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DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA (2009), [http://www.rand.org/pubs/technical\\_reports/2009/RAND\\_TR774.pdf](http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf); see also JUDYTH PENDELL, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, REGULATING ATTORNEY-FUNDED MASS MEDICAL SCREENINGS: A PUBLIC HEALTH IMPERATIVE? (2005), <http://www.reg-markets.org/admin/authorpdfs/page.php?id=1193>.

<sup>5</sup> See Cassandra R. Cole & Kathleen A. McCullough, *A Discussion of the Legal and Legislative Issues Surrounding Silica-Related Injuries*, J. INS. REG., Summer 2005, at 21, 23.

<sup>6</sup> See CARROLL ET AL., *supra* note 4, at 2.

<sup>7</sup> *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

<sup>8</sup> In 1971, federal regulations set permissible exposure limits for occupational exposure to airborne silica. 41 C.F.R. § 50-204.50 (2009). In 1974, OSHA applied extensive abrasive blasting safety regulations, enacted for government contractors in the 1960s under the Walsh-Healy Act, to all employers, 29 C.F.R. § 1910.94(a)(5)(ii) (2009), and adopted standards for working with silica in the construction and maritime industries. 29 C.F.R. § 1910.1000 tbl.Z-3 (2009).

<sup>9</sup> 41 C.F.R. § 50-204.50.

<sup>10</sup> OSHA also addresses the use of protective equipment. See, e.g., 29 C.F.R. §§ 1910.94(a)(5)(i), (v), 1910.1000(e), 1910.134(a)(2), 1915.34(c)(3), 1926.55(b), 1926.57(f)(5), 1926.103.

threshold levels for silica dust in the workplace,<sup>11</sup> prohibit minors from working with silica refractory products,<sup>12</sup> and offer other worker protections.<sup>13</sup>

The Centers for Disease Control & Prevention (“CDC”) and the National Institute for Occupational Safety & Health (“NIOSH”) have reported that nationwide silicosis deaths declined sharply, from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, to 148 in 2002—a 93% decline in overall mortality.<sup>14</sup> Similarly, a 2005 study by OSHA staff found “a downward trend in the airborne silica exposure levels” from 1988–2003.<sup>15</sup> RAND found that “[b]etween 1995 and 2004, silicosis-related deaths were generally stable or decreasing in all states.”<sup>16</sup>

For years, silica litigation generally reflected this public health success. The litigation was stable with only a low number of people pursuing silica claims in any given year.<sup>17</sup>

### B. A Spike in Silica Claims

“[P]laintiffs’ lawyers filed an unprecedented number of silica cases from 2002 to 2004—a total of 20,479 cases in Mississippi alone—an amount ‘five times greater than one would expect over the same period in the *entire* United States.’”<sup>18</sup> The drastic rise in

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<sup>11</sup> See, e.g., ALA. CODE § 25-9-111(a) (2007); 225 ILL. COMP. STAT. § 705/24.06 (2007); W. VA. CODE § 22A-2-24(d) (2005).

<sup>12</sup> See, e.g., ARIZ. REV. STAT. ANN. § 23-231(A)(12) (1995); COLO. REV. STAT. § 8-12-110(2)(h) (2008); N.Y. LAB. LAW § 133(2)(g) (McKinney 2009).

<sup>13</sup> See, e.g., MINN. STAT. § 144.34 (2005) (requiring physicians to report suspected silica exposure to the State Department of Health); MONT. CODE ANN. § 39-73-104 (2009) (establishing eligibility for those with silicosis who cannot continue employment to receive special silicosis benefits); NEV. REV. STAT. § 617.168 (2006) (creating a state general fund for silicosis pensions); S.D. CODIFIED LAWS § 62-8-27 (2009) (allowing discharge and compensation for those with non-disabling silicosis), § 62-8-28 (providing that employees may petition the state for examination for silicosis).

