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

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

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

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

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2 Id. at 635.
4 See STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, THE ABUSE OF MEDICAL
I. SILICA LITIGATION: BACKGROUND AND MDL 1553

A. Knowledge and Regulation

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

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

The Federal Occupational Safety & Health Administration ("OSHA") has regulated workplace silica exposure since the early 1970s.\(^8\) Today, OSHA provides detailed regulations requiring employers to protect employees from overexposure to silica through the enforcement of permissible exposure limits ("PELs") for occupational exposure to airborne silica\(^9\) and the OSHA Hazard Communications Standard.\(^10\) States also have acted to protect workers from overexposure. For instance, many states set
threshold levels for silica dust in the workplace,\(^{11}\) prohibit minors from working with silica refractory products,\(^{12}\) and offer other worker protections.\(^{13}\)

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

For years, silica litigation generally reflected this public health success. The litigation was stable with only a low number of people pursuing silica claims in any given year.\(^{17}\)

B. A Spike in Silica Claims

"[P]laintiffs’ lawyers filed an unprecedented number of silica cases from 2002 to 2004—a total of 20,479 cases in Mississippi alone—an amount ‘five times greater than one would expect over the same period in the entire United States.’"\(^{18}\) The drastic rise in

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


\(^{16}\) CARROLL ET AL., supra note 4, at 44.


\(^{18}\) David Maron & Walker W. (Bill) Jones, Taming an Elephant: A Closer Look at Mass
claims against U.S. Silica, a leading supplier, exemplified this surge. In 1998, U.S. Silica was named in 198 silicosis claims; the number of claims jumped to 1,356 in 2001 before soaring to 5,277 in 2002 and skyrocketing to 19,865 in 2003.\footnote{See Kimberly A. Strassel, \textit{He Fought the Tort Bar—and Won}, WALL ST. J., May 4, 2009, at A14; CARROLL ET AL., supra note 4, at 3.} Nearly two-thirds of the claims filed against U.S. Silica between 2001 and 2003 were filed in Mississippi state courts; most of the other cases were filed in Texas state courts.\footnote{See CARROLL ET AL., supra note 4, at 3. During this period, Mississippi had liberal joinder and venue rules that allowed large numbers of claims to flow into the state.}

Other defendants experienced a similar pattern: “Before 2002, one respirator manufacturer had about 200 silicosis claims filed against it each year. Between 2002 and 2004, 29,000 silicosis claims were filed—a 5000\% increase in claims filed.”\footnote{Behrens et al., Silica: An Overview, supra note 17, at 24; see also Susanne Sclafane, \textit{Silica Dust: The Next Asbestos? Hard Hat Maker With Former RIMS President Among 160 Defendants Facing Dust Claims}, NAT'L UNDERWRITER PROP. & CAS.—RISK & BENEFITS MGMT., May 10, 2004, at 10 (noting that E.D. Bullard Co., the inventor of the hard hat, faced a "surge" of silica claims in 2003, from 62 cases filed by roughly 200 plaintiffs in 1999 to 156 cases filed by 4,306 plaintiffs in 2002 to 643 cases filed by 17,288 plaintiffs in 2003).}

If legitimate, this spike would have suggested "perhaps the worst industrial disaster in recorded world history."\footnote{In re Silica, 398 F. Supp. 2d at 572.} Within two years, however, the litigation was essentially over. According to RAND, “[t]he proceeding in Judge Jack’s court exposed gross abuses in the diagnosing of silica-related injuries, and, due in large part to her findings, the litigation collapsed.”\footnote{CARROLL ET AL., supra note 4, at ix.}

C. Judge Jack: The Phantom Epidemic

MDL 1553 began in September 2003 when over ten thousand individual silicosis claims that primarily originated in Mississippi state court were removed to federal court and centralized for pretrial purposes before Judge Jack.\footnote{See in re Silica Prods. Liab. Litig., 280 F. Supp. 2d 1381 (J.P.M.L. 2003); In re Silica, 398 F. Supp. 2d at 573.}

As a trained nurse, Judge Jack appreciated that the surge in claims defied medical explanation. She observed: "The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the..."
nation."25 Instead, Judge Jack offered two theories as to why there was a sudden increase in silica claims: (1) plaintiffs' attorneys sought to beat the effective date of major civil justice reform legislation in Mississippi; and (2) asbestos plaintiffs' attorneys wanted to diversify their litigation portfolios.26

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

The fact sheets revealed several suspicious patterns.

