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Derailing the Gravy Train: A Three Pronged Approach to End Fraud in Mass-Tort Medical Diagnosing

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NOTES

DERAILING THE GRAVY TRAIN: A THREE-PRONGED APPROACH TO END FRAUD IN MASS TORT MEDICAL DIAGNOSING

INTRODUCTION

Mass medical screening, or "diagnosing for dollars,"[1] currently fuels mass tort litigation. Functionally, these screenings range from the processing of hundreds to thousands of plaintiffs through hotel conference rooms acting as quasi-medical offices[2] to unlicensed technicians operating X-ray machines in the back of a van.[3] Although this phenomenon has existed since the early days of asbestos litigation,[4] some mass tort plaintiffs' attorneys appear to be employing increasingly brazen and dubious methods to enlist plaintiffs via these medical screenings.[5]

The extent of this problem was vehemently emphasized by Judge Jack in her recent opinion in *Silica Products*.[6] In a lengthy and well-researched opinion, Judge Jack implied that the plaintiffs' attorneys

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1. Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96-97.

2. *See id.* at 108.

3. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 598 (S.D. Tex. 2005); Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *5 (D. Kan. May 30, 1990).

4. *See, e.g.*, *In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 308-10 (E.D.N.Y. 2002); *Raymark*, 1990 WL 72588, at *5.

5. *See Silica Prods.*, 398 F. Supp. 2d at 596-603; *see also infra* Part I.

6. *Silica Prods.*, 398 F. Supp. 2d at 635-37 ("This explosion in the number of silicosis claims ... suggest[s] perhaps the worst industrial disaster in recorded world history. And yet, these claims do not look anything like what one would expect from an industrial disaster.... [T]his appears to be a phantom epidemic ... and the courts ... must determine whether they are being faced with the effects of an industrial disaster of unprecedented proportion—or something else entirely.").

and the diagnosing doctors engaged in rampant fraud, and she openly questioned the validity of virtually all silica-based personal injury claims.[7] Excoriating the attorneys and doctors involved, Judge Jack imposed sanctions[8] and declared that "these diagnoses were driven by neither health nor justice: they were manufactured for money."[9]

Though her opinion did not definitively establish the amount of the sanctions to be levied against the plaintiffs' attorneys, Judge Jack left no doubt that whatever sanction that would ultimately be levied would be insufficient.[10] The defendants' estimated costs of preparing for the *Daubert* hearing[11] were $825,000,[12] but after finding that her court had subject-matter jurisdiction over only one percent of the cases, Judge Jack tentatively set the sanctions at a proportional amount: $8250.[13] Even had the sanctions not been reduced, however, it is not clear that sanctions, alone, could sufficiently redress the harm the attorneys caused or deter similar screenings. The problem—that sanctions alone are insufficient to redress the harms caused by fraudulent medical screening and the mass tort litigations they drive—is the one this Note aims to solve.

The consequences of these unregulated mass screenings extend well beyond the obvious drain on corporate pocket books and clogging of the courts with potentially meritless claims.[14] As at least one commentator has previously observed, however, "[i]dentifying the problem does not ... prescribe a solution."[15] This Note proposes a three-pronged approach to eliminate potential fraud in mass tort medical screenings.

The first prong is legislative: though several states have passed commendable tort-reform laws to deal specifically with the asbestos

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7. *See id.* at 571-73.

8. *Id.* at 680.

9. *Id.* at 635.

10. *See id.* at 679.

11. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-95 (1993). For a discussion of *Daubert* and its progeny, see *infra* notes 68-75 and accompanying text.

12. *Silica Prods.*, 398 F. Supp. 2d at 678.

13. *Id.* at 678-79.

14. *See infra* Part II.

15. JAMES L. STENGEL, U.S. CHAMBER INST. FOR LEGAL REFORM, MASS TORT SCREENINGS: THE LEGISLATIVE OPTIONS 1 (2005), http://www.instituteforlegalreform.com/pdfs/Stengelpdf.pdf.

and silica screening crises,[16] these efforts do not go far enough. Rather than litigation-specific, backward-looking legislation, states should enact broader laws aimed at eliminating the possibility of *future* problematic mass screening.

The second prong involves the use of neutral, court-appointed experts. These experts could fill roles ranging from testifying as neutral trial experts to devising litigation-specific criteria for the screening of potential claimants. Though legislation of the type described above has the advantage of applying to a wide variety of potential mass torts, its resulting lack of specificity may leave too much room for interpretation. To close this gap, courts should use their power under Federal Rule of Evidence 706[17] to appoint independent medical experts.[18]

The final prong is the catch-all: the availability of serious sanctions against both plaintiffs' attorneys responsible for fraudulent mass screening and also the screening companies themselves. Although Judge Jack levied fines against the offending attorneys in *Silica Products*,[19] the amount of the fines was paltry in relation to the ultimate cost of the meritless claims resulting from the screening. Courts must be encouraged to levy fines with real deterrent power to discourage abuses in the screening process.

Part I of this Note will attempt to define the problem of fraudulent mass-medical screening by describing use of such screening in several types of mass tort litigations. Part II will examine the consequences of mass-medical screening. Part III will examine the need for a novel solution and argue that existing methods have not

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16. *See, e.g.*, Asbestos and Silica Compensation Fairness Act, FLA. STAT. ANN. §§ 774.201 to .209 (West Supp. 2006); GA. CODE ANN. § 51-14-1 to -10 (Supp. 2006); OHIO REV. CODE ANN. §§ 2307.84 to .902 (West Supp. 2006) (governing silica or mixed dust disease claims); OHIO REV. CODE ANN. §§ 2307.91 to .98 (West Supp. 2006) (governing asbestos claims); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001 to .012 (Vernon Supp. 2006).

17. FED. R. EVID. 706.

18. A majority of states have adopted provisions identical or similar to Rule 706. *See, e.g.*, ALA. R. EVID. 706; CAL. EVID. CODE § 730 (West 1995); MD. RULES 5-706 (LexisNexis 2006). Although mass tort claims typically arise under state law, the actions relevant to this Note—those with hundreds or thousands of plaintiffs—may be removable to federal court under the relaxed removal standards imposed by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (relevant sections codified at 28 U.S.C.A. §§ 1332(d), 1453 (West 2006)).

19. *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 679-80 (S.D. Tex. 2005).

been successful. Finally, Part IV will argue for a three-pronged approach to eliminating fraudulent medical screening.

I. THE PROBLEM OF SCREENING IN MASS TORT

A. Origins in Asbestos

To appreciate the scope and magnitude of the problem posed by mass tort medical screenings, it is helpful to examine the beginnings of the phenomenon. The paradigm example is, of course, asbestos litigation, which has resulted in hundreds of thousands of cases filed in the last three decades.[20] Although tales of asbestos screening abuses abound,[21] one particular example is illustrative of the extent of the problem. That instance involved an asbestos defendant, Raymark Industries, bringing fraud and RICO[22] charges against a group of asbestos plaintiffs' lawyers, alleging that the lawyers "devised and controlled a nationwide asbestos claim-generating scheme which involved the unethical solicitation" of potential claimants.[23] In plain terms, the plaintiffs' lawyers were accused of fraudulently creating claims.

Specifically, Raymark alleged that the plaintiffs' attorneys arranged to have vans equipped with X-ray equipment visit tire manufacturing plants around the country.[24] These "examobiles," as they were called, were operated by medical personnel with dubious credentials, such as lacking qualifications to diagnose asbestos disease, having been sued for misrepresenting qualifications, and being unlicensed to practice medicine in the United States.[25] Furthermore, the asbestos disease "diagnoses" were based entirely

20. *See* S. 15, 79th Leg., 2005 Reg. Sess. (Tex. 2005) (enacted) (legislative findings describing the history of asbestos litigation and the need for statutory reform).

21. *See, e.g.*, Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 836-39 (2005) (describing the common practices used by asbestos lawyers to screen potential claimants).

22. *See* 18 U.S.C. §§ 1961-1968 (2000 & Supp. 2004) (containing the Racketeer Influenced and Corrupt Organizations statute).

23. Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *2 (D. Kan. May 30, 1990).

24. *Id.* at *5.