<sup>14</sup> See NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., WORKER HEALTH CHARTBOOK 169 fig.2-192 (2004), <http://www.cdc.gov/niosh/docs/2004-146/detail/imagetdetail.asp@imgid234.htm>; Ctrs. for Disease Control & Prevention, Dep’t of Health & Human Servs., *Silicosis Mortality, Prevention and Control—United States, 1968–2002*, 54 MMWR WKLY. 401, 402 (2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>.

<sup>15</sup> Abdiaziz Yassin et al., *Occupational Exposure to Crystalline Silica Dust in the United States, 1988–2003*, 113 ENVTL. HEALTH PERSPECTIVES 255, 255 (2005).

<sup>16</sup> CARROLL ET AL., *supra* note 4, at 44.

<sup>17</sup> See Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, MEALEY’S LITIG. REP. SILICA, Feb. 2005, at 21, 24 & tbl. [hereinafter Behrens et al., *Silica: An Overview*]; Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173, 193 (2006).

<sup>18</sup> David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass*

claims against U.S. Silica, a leading supplier, exemplified this surge. In 1998, U.S. Silica was named in 198 silicosis claims; the number of claims jumped to 1,356 in 2001 before soaring to 5,277 in 2002 and skyrocketing to 19,865 in 2003.<sup>19</sup> Nearly two-thirds of the claims filed against U.S. Silica between 2001 and 2003 were filed in Mississippi state courts; most of the other cases were filed in Texas state courts.<sup>20</sup>

Other defendants experienced a similar pattern: "Before 2002, one respirator manufacturer had about 200 silicosis claims filed against it each year. Between 2002 and 2004, 29,000 silicosis claims were filed—a 5000% increase in claims filed."<sup>21</sup>

If legitimate, this spike would have suggested "perhaps the worst industrial disaster in recorded world history."<sup>22</sup> Within two years, however, the litigation was essentially over. According to RAND, "[t]he proceeding in Judge Jack's court exposed gross abuses in the diagnosing of silica-related injuries, and, due in large part to her findings, the litigation collapsed."<sup>23</sup>

### C. Judge Jack: The Phantom Epidemic

MDL 1553 began in September 2003 when over ten thousand individual silicosis claims that primarily originated in Mississippi state court were removed to federal court and centralized for pretrial purposes before Judge Jack.<sup>24</sup>

As a trained nurse, Judge Jack appreciated that the surge in claims defied medical explanation. She observed: "The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the

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*Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 258 (2007) (quoting *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 571–72 (S.D. Tex. 2005)).

<sup>19</sup> See Kimberly A. Strassel, *He Fought the Tort Bar—and Won*, WALL ST. J., May 4, 2009, at A14; CARROLL ET AL., *supra* note 4, at 3.

<sup>20</sup> See CARROLL ET AL., *supra* note 4, at 3. During this period, Mississippi had liberal joinder and venue rules that allowed large numbers of claims to flow into the state.

<sup>21</sup> Behrens et al., *Silica: An Overview*, *supra* note 17, at 24; see also Susanne Sclafane, *Silica Dust: The Next Asbestos? Hard Hat Maker With Former RIMS President Among 160 Defendants Facing Dust Claims*, NAT'L UNDERWRITER PROP. & CAS.—RISK & BENEFITS MGMT., May 10, 2004, at 10 (noting that E.D. Bullard Co., the inventor of the hard hat, faced a "surge" of silica claims in 2003, from 62 cases filed by roughly 200 plaintiffs in 1999 to 156 cases filed by 4,305 plaintiffs in 2002 to 643 cases filed by 17,288 plaintiffs in 2003).

<sup>22</sup> *In re Silica*, 398 F. Supp. 2d at 572.

<sup>23</sup> CARROLL ET AL., *supra* note 4, at ix.