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

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

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

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25 In re Silica, 398 F. Supp. 2d at 572.
26 Id. at 630; see also CARROLL ET AL., supra note 4, at 12–13; see also Maron & Jones, supra note 18, at 256 ("Due to the effective dates of the Mississippi Legislature's two major tort reform measures, a significant majority of mass tort filings delayed Mississippi courts in December 2002 (to avoid the January 1, 2003 effective date of Mississippi's 2002 tort reform legislation) and again in late Summer 2004 (to avoid the September 1, 2004 effective date of the 2004 tort reform legislation)."; Roy T. Atwood et al., Commentary, In Silica Litigation, The Numbers Alone Dictate Careful Scrutiny of Injury and Causation, ANDREWS ASBESTOS LITIG. REP., Dec. 4, 2003, at 12, 12 ("Most commentators point to pending legislative efforts relating to asbestos litigation, tort-reform initiatives in Mississippi and Texas, and the use of mass screenings as the reason silicosis 'victims' have seemingly emerged from the woodwork."); Susan Warren, Silicosis Suits Rise Like Dust—Lawyers in Asbestos Cases Target Many of the Same Companies, WALL ST. J., Sept. 4, 2003, at B6 ("Some from the defense side charge that the sudden rise in silicosis claims coincides with increasing constraints on asbestos litigation in state courts, as well as the threat of legislation that would create a national trust fund and eliminate asbestos litigation altogether.").
27 CARROLL ET AL., supra note 4, at ix.
28 Id. at ix-x.
29 Id. at 7.
30 Id. at 8.
all of the plaintiffs' B-reads and diagnoses.”32 Over nine thousand plaintiffs returned fact sheets, and they listed roughly eight thousand different doctors.33 “Remarkably, however, only twelve doctors diagnosed more than 9,000 plaintiffs with silicosis.”34

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

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

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

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

32 CARROLL ET AL., supra note 4, at 8.
34 Id. at 13.
35 CARROLL ET AL., supra note 4, at 8.
37 CARROLL ET AL., supra note 4, at 9.
38 Setter & Kalish, supra note 36, at 21.
40 CARROLL ET AL., supra note 4, at 9.
41 Id.
42 In re Silica, 388 F. Supp. 2d at 588 (citation omitted).
43 See CARROLL ET AL., supra note 4, at 9.
approximately 6,757 claims in th[e] MDL, while [another screening firm,] RTS . . . helped generate at least 1,444 claims." N&M generated these 6,500-plus claims in just ninety-nine screening days. As the court noted, “[t]o place this achievement in perspective, in just over two years, N&M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period.” 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.” “N&M was paid by the hiring law firm only for positive diagnoses. Payment was contingent on a positive diagnosis and the potential plaintiff signing with the law firm.”

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

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

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

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44 In re Silica, 398 F. Supp. 2d at 596.
45 See Setter & Kalish, supra note 36, at 22.
46 In re Silica, 398 F. Supp. 2d at 603.
47 Id.
48 CARROLL ET AL., supra note 4, at 11.
49 See In re Silica, 398 F. Supp. 2d at 606.
50 Lynn Brezovsky, Judge: Diagnose Methods in Silicosis Case ‘Frightening’ West Virginia Doctor Involved in Multistate Lawsuit in Texas, CHARLESTON GAZETTE, Feb. 19, 2005, at 6D.
51 In re Silica, 398 F. Supp. 2d at 608.
52 Id.
53 Id. at 609.
54 CARROLL ET AL., supra note 4, at 12.
55 Id.
被告方提供了超过12个例证，其中Dr. Ballard在之前诊断了同一群患者的肺部条件，这些条件与硅肺一致。56

Dr. Barry Levy诊断了近1400名原告，其中包括800人在72小时内完成。57 “他只花了四分钟来诊断每个患者。”58 “[I]t is clear that Dr. Levy had an agenda: diagnose silicosis and nothing else.”59