25. *Id.*

on the X-ray results,[26] a practice in direct conflict with the accepted medical standard of diagnosis, which considers any history of exposure, an appropriate latency time, chest X-ray evidence, and several other factors.[27] Further reason to doubt the adequacy of the asbestos litigants' screening protocol is the fact that it resulted in a diagnosis rate "3 to 4 1/2 times greater than among shipyard workers[,] who are known to have the greatest risk."[28]

In denying the plaintiffs' attorneys' motion for summary judgment, the court in *Raymark* vehemently summarized its view of the mass-screening and claim-generation process: "this claim process appears to be a 'professional farce!' The process makes a mockery of the practices of law and medicine! Indeed, if this court were now to acquiesce in any of them it would make a 'laughingstock' of the court!"[29] The court's conclusions about the screenings' accuracy were ultimately confirmed by science: A 1990 study of tire workers from one of the sites involved in the *Raymark* case, which was "prompted by the reporting of exceedingly high rates of alleged asbestos-related disease among rubber workers," found rates of disease much lower than the nearly sixty percent of workers who had filed legal claims.[30] "[P]ossibly 16 [3.6%], but more realistically 11 [2.5%], of the 439 cases evaluated may have a condition consistent with exposure to an asbestiform mineral."[31] The pronounced disparity between the results of the follow-up study and the diagnoses made in a mass screening of the same people underscores the gross unreliability of such screenings.

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26. *Id.*

27. *See* Am. Thoracic Soc'y, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 AM. J. RESPIRATORY & CRITICAL CARE MED. 691, 691-92 & tbl. 1 (2004).

28. *Raymark*, 1990 WL 72588, at *6.

29. *Id.* at *2.

30. Robert B. Reger et al., *Cases of Alleged Asbestos-related Disease: A Radiologic Re-evaluation*, 32 J. OCCUPATIONAL MED. 1088, 1088-89 (1990).

31. *Id.* at 1089.

B. Fen-phen[32]

It would be a mistake, however, to conclude that mass tort screening is just a part of the asbestos mess. The fen-phen litigation also exploded to unexpected, unmanageable numbers largely due to the same kind of unethical and possibly fraudulent screening procedures.[33] This time, the product manufacturer decided early in the litigation to limit claims by arranging a global settlement.[34] Rather than eliminating the need for mass screening, however, this strategy created a "feeding frenzy" which resulted in claims far out of proportion to expectations.[35]

Understandably alarmed by the huge number of claims, lawyers for the settlement trust began auditing individual claims.[36] This process produced results nothing short of stunning. By 2004, the trust had audited 4600 claims and found nearly two-thirds of them deficient.[37] The high rate of deficiency, of course, was explained by the screening process: entire industries had been spawned to screen potential fen-phen claimants; screening sessions were being held in law firms and hotel rooms; diagnosing physicians were working on contingency fees with escalating rewards for more serious diagnoses;[38] and some diagnosing physicians were finding injuries at twelve times the rate predicted by their own research studies.[39]

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32. Fen-phen is a nickname for a diet drug cocktail comprising fenfluramine and phentermine. Fenfluramine and a closely related compound, dexfenfluramine, were withdrawn from the market after being linked with heart-valve defects. Press Release, Food & Drug Admin., FDA Announces Withdrawal of Fenfluramine and Dexfenfluramine (Sept. 15, 1997), *available at* http://www.fda.gov/cder/news/phen/fenphenpr81597.htm.

33. *See* Alison Frankel, *Still Ticking*, AM. LAW., Mar. 1, 2005, at 92, 97-99, 133.

34. *Id.* at 94.

35. *Id.* at 96, 133.

36. *Id.* at 97-99.

37. *Id.*

38. *Id.*

39. *See In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 236 F. Supp. 2d 445, 456-57 (E.D. Pa. 2002) (showing that one doctor found moderate to severe mitral regurgitation in sixty to seventy percent of the 725 fen-phen claimants she examined, but that an earlier blinded study of the same diet drugs in which she participated found moderate to severe mitral regurgitation in only about five percent of like participants); *see also* Julius M. Gardin et al., *Valvular Abnormalities and Cardiovascular Status Following Exposure to Dexfenfluramine or Phentermine/Fenfluramine*, 283 J. AM. MED. ASS'N 1703, 1707, 1709 (2000) (showing the doctor's participation as a principal clinical investigator, and the study's results).

Perhaps worst of all, a 2004 audit of claims paid by the settlement trust found evidence of "rogue frames inserted into the [echocardiograms] of 84 patients."[40] This practice extends well beyond the realm of exaggerated diagnoses and into that of completely fabricated ones.

C. Silica

The mass-screening fiasco given the most press recently is the silica litigation. Judge Jack's blistering opinion reached a conclusion about silica mass tort screening that might be equally applicable to all mass tort screenings:

> [T]he clear motivation [for the heavy involvement of the plaintiffs' law firm in the screening process] was to inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system. This is apparently done in hopes of extracting mass nuisance-value settlements because the Defendants and the judicial system are financially incapable of examining the merits of each individual claim in the usual manner.[41]

In support of this conclusion, Judge Jack relied on several sources of information. First she detailed the screening process itself.[42] Reminiscent of the screenings in *Raymark*, the silica screening involved X-ray machines in vans, unqualified technicians, incomplete diagnostic protocols, and a small number of doctors responsible for thousands of diagnoses.[43] These factors, intuition suggests, lead to the possibility of major overdiagnosis and this intuition has been supported by statistics provided in the opinion. Based on Centers for Disease Control and Prevention (CDC) and National Institute for Occupational Safety and Health (NIOSH) statistics, there ought to have been between thirty-six and seventy-three cases of silicosis diagnosed in Mississippi per year;[44] but between 2002 and 2004,

40. Frankel, *supra* note 33, at 133.
41. *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 676 (S.D. Tex. 2005).
42. *See id.* at 596-603.
43. *Id.*
44. *Id.* at 571 n.8.

20,479 new silicosis claims were filed in Mississippi courts.[45] As Judge Jack pointed out, "these claims suggest perhaps the worst industrial disaster in recorded world history," yet "Mississippi's apparent silicosis epidemic has been greeted with silence by the media, the public, Congress and the scientific communities."[46] Once again, the implications of the discrepancy between scientifically recognized statistics and litigation-driven diagnoses are clear: mass screenings are unreliable and dramatically inflate the number of potential claimants in a given law suit.

D. Welding, Others on the Horizon?

Without an effective solution to the problem posed by mass screening, there is bound to be another asbestos or another silica on the horizon. In fact, there is some evidence that this problem is appearing in the relatively nascent welding-rod litigation.[47] Based on the allegation that the manganese in welding fumes may cause manganism or Parkinson's Disease, the litigation is estimated to already have between 8000 and 15,000 claimants.[48] Furthermore, with approximately 800,000 welders in the United States and a large pool of potential defendants, the litigation has the potential to grow.[49]

Many of these claims are apparently the result of a mass-screening process run by a Wisconsin neurologist, who claims to have screened 20,000 people thus far.[50] The neurologist received

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45. *Id.* at 572.

46. *Id.* To show the significance of the lack of public attention on the supposed epidemic, Judge Jack points out that "the CDC and NIOSH issued an outbreak alert in 1988 for *10 cases* of silicosis in Ector County, Texas, and for a single death from acute silicosis in Ohio in 1992." *Id.* (emphasis added).

47. *See* John Shaffery & Gary Och, *Welding Rod Injury and its Current Litigation: A Brief Overview*, TOXIC TORT WATCH, Mar. 2004, at 6, 64-65.

48. ROBERT KOORT ET AL., GOLDMAN SACHS EQUITY RESEARCH, WELDING ROD LITIGATION: UNLIKELY TO BECOME THE 'NEXT ASBESTOS' (2004), *available at* http://www.gawda.org/eSeries/Customer/Source/gawda_members/Resources/newsletters/Goldman-WeldingRodLitigation.pdf.

49. *Id.* at 2-3. Koort et al. did cite some factors, such as difficulty meeting the commonality required of class actions, which vitiate against the probability of mass tort litigation in the near future. *See id.* at 3. A 2003 plaintiffs' victory, however, demonstrated that plaintiffs can overcome these hurdles and welding-rod litigation could indeed grow in the future. *Id.*

50. *See* Brian Brueggemann, *Lawsuit Blames Welding for Illness*, BELLEVILLE NEWS-DEMOCRAT (Ill.), Oct. 13, 2003, at 1A, *available at* http://www.belleville.com/mld/belleville/archives/ (search "Lawsuit Blames Welding for Illness").

