

Asbestos

Mass Screenings: A Tale Of Two Recent Court Approaches

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Commentary

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Introduction

Since 2005, there has been a substantial transformation in asbestos litigation as nonmalignant claimant filings have declined dramatically in virtually all jurisdictions as a result of a number of factors. First, courts and legislatures in a number of key jurisdictions adopted inactive dockets and statutory medical criteria to address mass filings by the unimpaired.¹ Second, the landmark opinion by the manager of the federal multidistrict silica litigation also led courts to be alert to potential fraud and to begin to review all mass tort claims, especially asbestos claims, with greater scrutiny.² There are pockets, however, where suspect nonmalignant claims continue to be pressed. This commentary will study two jurisdictions that have continued the recent national trend of preventing flimsy or meritless claims generated by lawyer-driven

screenings from gaining traction: Indiana and the federal MDL. It will then discuss another jurisdiction, Wayne County, Michigan, where the presiding judge seems resistant to the national trend and to continuing the positive steps with respect to his own past exclusion of unreliable expert causation evidence. This commentary argues that courts confronting pockets of nonmalignant filings generated as a result of screenings should join the enlightened view started by Judge Jack and now shared by many asbestos judges that have taken steps to improve the asbestos litigation environment. From both a legal and policy perspective this approach is far superior to one that abdicates the proper judicial gate-keeping role regarding the admissibility of expert evidence because of its powerful effect in court.

By way of background, the “epidemic” of silica litigation arising in the early 2000s may be attributed in large part to screening outfits such as Respiratory Testing Services, Inc. (RTS), Netherland & Mason (N&M) and Occupational Diagnostics. Due to the massive growth of asbestos-related claims over the same timeframe, mass screening failures drastically dictated fluctuations in the number of asbestos-related claims filed each year. Armed with the primary goal of locating potential plaintiffs ripe for suit, RTS and its screening counterparts combed the national landscape for a sizeable inventory of positive silica and asbestos-related diagnoses by which attorneys could pirate mass tort litigation,³ painting a portrait of a systematically erroneous system generating diagnoses incentivized solely by profit.

However, the use of mass screening diagnoses for use as causative evidence came to an abrupt halt in 2005, when Judge Janis Jack, a federal judge in the Southern District of Texas, evaluated the screening evidence used in the Asbestos Multidistrict Litigation (MDL) 1553 and deemed such evidence inadmissible for “[failure] to satisfy the minimum, medically-acceptable criteria for the diagnosis of silicosis . . .”⁴ Though Judge Jack determined the Court had subject-matter jurisdiction over only one of 111 MDL cases, the residual effects from her order are not exclusive to silica litigation and also permeate asbestos litigation today.⁵ Recently, Judge Theodore Sosin and Commissioner Kenneth H. Johnson of the Marion County Complex Litigation Docket in Indianapolis, Indiana entered a series of orders excluding and striking not only materials produced by RTS, but also any testimony, reports and opinions relying upon RTS materials. Subsequently, in the MDL, District Court Judge Eduardo Robreno dismissed 70 cases for failure to submit sufficient diagnostic reports, or in some cases, none at all.

How Medical Screening Goes Awry

Medical screening for occupational and environmental lung diseases such as asbestos or silicosis, when performed properly, has the benefit of identifying occupations and industries where potentially dangerous exposure to a substance may occur so as to reduce hazardous exposures in the future. However, screening is merely a preliminary step in the determination of the presence of an occupational lung disease; in other words, the use of a chest x-ray and work history alone is insufficient to make a reliable and firm diagnosis. Rather, an appropriate assessment of occupational lung disease includes properly chosen and interpreted chest imaging; a complete exposure history; symptom review; pulmonary function testing; and physical examination.⁶ These programs should also include patient education, counseling, treatment, as an explanation of findings to the patient.⁷ Failure to implement any of these aspects in a clinical assessment unsuccessfully meets the standard of care and ethics in occupational health; accordingly, screenings dictated by attorneys can be dangerous when they do not provide the appropriate counseling or treatment for those screened.⁸

However, not all screening outfits meet AOEC's standards and opt for an “entrepreneurial” model of

litigation.⁹ For example, RTS, founded in 1994 by a pipefitter with no experience in medical technology or pulmonary lung function tests (PFT), emphasized the quantity of claims while wavering on the accuracy of the medical data.¹⁰ Moreover, its *modus operandi* encapsulated the fraudulent practices perpetuated by screening companies: failure to follow adopted criteria used in diagnosing asbestos-related disease; focus on generating higher number of claims; uncertified technicians and/or equipment; and, of course, the existence of financial incentives to produce positive diagnoses and readings.¹¹