另一位筛查医生Todd Coulter，诊断了237名MDL原告，在11天内作为合同的一部分，由Occupational Diagnostics公司运行，该公司还为Century 21房地产办公室举行筛查，“帐篷在停车场内。”60 Dr. W. Allen Oaks诊断了大约200名原告，并对447名原告进行了X光读取。尽管他给出了200份诊断，但他拒绝将自己称为“在...诊断硅肺”61

在2005年6月，法官Jack发表了尖刻的裁决，称“法院有理由相信...某些10,000例硅肺的‘流行病’是诊断错误的结果。”62 Judge Jack得出结论：“挑战的医生未能遵循相同的诊断标准，因为他们做的是‘医疗诊断’而不能作为‘医疗诊断’而不合格...在每一例中。”63 她随后驳回了所有案件，指出法院缺乏对每一个案件的管辖权，同时质疑了对每一例案件的公正性。64

在她唯一保留的案件中，她发现原告的律师团队不合理且过于关注地描述了律师的行为，作为更大进程的一部分，他们“压倒了...系统，以便在未对每个案件进行单独计划和确定每一项的总成本”65 她随后对律师团队所花费的成本进行了“按比例”计算，将最终费用定为$8,250，远低于总成本，以及对被告方和法院的费用。66

56 In re Silica, 398 F. Supp. 2d at 609.
57 Id. at 611.
58 See Setter & Kalish, supra note 36, at 24.
59 CARROLL ET AL., supra note 4, at 12.
60 In re Silica, 398 F. Supp. 2d at 615.
61 Id. at 616; see also Setter & Kalish, supra note 36, at 24 (“Dr. Harold Todd Coulter... diagnosed 237 patients in 11 days inside an x-ray van parked at such places as a Sizzler restaurant.”).
62 See In re Silica, 398 F. Supp. 2d at 618.
63 Id. at 632 (citation omitted).
64 Id. at 634.
66 In re Silica, 398 F. Supp. 2d at 676.
likely incurred as a result of the abusive diagnostic practices." Judge Jack concluded: "The Court trusts that this relatively minor sanction will nonetheless be sufficient to serve notice to counsel that truth matters in a courtroom no less than in a doctor's office."  

D. The Fallout

By mid-January 2006, "[m]ore than half" of the claims remanded to Mississippi and Texas state courts had been dismissed,69 "most of them voluntarily by the law firms that filed them."70 In addition, silica filings plummeted following Judge Jack's order.71 For example, "[n]ew filings against U.S. Silica fell to 1,900 claims in 2005 and to 227 claims in 2006. Only 15 claims were filed against U.S. Silica in the first half of 2007."72 Legal reforms enacted in several states during this time, especially statutes that require plaintiffs to demonstrate reliable evidence of physical impairment in order to proceed with a silica-related claim, also contributed to a decline in the number of claims.73

67 CARROLL ET AL., supra note 4, at 16 (citation omitted); see also In re Silica, 398 F. Supp. 2d at 678.
68 In re Silica, 398 F. Supp. 2d at 679.
70 Creaswell, supra note 3, at C3; see also Carolyn Kolker, Lighter Caseloads For All: Judge Jack's 2005 Ruling Continues to Snuff Out Silica Cases Nationwide, AM. L., July 2006, at 17, 17 (stating that plaintiffs' lawyers have dismissed Mississippi silica cases "at a rapid-fire rate"); CARROLL ET AL., supra note 4, at 17.
72 CARROLL ET AL., supra note 4, at 4.
Commentators have described Judge Jack's opinion as "a critical turning point in mass tort litigation because for the first time it allowed a comprehensive examination of the mass tort scheme—a look behind the curtain of secrecy that had guarded the 'forensic identification of diagnoses' [sic] or as it is more commonly known, litigation screening."74 The Director of the Federal Judicial Center, United States District Court Judge Barbara Rothstein of the Western District of Washington, has said: "One of the most important things is 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."75

