

# ASBESTOS LITIGATION SCREENING CHALLENGES: AN UPDATE

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## I. INTRODUCTION

In 2003, Professor Lester Brickman, an expert on asbestos litigation, excoriated the asbestos-litigation industry as a “massive client recruitment effort”<sup>1</sup> fueled by specious evidence that scholars and many courts refused to acknowledge up to that time.<sup>2</sup> Professor Brickman predicted,

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1. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 168 (2003). *U.S. News & World Report* described the recruitment process:

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: “Find out if YOU have MILLION DOLLAR LUNGS!”

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36; see *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (“Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”); JUDYTH PENDELL, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, *REGULATING ATTORNEY FUNDED MASS MEDICAL SCREENING: A PUBLIC HEALTH IMPERATIVE?* (2005), <http://www.aei-brookings.org/>

When the complete and unexpurgated history of asbestos litigation is finally written, that litigation will surely come to be considered for entry into the pantheon of such great American scandals as the . . . Savings & Loan scandals, WorldCom, and Enron. Even as that history is being written and assimilated, it has already become apparent that, for the most part, asbestos litigation has become a malignant enterprise. Despite mounting evidence of massive, specious claiming in asbestos litigation, few voices appear willing to acknowledge this reality.<sup>3</sup>

At about the same time, others began to scrutinize the practice of mass screenings. For example, former United States Attorney General Griffin Bell observed in 2003 that “[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up.”<sup>4</sup> Bell said that mass screenings conducted by plaintiffs’ lawyers and their agents had “driven the flow of new asbestos claims by healthy plaintiffs.”<sup>5</sup>

An American Bar Association Commission on Asbestos Litigation confirmed that claims filed by the nonsick generally arose from for-profit screening companies whose sole purpose was to identify large numbers of people with minimal X-ray changes consistent with asbestos exposure.<sup>6</sup> The Commission, with the help of the American Medical Association,

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publications/abstract.php?pid=993.

2. See Brickman, *supra* note 1, at 161.

3. *Id.* at 35.

4. Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003).

5. *Id.*; see James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 823 (2002) (“By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.”); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1 (“Very few new plaintiffs have serious injuries, even their lawyers acknowledge . . . . ‘The overwhelming majority of these cases . . . are brought by people who have no impairment whatsoever.’”) (citation omitted); Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004, at 186 (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are ‘unimpaired’—that is, they have slight or no physical symptoms.”).

6. See COMM’N ON ASBESTOS LITIG., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 8 (2003), available at [http://www.abanet.org/leadership/full\\_report.pdf](http://www.abanet.org/leadership/full_report.pdf) [hereinafter ABA COMM’N REP.] (recommending a “Standard for Non-Malignant Asbestos-Related Disease Claims”).

consulted prominent occupational-medicine and pulmonary-disease physicians to craft legal standards for asbestos-related impairment.<sup>7</sup> The Commission found: “Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars—in some cases, millions—in the aggregate by the litigation screening companies due to the volume of films read.”<sup>8</sup> The Commission also reported that litigation screening companies were finding X-ray evidence that was consistent with asbestos exposure at a “startlingly high” rate, often exceeding 50% and sometimes reaching 90%.<sup>9</sup>

Shortly thereafter, researchers at Johns Hopkins University compared the X-ray interpretations of B Readers employed by plaintiffs’ counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays’ origins.<sup>10</sup> The study found that, while B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in almost 96% of the X-rays, the independent B Readers found abnormalities in less

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7. *Id.* at 11. In February 2003, the ABA’s House of Delegates adopted the Commission’s proposal for the enactment of federal medical-criteria standards for nonmalignant asbestos-related claims. See *Asbestos Litigation Crisis: Hearings Before the S. Comm. on the Judiciary*, 108th Cong. 21–22 (2003) (statement of Dennis W. Archer, President-Elect, Am. Bar Ass’n), available at <http://www.gpo.gov/congress/senate/pdf/108hr/89326.pdf>.

8. ABA COMM’N REP., *supra* note 6, at 8.

9. *Id.* One of the earliest detailed reviews of B Reads in litigation arose out of information distributed to tire workers, which said that 94% of the workers screened at one location and 64% of the workers screened at another location were found to have asbestosis. See *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 WL 72588, at \*10 (D. Kan. May 30, 1990). In 1986, the National Institute for Occupational Safety and Health (NIOSH) looked into the matter and found that only 0.2% of the workers they evaluated had physical changes consistent with asbestosis. See J. JANKOVIC & R. B. REGER, HEALTH HAZARD EVALUATION REPORT, NIOSH Rep. No. HETA 87-017-1949, at 11 (Dep’t Health & Human Servs., NIOSH 1989). In 1998, an audit by the Manville Settlement Trust determined that 59% of X-ray readings relied upon by plaintiffs’ counsel to show asbestos-related abnormalities were inaccurate. See *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002). Another review of asbestos cases conducted by medical experts appointed by U.S. District Court Judge Carl Rubin of the Southern District of Ohio found that 65% of the claimants reviewed had no asbestos-related conditions and 20% presented only pleural plaques. See Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39 (1991).

10. Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 843 (Aug. 2004).

than 5% of the same X-rays—a difference the researchers said was “too great to be attributed to inter-observer variability.”<sup>11</sup>

One physician, Dr. Lawrence Martin, has explained the reason why plaintiffs’ B Readers seem to see asbestos-related lung abnormalities on chest X-rays in numbers not seen by neutral experts.<sup>12</sup> Dr. Martin has said, “[T]he chest x-rays are not read blindly, but always with knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker’s behalf.”<sup>13</sup> In 2005, Senior U.S. District Court Judge John Fullam said that many B Readers hired by plaintiffs’ lawyers were “so biased that their readings were simply unreliable.”<sup>14</sup>

Recently, significant progress has been made in exposing numerous screening abuses, and sometimes fraudulent conduct, by litigation physicians, screening companies, and others.<sup>15</sup> These and other developments have helped to stem the tide of massive numbers of questionable asbestos (and silica) claims. For example, asbestos-related

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11. *Id.*

12. David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003).

13. *Id.* at 13 (quoting Lawrence Martin, *Runaway Asbestos Litigation—Why it's a Medical Problem*, <http://www.mtsinai.org/pulmonary/Asbestos/AsbestosEditorial.html>, available at <http://www.lakesidepress.com/Asbestos/AsbestosEditorial.htm>).

14. *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005). More recently, Dr. Steven Haber, in his expert report filed in the W.R. Grace bankruptcy proceedings, reviewed the medical practice of numerous litigation physicians and screening companies and determined that, without exception, the reports they generated did not meet acceptable standards for medical screenings. His study included the following screeners: N&M; Healthscreen; Respiratory Testing Services, Inc.; American Medical Testing; and Pulmonary Testing Services. His study also included the following litigation physicians: Drs. James Ballard, Kevin Cooper, Todd Coulter, Andrew Harron, Ray Harron, Glyn Hilbun, Richard Kuebler, Larry Mitchell, Barry Levy, George Martindale, Gregory Nayden, Walter Allen Oaks, Robert Altmeyer, Jeffrey Bass, Richard Levine, Jay Segarra, Dominic Gaziano, Alvin Schonfeld, Leo Castiglioni, Phillip Lucas, Robert Mezey, James Krainson, Paul Venizelos, and Robert Von McGee. See Expert Report of Steven M. Haber, M.D., *Diagnostic Practices in a Litigation Context: Screening Companies and the Doctors They Employ*, *In re W.R. Grace & Co.*, No. 01-1139 (Bankr. D. Del. June 11, 2007).

15. *E.g.*, *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005); Steve Korris, *Man in Asbestos Case to Testify Against Lawyers*, THE W. VA. REC., July 24, 2009, available at <http://www.wvrecord.com/news/220192-man-in-asbestos-case-to-testify-against-lawyers>.

bankruptcy trusts<sup>16</sup> have barred claims that rely on the diagnoses, records, and reports of discredited physicians and screening companies.<sup>17</sup>

In addition, more courts today are willing to permit broader discovery into the methods used to generate screened cases—making possible the disclosure of assembly-line, medically indefensible diagnoses of asbestos and silica disease.<sup>18</sup> Allowing broader discovery is critical to exposing the screening abuses that explain the multitude of cases on a court's docket. More courts are also requiring proof of substantial exposure to prove injury causation.<sup>19</sup>

Further, many courts have implemented inactive asbestos dockets (also called deferred dockets or pleural registries) to advance only those cases of

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16. A provision in the Bankruptcy Code allows companies threatened by asbestos liabilities to channel current and future asbestos claims into a trust set up to pay claims. 11 U.S.C. § 524(g) (2006). *See generally* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 257, 281 (2008); Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271 (2006). Currently there are over 80 § 524(g) trusts in operation and accepting claims. *See* Mark D. Plevin et al., *Where Are They Now, Part Five: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 8:8 MEALEY'S ASBESTOS BANKR. REP. 1 (Mar. 2009).

17. *See* Memorandum from David Austern, President, Claims Resolution Mgmt. Corp., Suspension of Acceptance of Med. Reports (Sept. 12, 2005), available at <http://www.claimsres.com/documents/9%2005%20Suspension%20Memo.pdf>; Memorandum from William B. Nurre, Exec. Dir., Eagle-Picher Pers. Injury Settlement Trust to Claimants' Counsel (Oct. 19, 2005), available at <http://www.cpf-inc.com/includes/content/PhysicianNotice.pdf>; Memorandum from John L. Mekus, Exec. Dir., Celotex Asbestos Settlement Trust on Notice of Trust Policy Regarding Acceptance of Med. Reports (Oct. 20, 2005), available at [http://www.celotextrust.com/news\\_details.asp?nid=22](http://www.celotextrust.com/news_details.asp?nid=22); Memorandum, Plibrico Asbestos Trust, Trust Policy on Doctors and Screening Companies; Memorandum from Harry Huge, Trustee, Shook & Fletcher Asbestos Settlement Trust (Oct. 1, 2005), available at <http://www.mfrclaims.com/Change20in20Medical20Evidence.pdf>; Memorandum, Keene Creditors Trust c/o Claims Processing Facility, Inc., from Keene Asbestos Creditors Trust Trustees (Apr. 3, 2006), available at <http://www.cpf-inc.com/includes/content/KeeneClaimFilingInstructions.pdf>; Memorandum, Armstrong World Indus., Inc. Asbestos Pers. Injury Settlement Trust Trustees (May 11, 2007), available at <http://www.armstrongworldasbestostrust.com/files/AWI%20POC%20Instructions%20v5.pdf>.

18. *See, e.g., In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563.

