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R E P O R T



The Abuse of Medical Diagnostic Practices in Mass Litigation

The Case of Silica

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Summary

From 2001 to 2003, claims for injuries caused by inhaling silica dust skyrocketed, and commentators began to describe silica in terms of asbestos: It had the potential to be a mass tort that would last for decades. Within two years, however, the litigation was essentially over. In 2003, more than 10,000 claims—about 100 cases against 250 defendants—were aggregated in the Southern District of Texas before U.S. District Court Judge Janis Graham Jack to determine whether the federal courts had jurisdiction based on diversity. 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.

In this report, we analyze the proceedings in Judge Jack’s courtroom to identify how the widespread abuse was discovered. Besides describing the actions and decisions of the judge herself, we take a broad look at the behavior of attorneys and the characteristics of the litigation that contributed to the outcome. In the end, we consider what can be learned from the silica experience that might improve the ability of the civil justice system to detect the abuse of medical diagnostic practices in mass personal-injury litigation. Although we have not done the analysis needed to support specific policy recommendations, we identify the types of changes that should be analyzed by researchers and considered by policymakers to strengthen the performance of the tort system in this regard.

We base our analysis on data and knowledge gained in previous RAND research on asbestos and other mass toxic tort litigation, a detailed review of the proceedings before Judge Jack, data on silica-related claims from a major defendant in the silica litigation, and interviews with 43 individuals who have been involved in various aspects of silica litigation or mass torts more generally.

The Exposure of Diagnostic Abuses in Silica Litigation

A sequence of events occurred in Judge Jack’s court that led to the exposure of gross deficiencies in the diagnoses underlying the silica claims in front of her. In January 2004, Judge Jack issued a discovery order that required each plaintiff to submit a sworn

fact sheet specifying the plaintiff's diagnosis and pertinent medical and diagnostic information, as well as the results of B-reads of chest x-rays.¹ The fact sheets revealed that more than 9,000 plaintiffs were diagnosed by only 12 doctors and that a substantial fraction of the plaintiffs in the silica multidistrict litigation (MDL) had earlier filed claims for asbestos-related injuries.

Plaintiffs opposed defense requests to depose the diagnosing doctors and the three medical screening firms associated with the cases. Before Judge Jack could rule on motions to quash the discovery requests, one of the doctors agreed to be deposed and testified that he had never diagnosed silicosis. Judge Jack then ordered every doctor who diagnosed silicosis in any of the plaintiffs and two of the three medical screening companies to testify at a *Daubert* hearing in front of the court.²

At the hearing, Judge Jack questioned representatives from each of two medical screening companies and several diagnosing doctors. She concluded that virtually all of the diagnoses failed to satisfy the minimum, medically acceptable criteria for the diagnosis of silicosis. Exposure and health histories had been taken by people who not only had no medical training but had a financial interest in the outcome of a diagnosis. The diagnosing doctors relied solely on x-rays and failed to rule out other explanations for x-ray evidence or lung distress.

Judge Jack remanded all but one case to state court, citing lack of jurisdiction. However, the order doing so questioned the validity of virtually every claim. The court criticized the procedures used by the doctors who had diagnosed the vast majority of the plaintiffs and ordered sanctions against the plaintiffs' firm for the case for which she retained jurisdiction, finding that its behavior had been unreasonable and vexatious.³

Silica litigation plummeted following Judge Jack's order. Plaintiffs' firms voluntarily dismissed the bulk of the silica claims remanded to Texas and Mississippi state courts. Legal reforms enacted in several states during this period likely contributed to the decline in claims, but Jack's findings were undoubtedly a driving factor in the end of silica as a mass tort.

The impact of the ruling also spread to asbestos litigation. For example, the Manville Trust, one of the major trusts set up by the courts to pay asbestos claims, saw a major decline in claims and announced that it would no longer accept medical reports in support of asbestos claims from most of the doctors and testing facilities behind the diagnoses in the cases considered by Judge Jack. One of the doctors suspended by

¹ B-reads are done by physicians that have been certified through the B-reader program of the National Institute for Occupational Safety and Health (NIOSH). The program certifies that doctors are trained to interpret pulmonary x-rays using the International Labour Organization (ILO) International Classification of Radiographs of Pneumoconiosis.

² *Daubert v. Merrell Dow Pharms.* (509 U.S. 579, 1993) was a U.S. Supreme Court decision that became the basis for a judge's review of the admissibility of expert testimony—a *Daubert* hearing.

³ She may have had similar views on the behavior of the other plaintiffs' firms involved in the litigation but was silent, given that she remanded the other cases to state court.