Plaintiffs' firms and screening companies¹² targeted the same demographic and formed a symbiotic relationship in searching for possible clientele. Law firms provided screening companies with lists of existing plaintiffs and workers at industrial sites to contact, and expanded outreach efforts to placing advertisements in newspapers, renting billboard space, employing direct mail campaigns to selected audiences reaching audiences in the tens-of-thousands, and offered toll-free phone numbers offering assistance and information.¹³ Stocked with x-ray machines and equipment used to administer PFT, employees, without the appropriate medical training, conducted screenings out of mobile vans parked at factories and mall parking lots.¹⁴

During a screening, a potential plaintiff meets with a representative from the law firm sponsoring the screenings and signs a retainer agreement on contingency if the individual tests positive for an asbestos-related condition.¹⁵ Almost without fail, participants sign the agreement and quickly find themselves assisted by company representatives in filling out a form calling for personal information and a medical release.¹⁶ While providing assistance, each screening company representative leads a potential plaintiff to disclose work history, job sites, or product exposure information sufficient to establish eligibility for compensation and free screening.¹⁷ RTS' founder, Charles Foster, offered incontrovertible testimony before Judge Jack his diagnoses are litigation driven; when asked by the Court “What is your training on this, on [diagnosing] silicosis?” Mr. Foster responded, “Whatever the criteria the law firm sets.”¹⁸

In Indiana, asbestos and silica screenings never evolved out of an isolated problem; rather, screening companies and their staffs brought the “medical screening” scam

within Indiana's borders.¹⁹ Although the apparent purpose of the screenings was to determine if a person suffered from an occupational lung disease, the reality of the Indiana screenings, just like the screenings detailed in Judge Janis Jack's 2005 decision, was that they "were driven neither by health nor justice: they were manufactured for money."²⁰

In Indiana, from 1998 through 2004, RTS conducted over 70 screenings per day, eventually resulting in over 4,000 individuals screened, with over 1,800 positive results, and approximately \$1.7 million in fees collected. On September 27, 2002, Dr. Robert Altmeyer²¹ screened ninety-two individuals in Indianapolis in one day at one location, during which he conducted all B reads, physical examinations, and diagnoses. Allotted a mere five minutes to conduct each examination, Dr. Altmeyer completed all steps he needed to diagnose an individual in the time it takes to fry an egg. As a result, 45 percent of the 92 screened tested positive for an occupational lung disease.²²

Early Attempts To Bar Screening Materials: Judge Jack's Seminal Opinion

Nationwide, from 2001 to 2003, plaintiffs claiming silica related injuries skyrocketed²³ and by 2003, more than 10,000 claims had aggregated in Judge Jack's MDL.²⁴ Many of Judge Jack's decisions throughout the course of litigation were unconventional. First, early in the case, Judge Jack required early disclosures which revealed that only twelve doctors diagnosed more than 9,000 plaintiffs and that a large number of them had previously filed claims for asbestos related diseases. In addition, Judge Jack allowed the depositions of diagnosing doctors in her presence in the form of *Daubert* hearings and actively participated in cross-examinations. Judge Jack's management of the case, although unprecedented,²⁵ exposed gross abuses by screening companies, plaintiffs' lawyers, and "doctors." Although some have said that Judge Jack's decision has caused silica litigation to collapse²⁶, the mold was not broken and the litigation model is still seen in Indiana.

Indiana's Response To The Scandal: Challenging The 'Experts'

As evidenced by defense attorneys in Judge Jack's silica MDL, uncovering grossly inadequate diagnostic practices requires defense attorneys who do not shy away from confrontational tactics in order to challenge

diagnoses.²⁷ Mirroring prior efforts of the defense bar in the MDL, defense counsel in Marion County, Indiana followed an arduous and piecemeal journey in challenging the reliability and admissibility of several of plaintiffs' expert witness testimony, reports and opinions in a progressively decreasing batch of silica/mixed-dust/asbestos cases pending in Marion County, Indiana.