<sup>24</sup> See *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381 (J.P.M.L. 2003); *In re Silica*, 398 F. Supp. 2d at 573.

nation.”<sup>25</sup> Instead, Judge Jack offered two theories as to why there was a sudden increase in silica claims: (1) plaintiffs’ attorneys sought to beat the effective date of major civil justice reform legislation in Mississippi; and (2) asbestos plaintiffs’ attorneys wanted to diversify their litigation portfolios.<sup>26</sup>

The events in MDL 1553 that would lead to the exposure of “gross deficiencies in the diagnoses underlying the silica claims” were spurred by the review of fact sheets submitted by the plaintiffs.<sup>27</sup> Early in the litigation, Judge Jack ordered that each plaintiff submit “a sworn fact sheet specifying [his or her] diagnosis and [all] pertinent medical and diagnostic information, as well as the results of B-reads of chest x-rays.”<sup>28</sup> A plaintiff’s claim was dismissed if he or she failed to submit a fact sheet.<sup>29</sup>

The fact sheets revealed several suspicious patterns.

First, in almost all cases, the fact sheets showed that the diagnosis supplied by the plaintiff’s treating physician was not the basis for the plaintiff’s claim.<sup>30</sup> According to Judge Jack:

In virtually every case, these doctors were not the Plaintiffs’ treating physicians, did not work in the same city or . . . state as the Plaintiffs, and did not otherwise have any . . . connection to the Plaintiffs. Rather than being connected to the Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile x-ray screening companies.<sup>31</sup>

Second, “although almost all the plaintiffs had different treating physicians, a very small number of B-readers accounted for almost

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<sup>25</sup> *In re Silica*, 398 F. Supp. 2d at 572.

<sup>26</sup> *Id.* at 620; see also CARROLL ET AL., *supra* note 4, at 12–13; see also Maron & Jones, *supra* note 18, at 256 (“Due to the effective dates of the Mississippi Legislature’s two major tort reform measures, a significant majority of mass tort filings deluged Mississippi courts in December 2002 (to avoid the January 1, 2003 effective date of Mississippi’s 2002 tort reform legislation) and again in late Summer 2004 (to avoid the September 1, 2004 effective date of the 2004 tort reform legislation.)”); Roy T. Atwood et al., Commentary, *In Silica Litigation, The Numbers Alone Dictate Careful Scrutiny of Injury and Causation*, ANDREWS ASBESTOS LITIG. REP., Dec. 4, 2003, at 12, 12 (“Most commentators point to pending legislative efforts relating to asbestos litigation, tort-reform initiatives in Mississippi and Texas, and the use of mass screenings as the reason silicosis ‘victims’ have seemingly emerged from the woodwork.”); Susan Warren, *Silicosis Suits Rise Like Dust—Lawyers in Asbestos Cases Target Many of the Same Companies*, WALL ST. J., Sept. 4, 2003, at B5 (“Some from the defense side charge that the sudden rise in silicosis claims coincides with increasing constraints on asbestos litigation in state courts, as well as the threat of legislation that would create a national trust fund and eliminate asbestos litigation altogether.”).

<sup>27</sup> CARROLL ET AL., *supra* note 4, at ix.

<sup>28</sup> *Id.* at ix–x.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 580 (S.D. Tex. 2005).

all of the plaintiffs' B-reads and diagnoses."<sup>32</sup> Over nine thousand plaintiffs returned fact sheets, and they listed roughly eight thousand different doctors.<sup>33</sup> "Remarkably, however, only twelve doctors diagnosed more than 9,000 plaintiffs with silicosis."<sup>34</sup>

Third, the defense attorneys recognized that some of the B-readers who figured prominently in the silica litigation had been involved in asbestos litigation.<sup>35</sup>

Armed with information from the fact sheets, the defendants began deposing a few of the diagnosing doctors in late 2004. Dr. George Martindale "testified that he had not intended to diagnose these individuals with silicosis and withdrew his diagnoses."<sup>36</sup> Dr. Martindale claimed that "he assumed that he was simply confirming a diagnosis made by each plaintiff's personal physician, although no such diagnoses were ever made."<sup>37</sup> Additionally, he "purportedly diagnosed 3,617 MDL plaintiffs with silicosis while retained by the screening company N&M."<sup>38</sup> According to Judge Jack, "[t]hese 3,617 diagnoses were issued on only 48 days, at an average rate of 75 diagnoses per day."<sup>39</sup>

