

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 “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 broad media reporting of Judge Jack’s findings sparked criminal and congressional inquiries in which the suspect doctors “took the Fifth.”<sup>3</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>4</sup>

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<sup>1</sup> See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 675 (S.D. Tex. 2005).

<sup>2</sup> *Id.* at 635.

<sup>3</sup> See Jonathan D. Glater, *Civil Suits over Silica in Texas Become a Criminal Matter in New York*, N.Y. TIMES, May 18, 2005, at C5; Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3.

<sup>4</sup> 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.<sup>5</sup> 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.”<sup>6</sup>

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>7</sup>

The Federal Occupational Safety & Health Administration (“OSHA”) has regulated workplace silica exposure since the early 1970s.<sup>8</sup> 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<sup>9</sup> and the OSHA Hazard Communications Standard.<sup>10</sup> States also have acted to protect workers from overexposure. For instance, many states set

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DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA (2009), [http://www.rand.org/pubs/technical\\_reports/2009/RAND\\_TR774.pdf](http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf); see also JUDYTH PENDELL, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, REGULATING ATTORNEY-FUNDED MASS MEDICAL SCREENINGS: A PUBLIC HEALTH IMPERATIVE? (2005), <http://www.reg-markets.org/admin/authorpdfs/page.php?id=1193>.

<sup>5</sup> See Cassandra R. Cole & Kathleen A. McCullough, *A Discussion of the Legal and Legislative Issues Surrounding Silica-Related Injuries*, J. INS. REG., Summer 2005, at 21, 23.

<sup>6</sup> See CARROLL ET AL., *supra* note 4, at 2.

<sup>7</sup> *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

<sup>8</sup> In 1971, federal regulations set permissible exposure limits for occupational exposure to airborne silica. 41 C.F.R. § 50-204.50 (2009). In 1974, OSHA applied extensive abrasive blasting safety regulations, enacted for government contractors in the 1960s under the Walsh-Healy Act, to all employers, 29 C.F.R. § 1910.94(a)(5)(ii) (2009), and adopted standards for working with silica in the construction and maritime industries. 29 C.F.R. § 1910.1000 tbl.Z-3 (2009).

<sup>9</sup> 41 C.F.R. § 50-204.50.

<sup>10</sup> OSHA also addresses the use of protective equipment. See, e.g., 29 C.F.R. §§ 1910.94(a)(5)(i), (v), 1910.1000(e), 1910.134(a)(2), 1915.34(c)(3), 1926.55(b), 1926.57(f)(5), 1926.103.

threshold levels for silica dust in the workplace,<sup>11</sup> prohibit minors from working with silica refractory products,<sup>12</sup> and offer other worker protections.<sup>13</sup>

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.<sup>14</sup> Similarly, a 2005 study by OSHA staff found “a downward trend in the airborne silica exposure levels” from 1988–2003.<sup>15</sup> RAND found that “[b]etween 1995 and 2004, silicosis-related deaths were generally stable or decreasing in all states.”<sup>16</sup>

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>17</sup>

### *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.’”<sup>18</sup> The drastic rise in

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<sup>11</sup> See, e.g., ALA. CODE § 25-9-111(a) (2007); 225 ILL. COMP. STAT. § 705/24.06 (2007); W. VA. CODE § 22A-2-24(d) (2005).

<sup>12</sup> See, e.g., ARIZ. REV. STAT. ANN. § 23-231(A)(12) (1995); COLO. REV. STAT. § 8-12-110(2)(h) (2008); N.Y. LAB. LAW § 133(2)(j) (McKinney 2009).

<sup>13</sup> 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).

<sup>14</sup> See NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEPT OF HEALTH & HUMAN SERVS., WORKER HEALTH CHARTBOOK 169 fig.2-192 (2004), <http://www.cdc.gov/niosh/docs/2004-146/detail/imagdetail.asp@imgid234.htm>; Ctrs. for Disease Control & Prevention, Dep’t of Health & Human Servs., *Silicosis Mortality, Prevention and Control—United States, 1968–2002*, 54 MMWR WKLY. 401, 402 (2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>.

<sup>15</sup> Abdiaziz Yassin et al., *Occupational Exposure to Crystalline Silica Dust in the United States, 1988–2003*, 113 ENVTL. HEALTH PERSPECTIVES 255, 255 (2005).