$10,000 per day for the screening, and had received a total of $270,000 as of October 2003.[51] As a result of these screenings, the doctor claims to have found a dramatically increased risk of Parkinson's-type disease among current and former welders; he is careful, however, to acknowledge that no published study supports his findings.[52] The similarity between these allegedly widespread welding-related neurological deficits and the overdiagnosis of silica injuries as pointed out by Judge Jack is striking: if the welding mass screening is taken at face value, there appears to be yet another enormous public health risk that is receiving virtually no attention from recognized national health authorities like the CDC or NIOSH. Statistical analysis and follow-up studies have shown that silica claims were absurdly overstated;[53] time will tell whether the welding claims follow a similar path.

II. CONSEQUENCES: WHY "DIAGNOSING FOR DOLLARS" IS A BAD THING

The purpose of this Note is not to argue that mass screening is *necessarily* corrupt or undesirable. In fact, one court noted:

> Advertising and the use of technology and large scale operations by lawyers to improve efficiency and provide service to a large community—here those exposed to asbestos, injured and with a recognized substantive cause of action—is generally considered commendable under our capitalistic-entrepreneurial regime and ethical under our professional-legal system.[54]

Nevertheless, as the above examples have illustrated, mass screening for asbestos and other toxic torts is a much different

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51. *Id.*

52. *Id.*

53. *See supra* notes 41-46 and accompanying text.

54. *In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 312 (E.D.N.Y. 2002) (citing Bates v. State Bar of Ariz., 433 U.S. 350 (1977); MODEL RULES OF PROF'L CONDUCT R. 7.2 (2003); N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-101 (McKinney 2001); STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 398, 968 (2002); RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 746-56 (2d ed. 2001)); *see also In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 627 (S.D. Tex. 2005) ("[I]t is worth noting that there is nothing inherently wrong with a mass screening ....").

animal than screenings sometimes used to diagnose common diseases.[55] Indeed, notwithstanding the potential benefits of well-conducted screening procedures, dubious methods have, without doubt, been employed in numerous lawsuits.[56] Those screenings have contributed to the explosion of the asbestos litigation.[57] That litigation, in turn, has had a devastating impact not only on the asbestos industry,[58] but also on related industries.[59]

A. Judicial Waste

Nowhere has the judicial waste incurred by mass screening been more well-documented and notorious than in asbestos litigation. In 1990, U.S. Supreme Court Chief Justice William Rehnquist appointed an Ad Hoc Committee on Asbestos Litigation to examine the litigation's effect on the judicial system and to propose solutions.[60] The Committee concluded that the asbestos litigation was overwhelming both state and federal court dockets, resulting in delayed trials, relentlessly relitigated issues, and reduced plaintiff compensation due to high transaction costs.[61] These conclusions

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55. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 63 & n.89 (2003).

56. *See supra* Part I.

57. *See* STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 23 (2002).

58. *See In re Joint E. & S. Dists.*, 237 F. Supp. 2d at 305 ("Claims for compensation for asbestos-related injuries have already cost businesses over 50 billion dollars through the end of 2000. It has been estimated that the cost of such claims to business will ultimately reach at least $200 billion.... At least 60 companies have been driven into bankruptcy primarily by asbestos claims, with the pace of bankruptcy filings accelerating markedly in recent years."); *see also* Brickman, *supra* note 21, at 834-35 (providing examples of the impact of asbestos litigation and predicting that the worst may be yet to come).

59. *See* Richard O. Faulk, *Dispelling the Myths of the Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 950 (2003) ("Twenty years ago, only 300 defendants were involved in asbestos litigation. Current lawsuits name more than 8,000 defendants. Many of these defendants had no role in the manufacturing of asbestos products or their distribution into the stream of commerce." (footnotes omitted)); *see also* JOSEPH E. STIGLITZ ET AL., AM. INS. ASS'N, THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS 3 (2002) (finding that asbestos bankruptcies have led to the loss of 52,000 to 60,000 jobs, with each displaced worker losing $25,000 to $50,000 in wages over his or her career and about $8300 in pension loss).

60. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1828 (1992).

61. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997) (citing REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (1991)).

underscore the notion that an overloaded court system is detrimental not only to the courts themselves, but also to those litigants seeking relief.

B. Dilution of Legitimate Claims

That many claims are false does not mean there are not real, injured claimants deserving remedies.[62] These legitimate claimants, not only the defendant corporations, are harmed by mass screenings and the influx of meritless claims they can produce. For instance, in the fen-phen litigation, doctors auditing claims submitted to the trust found fifty cases in which "patients had actually suffered moderate or severe aortic valve damage that had gone undiagnosed."[63] Clearly, mass screening's unreliability leads to both over-diagnosing and under-diagnosing.

The administration of the Manville Trust for asbestos claimants also confronted the problem of frivolous claims taking both credence and award money from truly injured people. After meritless asbestosis claims forced the Trust to impose stricter evidentiary requirements for awards, many *plaintiffs'* attorneys called for even stricter requirements.[64]

C. Impact on Falsely Diagnosed Plaintiffs

Finally, even if most cases fall far short of an unneeded, major transplant surgery,[65] falsely diagnosing people with potentially

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62. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 675 (S.D. Tex. 2005) ("Of course, saying that the Plaintiffs do not have diagnoses is not to say that none of the ... Plaintiffs have silicosis.... The point is that because the lawyers short-circuited the appropriate diagnostic process ... there is no reliable basis for believing that every Plaintiff has silicosis.").

63. Frankel, *supra* note 33, at 133. Frankel goes on to describe "one horrifying case, [in which] a patient whose condition was overstated for the sake of obtaining payment through the trust ended up having unnecessary heart valve replacement surgery." *Id.*

64. *See In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 319-26 (E.D.N.Y. 2002). One plaintiffs' attorney, concerned that the new trust system would favor unimpaired claimants over those most seriously injured, argued, among other things, that the trust should ensure that diagnostic examinations are "real physical examinations of the quality required by ... workers' compensation boards" and that further research on the best testing methods was "badly needed." *Id.* at 328.

65. *See supra* note 63.

devastating diseases does impose real costs.[66] These individual costs are easily lost or overlooked within the scope of lawsuits that can comprise hundreds of thousands of plaintiffs. Such costs defy easy quantification, but logically must exist.[67]

III. DO WE NEED A SOLUTION?

An observer with a good understanding of American substantive and procedural law, but without the benefit of knowing anything about the mass torts described in this Note, might find it hard to believe that there is any need for increased regulation of mass screening. In other words, it is already against the rules. But current law, as this Part will demonstrate, is insufficient to protect against the harms caused by mass tort screening.

A. Daubert

The Supreme Court established in its landmark case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, that trial courts should exclude "*at the outset*" expert scientific testimony unless the "reasoning or methodology underlying the testimony is scientifically valid and ... that reasoning or methodology properly can be applied to the facts in issue."[68] *Daubert* and its progeny[69] have further refined those requirements to include, among other things, that a scientific expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[70] Judge Jack pounced on this requirement in excluding plaintiff experts in the silica Multi-District Litigation (MDL).[71]

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66. *See In re Silica Prods.*, 398 F. Supp. 2d at 636-37 ("In the case of the Plaintiffs who are healthy, at least some of them can be expected to have taken their diagnoses seriously. They can be expected to have reported their diagnoses when applying for health insurance and life insurance, to their employers and to ... their families and friends.").

67. *See id.*

68. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993) (emphasis added).

69. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

70. *Kumho Tire Co.*, 526 U.S. at 152.

71. *See In re Silica Prods.*, 398 F. Supp. 2d at 622; *see also* Frankel, *supra* note 33, at 99 ("[Dr.] Crouse found that the echocardiograms of 60-70 percent of the [law firm] clients her office tested exhibited disease ... compared to the 5 percent she found in a blinded clinical study ...."); *supra* note 39.

Though *Daubert* undeniably provides defendants with an important weapon, it is by no means a cure-all. First, not all states have adopted the evidentiary tenets of *Daubert*,[72] and the ones that have do not all apply its principles uniformly.[73] Second, the strategy of many mass tort lawyers appears to be to file enough claims to overwhelm defendants and extract "nuisance-value settlements."[74] If cases are settled prior to extensive litigation, *Daubert* will not help much. Furthermore, *Daubert* hearing fees can be very expensive for defendants;[75] thus, even a successful challenge does not completely avoid waste on meritless claims.

