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# LITIGATION

## RAND ISSUES REPORT ON ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION

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In June 2005, United States District Court Judge Janis Graham Jack of the Southern District of Texas declared that all but one of 10,000 cases aggregated under Multidistrict Litigation (MDL) 1553 were based on “fatally unreliable” diagnoses.<sup>1</sup> Judge Jack found that the claims “were driven by neither health nor justice: they were manufactured for money.”<sup>2</sup>

The RAND Institute for Civil Justice recently issued a report that carefully examines the MDL 1553 litigation to identify lessons that can be learned about the civil justice system’s ability to detect and address abusive medical diagnostic practices in mass personal injury litigation.<sup>3</sup>

### I. SILICA LITIGATION: BACKGROUND AND MDL 1553

#### 1. Knowledge and Regulation

Silica—quartz in its most common form—is a ubiquitous mineral. 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. Workers in many industries, including mining, quarrying, construction, abrasives, and ceramics, can be exposed to silica.

The risks of silica exposure have been well-known for a long time. For instance, as far back as 1949 the United States Supreme Court noted, “It is a matter of common knowledge that it is injurious to the lungs and dangerous to the health to work in silica dust . . . .”<sup>4</sup>

The federal Occupational Safety & Health Administration (OSHA) has regulated workplace silica exposure since the early 1970’s. 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 and the OSHA Hazard Communications Standard. States also have acted to protect workers from overexposure.

The Centers for Disease Control (CDC) & Prevention and National Institute for Occupational Safety & Health (NIOSH) have reported that nationwide silicosis deaths declined sharply, from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, to 148 in 2002—a 93% decline in overall mortality.<sup>5</sup> RAND found that “[b]etween 1995 and 2004, silicosis-related deaths were generally stable or decreasing in all states.”<sup>6</sup>

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For years, silica litigation generally reflected this public health success. The litigation was stable with only a low number of people pursuing silica claims in any given year.<sup>7</sup>

#### 2. A Spike in Silica Claims

“[P]laintiffs’ lawyers filed an unprecedented number of silica cases from 2002 to 2004—a total of 20,479 cases in Mississippi alone—an amount ‘five times greater than one would expect over the same period in the entire United States.’”<sup>8</sup> The drastic rise in claims against U.S. Silica, a leading supplier, exemplified this surge. In 1998, U.S. Silica fielded 198 silicosis claims; the number of claims jumped to 1,356 in 2001 before soaring to 5,277 in 2002 and skyrocketing to 19,865 in 2003.<sup>9</sup> Nearly two-thirds of the claims filed against U.S. Silica between 2001 and 2003 were filed in Mississippi state courts; most of the other cases were filed in Texas state courts.<sup>10</sup>

If legitimate, this spike would have suggested “perhaps the worst industrial disaster in recorded world history.”<sup>11</sup> 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, due in large part to her findings, the litigation collapsed.”<sup>12</sup>

#### 3. Judge Jack: The Phantom Epidemic

MDL 1553 began in September 2003 when over 10,000 individual silicosis claims that primarily originated in Mississippi state court were removed to federal court and centralized for pretrial purposes before Judge Jack.<sup>13</sup>

As a trained nurse, Judge Jack appreciated that the surge in claims defied medical explanation. She observed, “The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the nation.”<sup>14</sup>

The events that would lead to the exposure of “gross deficiencies in the diagnosis underlying the silica claims” were spurred by the review of fact sheets submitted by the plaintiffs.<sup>15</sup> Early in the litigation, Judge Jack required each plaintiff to submit a sworn fact sheet specifying their diagnosis and all pertinent medical and diagnostic information, as well as the results of B-reads of chest x-rays.<sup>16</sup> If a plaintiff failed to do so, his or her claim would be dismissed.<sup>17</sup>

The fact sheets revealed several suspicious patterns.