<sup>16</sup> CARROLL ET AL., *supra* note 4, at 44.

<sup>17</sup> See Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, MEALEY’S LITIG. REP. SILICA, Feb. 2005, at 21, 24 & tbl. [hereinafter Behrens et al., *Silica: An Overview*]; Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173, 193 (2006).

<sup>18</sup> 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.<sup>19</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>20</sup>

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.”<sup>21</sup>

If legitimate, this spike would have suggested “perhaps the worst industrial disaster in recorded world history.”<sup>22</sup> 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.”<sup>23</sup>

### 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.<sup>24</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

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*Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 258 (2007) (quoting *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 571–72 (S.D. Tex. 2005)).

<sup>19</sup> See Kimberly A. Strassel, *He Fought the Tort Bar—and Won*, WALL ST. J., May 4, 2009, at A14; CARROLL ET AL., *supra* note 4, at 3.

<sup>20</sup> 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.

<sup>21</sup> Behrens et al., *Silica: An Overview*, *supra* note 17, at 24; see also Susanne Sclafane, *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 4,305 plaintiffs in 2002 to 643 cases filed by 17,288 plaintiffs in 2003).

<sup>22</sup> *In re Silica*, 398 F. Supp. 2d at 572.

<sup>23</sup> CARROLL ET AL., *supra* note 4, at ix.

<sup>24</sup> 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.

nation.”<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.”<sup>28</sup> A plaintiff’s claim was dismissed if he or she failed to submit a fact sheet.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup>

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

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<sup>25</sup> *In re Silica*, 398 F. Supp. 2d at 572.

<sup>26</sup> *Id.* at 620; *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 deluged 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 B5 (“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.”).

<sup>27</sup> CARROLL ET AL., *supra* note 4, at ix.

<sup>28</sup> *Id.* at ix–x.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 580 (S.D. Tex. 2005).

all of the plaintiffs' B-reads and diagnoses."<sup>32</sup> Over nine thousand plaintiffs returned fact sheets, and they listed roughly eight thousand different doctors.<sup>33</sup> "Remarkably, however, only twelve doctors diagnosed more than 9,000 plaintiffs with silicosis."<sup>34</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>35</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>36</sup> 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."<sup>37</sup> Additionally, he "purportedly diagnosed 3,617 MDL plaintiffs with silicosis while retained by the screening company N&M."<sup>38</sup> According to Judge Jack, "[t]hese 3,617 diagnoses were issued on only 48 days, at an average rate of 75 diagnoses per day."<sup>39</sup>

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."<sup>40</sup> "Both doctors essentially echoed Martindale's testimony,"<sup>41</sup> emphasizing "that they did not diagnose any of the Plaintiffs with silicosis. Indeed, both doctors testified that they had *never* diagnosed anyone with silicosis."<sup>42</sup> They claimed "that N&M had inserted the diagnosis-of-silicosis language into their reports without their knowledge."<sup>43</sup>

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

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<sup>32</sup> CARROLL ET AL., *supra* note 4, at 8.

<sup>33</sup> John P. Hooper et al., *Undamaged: Federal Court Establishes Criteria for Mass Tort Screenings*, MASS TORTS NEWSL. (ABA Sec. of Litig., Comm. On Mass Tort Litig.), Summer 2007, at 12, 12-13.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> CARROLL ET AL., *supra* note 4, at 8.

<sup>36</sup> David M. Setter & Andrew L. Kalish, Commentary, *Recent Screening Developments: The MDL Silica 1553 Daubert Hearing*, MEALEY'S LITIG. REPORT SILICA, May 2005, at 20, 21.

<sup>37</sup> CARROLL ET AL., *supra* note 4, at 9.

<sup>38</sup> Setter & Kalish, *supra* note 36, at 21.

<sup>39</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 582 (S.D. Tex. 2005); *see also* CARROLL ET AL., *supra* note 4, at 8-9.

<sup>40</sup> CARROLL ET AL., *supra* note 4, at 9.

<sup>41</sup> *Id.*

<sup>42</sup> *In re Silica*, 398 F. Supp. 2d at 588 (citation omitted).