B. Model Rules

Of course, it almost goes without saying that the ABA's Model Rules already prohibit attorneys from bringing false claims,[76] unnecessarily multiplying litigation, or resorting to the sort of fraudulent mass-screening techniques seen in asbestos and fen-phen. Further, many states have applicable standards far more stringent than those suggested in the Model Rules.[77] Given the current landscape of mass tort litigation, however, the conclusion that the Model Rules and their state corollaries are insufficient is inescapable.

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72. David E. Bernstein, *Disinterested in* Daubert*: State Courts Lag Behind in Opposing "Junk" Science*, LEGAL OPINION LETTER (Wash. Legal Found.), June 21, 2002, at 1-2, *available at* http://www.wlf.org/upload/6-21-02Bernstein.pdf (identifying Alabama, Arizona, California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New York, Pennsylvania, South Carolina, Utah, Washington, and Wisconsin).

73. *Id.* (discussing, as examples, Oregon and West Virginia cases that purported to embrace *Daubert* but ignored essential guidance from *Kumho*).

74. *In re Silica Prods.*, 398 F. Supp. 2d at 676.

75. *See id.* at 678 (estimating defendants' attorney costs at $275,000 per day). Though all litigation is expensive, these costs are particularly galling considering they are expended only to dispose of meritless claims.

76. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006) ("A lawyer shall not bring ... a proceeding ... unless there is a basis in law and fact for doing so that is not frivolous ....").

77. *See, e.g.*, CAL. CIV. PROC. CODE § 128.5(a) (West 2005) ("Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous ...."); MONT. CODE ANN. § 37-61-421 (2005) ("An attorney or party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.").

C. Sanctions

Sanctions for attorney misconduct are already available through a number of avenues.[78] In particular, 28 U.S.C. § 1927 appears especially relevant:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[79]

Despite the apparent perfect fit between § 1927 and mass screenings, the sanctions avenue has not yet been used to its full potential. For instance, Judge Jack's silica opinion was severely critical of the attorneys' conduct, but even her sanctions were, as she noted, paltry compared to the costs reasonably incurred because of the unreliable diagnostic procedures.[80]

V. A THREE-PRONGED SOLUTION

A. Legislative

Perhaps the most intuitive solution to the problem of mass tort medical screening is comprehensive federal legislation. The Supreme Court recognized this solution in the asbestos context a decade ago,[81] and practitioners have recommended similar solutions to nonasbestos mass torts.[82] Despite this recommendation, the only federal legislative effort approaching the level of reform needed to

78. *See, e.g.*, *supra* note 77.

79. 28 U.S.C. § 1927 (2000).

80. *See In re Silica Prods.*, 398 F. Supp. 2d at 679.

81. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (stating that the "elephantine mass of asbestos cases ... defies customary judicial administration and calls for national legislation"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628-29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

82. *See, e.g.*, JAMES L. STENGEL, U.S. CHAMBER INST. FOR LEGAL REFORM, MASS TORT SCREENINGS: THE LEGISLATIVE OPTIONS 1-10 (2005), *available at* http://www.instituteforlegalreform.org/pdfs/Stengelpdf.pdf (presenting several legislative reform options).

curtail mass-screening abuse is the as-yet unenacted Fairness in Asbestos Injury Resolution Act of 2006 ("FAIR Act" or "Act").[83]

The FAIR Act, however, is limited to the asbestos litigation and therefore will not cure screening abuses found in other mass torts. Despite its limited scope, the Act is instructive as an example of why federal legislation cannot be relied on to solve the mass-screening problem.

First, it should be noted that the Act's substantive provisions would go a long way toward fixing the problem. By creating a "national asbestos injury claims resolution program,"[84] the Act is intended to supplant all other forms of asbestos-related compensation.[85] The most immediate and obvious consequence of that provision would be to relieve federal and state courts of their overwhelming asbestos-related case load. More important for purposes of this Note, however, is the claims resolution program itself.

Paramount to the Act's procedural reform is the establishment of the "Office of Asbestos Disease Compensation," the mandate for the appointment of an administrator of that office,[86] and the creation of an "Asbestos Injury Claims Resolution Fund."[87] The administrator would be responsible generally for the administration of the funds to claimants and all the necessarily related bureaucratic matters.[88]

Although this process might initially sound disturbingly similar to the infamous fen-phen fund,[89] the Act has built-in safeguards designed to prevent similar abuses. These safeguards are the provisions most relevant to the issue of mass screening. First, the Act provides for the creation of a Medical Advisory Committee to assist the Fund Administrator in creating injury standards and diagnostic protocols.[90] To ensure the integrity of the committee, the

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83. Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. (2006). Although the Act is getting attention in the Senate, it appears stalled in the House. *See* FAIR Act of 2005, H.R. 1360, 109th Cong. (2005), *available at* http://frwebgate.access. gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h1360ih.txt.pdf.

84. S. 3274 § 2(7).

85. *Id.*

86. *Id.* § 101.

87. *Id.* § 221.

88. *Id.* § 101.

89. *See supra* Part I.B.

90. FAIR Act of 2006, S. 3274, 109th Cong. §§ 103, 405(b)(6) (2006).

Act would limit its membership to individuals who have not received more than fifteen percent of their income from asbestos consulting for the previous five years.[91] Second, and perhaps more important, the Act would confer significant authority on the Administrator to "develop methods for auditing and evaluating the medical ... evidence" and to exclude medical evidence from physicians or facilities employing methods "not consistent with prevailing medical practices."[92] The Act, thus, does not merely allow the Administrator to audit and exclude individual, unreliable diagnoses, but rather allows the exclusion of *all* evidence from a particular physician or facility.

The Act also grants the Administrator authority with real teeth, allowing not only exclusion of evidence, but also the imposition of, among other penalties, a $10,000 fine[93] on "any person or entity found to have submitted or engaged in a materially false, fraudulent, or fictitious statement or practice."[94] The Act, therefore, contains both safeguards to prevent the submission of specious claims and punishments severe enough to deter claimants or their lawyers from attempting to make such claims.

The FAIR Act, however, cannot solve the problems of mass-medical screening for a couple of reasons. First, the Act is obviously aimed specifically at asbestos. As a result, its underlying purpose is to establish a fund from which all future asbestos claims will be paid.[95] This solution does not address future litigation in other areas.[96] The most damning problem with the FAIR Act, however, is that it is not yet binding law.

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91. *Id.*

92. *Id.* § 115.

93. *See id.* § 101 (describing the Administrator's duties to include "excluding evidence and disqualifying or debarring any attorney, physician, provider of medical or diagnostic services, including laboratories and others who provide evidence in support of a claimant's application for compensation where the Administrator determines that materially false, fraudulent, or fictitious statements or practices have been submitted or engaged in by such individuals or entities; and ... having all other powers incidental, necessary, or appropriate to carrying out the functions of the Office").

94. *Id.*

95. *Id.* § 2.

96. The FAIR Act will not, for example, preclude the application of the same diagnostic techniques and mass litigation strategies to the "next asbestos."

Although the Act was originally introduced in May of 2003, neither the Senate nor the House has passed it.[97] The political difficulty in passing the FAIR Act, which is aimed squarely at the widely recognized problem of asbestos litigation, underscores the notion that relying on federal reform to cure the ills of medical mass screening is unrealistic. Indeed, much of the opposition to the FAIR Act comes, not exclusively from the plaintiff's bar, but rather, from the asbestos industry[98] and its insurers.[99] Opponents point out that the Act's funding structure is uncertain and argue that the bill would favor big companies over smaller ones and unconstitutionally take insurance companies' assets in an arbitrary way.[100] This opposition stems in part from the Act's failure to realize hopes for forward-looking legislation narrowly aimed at setting standards for medical diagnoses.[101] Nevertheless, it is remarkable that a proposal for a federal asbestos solution, which the Supreme Court urged as early as 1990,[102] has had such difficulty gaining support.