19. *See* Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479 (2008).

individuals with demonstrated physical impairment.<sup>20</sup> Since 2002, the list of jurisdictions with inactive asbestos dockets has grown to include Cleveland, Ohio (March 2006); Minnesota (June 2005) (coordinated litigation); St. Clair County, Illinois (February 2005); Portsmouth, Virginia (August 2004) (applicable to cases filed by the Law Offices of Peter T. Nicholl); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City, New York (December 2002); and Seattle, Washington (December 2002).<sup>21</sup> Earlier courts that had adopted inactive dockets include Baltimore City, Maryland (December 1992); Cook County (Chicago), Illinois (March 1991); and Massachusetts (September 1986) (coordinated litigation).<sup>22</sup> A 2005 study by the RAND Institute for Civil Justice touted the “reemergence” of inactive dockets as one of “the most significant developments” in asbestos litigation.<sup>23</sup>

Courts in several other states (Arizona,<sup>24</sup> Delaware,<sup>25</sup> Maine,<sup>26</sup> Maryland,<sup>27</sup> and Pennsylvania<sup>28</sup>) and the federal courts for Hawaii<sup>29</sup> and

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20. See Susan Warren, *Swamped Courts Practice Plaintiff Triage*, WALL ST. J., Jan. 27, 2003, at B1 (discussing the use of an inactive docket in Baltimore City, and noting attempts by courts in Cleveland and New York City to give priority to the sickest asbestos plaintiffs); see also Jeb Barnes, *Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157 (2007) (documenting how judges have improved the asbestos litigation environment through “court-based tort reform”).

21. See Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 507-08 (2009). See generally Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253 (2005); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

22. See Behrens, *What's New in Asbestos Litigation?*, *supra* note 21, at 508-09.

23. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xx (2005); see *In re USG Corp.*, 290 B.R. 223, 226 n.3 (Bankr. D. Del. 2003) (“The practical benefits of dealing with the sickest claimants . . . have led to the adoption of deferred claims registries in various jurisdictions.”); Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 513 (2008) (“Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired.”).

24. See *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987) (holding that subclinical asbestos-related injury was insufficient to constitute the actual loss or damage required to support a cause of action).

25. See *In re Asbestos Litig.*, No. 87C-09-24, 1994 WL 721763, at \*5 (Del. Super. Ct. New Castle County June 14, 1994) (requiring claimants to establish present physical injury to support mental anguish claim based on fear of cancer), *rev'd on other grounds sub nom. Mancari v. A.C. & S., Inc.*, 670 A.2d 1339 (Del. 1995) (unpublished table decision), available at 1995 WL 567022.

26. See *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 542 (Me. 1986)

Massachusetts,<sup>30</sup> have held that the unimpaired do not have legally compensable claims. As the Supreme Judicial Court of Maine explained, “There is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury.”<sup>31</sup>

Other courts, including the Michigan and Ohio Supreme Courts, have acted to require individualized trials, removing an economic incentive for plaintiffs to file claims that may have little or no value unless they are joined with other, more serious cases.<sup>32</sup>

Beginning in 2004, state legislatures in some key jurisdictions also began to curb screening abuse by requiring asbestos and silica claimants to present credible and objective medical evidence of physical impairment to bring or proceed with a claim.<sup>33</sup> Medical-criteria procedures for asbestos

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(explaining that inhalation of asbestos dust does not constitute physical harm giving rise to a claim under state defective products statute).

27. See *Owens-Illinois v. Armstrong*, 591 A.2d 544, 560–61 (Md. Ct. Spec. App. 1991) (finding that workers with pleural plaques or pleural thickening without health significance did not have legally compensable claims), *aff’d in part, rev’d in part on other grounds*, 604 A.2d 47 (Md. 1992).

28. See *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (concluding that asymptomatic pleural thickening does not give rise to a cause of action).

29. See *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (finding no cause of action for claimants without functional impairment).

30. See *In re Mass. Asbestos Cases*, 639 F. Supp. 1, 3 (D. Mass. 1985) (“[T]he first appearance of symptoms attributable to [asbestos] constitutes the injury.” (quoting *Payton v. Abbott Labs*, 551 F. Supp. 245, 246 (D. Mass. 1982))).

31. *Bernier*, 516 A.2d at 542.

32. See Prohibition on “Bundling” Cases, Mich. Admin. Order No. 2006-6 (2006), available at <http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2003-47-080906.pdf>; OHIO R. CIV. P. 42(A)(2), available at <http://www.sconet.state.oh.us/LegalResources/Rules/civil/CivilProcedure.pdf>; see also *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1); *San Francisco Trial Judge Vacates His Own Consolidation Order*, HARRISMARTIN’S COLUMNS—ASBESTOS, May 2008, at 13, available at <http://www.harrismartin.com/pdfs/article/Article9860.pdf>; James C. Parker & Edward R. Hugo, *Fairness Over Efficiency: Why We Overturned a Consolidation Program*, HARRISMARTIN’S COLUMNS—ASBESTOS, July 2008, at 4, available at <http://www.harrismartin.com/pdfs/article/Article10016.pdf> (explaining why the San Francisco Superior Court overturned its consolidation program).

33. E.g., OHIO REV. CODE ANN. § 2307.92 (West 2005). See generally Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 SW. U. L. REV. 671, 689 (2008) (concluding that “medical criteria acts are a step in the right direction”); Philip Zimmerly, Comment, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to*

and silica cases were enacted in Ohio in 2004,<sup>34</sup> Texas<sup>35</sup> and Florida<sup>36</sup> in 2005, Kansas<sup>37</sup> and South Carolina<sup>38</sup> in 2006, Georgia<sup>39</sup> in 2007, and

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*Better Facilitate Asbestos Litigation*, 59 ALA. L. REV. 771 (2008) (providing overview of state medical-criteria laws and concluding that the laws help the truly sick access courts); Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 WM. & MARY L. REV. 2043, 2060 (2007) (medical-criteria laws “set forth rigid criteria for the claimant diagnoses”).

34. See Act of May 26, 2004, H.B. No. 292, 2004 Ohio Laws 3970, available at [http://www.legislature.state.oh.us/BillText125/125\\_HB\\_292\\_I\\_Y.pdf](http://www.legislature.state.oh.us/BillText125/125_HB_292_I_Y.pdf) (codified as amended at §§ 2307.91-.96); Act of June 1, 2004, H.B. No. 342, 2004 Ohio Laws 3946, available at [http://www.legislature.state.oh.us/BillText125/125\\_HB\\_342\\_EN\\_N.pdf](http://www.legislature.state.oh.us/BillText125/125_HB_342_EN_N.pdf) (codified as amended at §§ 2307.84-.902). Ohio’s asbestos medical-criteria law was upheld by the Ohio Supreme Court in *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008) (finding that asbestos medical-criteria law did not violate a prohibition against retroactive laws in the Ohio Constitution).

35. See Act of May 19, 2005, 79th Leg., R.S., ch. 97, 2005 Tex. Gen. Laws 171, available at <http://www.legis.state.tx.us/Search/DocViewer.aspx?K2DocKey=odbc%3a%2f%2fTLO%2fTLO.dbo.vwArchBillDocs%2f79%2fr%2fS%2fB%2f00015%2f5%2fB%40TloArchBillDocs&QueryText=asbestos&HighlightType=1> (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001-.012 (Vernon Supp. 2008)). See generally John G. George, Comment, *Sandbagging Closed Texas Courtrooms With Senate Bill 15: The Texas Legislature’s Attempt to Control Frivolous Silicosis Claims Without Restricting The Constitutional Rights of Silicosis Sufferers*, 37 ST. MARY’S L.J. 849 (2006) (providing background on Texas silica medical-criteria law and predicting that the law would be declared constitutional); James S. Lloyd, Comment, *Administering a Cure-All or Selling Snake Oil?: Implementing an Inactive Docket for Asbestos Litigation in Texas*, 43 HOUS. L. REV. 159 (2006) (describing the Texas medical-criteria law and suggesting it passes constitutional muster).

36. See Asbestos and Silica Compensation Fairness Act, ch. 274, 2005 Fla. Laws 2563, available at [http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=\\_h1019er.doc&DocumentType=Bill&BillNumber=1019&Session=2005](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1019er.doc&DocumentType=Bill&BillNumber=1019&Session=2005) (codified as amended at FLA. STAT. ANN. §§ 774.201-.209 (West Supp. 2009)).

37. See Silica and Asbestos Claims Act, ch. 196, 2006 Kan. Sess. Laws 1411, available at <http://www.kslegislature.org/sessionlaws/2006/chap196.pdf> (codified as amended at KAN. STAT. ANN. §§ 60-4901 to -4911 (2005 & Supp. 2007)).

38. See Asbestos and Silica Claims Procedure Act of 2006, No. 303, 2006 S.C. Acts 2376 (codified as amended at S.C. CODE ANN. §§ 44-135-10 to -110 (Supp. 2008)).

39. See Act of Apr. 30, 2007, No. 9, 2007 Ga. Laws 4 (codified as amended at GA. CODE ANN. §§ 51-14-1 to -13 (Supp. 2008)).



Oklahoma<sup>40</sup> in 2009. In 2006, Tennessee enacted medical-criteria procedures for silica cases.<sup>41</sup> Several states also enacted laws to generally prevent the consolidation of cases involving asbestos or silica.<sup>42</sup>

Defendants must not only continue to support efforts to ensure the reliability of claims alleging nonmalignant asbestos-related conditions but also must continue to be vigilant and proactive by challenging perceived litigation abuses through *Daubert*<sup>43</sup> motions.

This Article focuses primarily on recent events in two mass-asbestos, personal-injury dockets in which a high volume of nonmalignant cases remain pending: a successful *Daubert* challenge in Wayne County Circuit Court in Detroit, Michigan; and the effects of more expansive discovery and disclosures in the federal asbestos multidistrict litigation, MDL 875, including the scheduling of *Daubert* challenges under the judge now assigned to manage that docket, U.S. District Court Judge Eduardo Robreno of the Eastern District of Pennsylvania.

## II. THE SEA CHANGE OF JUDICIAL SCRUTINY: MDL 1553

Judicial scrutiny of screening methodology was significantly advanced by a landmark holding issued in June 2005 by U.S. District Court Judge Janis Graham Jack, manager of the federal silica multidistrict litigation (MDL 1553) in the Southern District of Texas.<sup>44</sup> The events that would lead to Judge Jack's holding

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40. See Asbestos and Silica Claims Priorities Act, 2009 Okla. Sess. Law Serv. Ch. 228 (West) (to be codified at OKLA. STAT. TIT. 76, §§ 60-71 (2009)).

41. See Silica Claims Priorities Act, ch. 728, 2006 Tenn. Pub. Acts 1885 (codified as amended at TENN. CODE ANN. §§ 29-34-301 to -309 (Supp. 2008)).

42. See Act of Apr. 30, 2007, No. 9, § 51-14-11, 2007 Ga. Laws 4, 21 (codified as amended at GA. CODE ANN. § 51-14-11 (Supp. 2008)); Silica and Asbestos Claims Act, ch. 196, § 2(j), 2006 Kan. Sess. Laws 1411, 1420 (codified as amended at KAN. STAT. ANN. § 60-4902(j) (Supp. 2008)); Act of May 11, 2005, ch. 97, § 90.009, 2005 Tex. Gen. Laws 169, 177 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (Vernon Supp. 2008)).

43. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (providing the framework for challenging the validity of scientific evidence).

44. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). The federal court silica litigation began in September of 2003 when the federal Judicial Panel on Multidistrict Litigation centralized, for pretrial purposes, a large number of silicosis claims that primarily originated in Mississippi state court and were removed to federal court. See *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003). The Panel assigned the cases to the Southern District of Texas before Judge Jack, "an experienced transferee judge for multidistrict litigation" and "a seasoned jurist." *Id.* at 1383. Cumulatively, over 10,000 individual plaintiffs' cases were transferred to Judge Jack. See *In re Silica Prods.*

were spurred by the . . . review of fact sheets submitted by [the] plaintiffs . . . . The fact sheets required plaintiffs to list all of their physicians, not just those physicians who diagnosed them with silicosis. More than 9,000 plaintiffs submitted fact sheets and listed approximately 8,000 different physicians. Remarkably, however, only twelve . . . doctors diagnosed more than 9,000 plaintiffs with silicosis.<sup>45</sup>

“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.”<sup>46</sup> Instead, the doctors “were affiliated with a handful of law firms and mobile x-ray screening companies.”<sup>47</sup>

Armed with information from the fact sheets, the defendants began deposing some of the diagnosing doctors in late 2004.<sup>48</sup> On October 29, 2004, Dr. George Martindale was deposed.<sup>49</sup> Dr. Martindale “had purportedly diagnosed 3,617 MDL plaintiffs with silicosis while retained by the screening company N&M.”<sup>50</sup> “He testified that he had not intended to diagnose these individuals with silicosis and withdrew his diagnoses.”<sup>51</sup>

On December 20, 2004, Dr. Glyn Hilbun was deposed regarding his 471 silicosis diagnoses.<sup>52</sup>

His deposition only added fuel to the fire. His testimony demonstrated that the abuses revealed at Dr. Martindale’s deposition were not unique. Dr. Hilbun, who N&M paid

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*Liab. Litig.*, 398 F. Supp. 2d at 573.

45. John P. Hooper et al., *Undamaged: Federal Court Establishes Criteria for Mass Tort Screenings*, MASS TORTS, Summer 2007, at 12, 12-13; see STEPHEN J. CARROLL ET AL., *THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA 9* (RAND Inst. for Civil Justice 2009), available at [http://www.rand.org/pubs/technical\\_reports/2009/RAND\\_TR774.pdf](http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf).

46. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 580.

47. *Id.*

48. *See id.* at 581.

49. *Id.*

50. David M. Setter & Andrew W. Kalish, *Recent Screening Developments: The MDL Silica 1553 Daubert Hearing*, MEALEY’S LITIG. REP.: SILICA, May 2005, at 11, 21 (arguing that one of the problems in the screening process is “for-profit screening companies” like N&M); see *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 582 (“These 3,617 diagnoses were issued on only 48 days, at an average rate of 75 diagnoses per day.”).

51. Setter & Kalish, *supra* note 50, at 21.

52. *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 587.

\$5,000 for each screening day, testified that he had “never in [his] life” diagnosed silicosis and that N&M had inserted diagnostic language into his reports without his knowledge.<sup>53</sup>

Dr. Hilbun withdrew his silicosis diagnoses; he was followed by Dr. Kevin Cooper, who was deposed on January 4, 2005.<sup>54</sup>

After these depositions, Judge Jack ordered the diagnosing doctors and screening companies, N&M and Respiratory Testing Services (RTS), to appear before her at a *Daubert* hearing to be held from February 16-18, 2005.<sup>55</sup> “N&M . . . helped generate approximately 6,757 claims in th[e] MDL, while RTS . . . helped generate at least 1,444 claims.”<sup>56</sup> N&M generated these “6,500-plus claims in just 99 screening days . . . .”<sup>57</sup> “To place this accomplishment 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>58</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>59</sup>

The most prolific MDL diagnosing physician, Dr. Ray Harron, “was involved in the diagnosis of approximately 6,350 [of the silica] MDL [plaintiffs] and listed as the diagnosing physician for approximately 2,600 Plaintiffs.”<sup>60</sup> His “testimony [at] the first day of the *Daubert* hearings abruptly ended when the [c]ourt granted his request for time to obtain counsel.”<sup>61</sup> Dr. Ray Harron’s son, “Dr. Andrew Harron[,] . . . diagnosed

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53. Setter & Kalish, *supra* note 50, at 21 (citation omitted).

54. *Id.* at 21-22; see *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 588 (“Both doctors emphasized that they did not diagnose any of the Plaintiffs with silicosis. Indeed, both doctors testified that they had *never* diagnosed anyone with silicosis.”) (citations omitted).

55. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 585.

56. *Id.* at 596.

57. See Setter & Kalish, *supra* note 50, at 22.

58. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 603.

59. *Id.*

60. *Id.* at 606.

61. *Id.* at 608. In the aftermath of the federal court silica litigation, several state medical-licensing agencies took action against Dr. Harron. In California and Florida, Dr. Harron agreed to voluntarily surrender his medical license. See Med. Bd. of Cal., License No. G-8415 (June 18, 2008), available at [http://www.medbd.ca.gov/publications/hotsheet\\_2008\\_07.pdf](http://www.medbd.ca.gov/publications/hotsheet_2008_07.pdf); Ray A. Harron, M.D., No. 2007-36780 (Fla. Bd. of Med. June 23, 2008), available at <http://ww2.doh.state.fl.us/imageappnet/repository/41ayt53bvjjjuqfgyfzcu53f/41ayt53bv>

approximately 505 MDL Plaintiffs for N&M.”<sup>62</sup> “Like his father, he never saw or read any of the reports purportedly written and signed by him.”<sup>63</sup>

Another screening physician, “Dr. James Ballard, . . . performed 1,444 [X-ray readings] on Plaintiffs in th[e] MDL[] in conjunction with RTS.”<sup>64</sup> The defendants presented over a dozen examples where Dr. Ballard had previously diagnosed the same individuals with lung conditions consistent with asbestosis.<sup>65</sup>

Screening physician Dr. Barry Levy diagnosed approximately 1,389 plaintiffs in the silica MDL,<sup>66</sup> including 800 MDL plaintiffs in seventy-two hours.<sup>67</sup> Similarly, Dr. H. Todd Coulter diagnosed 237 MDL plaintiffs in eleven days<sup>68</sup> as part of a contract with Occupational Diagnostics, a company that was run from a Century 21 realty office and held screenings

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wjjuqfyfzcu53f.pdf. In Mississippi, New Mexico, and Texas, Dr. Harron entered into agreed orders not to practice medicine until his license expired and not to renew it thereafter. See Miss. State Bd. of Med. Licensure (Nov. 8, 2007), <http://www.msbl.state.ms.us/boardactionreportnarr2007.htm> (table decision); *In re Matter of Ray A. Harron, M.D.*, No. 2008-016 (N.M. Med. Bd. June 20, 2008), available at [http://docboard.org/nm\\_orders/Harron,%20Ray.pdf](http://docboard.org/nm_orders/Harron,%20Ray.pdf); License of Raymond Anthony Harron, M.D., License No. C-9439 (Tex. Med. Bd. Apr. 13, 2007); see also Press release, Tex. Med. Bd. (Apr. 18, 2007), available at <http://www.tmb.state.tx.us/news/press/2007/041807a.php> (noting execution of agreed order). North Carolina and New York permanently revoked Dr. Harron’s medical license. See *In re Ray A. Harron, M.D.*, License No. 17826 (N.C. Med. Bd. Dec. 14, 2007), available at <http://glsuite.ncmedboard.org/DataTier/Documents/Repository/0/0/7/9/52151776-9f09-48d9-9eeb-f65fd938d017.pdf>; *In re Ray A. Harron, M.D.*, BPMC No. 09-02 (N.Y. Dept. of Health Dec. 30, 2008), available at [http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeafab85256b180058c032/187b1c1bcbee5c6e852574050057e87a/\\$FILE/HRG%20080969.pdf](http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeafab85256b180058c032/187b1c1bcbee5c6e852574050057e87a/$FILE/HRG%20080969.pdf), *aff’d*, ARB No. 09-02 (N.Y. Dept. of Health Admin. Rev. Bd. for Prof. Med. Conduct July 10, 2009).

62. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 608.

63. *Id.* at 609. Drs. Andrew Harron and Harold Todd Coulter were later reprimanded in Mississippi. See Miss. State Bd. of Med. Licensure (Nov. 8, 2007), <http://www.msbl.state.ms.us/boardactionreportnarr2007.htm> (explaining that Dr. Coulter agreed to a consent order to have his license suspended for one year with the suspension stayed 90 days beginning January 1, 2008, and Dr. Andrew Harron agreed by order not to renew or seek reinstatement of his license in Mississippi).

64. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 609.

65. *See id.*

66. *Id.* at 611.

67. *See id.* at 616.

68. Setter & Kalish, *supra* note 50, at 42.

from a “trailer in the parking lots of restaurants and hotels.”<sup>69</sup> Dr. W. Allen Oaks diagnosed approximately 200 plaintiffs and performed X-ray reads on 447 plaintiffs.<sup>70</sup> Nevertheless, he declined to label himself as an expert in diagnosing silicosis.<sup>71</sup>

On June 30, 2005, Judge Jack wrote a lengthy opinion in which she said that she was “confident . . . that the ‘epidemic’ of some 10,000 cases of silicosis ‘[wa]s largely the result of misdiagnoses.’”<sup>72</sup> Judge Jack said, “[T]hese diagnoses were driven by neither health nor justice: they were manufactured for money.”<sup>73</sup> As Judge Jack appreciated:

This explosion in the number of silicosis claims in Mississippi suggests . . . perhaps the worst industrial disaster in recorded world history.

And yet, these claims do not look anything like what one would expect from an industrial disaster. . . . 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 nation.

Moreover, given the sheer volume of claims—each supported by a silicosis diagnosis by a physician—one would expect the CDC or NIOSH to be involved . . . . One would expect local health departments and physician groups to be mobilized. One would expect a flurry of articles and attention from the media, such as what occurred in 2003 with SARS.

But none of these things have happened. There has been no response from OSHA, the CDC, NIOSH or the American Medical Association to this sudden, unprecedented onslaught of silicosis cases. . . . Likewise, Mississippi’s apparent silicosis epidemic has been greeted with silence by the media, the public, Congress and the scientific communities.

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69. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 616.

70. *Id.* at 618.

71. *Id.*

72. *Id.* at 632.

73. *Id.* at 635.

In short, this appears to be a phantom epidemic . . . .<sup>74</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>75</sup>

Judge Jack’s findings have impacted, and will continue to impact, asbestos litigation and other mass-tort screenings throughout the country.<sup>76</sup> For instance, in the wake of Judge Jack’s findings, “some trusts finally

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74. *Id.* at 572.

75. *Id.* at 634. Judge Jack issued a remand order on September 30, 2005. See *In re Silica Prods. Liab. Litig.*, No. MDL 1553, 2005 WL 2711320 (S.D. Tex. Sept. 30, 2005). In 2006, the U.S. House of Representatives Energy & Commerce Subcommittee on Oversight & Investigations held a series of hearings to probe fraud in silica suits. See Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3. Several doctors and the owners of two screening companies refused to answer Congressional questions, invoking their Fifth Amendment rights. Editorial, *Silicosis Clam-up*, WALL ST. J., Mar. 13, 2006, at A18; *Doctors Refuse to Testify at Silicosis Hearing; Others Recount Diagnoses ‘Manufactured for Money,’* U.S. FED. NEWS, Mar. 9, 2006; *Lawyers Questioned Over Faulty Silicosis Claims*, U.S. FED. NEWS, July 26, 2006. More recently, Dr. Ray Harron invoked his Fifth Amendment privilege when deposed in an asbestos case previously pending in the U.S. District Court for the Northern District of West Virginia. See *Ayers v. Continental Cas. Co.*, No. 5:05-CV-95, 2007 WL 1960613, at \*2 (N.D.W. Va. July 2, 2007) (“Defendant took the deposition of Dr. Harron. However, Dr. Harron refused to answer questions about his interpretations of x-rays, instead pleading his Fifth Amendment right against self-incrimination.”).