Beginning with the materials generated by RTS, the defense carefully portrayed a history of manipulated patient histories, suspicious medical affiliations and unreliable methodologies in diagnosing asbestos and silica related disease.²⁸ Chronicling each plaintiff's journey through the RTS screening process, certain motions to exclude RTS Materials revealed no mention of alleged exposure to silica or asbestos in the plaintiff's work history.²⁹ For the Marion County screenings, RTS employed a variety of physicians including Dr. Walter Allen Oaks³⁰ of Mobile, Alabama to perform review and analysis x-rays, while Dr. Altmeyer reviewed the occupational history, Dr. Oaks's B-Read results and PFT results in reaching a diagnosis.³¹

It is telling of the effect Judge Jack's opinion had on future screening litigation, as Dr. Altmeyer renounced any perceived affiliation with plaintiffs in Marion County, and even supplied affidavits to the same effect, specifically stating an unwillingness to serve as an expert witness for any of the individuals involved.³² Following in Dr. Altmeyer's footsteps, Charles Foster has routinely exercised his Fifth Amendment privilege against self-incrimination in lieu of testifying about the screening practices of his company including, but not limited to: his work with doctors; the authenticity of the X-rays and pulmonary function tests generated by his company; and any positive rates guaranteed by his company.³³ Suggesting the same rationale Judge Jack employed in her landmark opinion, the defense posited the RTS screenings, and the opinions, conclusions and reports resulting from its poisonous tree were driven solely by profit margins, and not out of any concern for health or safety.³⁴ On every account, the defense argued plaintiffs failed to establish the reliability and admissibility of each expert's testimony, conclusion and opinions. However, in an attempt to survive pending summary judgment motions, plaintiffs incorporated new causation evidence in their responsive briefing: unauthenticated, unsworn "letters" from

Dr. Newman and inconclusive and inadmissible affidavits from Dr. Arthur Frank, neither of which were previously identified nor disclosed in the course of the litigation.

Defendants' momentum in excluding plaintiffs' purported causation evidence began on October 22, 2009, when Judge Sosin issued two orders excluding a portion of the challenged expert proximate cause evidence relied upon by plaintiffs. Agreeing with defendants, Judge Sosin found the documents, records, and diagnostic materials generated by RTS contained unreliable conclusions which are inadmissible under the Indiana Rules of Evidence.³⁵ Once Judge Sosin excluded the underlying foundation of the Marion County diagnoses, he paved a pathway for the defense to extend their efforts to all causation evidence relying upon the RTS materials. Specifically, this Court excluded and struck from the record "all documents, records and diagnostic materials generated by Respiratory Testing Services, Inc., in the course of conducting mass screenings and any opinions and conclusions therein" because all such documents are "unreliable and, therefore, inadmissible, pursuant to Rules 702 and 703 of the Indiana Rules of Evidence[.]"³⁶ Additionally, this Court excluded and struck from the record Dr. Newman's January 15, 2008 report, as well as his opinions and conclusions therein, finding that "Dr. Newman relied upon documents generated by Respiratory Testing Services which have been deemed unreliable by this Court and, therefore, his opinions and conclusions are unreliable and, therefore, inadmissible, pursuant to Rules 702 and 703 of the Indiana Rules of Evidence [.]"³⁷

Next, defendants challenged the admissibility of Plaintiffs' proffered "new" expert evidence, specifically arguing that Dr. Newman's and Dr. Frank's opinions again failed to meet admissibility requirements under the Indiana Rules of Evidence for failure to employ scientific methodology or principles or generally accepted medical standards or criteria and are scientifically unreliable. Specifically, defendants note Dr. Newman failed to conduct any differential diagnoses which could possibly lay the foundation for admissible causation evidence.³⁸ Further, Dr. Frank's affidavit involved a tardy attempt under court-imposed deadlines to rehabilitate Dr. Newman's "new" opinions as well as prior discovery responses, disclosing diagnosis history.³⁹

Over three days in January 2010, Judge Kenneth H. Johnson of the Marion County Complex Litigation Docket held a hearing to determine the issue of the admissibility of the remaining expert proximate causation evidence upon which plaintiffs purportedly based their claims and which was challenged by many defendants. After hearing all of the tendered evidence and argument, including extensive testimony from Dr. Gary K. Friedman as to the standards, criteria, and methodology for determining if any interstitial fibrosis may be related to asbestos or silica, the court issued an order striking and excluding all of the remaining expert proximate causation evidence on which plaintiffs relied to support their claims herein as unreliable and inadmissible.⁴⁰ With the ruling excluding all of the plaintiffs' proffered evidence, the defense eliminated all evidence on the issue of proximate cause and upon which plaintiffs could rely to support their claims that each proffered plaintiff suffered from an asbestos-related or silica-related disease.