First, in almost all cases, the fact sheets showed that the plaintiff’s claim was not based on a diagnosis provided by the plaintiff’s treating physician.<sup>18</sup> “Rather than being connected to the Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile x-ray screening companies.”<sup>19</sup>

Second, “although almost all the plaintiffs had different treating physicians, a very small number of B-readers accounted for almost all of the plaintiffs’ B-reads and diagnoses.”<sup>20</sup>

More than 9,000 plaintiffs submitted fact sheets and listed approximately 8,000 different doctors.<sup>21</sup> “Remarkably, however, only twelve . . . doctors diagnosed more than 9,000 plaintiffs with silicosis.”<sup>22</sup>

Third, the defense attorneys recognized that some of the B-readers who figured prominently in the silica litigation had been involved in asbestos litigation.<sup>23</sup>

Armed with information from the fact sheets, the defendants began deposing a few of the diagnosing doctors in late 2004. Dr. George Martindale “testified that he had not intended to diagnose these individuals with silicosis and withdrew his diagnoses.”<sup>24</sup> Dr. Martindale “purportedly diagnosed 3,617 MDL plaintiffs with silicosis while retained by the screening company N&M.”<sup>25</sup> According to Judge Jack, “These 3,617 diagnoses were issued on only 48 days, at an average rate of 75 diagnoses per day.”<sup>26</sup>

The defendants subsequently deposed two other screening doctors, Glyn Hilbun and Kevin Cooper, “who had been listed as the diagnoses doctors on 471 and 225 plaintiff fact sheets, respectively.”<sup>27</sup> “Both doctors essentially echoed Martindale’s testimony.”<sup>28</sup>

In February 2005 *Daubert* hearings before Judge Jack, it was established that N&M “helped generate approximately 6,757 claims in th[e] MDL, while [another screening firm,] RTS . . . helped generate at least 1,444 claims.”<sup>29</sup> N&M generated these 6,500-plus claims in just ninety-nine screening days.<sup>30</sup> To place this accomplishment in perspective, “in just over two years, N&M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period.”<sup>31</sup> Furthermore, at least 4,031 N&M-generated plaintiffs had previously filed asbestosis claims with the Manville Personal Injury Settlement Trust, although “a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis.”<sup>32</sup>

The most prolific MDL diagnosing physician, Dr. Ray Harron, was involved in the diagnosis of approximately 6,350 of the silica MDL plaintiffs in just ninety-nine days<sup>33</sup> and was listed as the diagnosing physician for approximately 2,600 plaintiffs.<sup>34</sup> “He seemed at a loss to explain how permanent signs of asbestosis he’d diagnosed disappeared years later when he diagnosed the same workers with silicosis.”<sup>35</sup> His testimony “abruptly ended when the Court granted his request for time to obtain counsel.”<sup>36</sup>

“It became clear during the testimony of James Ballard, another of the diagnosing physicians, that similar practices were followed for plaintiffs screened by RTS.”<sup>37</sup> Dr. Ballard performed nearly 1,500 x-ray readings. “Like Harron, he also read a number of x-rays differently depending on what the hiring firm was looking for—initially asbestosis, then silicosis.”<sup>38</sup> The defendants presented over a dozen examples where Dr. Ballard had previously diagnosed the same individuals with lung conditions consistent with asbestosis.<sup>39</sup>

Dr. Barry Levy diagnosed almost 1,400 plaintiffs,<sup>40</sup> including 800 in seventy-two hours.<sup>41</sup> “He spent only four minutes on each diagnoses.”<sup>42</sup>

Another screening doctor, Todd Coulter, diagnosed 237 MDL plaintiffs in eleven days as part of a contract with

a company, Occupational Diagnostics, which was run from a Century 21 realty office and would hold screenings from a “trailer in the parking lots of restaurants and hotels.”<sup>43</sup>

In June 2005, Judge Jack issued a scathing opinion stating, “the Court is confident . . . that the ‘epidemic’ of some 10,000 cases of silicosis ‘is largely the result of misdiagnoses.’”<sup>44</sup> Judge Jack concluded that “the failure of the challenged doctors to observe the same standards for a ‘legal diagnosis’ as they do for a ‘medical diagnosis’ render[ed] their diagnoses . . . inadmissible . . .”<sup>45</sup> She then remanded all but one case to state court, citing lack of jurisdiction while questioning the validity of virtually every claim.

