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Over the last few years, the courts have increasingly confronted the opinions of physicians hired by plaintiff attorneys to provide their clients—who are not being treated for any medical problem—with ''diagnoses'' they can use in lawsuits against product liability defendants, according to authors Peter Grossi and Sarah Duncan. Most of these doctors, the authors say, admit that they participated in screening programs controlled by attorneys solely to support such lawsuits.

The authors review the hallmarks of such litigation screening programs in three mass tort contexts— asbestos, diet drugs, and silica—and argue that ''such diagnoses are inherently ''unreliable'' and therefore should not be admitted as evidence.

Litigation-Driven 'Medical' Screenings: Diagnoses for Dollars

BY PETER GROSSI AND SARAH DUNCAN

In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court held that an expert opinion must have been developed through ''reliable'' methods in order to be admissible. Since *Daubert*, a growing number of courts have held that ''medical diagnoses'' produced by mass screening programs that were not part of a normal clinical practice were ''unreliable.''

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For example, during the past year, the late Judge Charles Walsh of the New Jersey Superior Court issued a series of opinions rejecting purported ''diagnoses'' of valvular heart disease in former diet drug patients, reasoning that since

> *Daubert* and its progeny . . . demand that medical and other scientific evidence be reliable. . ., the law requires that a physician function in the courtroom as he or she would in an operating suite or clinical practice. It is the re-

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liability of the methodology viewed in this context which permits the admissibility of the opinions.[1]

Last June, Judge Janis Jack of the United States District Court for the Southern District of Texas similarly ruled that the opinions of doctors hired by plaintiff attorneys to provide ''diagnoses'' of silicosis in exposed workers were inadmissible because the doctors had not employed the standard methods of clinical practice, but rather ''seemed to be under the impression they were practicing law rather than medicine.''[2]

Although there are modest differences in the details, the experiences of these courts, as well as academic physicians, with the mass screening programs organized by the same cadre of plaintiff attorneys in the asbestos, diet drug and silica contexts are sufficiently similar to constitute a disturbing pattern. There are, in fact, certain hallmarks of such ''unreliable'' programs, in which doctors abandon normal clinical standards solely to justify litigation opinions. And a review of those troubling features should provide future courts with a basis to exclude all opinions from similarly flawed programs.

1. Lawyers, Not Doctors, Recruit 'Patients'

The first hallmark of an unreliable litigation screening program is the obvious—and yet still quite remarkable fact that it is *lawyer-generated*. Unlike the normal situation where *a patient is first diagnosed* with some disease through standard medical care and *then* seeks out an attorney to pursue a potential legal action against a defendant who sold a product linked to that problem, in the litigation-driven screening programs *lawyers first convince potential clients to retain them to file a lawsuit*, and only *then* determine whether they can even claim to have the relevant medical condition.

In this mass screening model, lawyers typically recruit potential plaintiffs by advertising ''free'' testing which no personal physician has ever recommended. The lawyers, and their ''screening'' companies, use the standard tools of any mass marketing campaign—television commercials, blanket mailings, newspaper advertisements. Often these advertisements urge the target audience—and sometimes the public at large—to undergo the screening even when they may have previously tested negative for the condition at issue.

Not surprisingly, this ''come-one-come-all'' approach persuades most potential clients to view the ''test'' as a ''no lose,'' money-making proposition, rather than an effort to obtain a true medical diagnosis for some serious disease. As one asbestos plaintiff put it, ''I saw the notice in the union newsletter and said, 'Why not?' It's better then the lottery. If they find something, I get a few thousand dollars I didn't have. If they don't find anything, I've just lost an afternoon.''[3]

In the *Diet Drug Cases*, the plaintiff attorneys were even more aggressive in their marketing. One survey by *plaintiffs* lead counsel in the national class action which resolved many diet drug claims estimated that in just three years plaintiff firms spent some $51 million on television commercials soliciting potential claimants.[4]

These attorneys promised potential clients ''free'' testing, stressing the amount of settlement funds available. As one ad trumpeted, ''Up to $1.4 million is available to those who suffered injuries from the use of [diet drugs] . . . . Even if you have not developed symptoms or for another reason think you have no claim, you should reevaluate your situation and seek immediate legal advice.''[5]