However, the defense counsel's work in Marion County was still not complete. Though previously stricken without objection on procedural grounds,⁴¹ the Court did not yet have occasion to evaluate the substance of the affidavit under Indiana Rules of Evidence 702 and 703. During argument before the Court, defense counsel harkened back to prior testimony from Dr. Gary K. Friedman during the January 2010 hearings on plaintiff's expert proximate causation evidence, who testified that interstitial fibrosis has a variety of causes and a proper diagnosis cannot be rendered without ruling out other potential causes.⁴² Referencing Judge Jack's famous *Daubert* hearing and Dr. Friedman's prior testimony taking into account various literature and criteria from governing bodies such as the American Thoracic Society (ATS) and the American College of Chest Physicians, counsel argued Dr. Frank must meet three criteria in order to properly diagnose an individual with silicosis or asbestosis: first, he must present radiographic evidence consistent with changes seen in silicosis or asbestosis, second, he must demonstrate a reliable history of adequate exposure, and third, he must exclude alternative causes for the radiographic findings.⁴³ Dr. Frank's evidence failed to meet any of the necessary criteria to formulate a diagnosis, let alone state any type of methodology or principles used in reaching his alleged diagnosis; further, Dr. Frank reviewed and relied upon information, reports and records previously

struck by the Court to support his opinion and purported diagnosis, what defense counsel deemed "the fruit of a poisonous tree."⁴⁴

The following day after argument the Court granted defendants' motion, agreeing that Dr. Frank employed unreliable methodology in reaching his opinions and conclusions and the conclusions, opinions and diagnosis contained in his affidavit were medically and scientifically unreliable.⁴⁵ A short seven weeks from this order, plaintiffs' counsel moved to dismiss all remaining defendants in the active cases in which the order applied. Despite the monumental success of defense counsel's steady push to obliterate all of plaintiff's purported causative evidence, the Court recently held Dr. Frank cannot be barred as a blanket measure, but rather, any subsequent motions to exclude or strike must be evaluated on a case-by-case basis.⁴⁶

Subsequent Success In The MDL

District Court Judge Eduardo Robreno's recent opinion in MDL 875 not only reiterates Judge Jack's 2005 cautionary tale, but exemplifies the judiciary's continued awareness and role in eliminating cases with insufficient medical evidence, due to procedural non-conformity, or otherwise.⁴⁷ After consolidation of nearly 2,000 cases in the MDL filed by the Cascino Vaughan Law Offices, United States Magistrate Judge David Strawbridge established various deadlines for the parties, among them, a deadline for plaintiffs to submit to the central records database all medical evidence which is either in their possession, presented to or relied upon by their experts, or submitted to a bankruptcy trust.⁴⁸ Cascino Vaughan, however, disregarded the deadlines set forth in the scheduling order, as well as the warnings issued in Judge Jack's landmark decision.

As a result, various defendants filed motions to dismiss in numerous cases pending in MDL 875 under Federal Rule 41(b), for failure to comply with the deadlines based on either lack of submissions or allegedly inadequate submissions.⁴⁹ Stressing the importance of District Court judges "hav[ing] authority to manage their dockets, especially during massive litigation' such as multidistrict litigation," Judge Robreno granted defendants' motions to dismiss where plaintiffs failed to timely submit x-rays, despite averments from plaintiffs' counsel that x-rays are currently in their possession.⁵⁰ Further, the Court refused to

extend plaintiffs' deadlines set forth in the scheduling order any further, as plaintiffs offered no explanation supporting a finding of good cause to alter the scheduling order.⁵¹ Focused upon the guidance and "road-map" function scheduling orders provide for a party to reach the merits of a claim, Judge Robreno noted when counsel fails to comply without justification, the delay not only affects the instant case, but all others waiting in the queue.⁵²