In the one case Judge Jack retained, she found that the plaintiffs’ law firm multiplied the proceedings unreasonably and vexatiously, describing the firm’s behavior as part of a larger process to “overwhelm the defendants and the judicial system.”<sup>46</sup> She then prorated her estimate of the costs of the litigation and set the fine at \$8,250,<sup>47</sup> explaining that “[t]he 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.”<sup>48</sup>

#### 4. *The Fall Out*

By mid-January 2006, “more than half” of the claims remanded to Mississippi and Texas state courts had been dismissed,<sup>49</sup> “most of them voluntarily by the law firms that filed them.”<sup>50</sup> In addition, silica filings plummeted following Judge Jack’s order.<sup>51</sup> 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.”<sup>52</sup> Legal reforms enacted in several states during this time also contributed to a decline in the number of claims, especially statutes that require plaintiffs to demonstrate reliable evidence of physical impairment in order to proceed with a silica-related claim.<sup>53</sup>

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.”<sup>54</sup> 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 alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case.”<sup>55</sup>

## II. RAND’S RECOMMENDATIONS

As the RAND report appreciates, “The prospect of large financial gain provides a powerful incentive to utilize inappropriate diagnostic procedures in order to manufacture large numbers of claims.”<sup>56</sup> Thus, while the uncovering of fraudulent diagnostic procedures in MDL 1553 “was a significant success for the tort system in handling a mass tort,”<sup>57</sup> there are no guarantees that similar practices would be uncovered in the future. 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 diagnostic practices might have continued."<sup>58</sup>

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.

### 1. 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."<sup>59</sup>

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."<sup>60</sup>

Second, RAND states that parties should be required to present evidence on appropriate diagnostic practices and whether they were followed.<sup>61</sup> "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."<sup>62</sup> At the same time appropriate practices are identified, the court could also require evidence showing that these practices were in fact followed.<sup>63</sup>

Third, RAND suggests that more guidance should be provided to federal and state judges on how they should handle mass personal injury torts.<sup>64</sup> 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."<sup>65</sup> The manual might identify a set of "best practices" to be followed by judges to effectively manage mass torts.

Finally, RAND recommends that 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.<sup>66</sup>

### 2. Changes to Conduct of Plaintiff and Defense Bars

RAND recommends that more serious sanctions should be considered for plaintiffs' lawyers that pursue cases based on grossly inadequate diagnoses.<sup>67</sup> In particular, RAND recommends that judges should consider fines that would deter misbehavior rather than just cover excess costs.<sup>68</sup> In addition, RAND suggests that policymakers might add "teeth" to the sanctions available under Federal Rule of Civil Procedure 11.<sup>69</sup>

RAND also 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."<sup>70</sup> 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,"<sup>71</sup> without any concerted effort to challenge suspect diagnoses.<sup>72</sup> RAND acknowledges that it is "not obvious" how to deter such practices because they are "difficult to observe."<sup>73</sup> RAND suggests that policymakers and practitioners consider what types of responses might be effective.<sup>74</sup>

## 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 are adopted, then abuses such as those uncovered in MDL 1553 may be less likely to occur.

## Endnotes

1 See *In re Silica Prods. Liab. Litig.* (MDL No. 1553), 398 F. Supp. 2d 563, 675 (S.D. Tex. 2005).

2 *Id.* at 635.

3 See STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA (2009), available at [http://www.rand.org/pubs/technical\\_reports/2009/RAND\\_TR774.pdf](http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf).

4 *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

5 See DEPT. OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, WORKER HEALTH CHARTBOOK 2004 (Pub. No. 2004-146), available at <http://www.cdc.gov/niosh/docs/2004-146/detail/imagdetail.asp@imgid234.htm>; Dept. of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Silicosis Mortality, Prevention and Control—United States, 1968-2002*, MMWR WKLY., Apr. 29, 2005, at 401-405, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>.

6 CARROLL ET AL., *supra* note 3, at 44.

7 See Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 MEALEY'S LITIG. REP.: ASBESTOS 33 (Feb. 21, 2005).

8 David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 258 (2007).

9 See Kimberly A. Strassel, Editorial, *He Fought the Tort Bar—and Won*, WALL ST. J., May 4, 2009, at A14.

10 See CARROLL ET AL., *supra* note 3, at 3.

11 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 572.