The unbridled recruitment of clients by lawyers and the screening companies they controlled was also at the heart of the more recent silica litigation. In her opinion criticizing such practices, Judge Jack noted that a number of screening companies used mass mailings and toll-free numbers in a way that made it unlikely plaintiffs would view the tests as true medical treatment.[6]

While somewhat different in tone and size, the screening programs in asbestos, diet drugs and silica were thus alike in that the impetus for the testing was a lawyer's interest in collecting an inventory of thousands of clients, not a concern on the part of any health care professional that a patient actually had a condition requiring real treatment. And hence these programs all lacked one of the essential attributes of a *valid* medical diagnosis—some initial investigation by a true *treating* physician.

2. Technicians, Unsupervised by Doctors, Perform the Tests

A second hallmark of litigation-driven screenings is that the testing itself is conducted by either laymen or technicians who, unlike normal clinical practice, are not supervised by any physician. In many cases, these tests take place in decidedly non-medical settings—law offices, hotel rooms, or vans in parking lots.

In the asbestos litigation, unsupervised technicians performed X-rays and pulmonary function tests (PFTs) in motel rooms and union halls. Although most state laws require that a physician order X-rays on a patient-by-patient basis—since they can potentially cause harm—many of the lawyer-created screening companies failed to have any doctor order or supervise the tests. Others circumvented such regulations by having doctors who worked for the attorneys hand out ''blanket'' prescriptions without identifying the patient in question. One doctor wrote such a blanket x-ray order which was then used for the next 6 years. He later explained that he wrote the order at the request of a plaintiff attorney because ''that's what friends are for.''[7]

In the *Diet Drug Cases*, technicians also typically performed echocardiograms—the relevant diagnostic test for the valvular heart condition associated with the drugs—on potential claimants with no supervision from any physician. Although such echocardiograms generally do not cause harm *per se*, the acquisition of an adequate study requires skill and adjustments tailored to each patient; and unsupervised tests can thus result in

[1] *In re Diet Drug Litigation*, Dkt. No. BERL 771803MT (N.J. Sup. Ct.) (July 22, 2004) at 11-12.

[2] *In re Silica Products Liability Litigation*, 2005 WL 1593936 (S.D. Tex. 2005) at 59.

[3] Schneider, Asbestos Lawsuits Anger Critics, St. Louis Post Dispatch, 2003 WL 3554893 (Feb. 9, 2002) at 9.

[4] *In re Diet Drugs*, MDL Dkt. No 1203, Joint Motion for An Emergency Stay of Processing Matrix Claims (E.D. Pa. 2002) at 17.

[5] *Id.* Ex. 3.

[6] *In re Silica Products Liability Litigation* at 2526.

[7] *Bentley v. Crane,* Dkt. No. 927655 (Cir. Ct. Jasper Co., Miss.) (12/12/01), Dep. Tr. at 43-44, 94-95, Ex. 4.

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invalid images which cause unwarranted anxiety and at times unnecessary treatment.

Yet Judge Harvey Bartle, who supervises the National Settlement Trust established to pay diet drug claimants, was presented with numerous instances where the screening companies did not have any doctor on staff much less one who properly supervised the technicians who performed the echoes. One company, which performed approximately 70,000 litigation echocardiograms in a single year, recruited its technicians from a list of the founder's friends. Those technicians then scanned up to 30 patients a day in hotel rooms or lawyer's offices where no doctor was present.[8] Another plaintiffs' attorney, who at first purchased thousands echocardiograms from that screening firm, ultimately hired his *own* technicians, and thus simply eliminated the middleman.[9]

In the silica litigation, Judge Jack similarly found that none of the people running one of the most prolific testing companies had any medical training; nor did they hire a medical director. The head of another silicosis screening firm, who admitted to having no real medical qualifications, decided on his own that a three-day training course was sufficient to perform even complex pulmonary function tests (PFTs).[10]

Yet true medical testing—like medicine itself—is almost always a patient-specific matter requiring individualized, and at times even unusual, approaches. A lack of direct and immediate physician supervision over such testing thus can be—and often is—fatal to a reliable diagnosis.