<sup>43</sup> *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.”<sup>44</sup> N&M generated these 6,500-plus claims in just ninety-nine screening days.<sup>45</sup> 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.”<sup>46</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>47</sup> “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.”<sup>48</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, and was listed as the diagnosing physician for approximately 2,600 plaintiffs.<sup>49</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>50</sup> His testimony “abruptly ended when the Court granted his request for time to obtain counsel.”<sup>51</sup>

Dr. Harron’s son, Dr. Andrew Harron, diagnosed approximately 505 MDL plaintiffs for N&M.<sup>52</sup> “Like his father, he never saw or read any of the reports purportedly written and signed by him.”<sup>53</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>54</sup> 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.”<sup>55</sup> The

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<sup>44</sup> *In re Silica*, 398 F. Supp. 2d at 596.

<sup>45</sup> See *Setter & Kalish*, *supra* note 36, at 22.

<sup>46</sup> *In re Silica*, 398 F. Supp. 2d at 603.

<sup>47</sup> *Id.*

<sup>48</sup> *CARROLL ET AL.*, *supra* note 4, at 11.

<sup>49</sup> See *In re Silica*, 398 F. Supp. 2d at 606.

<sup>50</sup> Lynn Brezosky, *Judge: Diagnoses Methods in Silicosis Case ‘Frightening’ West Virginia Doctor Involved in Multistate Lawsuit in Texas*, CHARLESTON GAZETTE, Feb. 19, 2005, at 6D.

<sup>51</sup> *In re Silica*, 398 F. Supp. 2d at 608.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 609.

<sup>54</sup> *CARROLL ET AL.*, *supra* note 4, at 12.

<sup>55</sup> *Id.*

defendants presented over a dozen examples where Dr. Ballard had previously diagnosed the same individuals with lung conditions consistent with asbestosis.<sup>56</sup>

Dr. Barry Levy diagnosed almost fourteen hundred plaintiffs,<sup>57</sup> including eight hundred in seventy-two hours.<sup>58</sup> “He spent only four minutes on each diagnosis.”<sup>59</sup> “[I]t is clear that Dr. Levy had an agenda: diagnose silicosis and nothing else.”<sup>60</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>61</sup> Dr. W. Allen Oaks diagnosed approximately two hundred plaintiffs and performed x-ray reads on 447 plaintiffs. Despite issuing 200 diagnoses, “he declined to label himself as an ‘expert in . . . diagnosing silicosis.’”<sup>62</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 misdiagnosis.’”<sup>63</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>64</sup> She then remanded all but one case to state court, citing lack of jurisdiction while questioning the validity of virtually every claim.<sup>65</sup>

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 system to prevent examination of each individual claim and to extract mass settlements.”<sup>66</sup> She then “prorated her estimate of the costs of the proceedings and set the fine at \$8,250, a small figure compared to the total costs defendants and the courts

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<sup>56</sup> *In re Silica*, 398 F. Supp. 2d at 609.

<sup>57</sup> *Id.* at 611.

<sup>58</sup> *See* Setter & Kalish, *supra* note 36, at 24.

<sup>59</sup> CARROLL ET AL., *supra* note 4, at 12.

<sup>60</sup> *In re Silica*, 398 F. Supp. 2d at 615.

<sup>61</sup> *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.”).

<sup>62</sup> *See In re Silica*, 398 F. Supp. 2d at 618.

<sup>63</sup> *Id.* at 632 (citation omitted).

<sup>64</sup> *Id.* at 634.

<sup>65</sup> *Id.* at 679; *see In re Silica Prods. Liab. Litig.*, No. MDL 1553, 2005 WL 2711320, at \*1 (S.D. Tex. Sept. 30, 2005).

<sup>66</sup> *In re Silica*, 398 F. Supp. 2d at 676.



likely incurred as a result of the abusive diagnostic practices.”<sup>67</sup> 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.”<sup>68</sup>

#### D. The Fallout

By mid-January 2006, “[m]ore than half” of the claims remanded to Mississippi and Texas state courts had been dismissed,<sup>69</sup> “most of them voluntarily by the law firms that filed them.”<sup>70</sup> In addition, silica filings plummeted following Judge Jack’s order.<sup>71</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>72</sup> 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.<sup>73</sup>

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<sup>67</sup> CARROLL ET AL., *supra* note 4, at 16 (citation omitted); *see also In re Silica*, 398 F. Supp. 2d at 678.

<sup>68</sup> *In re Silica*, 398 F. Supp. 2d at 679.

<sup>69</sup> Peter Geier, *Silica Cases Drawing Resistance Nationwide*, LEGAL INTELLIGENCER, Jan. 12, 2006, at 4.