76. See Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008) (Director of the Federal Judicial Center) (“One of the most important things . . . I think judges are now alert for is fraud, particularly since the silicosis case . . . , and the backward look we now have at the radiology in the asbestos case.”); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289 (2005–2006) (evaluating the practical implications of Judge Jack’s opinion on the “entrepreneurial model” of asbestos litigation); Elise Gelinias, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 162 (2009) (“Although her opinion dealt with silica litigation, Judge Jack’s findings significantly affect asbestos reform. By conducting *Daubert* hearings and court depositions that exposed the prevalence of fraud in silica litigation, Judge Jack exposed the prevalence of fraud in asbestos litigation as well. As a result, it is reasonable to conclude that the number of asbestos claims compensated through the tort system was greatly inflated due to fraud.”); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 529 (2007) (“The clearest examples [of fraud and abuse] come from lawyer-sponsored screening programs that recruit tens of thousands of mostly bogus asbestosis and other non-cancer claims.”).

have begun their own crackdown on claims submitted on the strength of B-reads performed by the discredited doctors.”<sup>77</sup> In March 2006, the Court of Common Pleas of Cuyahoga County in Cleveland, Ohio, dismissed all asbestos cases supported solely by doctors who refused to testify before the U.S. Congress, noting that they “are currently unlikely to testify at any hearing or trial in these matters.”<sup>78</sup> In September 2009, a West Virginia circuit court issued a revised case-management order for Federal Employers’ Liability Act cases brought by plaintiffs represented by the Pittsburgh law firm Robert Peirce & Associates, P.C. with nonmalignant injury claims against several railroads; the order provided that “upon Motion of the relevant Defendant, the court shall dismiss, without prejudice, any Plaintiff’s claim that relies only on a B read or other interpretation of diagnosing lung imaging or a diagnosing report prepared by Dr. Ray Harron.”<sup>79</sup> Judge Jack’s findings also paved the way for discovery pursued in Michigan, which led to the unprecedented result described below.<sup>80</sup>

### III. SUCCESSFUL CHALLENGE OF A HIGH-VOLUME-DIAGNOSING PHYSICIAN IN A MICHIGAN STATE COURT

In 2007, Michigan led the nation with over 900 new asbestos personal-injury filings, most of which involved plaintiffs with nonmalignant conditions.<sup>81</sup> A landmark ruling in Detroit, however, is likely to change Michigan’s status as a friendly forum for such high-volume cases.<sup>82</sup>

Following a two-day evidentiary hearing in November 2008, Wayne County Circuit Court Judge Robert J. Colombo, Jr., issued a ruling to exclude the testimony of plaintiffs’ medical expert, R. Michael Kelly, M.D.<sup>83</sup> This ruling was significant in Michigan asbestos litigation because

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77. Shelley et al., *supra* note 16, at 281.

78. Peter Geier, *Thousands of Asbestos Cases Dismissed: Ohio Court Tosses Cases that Rely on Questionable X-Ray Diagnoses*, NAT’L L.J., Apr. 10, 2006, at 13 (quoting *In re All Asbestos Cases*, No. 073958 (Cuyahoga County Ct. Com. Pl. Mar. 22, 2006) (order granting defense motions for evidentiary hearings)).

79. Revised Case Management Order, *In re FELA Asbestos Cases*, No. 02-C-9500 (W. Va. Cir. Ct. Kanawha County Sept. 9, 2009).

80. *See infra* Part III.

81. Summary of asbestos filing data by Navigant Consulting, Inc. (2007) (on file with the author).

82. *See* Megha Satyanarayana, *Wayne County Judge’s Ruling Jeopardizes Asbestos Cases: He Tosses Out Doctor’s Medical Evidence*, DET. FREE PRESS, Nov. 20, 2008, at 3B.

83. *See* Transcript of *Daubert* Hearing Before Judge Robert J. Colombo, Jr., Miles v. Sure Seal Prods. Co., No. 04-434812-NP (Mich. Cir. Ct. Wayne County

of the broad role that Dr. Kelly has played in many claims pending in that state. As the diagnosing physician for these claimants, Dr. Kelly ordered the X-rays, conducted the pulmonary function tests (PFT), and wrote the medical reports that support thousands of claimants' suits that are pending in Michigan. Frequently, cases were filed prior to Dr. Kelly rendering a diagnosis because attorneys knew that they could rely on Dr. Kelly's eventual positive diagnosis.

Judge Colombo's ruling was also significant because it was perhaps one of the first instances that a state-court *Daubert* challenge successfully resulted in the exclusion of a high-volume plaintiffs' litigation physician as unreliable.<sup>84</sup> The exclusion of Dr. Kelly is also noteworthy because of the persistence required to overcome procedural obstacles and the status quo. Limitations on discovery in high-volume, mass-tort dockets that facilitate the efficient settlement of cases grouped for pretrial disclosure, discovery, motions, and mediation can also impede efforts to expose unreliable medical practices because of the medical discretion inherent in the evaluation and diagnosis of any one individual.<sup>85</sup> Repeated deviation from accepted practices can more easily be demonstrated with data from numerous cases. The challenge to Dr. Kelly is an excellent example of this point.

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Nov. 19, 2008); see also Editorial, *Michigan Malpractice*, WALL ST. J., Nov. 10, 2008, at A18 [hereinafter *Michigan Malpractice*] ("The medical records also showed that the vast majority of the lung-function tests Dr. Kelly performed failed to meet accepted standards."); Editorial, *A Strange Find Up in Michigan: The Evidence for Asbestos Claims Needs to Be Examined Very Carefully*, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), Nov. 14, 2008, at 4A, available at 2008 WLNR 21798130 ("Defendants also found from medical records that most of the lung-function tests Kelly performed didn't meet standards.").

84. A few courts also have excluded litigation physicians for their failure to obtain a state medical license prior to their participation in screenings. For example, Judge Sharon Armstrong, Superior Court Judge for King County (Seattle), Washington, found that Dr. Jay Segarra had committed a criminal offense when he "participated in union screenings of certain plaintiffs," "performed examinations, rendered diagnoses, and recommended treatment without being licensed in Washington," and "relied for his diagnoses on radiology reports from unregistered and uncertified technicians or radiologists using unregistered and uncertified equipment." *In re Certain ACR XXIII Cases*, No. 02-2-10083-0 SEA (Wash. King County Super. Ct. Oct. 15, 2002) (order granting summary judgment motions). Judge Armstrong excluded Dr. Segarra's diagnoses, concluding that it would "contravene public policy to accept such evidence." *Id.*

85. See Brickman, *supra* note 1, at 157 (giving one example of a court's reluctance to allow discovery in asbestos litigation).



By way of background, the overwhelming majority of asbestos personal-injury cases in Michigan are filed in the Wayne County Circuit Court.<sup>86</sup> To effectively manage the thousands of cases pending on the court's docket, discovery and mandatory disclosures in the cases were staged for calendared trial groups pursuant to a case-management order designed for orderly processing, cost control, and settlement of claims.<sup>87</sup> These limitations on discovery made it difficult to mount a challenge to an expert based on systematic practices that involve apparently hundreds or thousands of cases. For example, plaintiffs were not required to produce medical reports confirming an asbestos-related disease until six months before trial, and cases filed with a later trial date were not subject to discovery.<sup>88</sup> In addition, the parties did not have the right to take the depositions of expert witnesses until the eve of trial, after settlement conferences that typically occurred within two to three weeks of trial.<sup>89</sup> Although Michigan cases are subject to an anti-bundling order issued by the Michigan Supreme Court,<sup>90</sup> seventy to ninety Wayne County cases were regularly set for a common trial date every two to three months for pretrial processing.<sup>91</sup> Trials of any unresolved cases were then to occur in serial individual plaintiff trials.

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86. See STATE COURT ADMINISTRATIVE OFFICE, CIRCUIT COURT CASE FILINGS 2002-2007 (Mar. 31, 2008), <http://courts.michigan.gov/scao/resources/publications/statistics/CircuitCourtrends.pdf>; STATE COURT ADMINISTRATIVE OFFICE, JUDICIAL RESOURCES RECOMMENDATIONS 9 (2007), available at <http://courts.michigan.gov/scao/resources/publications/reports/JRRSummary2007.pdf>.

87. See *In re All Asbestos Personal Injury Cases*, No. 03-310422-NP (Mich. Cir. Ct. Wayne County Nov. 21, 2003) (Case Management Order No. 14).

88. See *id.* at 17; see also Transcript of Telephone Conference before Judge Robert J. Colombo, Jr. at 15-16, *Garza v. Sure Seal Prods. Co.*, No. 07-702927-NP (Mich. Cir. Ct. Wayne County May 8, 2008).

89. See Transcript of Telephone Conference before Judge Robert J. Colombo, Jr., *supra* note 88, at 9; Transcript of Hearing before Judge Robert J. Colombo, Jr. at 15, *Hatcher v. Sure Seal Prods. Co.*, No. 07-702927-NP (Mich. Cir. Ct. Wayne County Oct. 10, 2008).

90. See Prohibition on "Bundling" Cases, Mich. Admin. Order No. 2006-6 (2006), available at <http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2003-47-080906.pdf>.

91. Transcript of Telephone Conference before Judge Robert J. Colombo, Jr., *supra* note 88, at 5.

The routine handling of cases commonly resulted in the settlement of cases involving plaintiffs with nonmalignancy conditions.<sup>92</sup> Experts were seldom deposed, and no challenges to the reliability of any experts were mounted.<sup>93</sup> Thus, the defense motion seeking to exclude Dr. Kelly, filed in September 2008, was unprecedented in Michigan asbestos litigation.<sup>94</sup> Dr. Kelly was the diagnosing physician in thousands of cases over the years.<sup>95</sup> For instance, from 1991 through 2006, Dr. Kelly reported more than 7,000 cases of occupational asbestosis to the Michigan Department of Labor and Economic Growth, primarily cases that he diagnosed for personal-injury law firms.<sup>96</sup> In 2008, the assembly of Dr. Kelly's reports and other documents, plus the analysis by certain defendants of Dr. Kelly's diagnostic and PFT reports in over 2,300 primarily previously resolved cases, provided the basis for the motion to exclude Dr. Kelly's testimony.<sup>97</sup> The defendants also analyzed over 1,800 chest X-ray radiology reports prepared by hospital clinical radiologists who had reviewed the same chest X-rays as Dr. Kelly because he had ordered the X-rays to be administered at the hospital.<sup>98</sup>

Dr. Kelly had diagnosed these claimants with asbestosis, which is a chronic lung disease that can result from inhalation of asbestos fibers.<sup>99</sup> The defendants were not only able to conduct an analysis of Dr. Kelly's diagnostic tests and reports, they were also able to take his limited deposition in advance of trial.<sup>100</sup> This was made possible notwithstanding limitations in the case-management order based on an agreement reached as part of a settlement that one of the Michigan plaintiffs' firms would make their experts, including Dr. Kelly, available for deposition.<sup>101</sup> Dr. Kelly's

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92. Transcript of Hearing before Judge Robert J. Colombo, Jr., *supra* note 89, at 8.