3. Technicians Don't Follow Standard Clinical Protocols

Bereft of supervision from experienced doctors, many technicians in these mass screening programs did not follow standard testing protocols, but rather purposely altered test procedures to achieve the results desired by their attorney-employers.

In the asbestos litigation, technicians frequently used improper PFT procedures; and plaintiffs with negative results had their X-rays re-read multiple times until a ''positive'' result was obtained. One doctor, who had worked as a plaintiffs' expert in the asbestos cases, later reported to a medical journal that he ''was amazed to discover, that in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one of them. The 'shopping around' of X-rays is not sound or proper medical practice and may in fact result in harm to some of the screened individuals.''[11]

In the *Diet Drug Cases*, technicians often altered the settings on the echocardiogram machines—which use color codes to show the velocity and direction of cardiac flow—so as to exaggerate the extent of the alleged abnormalities. As Judge Bartle found, this incorrect calibration of the machines was obviously contrary to normal clinical practice.[12]

The Diet Drug defense also challenged the undue influence of plaintiff lawyers on some technicians to record positive results. As one screening company official testified, at some sites law firm representatives were ''breathing down the backs'' of the technicians. Some screening outfits even kept tally sheets showing their ''hit rates'' (the number of positive reads) at each testing session; and supervisors told technicians to recalibrate the machines if their ''hit rate'' was too low.[13]

In the silica litigation, there was likewise evidence of the unjustified retesting of potential plaintiffs to achieve positive diagnoses. Judge Jack noted that some firms read X-rays numerous times, with those who tested negative sometimes being told to return for retesting at a later session. With no record of how many times those individuals were tested, it is possible some were exposed to a number of X-rays over a short period of time.[14] Obviously, none of this comported with normal clinical protocols for such potentially harmful procedures.

4. Doctors Interpreting the Tests Disavow Any Doctor-Patient Relationship

A fourth hallmark of unreliable litigation screenings is that the doctors who interpret the tests and render the ''diagnoses'' expressly deny any doctor-patient relationship often referring to their subjects as ''clients'' rather than ''patients.'' At times, this ersatz relationship was sadly comical. As one doctor testified in the asbestos litigation, ''I don't consider them my patients, but as a physician, there's just something that doesn't sound right about calling someone a client, so I don't know what else to call them.''[15]

In the *Diet Drug Cases, one doctor who certified more than 900 plaintiffs as having valvular heart disease similarly testified, ''My understanding was that there was not a doctor-patient relationship with respect to my reading and interpreting echocardiograms.''*[16] *Another, who diagnosed almost 3000 former diet drug users, announced on the face of his echocardiogram reports that the ''INTERPRETATION OF THIS STUDY BY THE ABOVE-NAMED PHYSICIAN DOES NOT CONSTITUTE A DOCTOR-PATIENT RELATIONSHIP.'' He later testified that he thought his lack of any personal contact with the plaintiffs he diagnosed and his open denial of a valid doctor-patient relationship eliminated his normal responsibility to inform the individual of his findings.*[17]

Judge Jack commented on similar denials in the silica litigation. One doctor tried to explain his conduct by reasoning that ''these people are not patients; it's a dif-

[8] *In re Diet Drugs*, MDL Dkt. No. 1203 (S.D. Tex.) (June 26, 2003), Dep. Tr. at 19-20, 31-33.

[9] *In re Diet Drugs*, MDL Dkt. No. 1203 (N.D. Tex.) (June 24, 2003), Dep. Tr. at 69, 70, 77.

[10] *In re Silica Products Liability Litigation* at 24, 27.

[11] Egilman. Asbestos Screenings. Am. J. Industrial Med. 42:163 (2002).

[12] *In re Diet Drugs Products Liability Litigation*, 236 F. Supp 2d 445, 452, 458 (E.D. Pa. 2002).

[13] *In re Diet Drugs*, MDL Dkt. No. 1203 (S.D. Tex.) (July 26, 2003), Dep. Tr. at 134-39.