Given the history of the FAIR Act, it seems unrealistic to believe that federal reform calling for specific diagnostic protocols in *all* litigation is a solution with any potential to be adopted in the near future. A more practical solution may be to focus legislative efforts on individual states. Further, this approach has the advantage of allowing different states to experiment with different approaches, thereby providing valuable examples for an eventual federal approach.[103] Indeed, several states have already enacted the type of

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97. Patrick M. Hanlon, *Asbestos Litigation: The FAIR Act Two Years On*, 1 PRATT'S J. BANKR. L. 207, 207, 209 (2005), *available at* http://www.goodwinprocter.com/getfile.aspx?filepath=/Files/publications/hanlon_p_08_05.pdf.

98. The phrase "asbestos industry" must be read with the understanding that the asbestos litigation has sucked in many companies only tangentially related to the actual manufacturers of asbestos.

99. *See Coalition for Asbestos Reform Opposes FAIR Act*, INS. J., Apr. 22, 2005, http://www.insurancejournal.com/news/national/2005/04/22/54201.htm.

100. *See id.*

101. *See id.* ("Coalition members ... support efforts to enact medical criteria legislation, an approach that has already proven at the state level to reduce costs and provide finality for defendants, neither of which will result from the Specter-Leahy FAIR Act.").

102. *See supra* notes 60-61 and accompanying text; *see also supra* notes 81-82 and accompanying text.

103. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

medical-screening- and diagnosis-focused legislation crucial to the elimination of mass-screening abuses.[104]

At first blush, these state statutes seem to fall victim to the same problem (aside from lack of political momentum) as the FAIR Act: the statutes address asbestos and silica claims exclusively. Unlike the federal regulation, however, these statutes do not propose to eliminate an asbestos- or silica-related cause of action through the creation of an administrative fund; rather, the Florida, Georgia, Ohio, and Texas statutes set forth rigid criteria for the claimant diagnoses.[105]

Although the various state statutes differ in many respects, their fundamental requirements share much in common. First, each of the statutes mandates the submission of "prima facie evidence" of impairment, usually in the form of a written report, early on in the litigation.[106] Second, the substance of this required evidence is quite similar in the states with such statutes: all diagnoses must be conducted by a qualified physician.[107] The statutes then set forth

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104. *See* FLA. STAT. ANN. §§ 774.201 to .209 (West Supp. 2006) (codifying the Asbestos and Silica Compensation Fairness Act); GA. CODE ANN. § 51-14-1 to -14-10 (Supp. 2006) (governing asbestos and silica claims); OHIO REV. CODE ANN. §§ 2307.84 to .902 (West Supp. 2006) (governing silica and mixed dust claims); OHIO REV. CODE ANN. §§ 2307.91 to .98 (West Supp. 2006) (governing asbestos claims); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001 to .012 (Vernon Supp. 2006) (governing asbestos and silica claims).

105. It is interesting to note that far prior to the adoption of these legislative reforms, courts presiding over mass tort cases were forced to take similar tacks. For instance, Judge Weinstein, presiding over the distribution of the Manville Trust, approved additional evidentiary amendments to the Trust's claim requirements. *See* Brickman, *supra* note 55, at 136. These amendments, which contained requirements similar to the state legislative efforts, were criticized by some plaintiffs' lawyers, specifically those representing "seriously ill claimants," as insufficiently rigid. *See id.* at 137. These attorneys' concerns stemmed from the diversion of Trust asset from the truly sick to those who remained unimpaired. *See id.*

106. Florida requires the submission of a written report and supporting test results with the complaint or initial pleading. FLA. STAT. ANN. § 774.205(2) (West Supp. 2006). Georgia requires submission of prima facie evidence of physical impairment before the commencement of any discovery (except for that related to the establishment or challenge of the prima facie evidence). GA. CODE ANN. § 51-14-7(a) (Supp. 2006). Similarly, Ohio requires the showing of prima facie evidence within thirty days of filing the complaint. OHIO REV. CODE ANN. § 2307.93(A)(1) (West Supp. 2006). Texas mandates the filing of a report within thirty days of the defendant's answer or entering of appearance. TEX. CIV. PRAC. & REM. CODE ANN. § 90.006(a) (Vernon Supp. 2006); *see also id.* §§ 96.003-.004.

107. *See* FLA. STAT. ANN. § 774.204 (West Supp. 2006) ("qualified physician"); GA. CODE ANN. § 51-14-2 (Supp. 2006) ("qualified physician"); OHIO REV. CODE ANN. § 2307.92 (West Supp. 2006) ("competent medical authority"). The Texas statute does not have any similar language, but does include many other requirements for diagnosing physicians. *See, e.g.*, TEX.

detailed definitions for qualified physicians. Those definitions range from mandatory board certification to the prohibition of reliance on any diagnoses, screenings, or reports that were "conducted in violation of any law, regulation, licensing requirement, or medical code of practice."[108] Further, the definitions generally require that a "qualified physician" actually have a "doctor-patient relationship" with the exposed individual.[109] Finally, the statutes exclude from the ranks of "qualified physicians" those who spend more than a certain percentage of their time consulting for civil litigation or generating more than a certain percentage of their practice's revenue from such consulting.[110]

The requirement for basic, prima facie evidence supported by a diagnosis from a "qualified physician" serves several purposes.[111] Perhaps the most obvious is to ensure that plaintiffs provide credible evidence of actual, physical impairment.[112] This requirement, of course, is specifically geared to deal with the asbestos litigation; nevertheless, such a mandate is equally applicable to any disease involving a long latency period. By limiting cases to those claimants suffering from actual, physical impairment, the statutes

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CIV. PRAC. & REM. CODE ANN. §§ 90.003 to .004 (Vernon Supp. 2006).

108. TEX. CIV. PRAC. & REM. CODE ANN. § 90.005(a) (Vernon Supp. 2006).

109. *See, e.g.*, FLA. STAT. ANN. § 774.203(23)(a)(2) (defining "qualified physician" to require "a doctor-patient relationship" with the plaintiff); OHIO REV. CODE ANN. § 2307.91(Z)(2) (requiring same for "competent medical authority").

110. *See, e.g.*, GA. CODE ANN. § 51-14-2(17)(A) (Supp. 2006) (qualified physician cannot spend more than ten percent of professional activity consulting for civil litigation and physician's overall practice cannot earn more than twenty percent of revenue providing such services); OHIO REV. CODE ANN. § 2307.91(Z)(4) (West Supp. 2006) (competent medical authority cannot spend more than twenty-five percent of professional activity consulting for civil litigation and physician's overall practice cannot earn more than twenty percent of revenue providing such services).

111. Note that the provisions described are only a few of the many requirements imposed by these state statutes. The statutes also require plaintiffs to meet detailed asbestos- and silica-specific threshold diagnostic requirements. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.003 to .004 (Vernon Supp. 2006).

112. The statutes generally expand the statute of limitations to provide that the limitation period does not begin to run until the exposed individual has a cause of action under the statute. *See, e.g.*, OHIO REV. CODE ANN. § 2307.94(A) (West Supp. 2006). This provision eliminates the need to file a claim as soon as the individual learns of any asbestos-related injury which does not cause impairment. Such claims may account for much of the current asbestos case load. *See* CARROLL ET AL., *supra* note 57, at 22, 45 (discussing the large number of claims for nonmalignant injuries and injuries causing "little or no functional impairment"). For this reason, postponing the running of the statute of limitations until the onset of actual impairment likely would reduce this caseload.

reserve judicial resources and corporate money for those claimants that need it most. Furthermore, the limitation cuts the potential litigant pool so dramatically as to eliminate the need for mass screening.[113]

Even if the statutes could not cut the demand for mass-litigant screening,[114] the substantive requirements for the prima facie case preclude the sort of mass-production efficiency responsible for asbestos and silica screening abuses. In particular, the requirement of a diagnosis by a qualified physician both drastically increases the cost of an individual diagnosis and is a requirement that is easily transferable to litigation contexts outside the asbestos arena. Several criteria for a "qualified physician" contribute to the effects, but two requirements, in particular, deserve special attention.

The first of these is the requirement that a qualified physician have a "doctor-patient relationship" with the exposed individual.[115] Indeed, the Ohio statute goes even further, mandating that the doctor actually have treated the exposed individual.[116] The specific depths of the "doctor-patient relationship" hardly need be explored to realize that mass tort medical screening does not fit the bill. Consider the testimony of one highly credentialed diagnosing physician in the silica litigation: "I was not practicing medicine ... I was providing diagnostic information in the context of medical/legal consultation."[117] This type of diagnosis-only relationship would not qualify under the state statutes.