93. *See id.* at 15.

94. *See Michigan Malpractice, supra* note 83.

95. *See* Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable at 5, *Hatcher v. Sure Seal Prods. Co.*, No. 04-431471-NP (Mich. Cir. Ct. Wayne County Sept. 26, 2008).

96. *See id.* at Exhibits 2-3; Deposition of R. Michael Kelly, M.D. at 29-30, *Hatcher v. Sure Seal Prods. Co.*, Case No. 04-431471-NP (Mich. Cir. Ct. Wayne County Nov. 13, 2008).

97. *See* Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable, *supra* note 95, at 6, 15-16.

98. *See id.* at 9.

99. *See* CARROLL ET AL., *supra* note 23, at 13.

100. *See* Deposition Transcript of R. Michael Kelly, M.D. at 40-41, 46-47, 108, 121, *Garza v. Sure Seal Prods. Co.*, No. 07-702927-NP (Mich. Cir. Ct. Wayne County Mar. 11, 2008).

101. *See* Transcript of Telephone Conference before Judge Robert J. Colombo,

deposition concerning the cases set for trial in May 2008 commenced on March 11, 2008.<sup>102</sup>

The efforts to depose Dr. Kelly are also noteworthy because of the limitation on the scope of examination to questions only about the plaintiffs included in the next trial-set group.<sup>103</sup> During the first session of Dr. Kelly's deposition, plaintiffs' counsel objected to questions not limited to that single trial group, and the court sustained that objection.<sup>104</sup> Thus, defense counsel were initially barred from examining Dr. Kelly about his practices in the more than 2,000 cases being analyzed to provide the basis for the argument that Dr. Kelly's routine practices demonstrated his departures from well-accepted medical practices.<sup>105</sup>

Dr. Kelly's deposition provided the stage for other aggressive tactics. At the March 11, 2008 session of his deposition, Dr. Kelly was examined by both a Michigan defense attorney and an out-of-state defense attorney, specializing in asbestos medicine and litigation screenings, who was admitted *pro hac vice* in the May trial-group cases.<sup>106</sup> The deposition session was limited to approximately two hours and was continued to a later date.<sup>107</sup> Before the deposition continued, the plaintiffs' attorneys took steps to prevent the participation of the out-of-state, specialized attorney.<sup>108</sup> The plaintiffs' attorneys first attempted to take that attorney's deposition, asserting that he was a material witness based on alleged participation in an X-ray article published in 2004 about unrelated cases,<sup>109</sup> which could have

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Jr., *supra* note 88, at 7.

102. See Deposition Transcript of R. Michael Kelly, M.D., *supra* note 100, at 3.

103. See *id.* at 40-41, 46-47, 108, 121.

104. *Id.*; Transcript of Telephone Conference before Judge Robert J. Colombo, Jr., *supra* note 88, at 15.

105. See Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable, *supra* note 95.

106. See Deposition Transcript of R. Michael Kelly, M.D., *supra* note 100; Taylor v. Marlo Co., No. 04-421364-NP (Mich. Cir. Ct. Wayne County Mar. 7, 2008) (order, *In re* All "Asbestos" Cases Presently Pending Before The Hon. Robert J. Colombo, Jr. For The May 19, 2008 Trial Group).

107. See Deposition Transcript of R. Michael Kelly, M.D., *supra* note 100, at 11, 125.

108. See, e.g., Motion to Quash Plaintiffs' Subpoena Duces Tecum and Notice of Deposition of David Setter, *In re* All "Asbestos" Cases Presently Pending before the Hon. Robert J. Colombo, Jr., for the May 19, 2008 Trial Group, Taylor v. Marlo Co., No. 04-421364-NP (Mich. Cir. Ct. Wayne County Apr. 2, 2008) (attempting to take a deposition of the out-of-state, specialized attorney).

109. See *id.*; Plaintiffs' Brief in Opposition to the Motion to Quash, *In re* All "Asbestos" Pers. Injury Plaintiffs Represented by Goldberg, Persky & White Presently Pending Before The Hon. Robert J. Colombo, Jr. For May 19, 2008 Trial

resulted in the attorney being disqualified as counsel in the *Daubert*-challenged cases. The court quashed that deposition.<sup>110</sup> The plaintiffs' counsel were, nonetheless, able to prevent the out-of-state attorney from examining Dr. Kelly further in this deposition by dismissing claims in the trial group as to each defendant represented by the out-of-state attorney before the deposition continued.<sup>111</sup>

Despite these impediments to challenging Dr. Kelly's reliability as an expert, a group of defendants filed a motion on September 26, 2008, to exclude Dr. Kelly's diagnostic opinions as scientifically unreliable with respect to the November 2008 Wayne County trial-group cases.<sup>112</sup> In their motion, the defendants presented their analysis of Dr. Kelly's medical practices in more than 2,000 cases, including the eighty November trial-group cases.<sup>113</sup>

Of the eighty November trial-group cases diagnosed by Dr. Kelly, sixty included a hospital clinical radiologist's report on the same X-ray film in which Dr. Kelly purported to find evidence of asbestos-related disease to support his diagnosis.<sup>114</sup> In 92% (fifty-five) of the sixty cases, the clinical radiologists found no radiographic evidence consistent with asbestos-related disease—a stunning rate of disagreement.<sup>115</sup> In over 1,800 of the more than 2,000 cases analyzed, a hospital clinical radiologist interpreted the same chest X-ray as Dr. Kelly.<sup>116</sup> Dr. Kelly reported evidence of

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Group, *Taylor v. Marlo Co.*, No. 04-421364-NP (Mich. Cir. Ct. Wayne County Apr. 23, 2008).

110. *See Taylor v. Marlo Co.*, No. 04-421364-NP (Mich. Cir. Ct. Wayne County Apr. 24, 2008) (order Granting Motion to Quash Deposition of David Setter, *In re All "Asbestos" Cases Presently Pending before the Hon. Robert J. Colombo, Jr.*, for the May 19, 2008 Trial Group).

111. *See* E-mail from Jay Bedortha to James Stuart (Apr. 8, 2008, 16:31 EDT) (on file with author). Late in the day before the scheduled continuation of Dr. Kelly's deposition, the plaintiffs' counsel dismissed all of the May trial-group plaintiffs' claims against the defendant represented by this attorney. *Id.* Subsequently, the same plaintiffs' firm dismissed claims against those particular defendants in all subsequent 2008-trial groups in an effort to keep that attorney from appearing on behalf of the defendants. *See* E-mail from James Stuart to Dave Setter (June 17, 2008, 11:51 AM) (on file with author).

112. Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable, *supra* note 95, at 1-2. The motion was brought pursuant to MICH. R. OF EVID. 702 and MICH. COMP. LAWS § 600.2955 (2000). *Id.*

113. *See* Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable, *supra* note 95, at 5.

114. *See id.* at 9.

115. *See id.*

116. *See id.*

asbestos-related disease in all cases, while the clinical radiologists' reports in over 1,600 cases reported no findings consistent with asbestos-related disease, resulting in disagreement in approximately 88% of the cases.<sup>117</sup>

The results of the defendants' analysis of Dr. Kelly's PFT reports were similarly astounding. Of the eighty November-group plaintiffs' PFTs personally administered by Dr. Kelly, 96% (seventy-seven) of the tests failed fundamental test-quality recommendations of the American Thoracic Society (ATS)<sup>118</sup> for test acceptability and reproducibility.<sup>119</sup> The defendants' analysis of over 2,200 of Dr. Kelly's PFTs likewise showed that 90% of the tests failed the ATS acceptability and reproducibility<sup>120</sup> test-quality recommendations.<sup>121</sup>

The defendants also asserted that Dr. Kelly had intentionally disregarded test-quality warnings provided by the PFT equipment he used.<sup>122</sup> The equipment was pre-programmed to display warning messages, such as "BLOW OUT LONGER," when the patient did not blow for at least five seconds during the test.<sup>123</sup> Because the test maneuver is repeated at least three times, and approximately 1,500 of more than 2,000 tests analyzed had less than five-second expirations, the defendants argued that

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117. *See id.*

118. ATS is the world's preeminent medical organization for lung diseases. ATS has promulgated well-established, universally accepted, medical criteria for the diagnosis of nonmalignant asbestos-related disease in an individual in a clinical setting for the purpose of managing that person's current condition and future health. *See* Am. Thoracic Soc'y, *Official Statement: Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 AM. J. RESPIRATORY CRITICAL CARE MED. 691, 691 (2004). Further, the ATS standards govern the administration of PFTs, which are designed to ensure the integrity of the testing process and the accuracy of PFT results. *See id.*

119. Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable, *supra* note 95, at 15.

120. ATS criteria require that when pulmonary function testing is performed, there should be multiple trials to confirm reproducibility and documentation of all trials attempted. *See* Am. Thoracic Soc'y, *supra* note 118, at 692. This ensures that any one specific test that shows impairment is not due to deliberate manipulation of the equipment or inadvertent error by either the person administering the PFT or the person performing the PFT. *See id.* The possibility that test results are falsely negative is significantly reduced by performing multiple tests that document that error codes are not present and that the person tested produced consistent results. *See id.*

121. *See* Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. as Scientifically Unreliable, *supra* note 95, at 6, 15-16.

122. *Id.* at 12-13.

123. *Id.*

Dr. Kelly had ignored the equipment warnings of substandard PFTs thousands of times.<sup>124</sup>

The defendants supported their analyses of Dr. Kelly's practices with reports and testimony at the *Daubert* hearing from three highly qualified expert witnesses.<sup>125</sup> Dr. John Parker<sup>126</sup> performed a blinded<sup>127</sup> X-ray reading study of available chest X-rays of the November-group plaintiffs.<sup>128</sup> Dr. Paul Enright<sup>129</sup> assessed the quality of eighty PFTs of the November-group plaintiffs administered by Dr. Kelly, a random sample of the more than 2,000 available tests, as well as tests in sixty-four cases where a hospital- or clinic-certified PFT technician had also tested the same plaintiffs as Dr. Kelly.<sup>130</sup> Dr. Gary Friedman<sup>131</sup> analyzed the treating

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124. *See id.*

125. Transcript of *Daubert* Hearing at 2, *Miles v. Sure Prods. Co.*, No. 04-434812-NP (Mich. Cir. Ct. Wayne County Nov. 18, 2008).

126. Dr. Parker is a highly qualified pulmonary specialist who worked for more than twenty years with the U.S. Public Health Service, including oversight of NIOSH's X-ray B Reader certification program. *See The Fairness in Asbestos Injury Resolution Act of 2003; Hearing on S. 1125 Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of John E. Parker, M.D., Professor and Chief Pulmonary and Critical Care Medicine, Robert C. Byrd Health Sciences Center of West Virginia University), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=777&wit\\_id=2187](http://judiciary.senate.gov/hearings/testimony.cfm?id=777&wit_id=2187).