[14] *In re Silica Products Liability Litigation* at 29.

[15] *Howland v. OwensCorning,* (Smith Co. Texas) (6/20/00), Dep. Tr. at 45.

[16] *Hazelwood v. Wyeth*, MDL Dkt. No. 1203 (E.D. Pa.) (June 26, 2003), Dep. Tr. at 41, 57-58.

[17] *Fuqua v. Wyeth*, MDL Dkt. No. 1203 (N.D. Tex.) (June 27, 2003), Dep. Tr. at 40-41.

ferent situation.''[18] After noting that another doctor ''did not consider the plaintiffs to be patients,'' Judge Jack outlined the troubling results of that rationalization:

> In contrast to his practice at his clinic, while at the [litigation] screenings, [the doctor] did not supervise the selection of x-ray equipment, the selection of the x-ray operators, the setting up and operation of equipment, or the amount of radiation to which the Plaintiffs were exposed.[19]

As evident in all three of these mass tort contexts, the doctors who work for lawyers in litigation screening programs apparently believe that, by disclaiming a doctor-patient relationship, they can evade the professional obligations it entails. And one doctor involved in thousands of asbestosis screenings did indeed use the disclaimer of a doctor-patient relationship to defeat a malpractice claim for failing to advise a ''client'' that he in fact had lung cancer.[20] But whether or not the evasion of professional responsibility is acceptable as a matter of medical ethics or legal liability, there can be no doubt that such a cavalier approach makes such litigation ''diagnoses'' all the less likely to be ''reliable.''

5. Doctors Disregard Standard Diagnosis Protocols

Since asbestosis, valvular heart disease, and silicosis are all conditions with symptoms and test findings that can be caused by a number of other illnesses, it is essential that a doctor rule out such alternative causes by a thorough medical history and other tests—that is, that the doctor render a true *differential* diagnosis. In the case of asbestosis and silicosis, it is also necessary to take a detailed occupational history to ensure that the individual has in fact had sufficient exposure to the suspect agent.

Yet the doctors in these litigation-driven screening programs often failed to take even the most cursory medical or occupational histories—much less review the person's relevant medical records in any detail. Instead, they all too frequently relied solely on the plaintiff attorneys to provide them with such information. Indeed, the majority of such screening doctors never even met the individuals they ''diagnosed'' much less conducted a proper physical examination. By not acquiring such necessary information, these doctors disregarded standard diagnosis procedures they had practiced since medical school.

In the asbestos litigation, many doctors met with potential plaintiffs for such a short time that any notion of a full physical was simply disregarded. Some claimed to have examined up to 200 potential claimants a day.

In the *Diet Drug Cases*, the doctors who produced the largest number of ''diagnoses'' were even more cavalier. One admitted that she never met the individuals she diagnosed, nor did she review their medical records. When called to task at one of the hearings held by Judge Bartle, she contended it was the law firm's duty—not hers—to take the medical histories.[21]

Such practices were common in the claims submitted to the National Settlement Trust established to compensate former diet drug users who truly had valvular heart disease. One part of the Trust's claim form required the doctor to certify the claimant did not have any history of several diseases or other drugs known to cause the same cardiac condition. Yet many of the certifying doctors hired by plaintiff attorneys gave this requirement short shrift. One contended that *precisely because* he had never met with the claimants, reviewed their medical records, nor taken any medical history, he could check ''NO'' for all of those alternative causes—since, *given* that ignorance, ''to the best of [his] knowledge,'' the answer was ''NO.''[22]

Judge Jack similarly found that a doctor who had ''diagnosed'' almost 1400 plaintiffs with silicosis,

> did not take the occupational or medical histories of any of the Plaintiffs; . . . did not perform the [x-ray] reads on any of the Plaintiffs; . . . did not perform the physical examination on any of the Plaintiffs; and . . . did not speak to any of the Plaintiffs or their primary care physicians . . . . Indeed all of [his] work in diagnosing Plaintiffs [who lived in Mississippi] occurred in his office in Massachusetts—without seeing or examining any Plaintiff.[23]