In matters where x-rays have been submitted, defendants moved to dismiss on the basis that the x-rays, conducted by N&M, could not be verified or authenticated according to regulatory and statutory requirements, on account of its owners' prior assertions of Fifth Amendment privileges when originally questioned as to N&M's practices.⁵³ Judge Robreno echoed Judge Jack in acknowledging the "increasingly common" role of the judiciary in mass tort litigation regarding requirements for diagnosing reports and submissions.⁵⁴ Due to the unavailability of N&M representatives to authenticate diagnosing reports, Judge Robreno considered the reports invalid and insufficient to satisfy the Court's Administrative Order No. 12.⁵⁵ This opinion should serve as a warning to counsel as to the repercussions of relying on the deficient diagnoses provided by outfits such as N&M; acknowledging the longstanding understanding as to the invalid reputation these diagnoses have come to receive, Judge Robreno notes counsel should have recognized the deficient nature of its diagnostic materials long before current attempts for leave to retain new reports.⁵⁶ Lending additional credence to standards promulgated by organizations such as ATS and the AOEC in determining whether a claim is legally cognizable, this opinion recognizes the importance of submitting diagnostic material which considers a complete exposure history as any material excluding this information lacks a basis on medically-accepted principles and practices.⁵⁷ It is also with decreasing probability that cases like those dismissed by Judge Robreno will channel into bankruptcy trust claims, as several trusts require reasonable confidence that medical evidence in support of the claim is credible and consistent with recognizable medical standards and refuse to process claims relying upon specific physicians and screening facilities.⁵⁸

Not All Challenges Shall Be Victorious

Despite the monumental changes screenings litigation by Judge Jack's 2005 opinion, echoed with the recent

victories in Indiana and the MDL, plaintiffs and defendants continue to battle over the admissibility of diagnoses offered by doctors. Plaintiffs persist in filing claims of mixed-dust disease using unreliable diagnoses, while defendants continue to weed through the thousands of cases generated by nouveau screening schemes.

However, judicial rulings upon the reliability issue are not one-sided. Last year, Wayne County Circuit Judge Robert J. Colombo, Jr. ruled on the admissibility of positive diagnoses issued by Dr. Ella Kazerooni and Dr. George E. Metropoulos. Defendants moved to exclude Dr. George E. Metropoulos' diagnostic opinions by alleging that the X-rays he used for the diagnoses were illegally obtained, the diagnoses were inconsistent with the diagnoses of Plaintiffs' treating physicians and the B-read upon which the diagnoses were based are inaccurate and unreliable.⁵⁹ Defendants claimed that Dr. Metropoulos was nothing more than a Plaintiffs' hired "go-to" doctor.⁶⁰ Plaintiffs countered that the defense failed to seriously question Dr. Metropoulos' diagnoses, and principally based their challenge of Dr. Metropoulos' on the fact that he relied on Dr. Kazerooni's unreliable and inaccurate B-readings.

In a surprising rejection⁶¹ of defendants' arguments, Judge Columbo initially addressed the admissibility of Dr. Kazerooni. In finding Dr. Kazerooni a reliable witness, Judge Columbo stressed her passing of the B-reading test, her two certifications, and her being published in a peer reviewed study, concluding she had many professional positions and was well respected among her peers. With regard to Dr. Metropoulos, Judge Columbo ruled many doctors rely upon B-Reads to diagnose asbestosis, and although Dr. Metropoulos testified that he could not read B-reads or X-rays, he relied on Dr. Kazerooni's B-reads in addition to considering alternative causes before making a final diagnosis. The court further noted that although the case was fashioned as a *Daubert* hearing to determine the reliability and the methodology used by both doctors, defendants failed to present a proper *Daubert* challenge because the case was "really about whether this Court should believe" the doctors.⁶² Thus, the court held that Dr. Metropoulos' diagnoses were reliable.

Conclusion

The exclusion of the screening materials, as well as the opinions and diagnoses reliant upon them, in both

Indiana and the MDL marks progress in obliterating use of unreliable litigation physicians in mass tort litigation, and should act as a measuring stick for courts encountering nonmalignancy claims. Defendants must remain diligent in challenging litigation abuses posed by screening diagnoses, as the presumption that all cases filed in the court system are legitimate remains unfounded. The precedent set in both Indiana and the federal MDL reiterate the resonant impact of Judge Jack's ruling and further demonstrate how permitting broad, systematic discovery and investigation into the methods and techniques used in mass tort screenings can uncover "assembly-line, medically indefensible diagnoses."⁶³ However, the recent trends of those courts willing to reduce the procedural obstacles in identifying illegitimate diagnoses illustrate how ever-present nonmalignancies may be disposed of with judicial ease. Therefore, when defendants marshal this type of evidence, courts need not look beyond the guidance offered by Indiana and the MDL, but must act on it to prevent further injustice.