According to Professor Lester Brickman, an expert on asbestos litigation, Judge Jack's findings apply "with at least equal force to nonmalignant asbestos litigation: the diagnoses are mostly manufactured for money."76 As Judge Jack acknowledged, "[t]he screening companies were established initially to meet law firm demand for asbestos cases."77 Another commentator has explained,

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.78

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74 Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation, 59 Ala. L. Rev. 771 (2008) (overview of medical criteria laws). Mississippi's legal climate has improved as a result of actions taken by the legislature and the Mississippi Supreme Court. See Mark A. Behrens & Cary Silverman, Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, 395 (2005); John W. Christopher, Tort Reform by the Mississippi Supreme Court, 24 Miss. C. L. Rev. 427, 427 (2006).

75 Maron & Jones, supra note 18, at 261 (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 822 (1999)).


The B-readers and screening firms referenced in Judge Jack’s opinion helped generate tens of thousands of asbestos claims. “According to the Manville Trust, perhaps the most complete database of asbestos claims, the six combined [screening doctors referenced in Judge Jack’s opinion] authored an astonishing 140,911 asbestos ‘diagnoses’—and the number is probably much higher.”

For instance, Dr. Ray Harron reportedly diagnosed disease in 51,048 Manville asbestos personal injury claims and supplied 88,258 reports in support of other claims. In one day, Dr. Harron reportedly diagnosed 515 people, or the equivalent of more than one a minute in an eight-hour shift. “Dr. Harron was not a professional rendering an independent opinion, but a vital cog in a multibillion-dollar lawsuit machine.”

“But Harron is only the most prolific of a prolific breed.” Another silica screener, Dr. James Ballard, provided 10,700 primary diagnoses and another 30,329 reports in support of asbestos claims. Dr. Jay Segarra “participated in almost 40,000 positive diagnoses for asbestos-related illnesses over the last 13 years, or about eight per day, every day, including weekends and holidays. There were about 200 days on which Dr. Segarra rendered positive diagnoses for more than 20 people, and 14 days with more than 50.”

Now, some trusts set up by bankruptcy courts to pay asbestos claims “finally have begun their own crackdown on claims submitted on the strength of B-reads performed by the discredited doctors.”

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Section, Contingent Fees in Mass Tort Litigation, 42 TORT Trial & INS. Prac. L.J. 105, 153 (2006) (“The rate of fraudulent asbestos claims is very high.”) (summarizing remarks of Mississippi defense attorney Danny Mulholland).

79 Editorial, The Asbestos Waterloo, WALL ST. J., June 10, 2006, at A12; see also Roger Parloff, Diagnosing for Dollars, FORTUNE, June 13, 2005, at 96, 98 (“Just five screening doctors account for almost 25% of all the asbestos claims ever filed with the Manville Trust, while the top 25 account for 46%.”).


81 Id.


83 Parloff, supra note 79, at 98.

84 Silicosis Clam-Up, supra note 80, at A18.


86 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).
In addition, several state medical licensing agencies have taken action against Dr. Ray Harron. In California and Florida, Dr. Harron agreed to voluntarily surrender his medical license. 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. North Carolina and New York permanently revoked Dr. Harron's medical license. Additionally, Drs. Andrew Harron and H. Todd Coulter were both reprimanded in Mississippi.

More recently, in November 2008, Wayne County (Detroit) Circuit Court Judge Robert Colombo, Jr. granted a defense motion to exclude plaintiffs' expert testimony by Lansing-based Dr. R. Michael Kelly of Mid-Michigan Physicians. The motion argued that Dr. Kelly, who earned $500 per exam and had diagnosed more than seven thousand asbestos litigants, should be excluded because

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90 See Miss. State Bd. of Med. Licensure, Board Actions, http://www.msmbm.state.ms.us/ boardactionsreportnarr2007.htm (last visited Mar. 6, 2010) (setting forth both the Consent Order by Dr. Harold Todd Coulter to have his license suspended for one year with the suspension stayed ninety days beginning January 1, 2008 and the Agreed Order by Dr. Andrew W. Harron not to renew or seek reinstatement of his license in Mississippi).