In lieu of their normal diagnostic protocols, many of the screening doctors employed checklists created by the lawyers for whom they worked. For example, in the *Diet Drug Cases*, doctors who had not interpreted echocardiograms since their medical school days adopted scoresheets created by their lawyer-employers that were different from those used in normal clinical practice. One of the doctors even allowed the law firm's personnel to instruct the doctor's technicians on how to make the critical echocardiographic measurements.[24]

In the silica litigation, Judge Jack noted that one of the most prolific physicians admitted that he personally did not know the traditional medical criteria for diagnosing silicosis. This was troubling in that it is, of course, necessary to rule out other conditions that might produce test findings similar to silicosis. Instead, the lawyers typically focused the doctors exclusively on the condition they wanted to prosecute. One doctor even ''testified that he did not agree that one of the criteria for the diagnosis of silicosis is the absence of any good reason to believe that the . . . findings are the result of some other condition. [Yet] this opinion is contradicted by all of the major textbooks in the field.'' Another ''testified that if the screening company told him to read for silicosis, that is the only disease he would mention in the report, even if he felt the x-ray was . . . consistent with asbestosis . . . . If the screening company told him to look for asbestosis, that is all he would report.''[25]

Such behavior obviously does not square with standard clinical practice. And, just as obviously, it makes any such ''differential'' diagnoses suspect to say the least.

6. Fee Arrangement to Compensate Diagnosing Doctors Biases the Results

Another feature of the worst of the litigation screening programs is that the plaintiff lawyers compensate

[18] *In re Silica Products Liability Litigation* at 59.
[19] *Id.* at 43.
[20] *Adams v. Harron*, 191 F.3d 447 (4th Cir. 1999).
[21] *In re Diet Drugs Products Liability Litigation*, 236 F. Supp. 2d 445, 45657 (E.D. Pa. 2002).
[22] *Hazelwood v. Wyeth*, MDL Dkt. No. 1203 (E.D. Pa.) (June 26, 2003), Dep. Tr. at 51.
[23] *In re Silica Products Liability Litigation* at 37.
[24] *In re Diet Drugs Products Liability Litigation,* 236 F. Supp. 2d 445, 45556 (E.D. Pa. 2002).
[25] *In re Silica Products Liability Litigation* at 44.

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the diagnosing physicians under payment schedules that bias them in favor of rushed and ''positive'' diagnoses. In the early asbestos cases, for example, the diagnosing doctors were paid $70 for a positive reading versus $35 for a negative one.[26]

This approach reached full-flower in the *Diet Drug Cases*, where doctors were routinely paid huge amounts for rushed, yet positive, diagnoses. For example, Judge Bartle rejected the findings of one doctor who had certified more than 3000 claimants, noting that she had generally spent only a few minutes reading each echocardiogram (which normally take 20 to 30 minutes to interpret) in a ''mass production operation that would have been the envy of Henry Ford.''[27]

But the issue of how long such doctors spent reviewing litigation echocardiograms pales in comparison to the biased nature of the compensation plans developed by many of their attorney-employers. Under the National Class Action Settlement in the *Diet Drug Cases*, a doctor who read an echocardiogram as positive for valvular regurgitation was then in a position to report that result on a ''Green Form'' the lawyers could submit for payment. As noted above, many of those doctors treated the ''Green Form'' as little more than an administrative annoyance. Yet the plaintiff attorneys often paid those doctors staggering additional fees for simply filling out the forms. One doctor, who certified more than 1800 Green Forms in a few months' time, was offered $1500 to complete each one even though, as he later admitted, the form took him only about five minutes. He was thus guaranteed an estimated $18,000 per hour to fill out forms, in contrast to the estimated $1500 per hour he received to review echocardiograms.[28] The opportunity for such windfall fees would almost certainly bias a doctor towards positive readings.