Endnotes

1. See Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. COOLEY L. REV. 721, 725-727 (2009). [hereinafter Behrens, *Asbestos Litigation Screening Challenges*].
2. See Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008) ("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.").
3. See Lester Brickman, *On The Theory of Class's Theories of Asbestos Litigation: The Disconnect between Scholarship and Reality*, 31 PEPP. L. REV. 33, 81-82 (2003) [hereinafter Brickman, *The Disconnect*].
4. Stephen J. Carroll, et al., *The Abuse Of Medical Diagnostic Practices in Mass Litigation, The Case of Silica*, 2009 RAND INST. FOR CIV. JUST. 13 (quoting *In re Silica Prods. Liab. Litig.*, *infra* note 26) [hereinafter Carroll, *The Case of Silica*].

5. *Id.* at 15-16.
6. See, e.g., John R. Balmes & Frank E. Speizer, *Occupational and Environmental Lung Disease* in HARRISON'S PRINCIPLES OF INTERNAL MEDICINE Ch. 256 (18th ed. 2012) available at <http://www.accessmedicine.com/content.aspx?aID=9128013>.
7. See David Egilman, MD, MPH, et al., *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. IND. MED. 305, 305-307 (2004).
8. *Id.*
9. See Lester Brickman, *On The Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289, 290 (2005-06) (stating that the traditional model of litigation is where an injured person seeks a lawyer, while in an entrepreneurial model, plaintiff's lawyers and their agents actively recruit potential litigants who could claim workplace exposure).
10. Brickman, *The Disconnect*, *supra* note 3, at 81.
11. Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated By Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 526 (2007).
12. Three main screening companies, N&M, Inc., RTS, Inc., and Occupational Diagnostics., were the subject of Judge Jack's review (profiled *infra*) and shared similar symbiotic relationships with the plaintiffs bar. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 595-598 (S.D. TX 2005).
13. Brickman, *The Disconnect*, *supra* note 3, at 77.
14. *Id.* at 78; see *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 598.
15. Brickman, *The Disconnect*, *supra* note 3, at 80; see also Deposition Transcript of Dr. Jose R. Roman, *Koontz v. AC&S, Inc., et al.*, 49D02-9601-MI-0001-668 (Marion Super. Ct. Ind. Oct. 11, 2002).
16. Brickman, *The Disconnect*, *supra* note 3, at 80.
17. See *Id.*
18. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 598.
19. Jason Kennedy & Jill M. Felkins, *A Survey of Asbestos Litigation – Nationally and in Indiana*, 5 IND. CIV. LIT. REV. 223, 229 (2008).
20. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 635; see also Egilman, *supra* note 7, at 305-307.
21. Dr. Altmeyer was not licensed to practice medicine in the state of Indiana, but was still retained by a local plaintiff's firm to conduct screenings.
22. The month prior to this screening, the Indianapolis law firm Laudig George Rutherford & Sipes (now George & Farinas) acknowledged in a letter to Charlie Foster that a previous screening resulted in a 75% positive rate and they "will not be put in a position like this that challenges our credibility in this state. We need to find another way." The letter included suggestions such as to restructuring payments to avoid a payment schedule which promoted positive findings, selectively choosing physicians conducting the review, or have all test results independently reviewed. Letter from W. Russell Sipes to Charlie Foster, (Aug. 9, 2002) (on file with author).
23. Carroll, *The Case of Silica*, *supra* note 4, at ix.
24. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 567.
25. Carroll, *The Case of Silica*, *supra* note 4, at xii (stating that leading defense attorneys interviewed for the study commented that the latitude to question doctors across all the plaintiffs in front of a judge was unprecedented).
26. *Id.* at 1.
27. See *id.* at 21-22 (stating that some defense attorneys were reluctant to challenge the diagnoses because, first, challenging the diagnoses adds to legal costs and some attorneys may have concluded that the cheapest way out of the litigation was to quickly settle claims without challenging diagnoses. Second, some insurers may have thought that it was in their financial interest to settle claims against their policyholders. Third, a number of defense attorneys were concerned that plaintiffs' attorneys would target their clients in future cases if diagnoses were

