ASBESTOS LITIGATION SCREENING CHALLENGES: AN UPDATE

MARK A. BEHRENS*

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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"[1] fueled by specious evidence that scholars and many courts refused to acknowledge up to that time.[2] Professor Brickman predicted,

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* Mark A. Behrens is a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He received his B.A. from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University Law School in 1990, where he was a member of the *Vanderbilt Law Review*. Research support for this Article was provided by the Coalition for Litigation Justice, Inc. The views discussed herein are solely those of the author.

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.[3]

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."[4] Bell said that mass screenings conducted by plaintiffs' lawyers and their agents had "driven the flow of new asbestos claims by healthy plaintiffs."[5]

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.[6] 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 'unimpaireds'—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 [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.[7] 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."[8] 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%.[9]

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.[10] 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/108hrg/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."[11]

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.[12] 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."[13] 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."[14]

Recently, significant progress has been made in exposing numerous screening abuses, and sometimes fraudulent conduct, by litigation physicians, screening companies, and others.[15] 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[16] have barred claims that rely on the diagnoses, records, and reports of discredited physicians and screening companies.[17]

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.[18] 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.[19]

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; 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.[20] 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).[21] 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).[22] 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.[23]

Courts in several other states (Arizona,[24] Delaware,[25] Maine,[26] Maryland,[27] and Pennsylvania[28]) and the federal courts for Hawaii[29] 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,[30] 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."[31]

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.[32]

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.[33] 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,[34] Texas[35] and Florida[36] in 2005, Kansas[37] and South Carolina[38] in 2006, Georgia[39] 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 (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 (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 (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[40] in 2009. In 2006, Tennessee enacted medical-criteria procedures for silica cases.[41] Several states also enacted laws to generally prevent the consolidation of cases involving asbestos or silica.[42]

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*[43] 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.[44] 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.[45]

"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."[46] Instead, the doctors "were affiliated with a handful of law firms and mobile x-ray screening companies."[47]

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

On December 20, 2004, Dr. Glyn Hilbun was deposed regarding his 471 silicosis diagnoses.[52]

> 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.

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.[53]

Dr. Hilbun withdrew his silicosis diagnoses; he was followed by Dr. Kevin Cooper, who was deposed on January 4, 2005.[54]

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.[55] "N&M . . . helped generate approximately 6,757 claims in th[e] MDL, while RTS . . . helped generate at least 1,444 claims."[56] N&M generated these "6,500-plus claims in just 99 screening days . . . ."[57] "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."[58] 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."[59]

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."[60] His "testimony [at] the first day of the *Daubert* hearings abruptly ended when the [c]ourt granted his request for time to obtain counsel."[61] 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; 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/41ayt53bvwjjuqfgyfzcu53f/41ayt53bv

approximately 505 MDL Plaintiffs for N&M."[62] "Like his father, he never saw or read any of the reports purportedly written and signed by him."[63]

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

Screening physician Dr. Barry Levy diagnosed approximately 1,389 plaintiffs in the silica MDL,[66] including 800 MDL plaintiffs in seventy-two hours.[67] Similarly, Dr. H. Todd Coulter diagnosed 237 MDL plaintiffs in eleven days[68] 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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wjjuqfgyfzcu53f.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.msbml.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; 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/58220a7f9eeaafab85256b180058c032/187b1c1bcbee5c6e852574050057e87a/$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.msbml.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."[69] Dr. W. Allen Oaks diagnosed approximately 200 plaintiffs and performed X-ray reads on 447 plaintiffs.[70] Nevertheless, he declined to label himself as an expert in diagnosing silicosis.[71]

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.'"[72] Judge Jack said, "[T]hese diagnoses were driven by neither health nor justice: they were manufactured for money."[73] 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 . . . .[74]

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."[75]

Judge Jack's findings have impacted, and will continue to impact, asbestos litigation and other mass-tort screenings throughout the country.[76] 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 Gelinas, 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."[77] 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."[78] 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."[79] Judge Jack's findings also paved the way for discovery pursued in Michigan, which led to the unprecedented result described below.[80]

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.[81] A landmark ruling in Detroit, however, is likely to change Michigan's status as a friendly forum for such high-volume cases.[82]

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.[83] 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.[84] 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.[85] 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.

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.[86] 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.[87] 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.[88] 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.[89] Although Michigan cases are subject to an anti-bundling order issued by the Michigan Supreme Court,[90] seventy to ninety Wayne County cases were regularly set for a common trial date every two to three months for pretrial processing.[91] 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/CircuitCourttrends.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.