Many doctors in the silica screening programs likewise spent only a few minutes on their ''diagnoses,'' with lawyers compensating them more for positive reads. Judge Jack cited one doctor who produced 1239 diagnoses in 72 hours, spending an average of less than four minutes on each (assuming, of course, he did not sleep). Judge Jack reported that another screening outfit worked under an arrangement with a plaintiff attorney who paid the company $750 if the person was diagnosed with silicosis *and* retained that attorney's firm to prosecute a case, but nothing if the individual's test results were negative or he did not hire that particular attorney. One of the officers of that screening company conceded that there was an emphasis on producing positive diagnoses, adding that ''from a business standpoint of mine, you had to do large numbers.''[29]

7. Inordinate Compensation for Doctors Strip Them of Independence

Quite apart from the contingent nature of some payment schemes which bias the technicians and doctors in favor of positive readings, the sheer size of the fees available in litigation screening programs undoubtedly influence them to render the findings their lawyeremployers desire. Indeed, it was common in all three contexts for technicians to make more for part-time, weekend work than they did as full-time technicians at their hospitals.

These excessive payments extended to the diagnosing physicians as well. In the *Diet Drug Cases*, Judge Bartle found that lawyers agreed to pay one doctor $250 to ''review'' each of a staggering 10,000 echocardiograms in a ''part-time'' effort over 10 months resulting in a fee of $2.5 million.[30] Other doctors made up to $5 million for ''interpretations'' they likewise claimed to have done working part time over less than two years.

In the silica litigation, some doctors ultimately abandoned their clinical practices entirely to work solely in the litigation screening programs. As one put it, he ''kind of gave up real medicine'' to work for the plaintiff lawyers.[31]

While virtually all physicians who act as an expert for either side in products liability cases are paid for their time—appropriately earning about the same amount as they would had they spent that time in their normal medical practices—the staggering fees paid by plaintiff attorneys to many doctors in litigation screening programs cast grave doubt on their independence, and hence the ''reliability'' (and admissibility) of the diagnoses their benefactors need to pursue such lawsuits.

8. Litigation Screening Programs Case Reports Far Exceed the Independent Epidemiological Predictions

One of the most remarkable similarities of the asbestos, diet drug, and silicosis litigations is that in each the number of cases ''diagnosed'' by doctors working for plaintiff lawyers vastly exceeded the total number of such cases predicted by the best, independent epidemiology. This is further evidence of the invalid nature of the litigation screening programs. As Judge Bartle noted in the *Diet Drug Cases*, the ''increase in the number of [litigation] claims [was] totally at odds with impressive and undisputed epidemiological evidence . . . . [C]ommon sense compels the conclusion that something may be seriously amiss.''[32]

In the silica litigation, Judge Jack similarly relied on the leading epidemiological study which suggested that there would only be 8 new cases of silicosis in Mississippi each year. By contrast, as a result of the work of just a few mass screeners working for plaintiff lawyers, the number of *filed* silicosis claims in that one state rose from 40 cases in 2000 (itself 5 times the predicted number) to a staggering 10,000 in 2002 (the number that would be expected in a millennium). All told, in a 5-year period, the plaintiff attorneys filed more than 20,000 silicosis lawsuits in Mississippi—500 times the number that would be expected based on the accepted, independent epidemiology.

Judge Jack further noted that, according to federal health officials, the number of *true* silicosis-related deaths had actually *decreased* during the past 30 years to less than 200 *nationwide* in 1999—even as the number of silicosis lawsuits filed in Mississippi alone far outstripped that number:

[26] Egilman. Asbestosis Screenings. Am. J. Industrial Med. 42:163 (2002).

[27] *In re Diet Drugs Products Liability Litigation*, 236 F. Supp. 2d 445, 45657 (E.D. Pa. 2002).

[28] *James v. Wyeth*, (Miss. Cir. Ct.) (May 22, 2003), Dep. Tr. 185, 188.

[29] *In re Silica Products Liability Litigation* at 2829, 38.

[30] *In re Diet Drugs Products Liability Litigation*, 236 F. Supp. 2d 445, 456, n.11. (E.D. Pa. 2002).

[31] *In re Silica Products Liability Litigation* at 31.

[32] *In re Diet Drugs Products Liability Litigation*, MDL Dkt. No. 1203, PTO 2662 (E.D. Pa. 2002) at 11-12.