- challenged and fourth, paid greater attention to generating fees than to minimizing the long-term cost of litigation to their clients).
28. Some plaintiffs in the Indiana litigation were allegedly diagnosed with "mixed dust" disease, purportedly a combination of silica and asbestos diseases.
 29. *See e.g.*, Defendant's Motion to Strike All Respiratory Testing Services, Inc. Diagnostic Materials at 12, *Kerfoot v. A.W. Chesterton Co., et al.*, No. 49D02-9801-MI-0001-267 (Marion Super. Ct. Ind. 2008) [hereinafter Motion to Strike RTS Materials].
 30. Much like Dr. Altmeyer, Dr. Oaks was not licensed to practice medicine in the state of Indiana.
 31. *See, e.g.*, Motion to Strike RTS Materials, *supra* note 29, at 13; other cases pending in Marion County involved screenings performed by another unlicensed physician, Dr. Jose Roman. Dr. Roman, only licensed in Puerto Rico at the time he performed his screenings in Indiana, and viewed the screening participants as clients or customers, as opposed to patients. Dr. Roman based a diagnosis of asbestos solely on the subjective work history supplied to RTS and the B-Reader's review of a single x-ray taken during screening; *see also* Deposition Transcript of Dr. Jose R. Roman, *supra* note 15.
 32. *See*, Motion to Strike RTS Materials, *supra* note 29, at 14. Plaintiffs' experts, including Dr. Altmeyer have referred to these screenings as "unsavory."
 33. *See* Deposition Transcript of Charles Foster, Mass Tort Litigation Deposition Docket, 49D02-9801-MI-0001-000 (Marion Super. Ct. Ind. Aug. 08, 2007).
 34. *See* Motion to Strike RTS Materials, *supra* note 29, at 3-4.
 35. Order Excluding and Striking Documents, Records and Diagnostic Materials Generated by Respiratory Testing Services, Marion Superior Court Complex Litigation Docket Silica/Mixed Dust Division, 49D02-9601-MI-0001-000 (Marion Super. Ct. Ind. Oct. 22, 2009).
 36. *Id.*
 37. Order Excluding and Striking Dr. Newman's January 15, 2008 Report and the Opinions and Conclusions Contained Therein, Marion Superior Court Complex Litigation Docket Silica/Mixed Dust Division, 49D02-9601-MI-0001-000 (Marion Super. Ct. Ind. Oct. 22, 2009).
 38. *See, e.g.*, Duke Energy Indiana, Inc., et al.'s Consolidated Reply in Support of their Motions to Strike, Motions to Exclude, and Motions for Summary Judgment, *Kerfoot*, 49D02-9801-MI-0001-267 (Super. Ct. Ind. Mar. 27, 2009).
 39. Prior discovery responses referred to Dr. Robert Altmeyer as the diagnosing physician and refer to PFT and x-rays obtained by RTS. *See, e.g.*, Sur-response to Motions for Summary Judgment by All Defendants, *Kerfoot*, 49D02-9801-MI-0001-267 (Marion Super. Ct. Ind. Apr. 29, 2011).
 40. Order on Various Defendants Motions to Strike and Exclude, Complex Litigation Docket Silica/Mixed Dust Division, *Graham v. A.E. Staley Mfg. Co., et al.*, 49D02-9801-MI-0001-071; *Grider v. Bayer Cropscience LP, et al.*, 49D02-9801-MI-0001-263; *Kerfoot*, 49D02-9801-MI-0001-267; *Robison v. A.W. Chesterton Co., et al.*, 49D02-9801-MI-0001-135; *Switzer v. A.W. Chesterton Co., et al.*, 49D02-9801-MI-0001-157 (Marion Super. Ct. Ind. March 12, 2010).
 41. The Court struck Dr. Frank's affidavit as untimely evidence which may not be considered when ruling on a motion for summary judgment. *See, e.g.*, Order on Defendants' Rule 702 and 703 Renewed Motion to Exclude the Affidavit of Dr. Arthur L. Frank, *Kerfoot*, 49D02-9801-MI-0001-267 (Marion Super. Ct. Ind. May 20, 2011).
 42. *See* Transcript of Hearing at 18, *Graham*, 49D02-9801-MI-0001-071; *Kerfoot*, 49D02-9801-MI-0001-267 (Marion Super. Ct. Ind. May 19, 2011)[hereinafter Marion County May 19, 2011 Hearing]; *see also* Transcript of the Record of Proceedings, Volume 1 at 53-54, 57, *Graham*, 49D02-9801-MI-0001-071; *Grider*, 49D02-9801-MI-0001-263; *Kerfoot*, 49D02-9801-MI-0001-267; *Robison*, 49D02-9801-MI-0001-135; *Switzer*, 49D02-9801-MI-0001-157 (Marion Super. Ct. Ind. January 14 and 15, 2010).