Manville, Ray Harron, had submitted documents in support of at least 53,724 of the approximately 680,000 claims that the Manville Trust had received through 2005.

Factors That Contributed to Exposure of Diagnostic Abuses in Silica Litigation

To understand how the tort system succeeded in exposing the grossly inadequate diagnostic practices in the silica setting, we identify factors that worked in favor of as well as factors that worked against exposing the diagnostic abuses. In the case of silica, the factors that worked in favor of uncovering such practices won out, but such may not be the case in other settings.

Actions by the Defense

Three defense strategies were particularly important in the discovery of abuses in silica diagnoses. First, defendants succeeded in removing cases filed in Mississippi and Texas state courts to federal court, where they could be brought together in front of one judge. Because of this aggregation, defendants were able to see that a small number of doctors accounted for a huge number of the diagnoses. Second, the defense attorneys challenged the diagnoses, something that does not always happen. And third, the leading defense firm built detailed databases on a large number of silica and asbestos claims, including claims that were not part of the litigation before Judge Jack. The data showed that a vast number of plaintiffs had previously filed asbestos claims.

These strategies were hotly contested among the defense attorneys. According to defense counsel involved with the case, some attorneys were opposed to the confrontational tactics of Forman Perry Watkins Krutz and Tardy, the lead defense firm. Some opposed aggregation by arguing that removing so many cases to a single court would risk an assignment to a plaintiff-friendly federal district court or that discovery in federal district court could aid plaintiffs' attorneys in bringing other cases. Some attorneys proposed settling claims rather than challenging the diagnoses, on the grounds that challenging them could add to legal costs or even to reprisals by plaintiffs' attorneys. The third strategy, building the database, was an expensive undertaking that was made possible by two factors: advances in computer software and the fact that the lead defense firm represented a large number of defendants that could spread the costs.

Procedural Decisions by Judge Jack

Several of Judge Jack's decisions stand in sharp contrast to the judicial procedures often used in such cases. First, requiring fact sheets with every plaintiff's diagnosis and all pertinent medical and diagnostic information early in the case provided defense attorneys with information that was essential to uncovering diagnostic irregularities. More

commonly, plaintiffs' attorneys do not provide a physician's diagnosis until discovery, and, if the case settles, a diagnosis may never be provided.

Second, Judge Jack not only allowed the diagnosing doctors to be deposed by defense attorneys, she directed the depositions to occur in her presence in the form of a *Daubert* hearing. Leading defense attorneys interviewed for this study commented that the latitude to question doctors across all the plaintiffs in front of a judge was unprecedented. The presence of the judge reduced the number of plaintiff objections and resulted in more-direct answers. Judge Jack also actively participated in the cross-examination and heard firsthand about the diagnostic practices underlying the claims.

Third, Judge Jack actively managed the case. She called for early disclosure of diagnoses, required the doctors to testify in her presence (to address allegations made by both sides of misconduct during depositions), and held a monthly status conference with opposing counsel. This active case management contrasts with judicial case management in other settings described by those interviewed: When faced with a large number of claims and a crowded docket, judges often allow cases to churn for a few years in hopes that they will settle.

Unique Characteristics of Silica Litigation

Some features of the litigation itself contributed to the discovery of diagnostic abuses:

- a large number of cases and the preexistence of litigation in a closely related area (asbestos)
- the absence of a terminal cancer uniquely associated with silica, which reduced defendant concerns about cases coming to trial and about plaintiffs' attorneys' threats to target defendants who challenged diagnoses.

Policy Implications

The federal court's actions and the consequences of those actions clearly demonstrate that the tort system has the capacity to identify questionable claims in a mass-tort setting. However, one should not be too satisfied with the performance of the tort system in this regard. First, the diagnostic practices were attempted in the first place, and considerable time and expense were spent in exposing them. Second, the tort system does not appear to have been nearly so effective in the largest mass tort to date—*asbestos litigation*. For example, it is reasonable to suspect that many of the asbestos claims based on *Harron's reports* relied on similar procedures used in silica litigation.

There is thus no guarantee that similar practices would be discovered should they be used in the future. A number of factors worked in favor of uncovering diagnostic abuses in the silica litigation, and, absent the fortuitous alignment of these factors, litigation based on abusive diagnostic practices might have continued.