<sup>70</sup> Creswell, *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. LAW., 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.

<sup>71</sup> *See* Paul Davies, *Class Inaction: Plaintiffs’ Lawsuits Against Companies Sharply Decline*, WALL ST. J., Aug. 26, 2006, at A1.

<sup>72</sup> CARROLL ET AL., *supra* note 4, at 4.

<sup>73</sup> *See* Asbestos and Silica Compensation Fairness Act, FLA. STAT. §§ 774.201–209 (2005); GA. CODE ANN. §§ 51-14-1 to -13 (Supp. 2009); Silica and Asbestos Claims Act, KAN. STAT. ANN. §§ 60-4901 to -4911 (2005); OHIO REV. CODE ANN. §§ 2307.84–902 (LexisNexis 2005); Asbestos and Silica Claims Priorities Act, OKLA. STAT. tit. 76, §§ 60–71 (Supp. 2010); S.C. CODE ANN. § 44-135-30 (Supp. 2009); Silica Claims Priorities Act, TENN. CODE ANN. §§ 29-34-301 to -309 (Supp. 2008); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001–012 (Vernon Supp. 2009). These laws “set forth rigid criteria for the claimant diagnoses.” Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Medical Diagnosing*, 48 WM. & MARY L. REV. 2043, 2060 (2007). *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 the Texas silica medical criteria law and predicting that it would be held 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); Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 SW. U. L. REV. 671, 689 (2008) (“[T]he medical criteria acts are a step in the right direction.”); Philip Zimmerly, Comment, *The Answer is Blowing in Procedure: States*

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."<sup>74</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 now alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case."<sup>75</sup>

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."<sup>76</sup> As Judge Jack acknowledged, "[t]he screening companies were established initially to meet law firm demand for asbestos cases."<sup>77</sup> 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.<sup>78</sup>

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*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 (2005).

<sup>74</sup> Maron & Jones, *supra* note 18, at 261 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 822 (1999)).

<sup>75</sup> Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008).

<sup>76</sup> Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 591 (2007); see also Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289 (2006).

<sup>77</sup> See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 597 (S.D. Tex. 2005).

<sup>78</sup> Elise Gelinias, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 163 (2009); see also 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."); Task Force on Contingent Fees of the Am. Bar Ass'n Tort Trial & Ins. Practice

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."<sup>79</sup>

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.<sup>80</sup> In one day, Dr. Harron reportedly diagnosed 515 people, or the equivalent of more than one a minute in an eight-hour shift.<sup>81</sup> "Dr. Harron was not a professional rendering an independent opinion, but a vital cog in a multibillion-dollar lawsuit machine."<sup>82</sup>

"But Harron is only the most prolific of a prolific breed."<sup>83</sup> Another silica screener, Dr. James Ballard, provided 10,700 primary diagnoses and another 30,329 reports in support of asbestos claims.<sup>84</sup> 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."<sup>85</sup>

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."<sup>86</sup>

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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).

<sup>79</sup> 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%.")

<sup>80</sup> See Editorial, *Silicosis Clam-Up*, WALL ST. J., Mar. 13, 2006, at A18 [hereinafter *Silicosis Clam-Up*].

<sup>81</sup> *Id.*

<sup>82</sup> Jonathan D. Glater, *Reading X-Rays in Asbestos Suits Enriched Doctor*, N.Y. TIMES, Nov. 29, 2005, at A1.

<sup>83</sup> Parloff, *supra* note 79, at 98.

<sup>84</sup> *Silicosis Clam-Up*, *supra* note 80, at A18.

<sup>85</sup> Adam Liptak, *Defendants See a Case of Diagnosing for Dollars*, N.Y. TIMES, Oct. 1, 2007, at A14.

<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> North Carolina and New York permanently revoked Dr. Harron's medical license.<sup>89</sup> Additionally, Drs. Andrew Harron and H. Todd Coulter were both reprimanded in Mississippi.<sup>90</sup>

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.<sup>91</sup> The motion argued that Dr. Kelly, who earned \$500 per exam and had diagnosed more than seven thousand asbestos litigants, should be excluded because

<sup>87</sup> See Decision at 2–3, *In re Harron*, No. 16-2007-183197 (Med. Bd. Cal. June 11, 2008), available at <http://publicdocs.mbc.ca.gov/pdl/mbc.aspx> (search for license number "8415"); Final Order at 1, *Dep't of Health v. Harron*, No. 2007-36780 (Fla. Bd. Med. June 19, 2008), available at <http://ww2.doh.state.fl.us/imageappnet/repository/ew40pu553cek3sn44ws1o045/e w40pu553cek3sn44ws1o045.pdf>.