The emphasis on treatment found in the Ohio and other statutes will not only deter mass screening and the ensuing flood of

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113. *See* CARROLL ET AL., *supra* note 57, at 20 ("Several ... recent studies have found fractions of unimpaired claimants ranging from two-thirds to up to 90 percent of all current claimants.").

114. In cases in which immediate impairment is alleged, for instance, the demand for such screening would remain. *See, e.g.*, *supra* notes 47-53 and accompanying text. The welding litigation's appetite for mass screening, for example, would not be diminished by relaxed statute of limitations provisions because the injuries that are alleged to cause immediate impairment. With a large class of currently impaired claimants, the demand for mass screening remains.

115. *See supra* note 109.

116. OHIO REV. CODE ANN. § 2307.91(Z)(2) (West Supp. 2006).

117. *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 640 (S.D. Tex. 2005) (citing Transcript of *Daubert Hearings* at 56-57, *In re Silica Prods.*, 398 F. Supp. 2d 563, No. MDL 1553 (Feb. 16, 2005)). This testimony was echoed by other physicians in the litigation, one who opined that he was applying "a legal standard and not a real diagnosis." *Id.*

impairment-free claims; it will also help those individuals with legitimate claims. Rather than being drawn by advertising to a mass screening that emphasizes the manufacture of thousands of claims, these individuals may visit doctors capable of, and willing to, offer real treatment.

The second requirement of particular relevance to non-asbestos mass tort litigation is the limit on the amount of time qualified physicians may spend consulting in civil litigations.[118] Likely enacted in response to the litigation-linked diagnostic industries that sprung up around asbestos,[119] silica,[120] and fen-phen litigation,[121] this limitation eliminates the demand for those industries and increases the likelihood of unbiased diagnoses.

Both of these statutory elements—the requirement for doctor-patient relationships and the limitation on litigation consulting time—will likely have positive effects on the standard of care received by legitimately impaired individuals. The effectiveness of these measures in reducing mass-screening abuse, however, will likely result from their impact on the cost of implementing conforming diagnoses. Without these requirements, a single doctor may diagnose hundreds or even thousands of patients and earn most of his income from this practice.[122] Without the efficiencies of mass-produced claims, plaintiffs' lawyers will be unlikely to spend significant amounts of money diagnosing those with little or no impairment because the potential for a return on that investment would be tenuous or nonexistent.

As evidenced by the above comparison with existing asbestos reform statutes, a state-by-state legislative solution offers many attractive possibilities. The success of those statutes will stem from the resulting dramatic increase in the cost of mass screenings.[123]

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118. *See supra* note 110.

119. *See* Brickman, *supra* note 55, at 81 (describing the creation of multiple companies for the sole purpose of providing asbestos screening X-rays and pulmonary tests).

120. *See In re Silica Prods.*, 398 F. Supp. 2d at 580 & n.26, 581 (detailing the methods of one screening company employed by plaintiff firms to provide X-rays for silicosis diagnoses).

121. *See supra* notes 32-40 and accompanying text.

122. *See, e.g., In re Silica Prods.*, 398 F. Supp. 2d at 639 (describing how one doctor reviewed 1200 cases in seventy-two hours and diagnosed 800 life threatening illnesses in the process); *id.* at 587 (one physician stating his motivation to participate in the screening process was "easy money").

123. This result would presumably end mass screenings. *See id.* at 635 ("[T]hese diagnoses were driven by neither health nor justice: they were manufactured for money."); Raymark

This solution, however, will not independently end all future dubious mass-medical screenings.

The first shortcoming of the legislative solution is an obvious but frequently fatal one: before legislation can do anything, it must be enacted. In spite of the fact that screening abuses in asbestos litigation have been documented since at least the early 1990s,[124] only four states have passed legislation to curtail these practices. Furthermore, even those states did so only in the last two years.[125] Finally, unless all states enact similar reforms, plaintiffs' attorneys will simply move their screening enterprises to new jurisdictions. Although those jurisdictions may ultimately decide to enact reform measures, in the meantime thousands of meritless, or at least impairment-less, suits may be filed.

Opposition to asbestos tort reform has apparently been successful in holding off these statutes for quite some time; the legislation this Note proposes, however, would be even broader. Not restricted to a single type of lawsuit, the legislative efforts this Note proposes would cut across every type of claim. It is reasonable to assume, therefore, that such legislation would engender even more strenuous opposition while garnering perhaps less vehement support.[126]

On the other hand, in some respects legislation aimed at a broader range of lawsuits would impose less stringent requirements. Such statutes would be limited to requiring basic formalities,[127] but could not back those formalities with disease-specific diagnostic requirements. Although this lack of specificity may be a positive in the eyes of tort-reform opposition, it may create gaps large enough to allow unreliable diagnoses to continue to act as the basis for lawsuits. Obviously, then, legislative reform cannot act alone.

Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *13 (D. Kan. May 30, 1990) ("In sum, it appears that this unusual, distasteful and disappointing case emanates from the attorneys' greed, which has clouded their professional judgment, i.e., their indifference as to whether any of the 6,000 claims meet professional standards or not.").

124. *See, e.g.*, *Raymark*, 1990 WL 72588, at *1.

125. The Ohio statute was enacted in 2004; the other three statutes were enacted in 2005. *See supra* notes 16, 104.

126. Without the pressure of constant media attention declaring a crisis, legislation dealing with nonasbestos abuses may not attract as much attention.

127. See *supra* notes 106-10 and accompanying text for a discussion of such formalities.

B. Independent Regulations

An effective complement to state tort reform would need to meet two primary needs: filling the diagnosis-specific gaps left by general statutory requirements, and having some chance of working independently should such legislative reforms prove politically impossible. A solution that provided only disease-specific protocols for diagnosis would have little use if employed in a state with no requirement that this diagnosis be made by a doctor uninvolved in litigation; the protocols would simply change the assembly-line process used in mass screening.

Such a complement actually already exists in Federal Rule of Evidence 706. Under the Rule, a court may "on its own motion ... appoint expert witnesses of its own selection."[128] Although Rule 706 provides a specific example of a court's authority to appoint its own expert, a variety of sources have been invoked in support of this power.[129] The Supreme Court has recognized and recommended the practice of calling court-appointed experts as a potentially useful one in the post-*Daubert* age of scientific gate-keeping.[130]

Despite these recommendations, the use of court-appointed experts appears to be relatively uncommon.[131] The Federal Judicial

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128. FED. R. EVID. 706.

129. Robert E. Thackston, Esq., Andrews Continuing Legal Educ. Institute, Continuing Legal Education Presentation: Court-appointed Experts in Toxic Tort Litigation (May 4, 1998), 1998 WL 34182437 (ANCLE), at *2 ("Federal courts cite a variety of authority for appointing their own experts, also called 'advisors' or 'technical advisors': 'inherent authority;' Federal Rule of Evidence 706, 'Court-Appointed Experts;' Federal Rule of Evidence 104, 'Preliminary Questions' and Federal Rule of Civil Procedure 53, 'Masters.' Federal courts have long had 'virtually unquestioned' inherent power to appoint their own experts. Despite the existence of a specific rule on appointment of experts, some courts cite only their 'inherent authority.'" (footnotes omitted)).

130. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) ("Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules.... Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing."); *see also* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149-50 (1997) ("[A] judge could better fulfill [his or her] gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority ... to appoint experts .... Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.") (quoting with approval Brief of Amici Curiae The New England Journal of Medicine and Marcia Angell, M.D., in Support of Neither Petitioners nor Respondents at 18-19, *Gen. Elec.*, 522 U.S. 136 (May 30, 1997) (No. 96-188)).

131. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.5 (1985).

Center researched the use of court-appointed experts by sending short surveys to all 537 active district court judges.[132] The responses indicated that roughly twenty percent, or eighty-six, of the responding judges had appointed experts.[133] Only five of the reported cases involved experts addressing causation issues in toxic tort cases.[134] The appointment of experts in mass torts—the types of cases most likely to involve the screenings of thousands of potential claimants—was thus quite rare.