127. Dr. Parker performed a blinded B Reader study based upon NIOSH recommendations for contested proceedings. *See Reply Brief in Support of Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D. at Exhibit 1, Hatcher v. Sure Seal Prods. Co.*, No. 04-431471-NP (Mich. Cir. Ct. Wayne County Oct. 29, 2008). This involved masking identifying information on the plaintiffs' X-ray films, and the classification of the films by two other B Readers who were blinded, that is not informed of the source of the records, the purpose of the study, or any information about the subject's X-rays or other physician's interpretations of the same X-rays. *Id.* Dr. Parker also included well-validated, masked control films in the study to confirm the accuracy of readings by the X-ray study B Readers and the absence of the bias. *Id.*

128. *See id.* at 3-4.

129. Dr. Enright has served on the ATS standards committee for more than a decade and is a special consultant to NIOSH for investigations of lung disease in workplace settings. *Id.* at 5.

130. *Id.* at 5.

131. "Dr. Friedman is a specialist in the diagnosis of asbestos-related diseases who has been a practicing pulmonologist since 1973 . . ." *Id.* at 6. He currently serves as the Director of Occupational and Environmental Medicine at the University of Texas Health Sciences Center at Houston. *Id.* at 6. He has also "testified on behalf of numerous" asbestos personal-injury plaintiffs and defendants. *Id.* at 7.

physician records of more than seventy November-group plaintiffs to compare the treating physician's findings and conclusions with Dr. Kelly's reports and to assess Dr. Kelly's diagnostic practices.<sup>132</sup> These experts' findings confirmed the defendants' analyses of Dr. Kelly's X-ray interpretations and PFTs.<sup>133</sup>

The results of Dr. Parker's blinded X-ray study supported the defendants' analysis of the hospital clinical radiologist's reports.<sup>134</sup> The study included sixty-eight of the same X-ray films interpreted by Dr. Kelly.<sup>135</sup> While Dr. Kelly reported X-ray evidence of profusion<sup>136</sup> abnormalities consistent with asbestosis<sup>137</sup> for 88% (sixty) of the

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132. *See id.* at 7-8.

133. *See id.* at 4-6.

134. *See id.* at 4.

135. *See id.* at Exhibit 1, 4 (Report of John E. Parker, M.D.).

136. "Profusion" is the concentration of scarring, or small opacities, in a person's lungs. INT'L LABOUR OFFICE, GUIDELINES FOR THE USE OF THE ILO INTERNATIONAL CLASSIFICATION OF RADIOGRAPHS OF PNEUMOCONIOSIS 3 (2000). "The International Labour Office . . . [(ILO)] in Geneva, Switzerland, is the main administrative professional organization behind the development of the standardized system for classifying x-rays [and the profusions that can be seen in them] for dust exposed workers." Transcript of *Daubert* Hearing Before Judge Robert J. Colombo, Jr., *supra* note 83, at 4. The most recent system developed by the ILO was published in 2000, and the form typically used when grading an X-ray according to this system is commonly called an ILO. *See id.*

The ILO has a twelve point scale. The first number is the major scale and is a four point scale of zero, one, two, and three. Zero is normal. One is mildly abnormal. Two is moderately abnormal. Three is severely abnormal. . . . The second number is the minor category of relative grades. A patient's x-rays are measured against standard ILO x-rays and a score is given by a B-Reader.

*Id.* at 4-5.

137. Asbestosis is an illness that can result from asbestos exposure. Am. Thoracic Soc'y, *supra* note 118, at 697. A component of making a diagnosis of asbestosis is for a physician to examine the X-ray of an exposed individual and determine whether there are markings that are indicative of asbestos exposure. *Id.* at 696. A physician must rule out other potential illnesses, however, because these markings are also indicative of numerous other illnesses. *Id.* at 702. As explained by the ATS,

Asbestosis resembles a variety of other diffuse interstitial inflammatory and fibrotic processes in the lung and must be distinguished from other pneumoconiosis, [for example] IPF, hypersensitivity pneumonitis, sarcoidosis, and other diseases of this class. The clinical features of asbestosis, although characteristic, are not individually unique or pathognomonic, but the characteristic signs of the disease are highly suggestive when they occur together.

November-group films, the consensus of the blinded X-ray-study readers found profusion abnormalities thought to be consistent with asbestosis in just over 1% (one) of the sixty-eight films.<sup>138</sup> Dr. Parker concluded that Dr. Kelly's X-ray interpretations, and diagnoses based upon those interpretations, were scientifically unreliable.<sup>139</sup>

Dr. Enright analyzed the quality of Dr. Kelly's PFTs in the November 2008 trial group, in a sample of the more than 2,000 PFT reports accumulated by the defendants, and in a group of cases in which the plaintiffs had been tested in a hospital or clinic PFT lab in addition to being tested by Dr. Kelly.<sup>140</sup> Dr. Enright's conclusion that Dr. Kelly systematically performed substandard PFTs that were invalid for rendering diagnoses or assessing lung-function impairment was based on findings of gross deviations from the accepted ATS PFT quality standards.<sup>141</sup> He found that 95% of the trial-group PFTs and 85% of the sample of more than 2,000 PFTs failed ATS acceptability standards.<sup>142</sup> He also found that in 92% (fifty-nine) of the sixty-four cases with PFTs both by Dr. Kelly and at a hospital or clinic PFT lab, the "vital capacity"<sup>143</sup> measurements obtained at the PFT labs were 20% higher than in Dr. Kelly's tests.<sup>144</sup> Dr. Enright also concluded that Dr. Kelly had routinely ignored equipment prompts to delete and repeat substandard tests and on numerous test reports had

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The presence of pleural plaques provides useful corollary evidence that the parenchymal process is asbestos related.

*Id.*

138. Reply Brief in Support of Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D., *supra* note 127, at 4.

139. *Id.* at 2.

140. *See id.* at 5.

141. *Id.*

142. *Id.* at 6.

143. This means that Dr. Kelly consistently created PFT reports that indicated that plaintiffs' abilities to breathe were impaired when either they were not impaired at all or, alternatively, were not impaired to the extent represented by Dr. Kelly. Abnormal lung function associated with asbestosis usually involves restrictive impairment, characterized by a reduction in lung volumes, as well as, at times, a decrease in diffusion capacity. Am. Thoracic Soc'y, *supra* note 118, at 697. Diffusion capacity is a measure of the lung's ability to transfer gases. Brickman, *supra* note 1, at 113. PFTs (including spirometry, lung volume, and diffusion capacity tests) provide objective and quantifiable measurements of lung function to determine if an individual is impaired and the nature of any impairment (restrictive or obstructive). *See id.* at 111-13. This is why PFTs are an important factor in valuing asbestos-related personal-injury claims.

144. Reply Brief in Support of Motion to Exclude Diagnostic Opinions of R. Michael Kelly, M.D., *supra* note 127, at 6.



suppressed the printing of automated quality grades generated by the equipment programming.<sup>145</sup>

Dr. Friedman's report was especially critical of Dr. Kelly's diagnostic practices.<sup>146</sup> Dr. Friedman reviewed Dr. Kelly's diagnostic reports and treating physician records for seventy-four of the November 2008 trial-group plaintiffs.<sup>147</sup> Dr. Friedman found medically inexplicable patterns including: Dr. Kelly's repetition of the same respiratory symptoms for almost every plaintiff; reported symptoms that did not correlate to Dr. Kelly's interpretations of the plaintiffs' X-rays or the results of the PFTs that he administered; and reported medical symptoms, histories, and findings that were consistently contradicted by treating-physician records.<sup>148</sup>

Based on the plaintiffs' dismissal of claims prior to the hearing on the defendants' motion to exclude Dr. Kelly, there was only a single plaintiff's case left at issue in the November trial group when the motion came up for the *Daubert* hearing on November 17, 2008.<sup>149</sup> Counsel for the plaintiff presented testimony only from Dr. Kelly at the hearing to support the reliability of his practices.<sup>150</sup> The defendants presented testimony from Drs. Enright and Friedman as well as the transcript of Dr. Parker's video deposition.<sup>151</sup> These experts testified consistently with their reports. In addition, Dr. Enright demonstrated the use of the PFT equipment that Dr. Kelly had used for most of his tests, including a demonstration of how the equipment was programmed to print a graph that appeared to show a test performed to ATS quality standards when the prompts to delete and repeat a substandard test were ignored by Dr. Kelly.<sup>152</sup>

At the conclusion of the hearing, Judge Colombo issued a bench ruling excluding Dr. Kelly's expert testimony as unreliable.<sup>153</sup> The court made detailed findings of fact, and concluded:

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145. *See id.*

146. *See id.* at 7-8.

147. *Id.* at 8.

148. *See id.* at 7-8.

149. Transcript of *Daubert* Hearing Before Judge Robert J. Colombo, Jr. at 27, *Miles v. Sure Seal Prods. Co.*, No. 04-434812-NP (Mich. Cir. Ct. Wayne County Nov. 17, 2008).

150. Transcript of *Daubert* Hearing Before Judge Robert J. Colombo, Jr. at 27, *Miles v. Sure Seal Prods. Co.*, No. 04-434812-NP (Mich. Cir. Ct. Wayne County Nov. 18, 2008).

151. Transcript of *Daubert* Hearing Before Judge Robert J. Colombo, Jr., *supra* note 149, at 24-27, 170-71.

152. *See id.*

153. Editorial, *Colombo the Asbestos Sleuth*, WALL ST. J., Dec. 23, 2008, at A12 ("In his ruling, Judge Colombo laid out the facts and found that 'the only

The findings of Dr. Kelly are suspect. The same findings appear in almost every case. Although this Court concedes that many of the Plaintiffs have the same work history, it is hard to believe that they have the same physical conditions. It is also hard to understand how Dr. Kelly, who claims he conducted a complete exam, fails to refer Plaintiffs to doctors for their medical conditions. . . . [I]f Dr. Kelly's opinions are medically supportable, why do the medical records of the Plaintiffs and the findings of the treating physicians fail to support Dr. Kelly's findings and diagnosis? The only conclusion in the face of such overwhelming medical evidence is that the opinions of Dr. Kelly are not reliable.

....

This Court finds that the Plaintiff has failed to sustain its burden of proof that Dr. Kelly's opinions are the product of reliable principles and methods, and that Dr. Kelly has applied the principles and methods reliably to the facts of the Miles' case. This Court further finds the facts demonstrate that Dr. Kelly's opinion is unreliable and Dr. Kelly is excluded as an expert witness . . . .<sup>154</sup>

Beyond the strongly worded findings about Dr. Kelly's medical practices, Judge Colombo also stated to counsel for the plaintiff, "I don't believe that you could have found an expert to support Dr. Kelly's position."<sup>155</sup>

The exclusion of Dr. Kelly by Judge Colombo has had significant ramifications far beyond the single-plaintiff case in which his order was entered.<sup>156</sup> The court stated its intention to apply the ruling to subsequent trial-set cases diagnosed by Dr. Kelly, denied motions to continue trial dates to permit the plaintiffs additional time to find a replacement expert, and dismissed cases in which plaintiffs had only Dr. Kelly's diagnoses to support their claims of asbestos-related disease.<sup>157</sup> Further, the court

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conclusion in the face of such overwhelming medical evidence is that the opinions of Dr. Kelly are not reliable.' He then disqualified him from the case.").