The defendants subsequently deposed Glyn Hilburn and Kevin Cooper, two other screening doctors, "who had been listed as the diagnosing doctors on 471 and 255 plaintiff fact sheets, respectively."<sup>40</sup> "Both doctors essentially echoed Martindale's testimony,"<sup>41</sup> emphasizing "that they did not diagnose any of the Plaintiffs with silicosis. Indeed, both doctors testified that they had *never* diagnosed anyone with silicosis."<sup>42</sup> They claimed "that N&M had inserted the diagnosis-of-silicosis language into their reports without their knowledge."<sup>43</sup>

Soon thereafter, in February 2005, at *Daubert* hearings before Judge Jack, it was established that N&M "helped generate

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<sup>32</sup> CARROLL ET AL., *supra* note 4, at 8.

<sup>33</sup> John P. Hooper et al., *Undamaged: Federal Court Establishes Criteria for Mass Tort Screenings*, MASS TORTS NEWSL. (ABA Sec. of Litig., Comm. On Mass Tort Litig.), Summer 2007, at 12, 12-13.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> CARROLL ET AL., *supra* note 4, at 8.

<sup>36</sup> David M. Setter & Andrew L. Kalish, Commentary, *Recent Screening Developments: The MDL Silica 1553 Daubert Hearing*, MEALEY'S LITIG. REPORT SILICA, May 2005, at 20, 21.

<sup>37</sup> CARROLL ET AL., *supra* note 4, at 9.

<sup>38</sup> Setter & Kalish, *supra* note 36, at 21.

<sup>39</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 582 (S.D. Tex. 2005); *see also* CARROLL ET AL., *supra* note 4, at 8-9.

<sup>40</sup> CARROLL ET AL., *supra* note 4, at 9.

<sup>41</sup> *Id.*

<sup>42</sup> *In re Silica*, 398 F. Supp. 2d at 588 (citation omitted).

<sup>43</sup> *See* CARROLL ET AL., *supra* note 4, at 9.

approximately 6,757 claims in th[e] MDL, while [another screening firm.] RTS . . . helped generate at least 1,444 claims.”<sup>44</sup> N&M generated these 6,500-plus claims in just ninety-nine screening days.<sup>45</sup> As the court noted, “[t]o place this achievement in perspective, in just over two years, N&M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period.”<sup>46</sup> Furthermore, at least 4,031 N&M-generated plaintiffs had previously filed asbestosis claims with the Manville Personal Injury Settlement Trust, although “a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis.”<sup>47</sup> “N&M was paid by the hiring law firm only for positive diagnoses. Payment was contingent on a positive diagnosis and the potential plaintiff signing with the law firm.”<sup>48</sup>

The most prolific MDL diagnosing physician, Dr. Ray Harron, was involved in the diagnosis of approximately 6,350 of the silica MDL plaintiffs in just ninety-nine days, and was listed as the diagnosing physician for approximately 2,600 plaintiffs.<sup>49</sup> “He seemed at a loss to explain how permanent signs of asbestosis he’d diagnosed disappeared years later when he diagnosed the same workers with silicosis.”<sup>50</sup> His testimony “abruptly ended when the Court granted his request for time to obtain counsel.”<sup>51</sup>

Dr. Harron’s son, Dr. Andrew Harron, diagnosed approximately 505 MDL plaintiffs for N&M.<sup>52</sup> “Like his father, he never saw or read any of the reports purportedly written and signed by him.”<sup>53</sup>

“It became clear during the testimony of James Ballard, another of the diagnosing physicians, that similar practices were followed for plaintiffs screened by RTS.”<sup>54</sup> Dr. Ballard performed nearly fifteen hundred x-ray readings. “Like [Ray] Harron, he also read a number of x-rays differently depending on what the hiring law firm was looking for—initially asbestosis, then silicosis.”<sup>55</sup> The

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<sup>44</sup> *In re Silica*, 398 F. Supp. 2d at 596.