12 CARROLL ET AL., *supra* note 3, at ix.

13 See *In re Silica Prods. Liab. Litig.* (MDL No. 1553), 280 F. Supp. 2d 1381 (Jud. Pan. Mult. Lit. 2003).

14 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 572.

15 CARROLL ET AL., *supra* note 3, at ix.

16 See *id.* at x, 7.

17 See *id.* at 7.

- 18 *See id.* at 8.
- 19 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 580.
- 20 CARROLL ET AL., *supra* note 3, at 8.
- 21 *See* John P. Hooper et al., *Undamaged: Federal Court Establishes Criteria for Mass Tort Screenings*, American Bar Association Section of Litigation, 5:3 MASS TORTS 12, 12-13 (Summer 2007).
- 22 *Id.* at 13.
- 23 CARROLL ET AL., *supra* note 3, at 8.
- 24 David M. Setter & Andrew W. Kalish, Commentary, *Recent Screening Developments: The MDL Silica 1553 Daubert Hearing*, 20:9 MEALEY'S LITIG. REP.: ASBESTOS 38, 39 (June 1, 2005).
- 25 *Id.* at 39.
- 26 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 581; *see also* CARROLL ET AL., *supra* note 3, at 8-9.
- 27 CARROLL ET AL., *supra* note 3, at 9.
- 28 *Id.*
- 29 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 596.
- 30 *See* Setter & Kalish, *supra* note 24, at 40.
- 31 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 603.
- 32 *Id.*
- 33 *See* Setter & Kalish, *supra* note 24, at 43.
- 34 *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 606.
- 35 Lynn Brezovsky, *Judge: Diagnoses Methods in Silicosis Case 'Frightening' West Virginia Doctor Involved in Multistate Lawsuit in Texas*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 19, 2005, at 6D, *available at* 2005 WLNR 2702789.
- 36 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 608.
- 37 CARROLL ET AL., *supra* note 3, at 12.
- 38 *Id.*
- 39 *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 609.
- 40 *See id.* at 611.
- 41 *See* Setter & Kalish, *supra* note 24, at 40.
- 42 CARROLL ET AL., *supra* note 3, at 12.
- 43 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 616.
- 44 *Id.* at 632 (internal citation omitted).
- 45 *Id.* at 634.
- 46 *Id.* at 676.
- 47 *See id.* at 678.
- 48 *See id.* at 679.
- 49 Peter Geier, *Silica Cases Drawing Resistance Nationwide*, 233:8 LEGAL INTELLIGENCER 4 (Jan. 12, 2006).
- 50 Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3, *abstract available at* 2006 WLNR 3870056.
- 51 *See* Paul Davies, *Plaintiffs' Lawsuits Against Companies Sharply Decline*, WALL ST. J., Aug. 26, 2006, at A1, *abstract available at* 2006 WLNR 14914829.
- 52 CARROLL ET AL., *supra* note 3, at 4.
- 53 *See* OHIO REV. CODE §§ 2307.84 et seq.; TEX. CIV. PRAC. & REM. CODE §§ 90.001 et seq.; FLA. STAT. ANN. §§ 774.203 et seq.; KAN. STAT. ANN. §§ 60-4901 et seq.; TENN. CODE ANN. §§ 29-34-301 et seq.; S.C. CODE ANN. §§ 44-135-30 et seq.; GA. CODE ANN. §§ 51-14-1 et seq.; OKLA. STAT. tit. 76 §§ 60 et seq.
- 54 Maron & Jones, *supra* note 8, at 261.
- 55 Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008).
- 56 CARROLL ET AL., *supra* note 3, at 1.
- 57 *Id.*
- 58 *Id.* at 26.
- 59 *Id.* at 28.
- 60 *Id.*; *see also id.* at xiii.
- 61 *See id.* at xiii.
- 62 *Id.* at 29.
- 63 *See id.*
- 64 *See id.* at xiii.
- 65 *Id.* at 30.
- 66 *Id.* at 30-32; *see also id.* at xiv.
- 67 *See id.*
- 68 *Id.* at 34.
- 69 *See id.*
- 70 *Id.* at 21.
- 71 *Id.* at 22.
- 72 *Id.* at 34.
- 73 *Id.* at 34.
- 74 *See id.* at xiv, 34.