<sup>88</sup> See Miss. State Bd. of Med. Licensure, Board Actions, <http://www.msbml.state.ms.us/boardactionreportnarr2007.htm> (last visited Mar. 6, 2010); Order at 1, *In re Harron*, No. 2008-016 (N.M. Med. Bd. June 20, 2008), available at [http://doeboard.org/nm\\_orders/Harron,%20Ray.pdf](http://doeboard.org/nm_orders/Harron,%20Ray.pdf); *Disciplinary Actions: Quality of Care Violations*, TEX. MED. BD. BULL., Spring 2007, at 3, 4, available at <http://www.tmb.state.tx.us/news/Spring07/TxMedBdBulletin%20Spring%2007%20web.pdf>; see also Press Release, Tex. Med. Bd., Medical Board Disciplines 34 Doctors (Apr. 18, 2007), available at <http://www.tmb.state.tx.us/news/press/2007/041807a.php>.

<sup>89</sup> See Order at 4–5, *In re Harron*, License No. 17826 (Dec. 14, 2007), available at <http://glsuite.ncmedboard.org/DataTier/Documents/Repository/0/0/7/9/52151776-9f09-48d9-9eeb-f65fd938d017.pdf>; Determination and Order at 7, *In re Harron*, BPMC No. 09-02 (N.Y. Dep't of Health Bd. for Prof'l Med. Conduct Dec. 30, 2008), available at [http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeaaafab85256b180058c032/187b1c1bcb ee5c6e852574050057e87a/\\$FILE/HRG%20080969.pdf](http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeaaafab85256b180058c032/187b1c1bcb ee5c6e852574050057e87a/$FILE/HRG%20080969.pdf). Harron's appeal of the determination of the New York State Board of Professional Medical Conduct by the Administrative Review Board was subsequently denied. *In re Harron*, No. 09-02 (N.Y. Dep't of Health Admin. Rev. Bd. for Prof'l Med. Conduct July 10, 2009), available at [http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeaaafab85256b180058c032/187b1c1bcb ee5c6e852574050057e87a/\\$FILE/ARB%20080969.pdf](http://w3.health.state.ny.us/opmc/factions.nsf/58220a7f9eeaaafab85256b180058c032/187b1c1bcb ee5c6e852574050057e87a/$FILE/ARB%20080969.pdf).

<sup>90</sup> See Miss. State Bd. of Med. Licensure, Board Actions, <http://www.msbml.state.ms.us/boardactionreportnarr2007.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).

<sup>91</sup> 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. 04-434812-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.<sup>92</sup> "The medical records also showed that the vast majority of the lung-function tests Dr. Kelly performed failed to meet accepted standards."<sup>93</sup>

Unreliable diagnostic practices also have been reported in pharmaceutical cases, such as the fen-phen "Diet Drug" litigation<sup>94</sup> and litigation involving phenylpropanolamine ("PPA"), an ingredient used in many over-the-counter cold medications.<sup>95</sup>

## 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."<sup>96</sup> 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"<sup>97</sup>—places the American Tort Reform Foundation calls "Judicial Hellholes"—plaintiffs' attorneys have an added weapon: if

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<sup>92</sup> See *id.*

<sup>93</sup> 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.").

<sup>94</sup> See *In re Diet Drugs Prods. Liab. Litig.*, 236 F. Supp. 2d 445 (E.D. Pa. 2002); see also Peter Grossi & Sarah Duncan, *Litigation-Driven 'Medical' Screenings: Diagnoses for Dollars*, 33 PROD. SAFETY & LIAB. REP. 1027, 1030 (2005); Lester Brickman, *The Use of Litigation Screening in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1243–66 (2008); Jessica Richman Birk, *Defending Against the 'Litigation Diagnosis' in the Mass Tort Context*, LEGAL INTELLIGENCER, Oct. 17, 2005, at 20.

<sup>95</sup> See David J. Walz, *Discovering and Punishing Mass Tort Fraud*, FOR THE DEFENSE, Feb. 2007, at 8, 9–10.