91 See Editorial, Colombo the Asbestos Sleuth: A Judge Exposes More Phony Claims, WALL. ST. J., Dec. 23, 2008, at A12 ("In his ruling, Judge Colombo laid out the facts and found that 'the only 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." (quoting Transcript of Opinion at 14-15, Miles v. Sure Seal Prods. Co., No. 04-438412-NP (Mich. Cir. Ct. Nov. 19, 2008)).
Dr. Kelly was neither a radiologist nor board-certified in reading X-rays, and because independent radiologists that examined 1,875 of Dr. Kelly's cases found no evidence of disease in eighty-eight percent of them.92 "The medical records also showed that the vast majority of the lung-function tests Dr. Kelly performed failed to meet accepted standards."93

Unreliable diagnostic practices also have been reported in pharmaceutical cases, such as the fen-phen "Diet Drug" litigation94 and litigation involving phenylpropanolamine ("PPA"), an ingredient used in many over-the-counter cold medications.95

II. RAND'S RECOMMENDATIONS

As the RAND report appreciates, "[t]he prospect of large financial gain provides a powerful incentive to utilize inappropriate diagnostic procedures in order to manufacture large numbers of claims."96 Lawyer-sponsored screenings can generate staggering numbers of claims, overwhelming defendants and courts. This strategy prevents cases from being addressed on an individual basis as economies of scale frequently compel settlement of screened cases.

In addition, because mass tort cases typically are filed in "magic jurisdictions"97—places the American Tort Reform Foundation calls "Judicial Hellholes"—plaintiffs' attorneys have an added weapon: if

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92 See id.
93 Editorial, Michigan Malpractice, WALL ST. J., Nov. 10, 2008, at A18; see also Editorial, A Strange Find up in Michigan: The Evidence for Asbestos Claims Needs to Be Examined Very Carefully, CHARLESTON DAILY MAIL, Nov. 14, 2008, at 4A ("Defendants also found from medical records that most of the lung-function tests Kelly performed didn’t meet standards.").
95 See David J. Walz, Discovering and Punishing Mass Tort Fraud, FOR THE DEFENSE, Feb. 2007, at 8, 9-10.
96 CARROLL ET AL., supra note 4, at 1.
97 Former Mississippi plaintiffs' attorney Richard Scruggs has said:
What I call the 'magic jurisdiction,' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're populists. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places.
a defendant does not settle the entire inventory the plaintiff's lawyer will set "one good one for trial." As one commentator has explained, "[i]n theory, judges should prevent abuses. In practice, trial lawyers depend on a few states, whose expansive liability laws, procedural rules or well-known anti-corporate bias shift the odds in their favor."98

Consequently, while the uncovering of fraudulent diagnostic procedures in MDL 1553 "was a significant success for the tort system in handling a mass tort,"99 there are no guarantees that similar practices would be uncovered in the future. RAND explains:

Plaintiffs can attempt to overwhelm defendants with claims to force defendants to settle with little attention paid to the merits of the claims. It can be extremely costly for defendants to investigate the merits of a substantial proportion of the claims, and some may conclude that it is cheaper, at least in the short run, to settle. Judges have an incentive to push for rapid settlements that clear their overloaded dockets.

Such situations are ripe for the abuse of expert evidence.100

Likewise, Boston University Law School Professor Keith Hylton has said that plaintiffs’ lawyers have an incentive to file unreliable claims because “[t]he lawyer knows that it is costly to determine whether any given victim is fraudulent. He knows that it would not be rational, given the cost of checking, to examine every victim in the class to determine validity.”101

Indeed, in MDL 1553, plaintiffs’ lead counsel was confident enough that defendants would be pressured to settle prior to discovery that he “presented the defendants with a letter demanding $1 billion to settle the cases. He suggested that the price was a bargain, because "litigating the Silica MDL will collectively cost the defendants more than $1,500,000,000" in pretrial expenses alone."102

The abuses in MDL 1553 were brought to light as a result of a perfect storm of events. If not for the strategy adopted by defense counsel and Judge Jack’s leadership, “litigation based on abusive

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98 Robert J. Samuelson, Editorial, Shamelessly Milking the Asbestos Cash Cow: It Isn’t Justice; It’s a Business Worth $54 Billion, CHARLESTON DAILY MAIL, Nov. 21, 2002, at 5A.
99 CARROLL ET AL., supra note 4, at 1.
100 Id. at 28.
102 Parloff, supra note 79, at 104.
diagnostic practices might have continued."\textsuperscript{103} The RAND report, therefore, discusses several changes to judicial practices and procedures and attorney practices that might help ensure that similar abuses do not occur in the future.