The Judicial Center researchers identified four primary reasons for the judicial reluctance to appoint experts: infrequent need, respect for the adversarial system,[135] difficulty in assessing costs and the "awkward problem" of having to require parties to compensate the court-appointed expert,[136] and the trouble inherent in locating truly neutral experts.[137] These concerns, however, are either not applicable to the mass tort context or otherwise answerable for several reasons. First, experience and common sense both dictate that mass tort cases invariably require expert opinion to decide causation issues. These cases frequently involve "a procession of persons with impeccable credentials and persuasive testimony ... [who] will reach diametrically opposite viewpoints depending upon which side they testify for."[138] Though in most cases, courts may seldom have need to appoint experts, mass torts are an exception.

Second, thirty-nine of the responding judges cited "[r]espect for the adversarial system" as a reason to avoid appointing experts.[139] The rationale underlying this "respect" was essentially that both parties can provide their own experts, cross-examine the opposing expert, and any differences in opinion will then be resolved by the jury. Again, however, this reasoning may not be sound when applied

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132. Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert*'s Invitation: Defining a Role for Court-appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004 & n.33 (1994). Four hundred thirty-one of the judges responded. *Id.*

133. *Id.* at 1004.

134. *Id.* at 1006.

135. *Id.* at 1015-20.

136. *Id.* at 1045-55.

137. *Id.* at 1022-23.

138. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 FED. RULES DECISIONS 35, 35 (1991) (arguing that the development of the "expert-advocate" and the likelihood that battling experts may confuse juries is a good reason for courts to appoint neutral experts).

139. Cecil & Willging, *supra* note 132, at 1018-19.

to the mass tort context. The extent of the fraud alleged in the *Raymark* case, the Silica MDL, and the fen-phen trust belies the notion that opposing experts represent merely "differences of opinion."[140] Instead, these cases represent total breakdowns of the adversarial system.

Third, the logistical need to apportion the appointed expert's costs among parties has been a hindrance to some judges.[141] Rule 706 grants the trial judge wide discretion in allocating the costs of the expert,[142] and although a judge may be unsure how to apportion costs if one of the parties is indigent,[143] cases involving the mass screening of plaintiffs, however, are not typically ones with indigent parties unable to afford the cost of an additional expert.[144] In the mass tort context, either an equal splitting of costs or some allocation based on the outcome of the case would therefore be a workable solution.

Finally, the Judicial Center's research found that many judges had reservations about the practicality of finding experts that are truly neutral.[145] Unlike the three concerns mentioned above, this problem could actually be more significant in the mass tort context. As seen in asbestos and fen-phen litigation, these suits can quickly assume monstrous proportions and involve tens of thousands of plaintiffs. Along with these thousands of plaintiffs come hundreds of lawyers and dozens of experts. In short, it may actually be logistically difficult to find experts without a conflict.

Yet this problem may not be as bad as it sounds. First, it is worth noting that Judge Rubin found experts in an asbestos case that were neutral by contacting several national health-related agencies.[146] Neutral experts, thus, are available. More important, the need

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140. *See supra* Part I.

141. Cecil & Willging, *supra* note 132, at 1045-56.

142. FED. R. EVID. 706(b) ("[In civil actions not including just compensation under the Fifth Amendment)] the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.").

143. *See* Cecil & Willging, *supra* note 132, at 55-56.

144. *Id.* at 1052-53. While Rule 706 allows for expenses to fall on the nonindigent party, judges typically first require the Plaintiff's claim to have merit. *Id.*; *see also* David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281 (1990).

145. Cecil & Willging, *supra* note 132, at 1022 ("Several judges doubted that such testimony would be truly neutral, even if the expert was invited to testify by the court.").

146. *See* Rubin & Ringenbach, *supra* note 138, at 38.

for such an independent search may now be obviated by the establishment of a program by the American Association for the Advancement of Science designed to match experts to lawsuits.[147] If judges are less hesitant to appoint such experts, more programs like the Academy's will likely be created,[148] lessening the difficulty of finding neutral and qualified experts.

Although appointing independent experts in mass tort cases is far from commonplace, several judges have successfully done so.[149] Judge Carl Rubin of the Southern District of Ohio appointed experts to testify in a series of asbestos cases in the late 1980s.[150] Judge Rubin queried the American Medical Association, the American Thoracic Society, the American Board of Internal Medicine, and other national groups to find potential expert candidates.[151] Importantly, the candidates were excluded if they had any previous association with the asbestos industry or litigation.[152] Once selected, the experts were provided with all relevant plaintiff records and ultimately testified at the trial.[153]

Perhaps the most striking result of Judge Rubin's use of court-appointed experts is the correlation between the court expert's opinion and the disposition of the case: the jury decided in accordance with the independent expert in thirteen of sixteen cases.[154] Furthermore, the independent expert found that nearly two-thirds of the plaintiffs were "free of any condition giving rise to a cause of action."[155] The implications of these findings are obvious: not only did neutral experts find that a majority of claimants had no

147. *See The Role of Science in Making Good Decisions: Hearing Before the H. Comm. on Science*, 105th Cong. (1998) (statement of Mark S. Frankel, Director, Program on Scientific Freedom, Responsibility and Law, American Association for the Advancement of Science), *available at* http://www.aaas.org/spp/sfrl/projects/testim/mftest.htm; *see also* Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group*, 187 FED. RULES DECISIONS 328, 377-79 (1999).

148. Indeed, Duke Law School's Private Adjudication Center established a similar program. *See* Willging, *supra* note 147, at 379.

149. The examples that follow are not intended to be an exhaustive list of court-appointed experts in tort litigation, but rather a few examples illustrative of the practice's promise for eliminating the advantage gained by dubious screening methods.

150. *See* Rubin & Ringenbach, *supra* note 138, at 37-42 & apps. I-VI.

151. *Id.* at 38.

152. *Id.*

153. *Id.* at 40.

154. *Id.* at 41.

155. *Id.* at 39.

actionable injury, but those experts were credible enough that juries believed them.[156]

Judge Rubin's use of court-appointed experts, however, occurred prior to the Supreme Court's *Daubert* decision and the resulting changes in admissibility standards for scientific and technical evidence. Whereas he employed the neutral expert as a sort of third-party expert—an alternative to the parties' experts—courts since *Daubert* have focused the use of independent experts on assisting the judge in *Daubert* and summary judgment hearings.[157]

This practice was used extensively in breast implant cases. Multiple trial courts appointed panels of experts, as did Judge Samuel C. Pointer, Jr., who presided over the federal breast implant cases, consolidated into Multi-District Litigation.[158] An Oregon trial judge, Robert Jones, appointed independent medical "advisors" in the fields of epidemiology, immunology/toxicology, rheumatology, and chemistry.[159] Unlike in Judge Rubin's asbestos trials, however, Judge Jones appointed the experts pursuant to Rule 104, in order "[t]o keep [them] independent of any ongoing proceedings...."[160] After the parties submitted materials for the experts to review, a four-day hearing was held, during which both sides' experts were questioned by the court-appointed experts.[161] Once the hearings were completed, questions were submitted to the independent experts, who generated a report.[162] Finally, based on that report, Judge Jones

156. Of course, the significant correlation between the independent expert's opinion and the ultimate decision of the jury may lend credence to the argument that the use of such experts is harmful to the adversarial system and results in jurors abdicating their decision-making role. *Cf.* Cecil & Willging, *supra* note 132, at 1019-20 (discussing judges' concern about abdicating their decision-making role to expert witnesses). Such an argument posits that court-appointed experts possess an "aura of infallibility to which they are not entitled." FED. R. EVID. 706 advisory committee's notes (citing Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMPLE L.Q. 416 (1961)). This concern is one applicable to all expert testimony, however, and any increased credibility resulting from the perceived impartiality of a court-appointed expert is a comparatively benign result.

157. *See* Thackston, *supra* note 129, at *2 (discussing alternative uses of experts, such as having an expert meet with the judge in chambers only, "as a technical advisor, in the nature of a law clerk, ... [for] free-wheeling discussion" (internal quotation marks omitted)).

158. *Id.* at *5.

159. *Id.*

160. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1392 n.8 (D. Or. 1996).

161. *Id.* at 1393-94.