<sup>96</sup> CARROLL ET AL., *supra* note 4, at 1.

<sup>97</sup> 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 popul[ists]. 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.

AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2009–2010 (2009), <http://www.atra.org/reports/hellholes/report.pdf>.

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."<sup>98</sup>

Consequently, while the uncovering of fraudulent diagnostic procedures in MDL 1553 "was a significant success for the tort system in handling a mass tort,"<sup>99</sup> 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.<sup>100</sup>

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."<sup>101</sup>

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."<sup>102</sup>

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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<sup>98</sup> 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.

<sup>99</sup> CARROLL ET AL., *supra* note 4, at 1.

<sup>100</sup> *Id.* at 26.

<sup>101</sup> Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575, 586 (2008).

<sup>102</sup> Parloff, *supra* note 79, at 104.

diagnostic practices might have continued.”<sup>103</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.

#### 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.”<sup>104</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>105</sup> 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.”<sup>106</sup> “More commonly, plaintiffs’ attorneys do not provide a physician’s diagnosis until discovery, and, if the case settles, a diagnosis may never be provided.”<sup>107</sup> “Defense efforts to obtain diagnostic information can be time consuming and costly.”<sup>108</sup> 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.”<sup>109</sup> 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.”<sup>110</sup>

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<sup>103</sup> CARROLL ET AL., *supra* note 4, at xii.

<sup>104</sup> *Id.* at 28.

<sup>105</sup> *Id.*; *see also id.* at xiii.

<sup>106</sup> *Id.* at xi.

<sup>107</sup> *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.”).

<sup>108</sup> *Id.* at 23.

<sup>109</sup> *Id.* at 29.

<sup>110</sup> *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."<sup>111</sup>

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, d]iagnoses 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>112</sup>

At the same time appropriate practices are identified, the court could also require evidence showing that these practices were in fact followed.<sup>113</sup> "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."<sup>114</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>115</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>116</sup> In this way, the manual might identify a set of "best practices" to be followed by judges to effectively manage mass torts.<sup>117</sup>

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."<sup>118</sup> 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

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L-33606-85, 1986 WL 637507, at \*1-2 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

<sup>111</sup> CARROLL ET AL., *supra* note 4, at 29.

<sup>112</sup> *Id.* at 29.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 29-30.

<sup>115</sup> *See id.* at xiii.

<sup>116</sup> *Id.* at 30.

<sup>117</sup> *See id.*

<sup>118</sup> *Id.* at 24-25.



approaches.”<sup>119</sup>

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].”<sup>120</sup>

### *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.”<sup>121</sup> 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.”<sup>122</sup>

First, RAND recommends that more serious sanctions should be considered for plaintiffs’ lawyers that pursue cases based on grossly inadequate diagnoses.<sup>123</sup> 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.”<sup>124</sup> Similarly, little seems to have come out of the criminal and congressional inquiries following Judge Jack’s decision.<sup>125</sup> Consequently, RAND recommends that judges should “consider fines that would deter misbehavior rather than just recover excess costs.”<sup>126</sup> In addition, RAND suggests that policymakers should add “teeth” to the

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<sup>119</sup> *Id.* at 25.

<sup>120</sup> *Id.* at xiv; *see id.* at 30–32.

<sup>121</sup> *Id.* at 33.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 34.

<sup>124</sup> *Id.* at 33.

<sup>125</sup> *See* Lester Brickman, *DOJ’s Free Pass for Tort Fraud*, WALL ST. J., Dec. 26, 2007, at A11.

<sup>126</sup> 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.<sup>127</sup> The tools available to state court judges for deterring improper attorney behavior should also be reviewed and assessed.<sup>128</sup>

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.”<sup>129</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>130</sup> “without any concerted effort to challenge suspect diagnoses.”<sup>131</sup>

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.”<sup>132</sup>

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.”<sup>133</sup> 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.”<sup>134</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

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<sup>127</sup> See *id.* at xiv, 34.

<sup>128</sup> See *id.* at xiii.

<sup>129</sup> *Id.* at 21.

<sup>130</sup> *Id.* at 22.

<sup>131</sup> *Id.* at 34.

<sup>132</sup> *Id.* at xiv.

<sup>133</sup> *Id.* at 34.

<sup>134</sup> *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.