<sup>45</sup> See Setter & Kalish, *supra* note 36, at 22.

<sup>46</sup> *In re Silica*, 398 F. Supp. 2d at 603.

<sup>47</sup> *Id.*

<sup>48</sup> CARROLL ET AL., *supra* note 4, at 11.

<sup>49</sup> See *In re Silica*, 398 F. Supp. 2d at 606.

<sup>50</sup> Lynn Brezosky, *Judge: Diagnoses Methods in Silicosis Case ‘Frightening’ West Virginia Doctor Involved in Multistate Lawsuit in Texas*, CHARLESTON GAZETTE, Feb. 19, 2005, at 6D.

<sup>51</sup> *In re Silica*, 398 F. Supp. 2d at 608.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 609.

<sup>54</sup> CARROLL ET AL., *supra* note 4, at 12.

<sup>55</sup> *Id.*

defendants presented over a dozen examples where Dr. Ballard had previously diagnosed the same individuals with lung conditions consistent with asbestosis.<sup>56</sup>

Dr. Barry Levy diagnosed almost fourteen hundred plaintiffs,<sup>57</sup> including eight hundred in seventy-two hours.<sup>58</sup> “He spent only four minutes on each diagnosis.”<sup>59</sup> “[I]t is clear that Dr. Levy had an agenda: diagnose silicosis and nothing else.”<sup>60</sup>

Another screening doctor, Todd Coulter, diagnosed 237 MDL plaintiffs in eleven days as part of a contract with a company, Occupational Diagnostics, which was run from a Century 21 realty office and would hold screenings from a “trailer in the parking lots of restaurants and hotels.”<sup>61</sup> Dr. W. Allen Oaks diagnosed approximately two hundred plaintiffs and performed x-ray reads on 447 plaintiffs. Despite issuing 200 diagnoses, “he declined to label himself as an ‘expert in . . . diagnosing silicosis.’”<sup>62</sup>

In June 2005, Judge Jack issued a scathing opinion stating, “the Court is confident . . . that the ‘epidemic’ of some 10,000 cases of silicosis ‘is largely the result of misdiagnosis.’”<sup>63</sup> Judge Jack concluded that “the failure of the challenged doctors to observe the same standards for a ‘legal diagnosis’ as they do for a ‘medical diagnosis’ render[ed] their diagnoses . . . inadmissible.”<sup>64</sup> She then remanded all but one case to state court, citing lack of jurisdiction while questioning the validity of virtually every claim.<sup>65</sup>

In the one case Judge Jack retained, she found that the plaintiffs’ law firm multiplied the proceedings unreasonably and vexatiously, describing the firm’s behavior as part of a larger process to “overwhelm[] the system to prevent examination of each individual claim and to extract mass settlements.”<sup>66</sup> She then “prorated her estimate of the costs of the proceedings and set the fine at \$8,250, a small figure compared to the total costs defendants and the courts

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<sup>56</sup> *In re Silica*, 398 F. Supp. 2d at 609.

<sup>57</sup> *Id.* at 611.

<sup>58</sup> See *Setter & Kalish*, *supra* note 36, at 24.

<sup>59</sup> *CARROLL ET AL.*, *supra* note 4, at 12.

<sup>60</sup> *In re Silica*, 398 F. Supp. 2d at 615.

<sup>61</sup> *Id.* at 616; see also *Setter & Kalish*, *supra* note 36, at 24 (“Dr. Harold Todd Coulter . . . diagnosed 237 patients in 11 days inside an x-ray van parked at such places as a Sizzler restaurant.”).

<sup>62</sup> See *In re Silica*, 398 F. Supp. 2d at 618.

<sup>63</sup> *Id.* at 632 (citation omitted).

<sup>64</sup> *Id.* at 634.

<sup>65</sup> *Id.* at 679; see *In re Silica Prods. Liab. Litig.*, No. MDL 1553, 2005 WL 2711320, at \*1 (S.D. Tex. Sept. 30, 2005).

<sup>66</sup> *In re Silica*, 398 F. Supp. 2d at 676.