162. *Id.* at 1394-95.

granted the defendants' motions in limine to exclude the plaintiffs' expert causation testimony.[163]

Court appointed experts played very different roles in Judge Rubin's asbestos trials and Judges Jones's and Pointer's breast implant hearings. Both methods of employing experts—as trial witnesses and as *Daubert* hearing consultants—hold significant promise as a solutions to the mass-screening problem. If used as an actual trial witness, the independent expert would render it very difficult for plaintiff attorneys to pass off mass-manufactured diagnoses as legitimate. The use of expert panels would have a similar result.

To be most effective, however, neutral experts must be appointed in toxic-tort cases with regularity. If there exists only a remote chance of the appointment of an independent expert, as is the situation currently, the expectation of the resulting higher causation standard will not provide a deterrent to the type of mass-claimant stockpiling seen in the *Raymark* and fen-phen debacles. In other words, the threat of independent experts must be a consistent one in order to negate the settlement leverage plaintiffs' attorneys gain by screening thousands of potential claimants.

Consistent appointment of neutral experts also solves, to some extent, the debate over when these experts must be appointed. Because the mass-screening scenario involves the potential that claimant numbers will be inflated merely to pressure defendants to settle, the argument might be made that the neutral experts should be appointed immediately to counter plaintiffs' leverage. If such experts are consistently appointed in such cases, however, this counter leverage will exist no matter when in the course of the proceeding experts appear.

A consistent appointment approach, of course, begs the question of how to determine which cases merit application of this rule. Not all cases will automatically demand a court-appointed expert, and there are certainly cases, beyond the scope of this Note, in which

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163. *Id.* at 1394. Judge Jones deferred the effective date of his ruling in recognition that Judge Pointer, presiding over the national MDL, had implemented a similar panel of experts to assess the scientific validity of plaintiffs' causation claims. Though Judge Pointer appointed his panel pursuant to Rule 706, the results were similarly in favor of the defendant. *See* David E. Rovella, *Panel Finds Silicone Risk Is Unproven, Breast Implant Plaintiffs Regroup, Await NIH Report*, NAT'L L.J., Dec. 14, 1998, at B1.

such experts are appropriate. This Note posits simply that court-appointed experts should be appointed in cases alleging personal injuries resulting from exposure to a product or substance for which the defendant is responsible. In each case, counsel would be permitted to argue against such an appointment, and judges would remain the ultimate arbiters of this decision.

The use of court-appointed experts could either complement state statutory reform by providing courts with neutral, case-specific diagnostic protocols, or be used alone and serve a more expansive role in combating mass-screening abuses. Judges who have employed this judicial tool have been overwhelmingly and unanimously satisfied with the results.[164] Neutral, court-appointed experts appear to hold significant promise in curbing mass-screening abuses.

C. Sanctions

Both avenues of attack against fraudulent mass tort screening discussed above—state tort reform and court-appointed experts—are independently capable of drastically altering the cost/benefit structure of mass screening, thereby rendering it an ineffective method for plaintiffs' attorneys to make money. Because money making appears to be the primary, if not the only, motivation for such practices by plaintiffs' attorneys,[165] the implementation of such changes will likely reduce or eliminate the incidence of mass screenings. In spite of such promise, though, neither curative method is without flaws. State legislative reform depends on the political process for enactment; court-appointed experts depend on the discretionary appointment of the court, and many judges have voiced concern about the effect of the practice on the adversarial system.[166] In short, a fallback, catch-all approach may be needed to shore up the holes in the legislative and court-appointed-expert approaches.

This catch-all approach should take the form of sanctions. As discussed above, courts already have several avenues leading to

164. *See* Cecil & Willging, *supra* note 132, at 1009.

165. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 676 (S.D. Tex. 2005).

166. *See supra* note 139 and accompanying text.

sanctions against misbehaving litigants.[167] The one used by Judge Jack in the silica opinion, however, best fits the mass-screening scenario. Finding that the plaintiffs' counsel, by ignoring the clear indications of widespread unreliable diagnoses, had "unreasonably and vexatiously" multiplied the proceedings, Judge Jack fined the attorneys pursuant to 28 U.S.C. § 1927.[168]

Section 1927 states that "[a]ny attorney ... who so multiplies the proceedings in any case *unreasonably and vexatiously* may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred *because of* such conduct."[169] Courts have construed § 1927 to require "evidence of recklessness, bad faith, or improper motive," but have noted that imposition of such sanction is committed to the court's discretion.[170] Furthermore, as the plain language of the statute indicates, the sanctions are limited to those costs resulting from the unreasonable multiplication of the proceedings; this sets the outer limit for sanctions to those costs incurred after the offending party exercised bad faith.

This limitation is the reason Judge Jack sanctioned the silica counsel only for costs associated with preparation for the *Daubert* hearings rather than for all the defendants' costs. In fact, she stated specifically that "[a]bsent strict construction, the Court likely would find that liability [for sanctions] arose with the filing of the Complaint."[171] Judge Jack, however, also pointed out that it should have been initially apparent to plaintiffs' counsel that the sheer number of claims filed was enough to imply medical implausibility.[172] Given that she concluded that the "clear motivation ... of the diagnostic process was to ... overwhelm the Defendants and the judicial system,"[173] Judge Jack surely had sufficient evidence of "bad faith or improper motive" to support sanctions.

This hesitation to impose meaningful, deterring sanctions has been seen before in mass torts, and may in part account for the

167. *See supra* notes 78-79 and accompanying text.
168. *In re Silica Prods.*, 398 F. Supp. 2d at 673-79.
169. 28 U.S.C. § 1927 (2006) (emphasis added).
170. Travelers Ins. Co. v. St. Jude Hosp., 38 F.3d 1414, 1416-17 (5th Cir. 1994).
171. *In re Silica Prods.*, 398 F. Supp. 2d at 676 n.181.
172. *Id.* at 674.
173. *Id.* at 676.

proliferation of these fiascoes. For instance, in the *Raymark* tire workers cases, Judge Kelly openly acknowledged the "attorney defendants' reckless disregard of the truth, [and] their knowing intent to defraud."[174] Yet, despite this acknowledgement, the Judge refused to invalidate the settlement, pursuant to which Raymark had paid tens of millions of dollars.[175] The end result, therefore, was that the plaintiffs' attorneys who employed blatantly fraudulent diagnostic techniques ended up netting millions in contingency fees. With that kind of result, it is no surprise that silica-type diagnosing disasters have been uncovered fifteen years later.

The solution to this problem is obvious: judges should use § 1927 to its fullest extent after a finding that counsel have "unreasonably and vexatiously" multiplied the proceedings. Rather than finding the latest possible point in the litigation at which to assign liability, judges should examine the diagnostic processes themselves to determine whether they imply bad faith. Further, other courts should follow Judge Jack's lead by allowing discovery into the screening practices employed by plaintiff firms.[176] If this discovery uncovers persuasive evidence, as it did in the silica cases, that the diagnoses underlying plaintiffs' claims ought never to have been trusted by plaintiffs' counsel, then those attorneys should be held responsible for *all* costs. Such sanctions would provide much stronger deterrence against future screening abuses than the relatively slight ones administered in the silica litigation.

Finally, it is worth repeating that sanctions are not meant to be the primary or first line of defense against improper mass screening. Rather, sanctions should be used as a last line of defense; if state legislative provisions or court appointed experts cannot cure the abuse, *then* courts should turn to sanctions.

CONCLUSION

The preceding descriptions of the mass-screening abuses seen in asbestos, fen-phen, and silica, combined with the near certainty

174. Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *14 (D. Kan. May 30, 1990).

175. *See id.* at **28-29 & n.1; *see also* Brickman, *supra* note 55, at 101-02.

176. *See* Parloff, *supra* note 1, at 104 ("Judge Jack ruled that if a screening doctor's diagnosis was the basis for filing the suit, then information about it should be discoverable.").

of future abuses, make it clear that some legal recourse is warranted. This Note suggests a three-pronged approach. The three approaches—legislative reform, court appointed experts, and sanctions—may work together to eliminate screening abuses, or they may work independently to achieve the same end. What is important is that courts take seriously the problem posed by these assembly-line diagnosis practices. These practices do not help truly injured plaintiffs recover; rather they dilute those claims by lumping them together with others, all of which will be disposed of without an individual examination of their merits. The adversarial system has failed for twenty years to solve this problem; implementation of the solutions this Note suggests will help reverse that trend.

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