Our review of silica litigation generates some insights as to the types of changes in legal procedure and practice that have the potential to increase the likelihood that abusive diagnostic practices will be uncovered in future mass personal-injury litigation and improve the quality of the medical diagnoses that are introduced in the first place. If policymakers and practitioners agree that further improvements to the legal system in this area are needed, the pros and cons of the proposed changes should be carefully evaluated. Because the suggestions are based primarily on review of one type of litigation, an examination of experiences in other types of litigation would provide increased confidence about whether the benefits of change would outweigh their monetary and other costs. In addition, many of the changes we suggest for consideration raise important legal issues that should be more thoroughly explored: There may be need for modifications in the law and the rules of civil procedure at both the federal and state levels, and any changes might raise a variety of complex issues. Finally, it is important that the impact of potential changes on the ability of truly injured parties to pursue remedies in the civil justice system be considered.

We first discuss changes that focus on court procedures and practices. We then turn to changes aimed at influencing the behavior of plaintiff and defense lawyers.

Judicial Practices and Procedures

Require Diagnosis to Be Provided with Relevant Medical Records at Time of Case Filing. Requiring disclosure of the diagnosis, the identity of the diagnosing physician, and relevant medical records at case filing as soon as the litigation has achieved a sufficient size would help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate and value claims.

Require Parties Early On to Present Evidence on Appropriate Diagnostic Practices and Whether They Were Followed. Once litigation has reached a sufficient scale, courts should require evidence that diagnoses were based on reasonable medical standards or consistent with accepted medical practice. Such a determination could be accomplished with briefs submitted by defense and plaintiffs' lawyers or by hearings in front of the court. If a substantial number of claims are based on diagnosis from a particular doctor, the court could consider conducting a hearing on the doctor's training, any affiliation with the screening facilities involved with the claims, and the procedures followed in his or her practice.

Augment Guidance for Multidistrict Litigation Judges. There are strong differences of opinion in the legal community about the proactive role that Judge Jack played in this case. For that reason, we suggest that more guidance be provided for federal and state judges on how they should handle mass personal-injury torts. For example, it may be appropriate to expand the Federal Judicial Center's (2004) *Manual for Complex Litigation, Fourth*, to provide an assessment of what types of judicial practices have been effective in mass personal-injury litigation and which have not. The manual might identify a set of recommended practices for mass personal-injury cases.

Enhance Mechanisms for Aggregating Information Across Claims for Pretrial Purposes. Procedures exist for aggregating claims for pretrial purposes, such as discovery and evaluation of the evidence, but they have important limitations. The pros and cons of changes that would facilitate the aggregation of claims in mass personal-injury litigation for pretrial purposes should be explored. Options that warrant further consideration include the following:

- Create an infrastructure for voluntary coordination between state and federal judges.
- Create a mechanism that would allow federal courts to aggregate claims in state courts for the purpose of developing information about the cases.
- Facilitate consolidation of cases already in federal court.

Practices of the Plaintiffs' and Defense Bars

Consider More-Serious Sanctions for Pursuing Cases Based on Grossly Inadequate Diagnoses. Judge Jack fined one plaintiffs' firm the prorated share of the excess costs, expenses, and attorneys' fees that the defendants incurred for the *Daubert* hearing. However, the fine was so small that the direct financial consequences for the firm were minor, and subsequent defense motions in Mississippi state courts for sanctions against other plaintiffs' firms failed.

Judge Jack imposed sanctions under a section of the U.S. Code (28 U.S.C. §1927) that allows sanctions only for direct excess costs, but Rule 11 of the Federal Rules of Civil Procedure (F.R.C.P. 11) allows penalties that would deter improper behavior. Judges should routinely consider fines that would deter the behavior rather than just recover excess costs.

Policymakers might also consider strengthening Rule 11. Since 1993, penalties for improper attorney conduct are discretionary, and a return to the mandatory penalties that existed before 1993 should be considered. The tools available to state court judges for deterring improper attorney behavior should also be reviewed and assessed.

Pay Closer Attention to the Performance of the Defense Bar. While plaintiffs' firms are typically the focus of complaints about diagnostic practices, our investigation of silica litigation identified a number of defense-attorney practices that enabled litigation based on inadequate diagnoses. For example, one plaintiffs' attorney interviewed for this study recalled multiple instances in which a defense attorney would call and suggest that his client be named in a silica case.

It is not obvious how to deter defense practices that enable litigation based on inadequate diagnostic practices, in part because such practices are difficult to observe. For example, it is difficult to determine the extent to which a defense attorney is simply churning a claim to generate fees with the ultimate goal of settling, without any concerted effort to challenge suspect diagnoses. However, given the importance of the issue, policymakers and practitioners should seriously consider what types of responses

might be effective. For example, policymakers and practitioners might consider developing means to chronicle and evaluate defense tactics in mass personal-injury litigation, including defense tactics directed by defendants' insurers. The results could motivate greater attention to ethical issues in law schools and continuing-education courses as well as in investigations by professional review panels.