A. Changes to Judicial Practices and Procedures

RAND identifies several changes to judicial practices and procedures that "could create conditions that would increase the likelihood that abuses in diagnostic practices in mass personal-injury litigation would be routinely uncovered regardless of the judge assigned to the case."\textsuperscript{104}

First, the report suggests that trial judges follow Judge Jack's example and require disclosure of diagnosis, the identity of the diagnosing physician, and relevant medical records "up front" once litigation has achieved sufficient size to "help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate claims."\textsuperscript{105} Judge Jack's decision to require the MDL 1553 plaintiffs to submit fact sheets with such information was pivotal in "provid[ing] defense attorneys with information that was essential to uncovering diagnostic irregularities."\textsuperscript{106} "More commonly, plaintiffs' attorneys do not provide a physician's diagnosis until discovery, and, if the case settles, a diagnosis may never be provided."\textsuperscript{107} "Defense efforts to obtain diagnostic information can be time consuming and costly."\textsuperscript{108} RAND also explains that requiring disclosure of the diagnosing physician's identity would make that person subject to deposition and prevent plaintiffs from broadly shielding all of their experts from deposition "by arguing that [a particular] expert is a consulting expert and would not testify in a particular case."\textsuperscript{109} RAND notes that "[t]he diagnosis, identity of the diagnosing physician, and relevant medical records are commonly required by the Lone Pine orders that are sometimes used for case-management purposes by judges in mass torts."\textsuperscript{110}

\textsuperscript{103} CARROLL ET AL., supra note 4, at xii.
\textsuperscript{104} Id. at 28.
\textsuperscript{105} Id.; see also id. at xiii.
\textsuperscript{106} Id. at xi.
\textsuperscript{107} Id. at xi-xii.; see also id. at 23 ("Plaintiffs are typically not required to provide a physician's diagnosis until discovery, and, if a case settles before going to trial, a diagnosis may never be provided.").
\textsuperscript{108} Id. at 23.
\textsuperscript{109} Id. at 29.
\textsuperscript{110} Id.. Lone Pine orders take their name from Lore v. Lone Pine Corp., where the court ordered each plaintiff to submit documentation regarding exposure to toxic substances. No.
RAND's recommendation is to expand the use of such orders "in a particular type of litigation once the number of cases has grown sufficiently large." 111

Second, RAND states that parties should be required to present [e]vidence on [a]ppropriate [d]iagnostic [p]ractices and [w]hether [t]hey [w]ere [f]ollowed. Specifically, diagnoses should be based on reasonable medical standards or consistent with accepted medical practice, and, once litigation has reached sufficient scale, it would be beneficial for courts to routinely require that these standards and practices be identified early in the case. 112

At the same time appropriate practices are identified, the court could also require evidence showing that these practices were in fact followed. 113 "If a substantial number of claims are based on diagnosis from a particular doctor, the court could consider conducting a hearing on the training of the doctor, whether the doctor is connected to screening facilities, and the procedures followed in his or her practice." 114

Third, RAND suggests that more guidance should be provided to federal and state judges on how they should handle mass personal injury torts. 115 For example, RAND suggests that it "may be appropriate to enhance the Federal Judicial Center's (2004) Manual for Complex Litigation, Fourth, to provide an assessment of which types of judicial practices have been effective in mass personal-injury litigation and which have not." 116 In this way, the manual might identify a set of "best practices" to be followed by judges to effectively manage mass torts. 117

RAND notes that "Judge Jack actively managed" MDL 1553 while other judges faced with a large number of claims and a crowded docket often "allow cases to churn for a few years in hopes they will settle." 118 RAND added: "To reduce their large dockets, judges may also push for cases to settle with little investigation of the merits of the underlying claim. Judge Jack took neither of these
Finally, RAND recommends that the mechanisms for aggregating information across claims for pretrial purposes should be enhanced. The importance of the ability to jointly evaluate a large sample of claims was made evident in the proceedings before Judge Jack. As options, RAND lists: (1) "creat[ing] an infrastructure for voluntary coordination between state and federal judges"; (2) "creat[ing] a mechanism [to] allow federal courts to aggregate claims in state courts for the purpose of developing information about the cases"; and (3) "facilitat[ing] pretrial consolidation of cases already in federal court[s]."

