Legal Opinion Letter

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RAND REPORT HIGHLIGHTS ABUSE OF MEDICAL DIAGNOSTICS IN MASS TORTS

by
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In June of 2005, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas issued a landmark opinion declaring that all but one of 10,000 silica cases in MDL 1553 were based on "fatally unreliable" diagnoses. Judge Jack found that the claims "were driven by neither health nor justice: they were manufactured for money." The broad media reporting of Judge Jack's findings sparked criminal and congressional inquiries at which the suspect doctors "took the Fifth." The ripple effects continue.

A recent report issued by the prestigious RAND Institute for Civil Justice examines the silica litigation experience to determine what lessons can be learned about the civil justice system's ability to detect abusive medical diagnostic practices in mass personal injury litigation. *See* Stephen J. Carroll et al., *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* (RAND Inst. for Civil Justice 2009), *available at* http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf.

Silica litigation emerged in force on the tide of asbestos litigation. Silica—quartz in its most common form—is a ubiquitous mineral that covers beaches and fills sandboxes. When fragmented into tiny particles 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 occupational exposure to silica dust in various industries.

Plaintiffs' lawyers filed an unprecedented number of silica cases from 2002 to 2004—20,479 cases in Mississippi alone—an amount Judge Jack described as "five times greater than one would expect over the same period in the entire United States." If legitimate, she said, the sudden spike in filings would have suggested "perhaps the worst industrial disaster in recorded world history." Within two years, however, the litigation was essentially over. According to RAND, "The proceeding in Judge Jack's court exposed gross abuses in the diagnosing of silica-related injuries" and played a large role in the collapse of the litigation.

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' or as it is more commonly known, litigation screening." The Director of the Federal Judicial Center, U.S. District Court Judge Barbara Rothstein of the Western District of Washington, has said, "One of the most important things is I think judges are alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case."

The RAND report wisely appreciates that the uncovering of fraudulent diagnostic procedures in the federal court silica litigation "was a significant success for the tort system in handling a mass tort," but there are no guarantees that similar practices would be uncovered in the future. After all,

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"[t]he prospect of large financial gain provides a powerful incentive to utilize inappropriate diagnostic procedures in order to manufacture large numbers of claims." Only through a perfect storm of events was the fraud uncovered in the silica MDL, and absent Judge Jack's leadership, "litigation based on abusive diagnostic practices might have continued."

Using the insights from the silica MDL, RAND identifies several changes to judicial practices and procedures that may strengthen the tort system's ability to police abusive diagnostic procedures in mass personal injury cases.

First, **judges should require disclosure of plaintiffs' diagnoses, the identity of the diagnosing physician, and relevant medical records at the time of case filing** to "help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate claims." RAND notes that several of Judge Jack's decisions in this regard "stand in sharp contrast to the judicial procedures often used in such cases. . . . More commonly, plaintiffs' attorneys do not provide a physician's diagnosis until discovery, and, if the case settles, a diagnosis may never be provided."

Second, **parties should be required early on to present evidence on appropriate diagnostic practices and whether they were followed**. "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 on in the case."

Third**, more guidance should be provided for federal and state judges on how they should handle mass personal injury torts**. For example, RAND suggests 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." The manual might identify a set of "best practices" to be followed by judges.

Fourth, the mechanisms for aggregating information across claims for pretrial purposes should be enhanced. As options, RAND lists: (1) creating an infrastructure for voluntary coordination between state and federal judges; (2) creating a mechanism to allow federal courts to aggregate claims in state courts for the purpose of developing information about the cases; and (3) facilitating pretrial consolidation of cases already in federal court.

RAND also identifies several changes with respect to the practices of the plaintiffs' and defense bars in mass torts.

First, 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 "was so small that the direct financial consequences for the firm were minor." Consequently, RAND recommends adding "teeth" to Rule 11 sanctions in federal courts. The tools available to state court judges for deterring improper attorney behavior should also be reviewed and assessed.

RAND also recommends that closer attention be paid to the performance of the defense bar, noting that one plaintiffs' attorney interviewed recalled multiple instances in which a defense attorney would actually call and ask that his client be named in a silica case. If true, this behavior is unconscionable and raises serious ethical issues that RAND suggests should be explored further by policymakers and practitioners.

RAND's latest report makes an important contribution with regard to identifying and addressing the potential for abusive diagnostic procedures in mass torts. If the recommendations are followed by policymakers and courts, perhaps mass tort litigation will become less "fraud friendly" in the future.

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