43. See Marion County May 19, 2011 Hearing at 19-20.
44. *Id.* at 18-21, 29. Dr. Frank skipped the third prong of these criteria, and failed to perform a differential diagnosis in any of the cases before the Court. *Id.* at 20.
45. See, e.g., Order on Defendants' Rule 702 and 703 Renewed Motion to Exclude the Affidavit of Dr. Arthur L. Frank, *Kerfoot*, 49D02-9801-M1-0001-267 (Marion Super. Ct. Ind. May 20, 2011).
46. See Order Denying Motion to Exclude RTS Testing Materials and Related Materials, *Mourning v. A.E. Staley Mfg. Co.*, 49D02-9801-M1-0001-116 (Marion Super. Ct. Ind. Sep. 8, 2011).
47. Now that a majority of the MDL's backlogged cases reached final disposition, Judge Robreno has suggested to the MDL Panel that a large number of jurisdictions can supervise and adjudicate its asbestos cases without undue administrative burden. Suggestion to the Panel on Multidistrict Litigation ("The Panel") Concerning Future Tag-Along Transfers, *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 01-00875 (E.D. Pa. Nov. 23, 2011).
48. See, e.g., Memorandum Opinion at 2-3, *Aberle v. Anchor Packing Co., et al.*, No. 08-91650 (E.D. Pa. Nov. 14, 2011).
49. *Id.* at 3.
50. *Id.* at 4, 7 (quoting *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 822-23 (D.C. Cir. 2009)).
51. *Id.* at 7-8.
52. *Id.* at 8. Judge Robreno employed similar logic in denying plaintiffs' request for an extension to file required "AO 12" submissions, rejecting any contention that counsel "is entitled to a margin of error in complying with [Court orders]" merely because counsel chose to represent a large clientele. *Id.* at 12.
53. *Id.* at 10.
54. *Id.* at 10 (citing *In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d at 575 & n.18).
55. *Id.*; see also Administrative Order No. 12, <http://www.paed.uscourts.gov/documents/MDL/MDL875/adord12.pdf> (last visited November 30, 2011).
56. See *id.* at 11 (citing *In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d at 581-620 (highlighting N&M's violation of state standards during periodic inspections, lack of any policy regarding professional supervision of x-rays and equipment, and failure to receive any order for x-rays from a medical professional, contrary to normal medical practice)).
57. *Id.* at 14-15.
58. See, e.g., A-Best Asbestos Settlement Trust Distribution Procedures, http://www.abestasbestostrust.com/Files/A-Best_TDP.pdf (last visited Nov. 30, 2011), AC&S Trust Policy on Certain Doctors and Screening Facilities, http://www.acandsasbestostrust.com/Files/20100901_ACandS_Physician_Policy.PDF (last visited Nov. 30, 2011).
59. Motion to Exclude Diagnostic Opinions of George E. Metropoulos, M.D. As Scientifically Unreliable, *Pasek, et al. v. Sure Seal Prods. Co., et al.*, 05-536546-NP (Wayne Cir. Ct. Mich. 2010).
60. *Id.*
61. In November 2008, Judge Colombo excluded the testimony of plaintiffs' medical expert, R. Michael Kelly, M.D. as unreliable after a *Daubert* challenge. Frequently used by the plaintiffs' bar in this jurisdiction, the Court found suspect Dr. Kelly's findings, which were similar in almost every case. Judge Colombo extended his ruling beyond the case at hand and stated an intention to apply his decision to future trial-set cases. For a detailed discussion of Judge Colombo's ruling and its subsequent ramifications, see Behrens, *Asbestos Litigation Screening Challenges*, *supra* note, 1 at 735-747.
62. Transcript of Judge Robert J. Colombo, Jr.'s Opinion, *Martinez v. Sure Seal Prods. Co.*, 06-603775-NP; *McLaughlin v. Sure Seal Prods. Co.*, 06-603776-NP; *Swett v. Sure Seal Products Co. Inc.*, 06-603784-NP (Wayne Cir. Ct. Mich. 2010).
63. Behrens, *Asbestos Litigation Screening Challenges*, *supra* note 1, at 725. ■

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