154. Transcript of Judge's Opinion, *Miles v. Sure Seal Prods. Co.*, No. 04-434812-NP (Mich. Cir. Ct. Wayne County Nov. 19, 2008).

155. *Id.*

156. See Megha Satyanarayana, *Ruling Jeopardizes Asbestos Cases*, DETROIT FREE PRESS, Nov. 20, 2008, at 3B.

157. See Transcript of Hearing before Judge Robert J. Colombo, Jr. at 10, *Amerson v. Adience, Inc.*, No. 04-437644 (Mich. Cir. Ct. Wayne County Dec. 5,

expressed concern about the overall reliability of other nonmalignant asbestos cases on the court's docket.<sup>158</sup>

Judge Colombo's ruling on the unreliability of Dr. Kelly's opinions has fundamentally changed the face of asbestos litigation in Michigan. It is unlikely that the Wayne County Circuit Court will be viewed in the future as a favorable forum for the filing of nonmalignant claims supported by high-volume, plaintiff-diagnostic experts.

#### IV. INEXORABLE PROGRESS IN MDL 875

For over fifteen years, MDL 875 pending in the U.S. District Court for the Eastern District of Pennsylvania has had jurisdiction over all asbestos cases in the federal court system for all pre-trial proceedings.<sup>159</sup> The three judges who have presided over MDL 875—Judges Charles R. Weiner, James T. Giles, and currently Eduardo Robreno—have progressively moved from the recognition that many screened cases may be illegitimate and should be subject to discovery, to the expansion of discovery permitted of screening doctors and screening companies, to the pursuit of rulings on motions to exclude unreliable litigation doctors and screening-company reports.<sup>160</sup>

In 1999, Judge Weiner, the presiding judge from 1991 through 2005,<sup>161</sup> first authorized discovery of the screening industry, holding that “discovery

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2008) (“It’s very clear to me based on the Daubert Hearing that Dr. Kelly’s opinion’s [sic] unreliable.”); Transcript of Hearing before Judge Robert J. Colombo, Jr. at 5, 8, *Stout v. Adience, Inc.*, No. 04-439179-NP (Mich. Cir. Ct. Wayne County Mar. 27, 2009) (“I’ve ruled that Dr. Kelly’s opinion is not reliable, you can’t rely on Dr. Kelly. . . . And the—there’s a dismissal of the asbestosis cases on the May and July ‘09 dockets that involve Dr. Kelly and/or Dr. Kelly and/or Dr. Parker.”).

158. See Transcript of Hearing Before Judge Robert J. Colombo, Jr., *Kettinger v. Sure Seal Prods. Co.*, No. 06-616648 (Mich. Cir. Ct. Wayne County Jan. 9, 2009) (“I am concerned about these asbestosis cases in light of what happened with Dr. Kelly.”).

159. See *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, 1996 WL 539589, at \*1 (E.D. Pa. Sept. 16, 1996) (“On July 29, 1991 the Judicial Panel For Multidistrict Litigation issued an order transferring all pending asbestos-related, personal injury lawsuits to the Eastern District of Pennsylvania for pre-trial management.”).

160. MDL 875 has jurisdiction over a massive volume of claims and rulings of that court and the information generated through discovery in that litigation can provide the basis for challenges in state courts as well as for bans of invalid reports in lucrative asbestos bankruptcy trust claims. See 28 U.S.C. § 1407 (2000).

161. See generally Mark A. Behrens & Phil Goldberg, *In Memoriam: Senior United States District Judge Charles R. Weiner*, 20:22 MEALEY’S LITIG. REP.:

is warranted as to litigation screening companies and the physicians they employ.”<sup>162</sup> These initial efforts ended up setting the stage for the expanded discovery and challenges to illegitimate screeners and litigation physicians in MDL 875.

In light of the information that became available because of the authorized discovery, Judge Weiner determined in 2002 that “the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.”<sup>163</sup> Judge Weiner also held that all cases that were initiated through a mass screening would be subject to administrative dismissal and tolled the statute of limitations on the effected claims.<sup>164</sup> The court left the cases active with respect to “settlement motions and orders . . . and other routine matters not requiring a formal hearing.”<sup>165</sup> Though these rulings were historic, they did not stop the filing of additional screened cases, and the cases pending on the docket, although administratively dismissed for some purposes, had to continue to be reported and accounted for in corporate-disclosure statements and other reporting regarding liabilities of the named defendants.

Judge Giles, the presiding MDL 875 judge from 2005 through 2008, went on to enter additional orders and make rulings consistent with Judge Weiner’s tremendous insights.<sup>166</sup> Though Judge Giles first noted that he did “not presume that there is fraud in mass tort litigation,”<sup>167</sup> only a short time later he concluded that medical reports generated by asbestos-

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ASBESTOS 24 (Dec. 21, 2005).

162. *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Mar. 23, 1999) (order authorizing discovery concerning litigation screenings).

163. *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, 2002 WL 32151574, at \*2 (E.D. Pa. Jan. 16, 2002) (Administrative Order No. 8), *vacated and superseded by order*, 2009 WL 2222977 (E.D. Pa. July 17, 2009) (issuing Admin. Order No. 19).

164. *See id.*

165. *Id.*

166. *See generally In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, 2007 WL 2372400 (E.D. Pa. May 31, 2007) (Administrative Order No. 12) (demonstrating that Giles is consistent with Wiener in his handling of the docket). *See also* Law Office of Roger G. Worthington, *Breaking the Logjam of Injustice*, MESOTHEL.COM, May 2, 2008, <http://www.mesothel.com/asbestos-cancer/legislation/logjam.htm>.

167. Transcript of Motions Hearing Before Judge James T. Giles at 20, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Jan. 31, 2007).

litigation screenings “lack reliability and accountability” and are “inherent[ly] suspicio[us].”<sup>168</sup>

In response to a subpoena issued by MDL 875 defendants, the Manville Personal Injury Settlement Trust provided a list of the top twenty-five physicians and screeners who were identified in the Trust’s database and other information.<sup>169</sup> Defendants thereafter issued over sixty subpoenas to litigation physicians and screening companies.<sup>170</sup>

As a result of the discovery efforts by defendants and the MDL 875 Court, litigation physicians and screeners have produced several million records to date.<sup>171</sup> Defendants in MDL 875 analyzed these records and have begun to present the evidence of documented suspect and fraudulent activities to the MDL 875 Court through the filing of omnibus motions.<sup>172</sup> These motions had not resulted in any rulings until the recent dismissal order entered by Judge Robreno regarding Dr. Ray Harron, discussed further below.<sup>173</sup>

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168. Administrative Order No. 12, *supra* note 166, at 3.

169. The Manville Personal Injury Settlement Trust is a bankruptcy trust managed by the Claims Resolution Management Corporation (CRMC), which accepts claims made against The Johns Manville Company, a bankrupt asbestos insulation manufacturer. *See generally* CRMC Response to Amend Notice of Deposition Upon Written Question, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. Mar. 12, 2006). Although the Manville Trust was formed in 1988, CRMC did not start tracking the frequency of diagnosing doctors until early 2002. Thus, the response “likely materially under report[s] the number of claims supported by medical reports prepared by” each litigation physician. *Id.* at 3.

170. Transcript of Telephone Conference before the Honorable David R. Strawbridge and Thomas J. Rueter United States District Court Judges at 4, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. Mar. 12, 2009).

171. *Id.* at 5, 34.

172. *See* Certain Defendants’ Combined Motion and Brief to Exclude Diagnostic Materials Created by Respiratory Testing Service, Inc. and to Dismiss Claims of Plaintiffs Relying on Same, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. Apr. 3, 2006); Certain Defendants’ Combined Motion and Brief to Exclude Expert Testimony by Dr. Jay T. Segarra and to Dismiss the Claims of Plaintiffs Relying on Same, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. Sept. 7, 2007); Certain Defendants’ Combined Motion and Brief to Exclude Expert Testimony and for Dismissal, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. June 8, 2006) (regarding Drs. Ray Harron, Andrew Harron, James Ballard, George Martindale, Richard Levine, and Jeffrey Bass).

173. *See In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875 (E.D. Pa. Jan. 30, 2009) (order excluding the testimony of Dr. Ray Harron and granting summary judgment).

Some doctors chose to simply disavow their diagnoses rather than produce their records in response to the MDL 875 subpoenas. For example, Dr. Jeffrey Bass executed an affidavit stating, "I never diagnosed anyone . . . with asbestosis or silicosis,"<sup>174</sup> although he had authored a purported 14,000 diagnoses. Other physicians have chosen to re-characterize their litigation work as something other than diagnoses. For example, Dr. Richard Levine had previously testified that he had made a diagnosis without any information regarding the latency, dose, or duration of the individual's exposure.<sup>175</sup> He had repeatedly testified that his diagnostic reports were, in fact, diagnoses.<sup>176</sup> Nonetheless, when faced with required production of all of his diagnostic reports, Dr. Levine issued an affidavit stating that his screening work was merely "screening triage" and that he did not provide a clinical diagnosis of occupational dust disease to support any claim, "nor am I trained to make such a clinical diagnosis, or to treat persons with such diseases."<sup>177</sup> Other physicians, including Drs. Ray Harron<sup>178</sup> and James Ballard, chose to assert their Fifth Amendment privilege against self-incrimination, risking the adverse inference created in civil litigation.<sup>179</sup>

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174. Affidavit of Jeffrey H. Bass at 1, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Jan. 25, 2006).

175. Deposition Transcript of Richard B. Levine, M.D. at 29-30, *Hughes v. A-Best Prods. Co.*, No. 293449-042 (Ohio Ct. C.P. Mar. 16, 2001).

176. *E.g.*, Deposition Transcript of Richard B. Levine, M.D. at 44, *Caffey v. Foster Wheeler Corp.*, No. 01-C-753 (Tex. Dist. Ct. Apr. 21, 2003).

177. Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screening Companies and Clinical Studies*, 29 *CARDOZO L. REV.* 513, 553 N.108 (2007) (quoting Affidavit of Richard B. Levine, M.D., *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. May 1, 2006)).

178. Dr. Harron first effectively "took the Fifth" by asking for legal representation and terminating his testimony in the February 2005 *Daubert* hearings in the federal court silica litigation. *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 607 (S.D. Tex. 2005). This was followed by a series of consistent assertions of his Fifth Amendment privilege against self-incrimination. *See Response of Dr. Ray A. Harron to Subpoena Duces Tecum, In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Oct. 21, 2005); Deposition Transcript of Ray A. Harron, M.D., *In re W.R. Grace & Co.*, No. 01-1139 (Bankr. D. Del. Dec. 15, 2005); *The Silicosis Story: Mass Tort Screening and the Public Health: Hearing Before the Subcomm. on Oversight and Investigations*, 109th Cong. (2006) (statement of Ray A. Harron, M.D.).

179. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'" 8 J. Wigmore, *Evidence* 439 (McNaughton

A number of physicians attempted to quash the subpoenas by arguing that the subpoenaed materials could not be produced because they fell into one or more protected categories.<sup>180</sup> These arguments asserted that the materials were privileged or otherwise protected (work product, attorney-client, consulting expert, and doctor-patient); that the materials were covered by the federal Health Insurance Portability and Accountability Act and, therefore, required a specific authorization from each screened person prior to production; and that the materials were not relevant.<sup>181</sup> Despite the numerous doctors and screeners who attempted to avoid this discovery, Judges Giles and Robreno and Magistrate Judge David Strawbridge have repeatedly rejected the privilege claims, overruled these objections, and authorized full discovery into the litigation records of the litigation physicians and screening companies responsible for the claims pending in MDL 875.<sup>182</sup>

The accumulation of records in the MDL 875 litigation produced pursuant to discovery subpoenas is not the only source of information regarding the activities of these physicians and screeners. In May 2007, Judge Giles ordered that all plaintiffs submit the diagnostic records upon which they relied to support their claims.<sup>183</sup> These submissions, and the lack thereof for a significant number of claimants pending in MDL 875,

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rev. 1961)).

180. *E.g.*, *In re Asbestos Prods. Liab. Litig.* (No. VI), 256 F.R.D. 151 (E.D. Pa. Feb. 25, 2009) (order denying plaintiffs' motion to quash).

181. *See id.*

182. *See In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Aug. 14, 2006) (order issuing the production of documents from Dr. Dominic Gaziano); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Nov. 1, 2007) (order issuing the production of documents from Holland Bieber) ("The Court found that these subpoenaed entities were engaged in the business of screening individuals for pneumoconiosis for litigation rather than medical purposes."); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Feb. 2, 2007) (order issuing the production of documents from Drs. Robert Springer and Harvey M. Richey, and Consultants in Pulmonary & Occupational Medicine, P.A) ("[T]he Court finds that Certain Defendants are in substantial need of the materials and are unable without undue hardship to obtain the substantial equivalent of the materials by other means."); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Feb. 12, 2007) (order issuing the production of documents from Dr. Alvin Schonfeld); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. Apr. 24, 2008) (order issuing production of documents from Occupational Medical Resources); Order denying plaintiff's motion to quash, *supra* note 180; *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, 2009 WL 1872093 (E.D. Pa. June 26, 2009) (order granting in part and denying in part defendant's motion to compel).

183. *See* Administrative Order No. 12, *supra* note 166, at 2.

resulted in an order requiring *Daubert* hearings to address the reliability of the physicians who have authored the reports upon which plaintiffs relied.<sup>184</sup> The stage has also been set for dismissal of the claims of plaintiffs who have failed to comply with the court's order to file the diagnoses that support their claims.

Some of the physicians and screeners have attempted to convince federal district court judges to protect them from having to comply with the MDL 875 discovery.<sup>185</sup> These efforts have been thwarted because defendants have successfully argued that the MDL 875 Court has jurisdiction to rule on these subpoenas pursuant to 28 U.S.C. § 1407(b).<sup>186</sup> One screening company fought the MDL 875 Court's exercise of jurisdiction all the way to the U.S. Supreme Court only to lose,<sup>187</sup> have the issues transferred to the MDL 875 Court, and be ordered to produce all of its records.<sup>188</sup> To date, all of the federal district courts that have addressed this issue have determined that the MDL 875 jurisdiction embraces these screening-discovery subpoenas.<sup>189</sup>

Judge Robreno has issued rulings that are favorable to the continued efforts to rid the docket of unsupportable claims created by discredited litigation physicians and screening companies.<sup>190</sup> He has demonstrated a commitment to address the issues that plague the MDL docket by granting the defense motion<sup>191</sup> to exclude Dr. Ray Harron's diagnostic reports.<sup>192</sup>

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184. See *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. Feb. 6, 2009) (order for *Daubert* Hearings).

185. See *In re Deposition Subpoena Served Upon James W. Ballard*, No. 2:05-mc-2491-RDP (N.D. Ala. Mar. 9, 2006) (order of Judge R. David Proctor); *In re Clients and Former Clients of Baron & Budd, P.C.*, 478 F.3d 670 (5th Cir. 2007).

186. Judiciary and Judicial Procedure, 28 U.S.C. § 1407(b) (2001).

187. See *Clients & Former Clients of Baron & Budd, P.C. v. U.S. Dist. Ct. for the S. Dist. of Tex.*, 128 S. Ct. 354 (2007) (denying petition for a writ of certiorari).

188. See Production Order for Occupational Medical Resources, *supra* note 180, at 1-2.

189. See *In re Deposition Subpoena Served Upon James W. Ballard*, *supra* note 180, at 2; *In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d at 671.

190. See, e.g., *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Feb. 24, 2009) (order denying defendant's motion).

191. See Certain Defendants' Combined Motion & Brief to Exclude Expert Testimony & for Dismissals at 1, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. June 8, 2006) (requesting to exclude expert testimony of Drs. Ray Harron, Andrew Harron, James Ballard, George Martindale, Richard Levine, and Jeffrey Bass).

192. See *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Jan. 30, 2009) (order "to exclude the testimony of Dr. Ray A. Harron and [granting] summary judgment . . .").



Judge Robreno has also appointed two magistrate judges, Thomas Rueter and David Strawbridge, who have shown that they will take an active role in holding hearings and making recommendations to the court to facilitate the resolution of claims on the MDL 875 docket.<sup>193</sup>

The magistrate judges have set a new precedent in MDL 875 by scheduling *Daubert* hearings regarding the physicians who created the diagnostic reports that plaintiffs have submitted in support of their claims.<sup>194</sup> The magistrates' order specifically identified the cases in which the motions are to be heard.<sup>195</sup> Anticipating that the plaintiffs may dismiss their claims rather than have the court conduct *Daubert* hearings on the reliability of the plaintiffs' experts, the order instructed the plaintiffs' attorneys to not only notify the court whether they are withdrawing any of the actions listed in the order, but specifically required that the attorneys "advise whether they are withdrawing any of the actions as a result of the above [set hearings]."<sup>196</sup>

Tellingly, counsel for a large number of MDL 875 plaintiffs stated at a hearing conducted by the magistrates on March 12, 2009, that they intended to withdraw all cases that are the subject of the upcoming *Daubert* hearings and that they anticipated that all other plaintiffs' counsel would do the same.<sup>197</sup> By doing so, the plaintiffs' attorneys can avoid a ruling by the court on the reliability of their medical experts.<sup>198</sup> Further, plaintiffs' counsel candidly admitted to the court that the nonmalignant claims pending in MDL 875 are considered to be worthless.<sup>199</sup> Not only were the cases at issue dismissed and the *Daubert* hearings cancelled, a subsequent

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193. See Order for *Daubert* Hearings, *supra* note 184, at 1-2.

194. See *id.*

195. See *id.* at Exhibit A.

196. *Id.* at 2.

197. See Transcript of Telephone Conference before the Honorable David R. Strawbridge and Thomas J. Rueter, United States District Court Judges, *supra* note 170, at 44.

198. It is advantageous for plaintiffs' counsel to continue to avoid a ruling regarding any of the litigation physicians because they have cases pending throughout the country that rely on diagnoses created by these same physicians. An adverse ruling in MDL 875 would undoubtedly affect other courts' evaluation of the legitimacy of these doctors and their diagnoses. Further, plaintiffs in MDL 875 currently have claims pending with bankruptcy trusts that are typically based on the same diagnoses that support their MDL 875 cases. See *id.* at 16-17 (referring to OMR's bankruptcy proceedings). If the MDL 875 Court excludes the diagnoses or the physicians who created them, then the plaintiffs and their attorneys will not be able to preserve the bankruptcy claims that will, in turn, significantly reduce the money acquired by plaintiffs and their attorneys.

199. See *id.* at 45-46.

group of cases in which Magistrate Judge Strawbridge set a *Daubert* deposition and hearing have followed the same course. After entering multiple production orders, Magistrate Judge Strawbridge postponed the *Daubert* proceedings until the litigation physician at issue, Dr. Jay Segarra, completely complied with the court's subpoena and production orders regarding his records.<sup>200</sup> In the meantime, defendants noticed the depositions of Dr. Segarra's former office manager and former transcriptionists<sup>201</sup> and propounded discovery to acquire medical records from each plaintiff's treating physician.<sup>202</sup> That, in conjunction with indications from the court that Dr. Segarra was, in fact, about to be forced to produce all of his litigation records,<sup>203</sup> caused the pending plaintiffs, like those in the group of cases discussed previously, to move to dismiss their cases.<sup>204</sup>

As all of these efforts make clear, Judge Robreno intends to proactively address the enormous nonmalignancy docket in MDL 875 and to build on the foundation laid by Judges Weiner and Giles by scrutinizing suspect claims generated by litigation physicians and screening companies.<sup>205</sup>

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200. See *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. May 14, 2009) (order granting a *Daubert* hearing to be heard on July 13, 2009 regarding Dr. Jay T. Segarra); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. July 7, 2009) (order postponing the *Daubert* hearing date for Dr. Jay T. Segarra until August 5, 2009); *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, Misc. Action No. 09-MC-103 (E.D. Pa. July 28, 2009) (continuing the *Daubert* hearing regarding Dr. Segarra "pending resolution of issues raised concerning Dr. Segarra's compliance with this Court's Order regarding his production of documents").

201. See Defendant's Notice of Deposition of Cora Allen, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, Misc. Action No. 09-MC-103 (E.D. Pa. Feb. 9, 2010).

202. See Defendant's First Set of Interrogatories, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, Misc. Action No. 09-MC-103 (E.D. Pa. Feb. 25, 2010); Defendant's First Set of Requests for Production of Documents, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, Misc. Action No. 09-MC-103 (E.D. Pa. Feb. 25, 2010).

203. *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875, Misc. Action No. 09-MC-103 (E.D. Pa. Mar. 4, 2010) (setting for hearing plaintiffs' motion to quash the discovery depositions of Dr. Segarra's former office manager and transcriptionists, defendant's motion to hold Dr. Segarra in civil contempt, and "the implementation of this Court's 'Segarra Production Order'").

204. See Plaintiffs' Motion to Dismiss, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Mar. 15, 2010).

205. See, e.g., Memorandum & Court Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa. Dec. 18, 2008) (discussing Administrative Order No. 12); Administrative Order No. 12A, *In re Asbestos Prods. Liab. Litig.* (No. VI),

#### IV. CONCLUSION

The exclusion of Dr. R. Michael Kelly in Michigan and of Dr. Ray Harron in federal MDL 875 are historic rulings that mark significant progress against unreliable litigation physicians in mass-asbestos tort litigation. Both events have set a precedent that will help end the mass-screening abuses of years past. These developments demonstrate that when courts are receptive to permitting broader discovery, defendants can overcome the unwarranted presumption that all cases filed in the court system are legitimate. The rulings also demonstrate that with persistence and a zeal for a searching inquiry into medical practices, it is possible to rid asbestos dockets of large numbers of specious nonmalignant injury claims, benefitting defendants, the courts, and the truly sick.<sup>206</sup>

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MDL No. 875 (E.D. Pa. Dec. 23, 2008) (amending Administrative Order No. 12); U.S. District Court, Eastern District of Pennsylvania, Clerk's Office, *In re: Asbestos* (MDL No. 875), available at <http://www.paed.uscourts.gov/mdl875.asp> (last visited May 25, 2010).

206. See generally Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 4 (2001).