B. Changes to Conduct of Plaintiff and Defense Bars

In Judge Jack's view, at least one law firm representing plaintiffs "unreasonably pursued the silica cases even after it became clear that there was no reliable basis for the claims." RAND also raises alleged improper behavior by one defense counsel that was hoping to land silica litigation work when the cases spiked. Perhaps to achieve balance, RAND offers suggestions to "attempt to reduce the prevalence of improper behaviors on both the plaintiff and defense sides." First, RAND recommends that more serious sanctions should be considered for plaintiffs' lawyers that pursue cases based on grossly inadequate diagnoses. In the silica litigation, for instance, the one fine that was issued against a plaintiffs' firm "was so small that the direct financial consequences for the firm were minor. In addition, subsequent defense motions in Mississippi state courts for sanctions against other plaintiffs' firms failed." Similarly, little seems to have come out of the criminal and congressional inquiries following Judge Jack's decision. Consequently, RAND recommends that judges should "consider fines that would deter misbehavior rather than just recover excess costs." In addition, RAND suggests that policymakers should add "teeth" to the

119 Id. at 25.
120 Id. at xiv; see id. at 30–32.
121 Id. at 33.
122 Id.
123 Id. at 34.
124 Id. at 33.
126 CARROLL ET AL., supra note 4, at 34.
sanctions available under Federal Rule of Civil Procedure 11, such as a return to a less permissive rule.\textsuperscript{127} The tools available to state court judges for deterring improper attorney behavior should also be reviewed and assessed.\textsuperscript{128}

Second, RAND recommends that closer attention be paid to the performance of the defense bar. For example, RAND notes, "[w]hile it might seem like a pedestrian observation, a critical action by the defense attorneys in the silica multidistrict litigation was to challenge the diagnoses."\textsuperscript{129} RAND points out that there are legitimate reasons that some defense counsel may be reluctant to challenge plaintiff diagnoses, such as fear of retaliation against their client and recognition that, in the short-run, it can be cheaper to quickly settle claims. On the other hand, according to some of those interviewed by RAND, "some defense attorneys increase their revenue by churning a case for a while, mediating the case for a while, and then settling,"\textsuperscript{130} "without any concerted effort to challenge suspect diagnoses."\textsuperscript{131}

RAND also cites an interview with a plaintiffs’ attorney who allegedly recalled multiple instances in which a defense attorney would call and ask that "his client be named in a silica case."\textsuperscript{132}

If true, these activities raise serious ethical issues. RAND acknowledges, however, that it is "not obvious how to deter" such practices because they are "difficult to observe."\textsuperscript{133} Furthermore, corporate clients are sophisticated shoppers for legal services, and the potential for repeat business in itself provides appropriate incentives for the vast majority of counsel. RAND does not offer specific safeguards to deter improper conduct by defense counsel, but suggests that policymakers and practitioners consider "what types of responses might be effective."\textsuperscript{134}

III. CONCLUSION

RAND’s latest report makes an important contribution with regard to identifying and addressing the potential for abusive diagnostic procedures in mass torts. If RAND’s recommendations

\textsuperscript{127} See id. at xiv, 34.
\textsuperscript{128} See id. at xiii.
\textsuperscript{129} Id. at 21.
\textsuperscript{130} Id. at 22.
\textsuperscript{131} Id. at 34.
\textsuperscript{132} Id. at xiv.
\textsuperscript{133} Id. at 34.
\textsuperscript{134} Id. at 34.
are followed by policymakers and courts, then abuses such as those uncovered in MDL 1553 may be less likely to occur in the future.