> The United States has enjoyed a steady 30-year decline in silicosis rates and mortality. And yet Mississippi, a state ranked only 43rd in the U.S. in silicosis mortality, recently experienced a crush of new silicosis lawsuits . . . . There is no rational medical explanation for the number of alleged diagnoses of silicosis [in the lawsuits].[33]

Such astounding differences between the independent epidemiological predictions of the total number of likely cases and the far greater number of claims certified by doctors working for plaintiff lawyers is further evidence of the inherent unreliability of these litigation screening programs.

9. Scientific Studies Demonstrate That the Mass Screening 'Diagnoses' Are Invalid

The final hallmark of these mass screening programs is that in all three of the litigations there has ultimately been objective proof by independent, academic physicians that the lawyerorganized programs vastly overstated the number of plaintiffs who truly had the medical condition at issue.

One study, which reevaluated 439 tire workers' x-rays diagnosed by lawyerretained doctors as showing asbestos-related conditions, found that in fact only 3 percent evidenced any real injury.[34] A few years later, the trust responsible for paying asbestosis claimants instituted an audit of each claim by two independent readers. Under the rules of the trust audit, if *either* of the two independent readers concurred with the claimed diagnosis, the trust paid the claim. Yet even under that relaxed ''either/or'' standard, the ten doctors most often used by plaintiff attorneys failed 63 percent of the time.[35] These audits recently led the trust to decide that it would no longer even consider the readings of nine doctors with the worst ''diagnosis'' track-records.[36]

The situation in the *Diet Drug Cases* was unfortunately the same. After being presented with evidence of all of the other flaws of the litigation screening programs, Judge Bartle further cited the findings of an independent cardiologist that as few as 12 percent of claims were medically valid.[37]

Most recently, Judge Jack cited yet another asbestos study which had found that where the plaintiffs' doctors had stated that 96 percent of the x-rays were positive for asbestosis, independent readers subsequently concluded that less than 5 percent were in fact positive.[38] Judge Jack cited this study from the asbestos context in her silica opinion presumably because she realized that there were so many similarities between the two screening programs including many common doctors and lawyers that their results were likely to be equally tainted.

The Consequences and Remedies for Unreliable Litigation Screenings

These facts, established after years of litigation in three different mass tort contexts, suggest that lawyer-organized screening programs will continue to challenge the courts for some time to come. Such schemes have a number of unfortunate consequences.

First, the welter of invalid claims taxes judicial resources and often prevents those with *real* injuries from proceeding with their cases. As Judge Jack warned, ''[N]ot only are those with meritorious claims denied just compensation, they are potentially denied full and meaningful access to the courts.''[39]

Second, healthy plaintiffs who take such ''diagnoses'' seriously are caused mental anguish, may pay higher health insurance premiums, and could conceivably be physically harmed by the invalid ''findings.'' Again, as Judge Jack recognized:

> If the plaintiffs truly have abnormal x-rays, then the radiographic finding . . . may be caused by a number of [other] conditions . . . . [W]hen the diagnosing doctors fail to exclude these other conditions, it leaves the Plaintiffs at risk of having treatable conditions go undiagnosed and untreated . . . .[40]

There have been tragedies. One worker, ''diagnosed'' with asbestosis in a screening program sponsored by a plaintiff attorney, shot himself after receiving the ''results'' which had been mailed to him without any physician explanation. He left a suicide note on the back of the form sent to him by the law firm. Later, two independent readers found no evidence of asbestosis in his x-ray, and psychiatrists determined that the ''diagnosis of asbestos-related disease and the fear he experienced of dying from that disease was a significant contributing factor in his suicide.''[41]

Finally, public health officials may become so suspicious of mass over-diagnoses that true health issues may go ignored. As Judge Jack noted, ''There is a risk that governmental entities, employers, and the public, will learn of this bevy of misdiagnoses and fail to take steps that need to be taken to further prevent worker exposure . . . .''[42]

Fortunately, the remedies for the abuses of lawyer-driven mass screening programs are equally clear:

First, the courts should recognize that, to fulfill their duty to be effective ''gate-keepers'' under *Daubert,* they must begin early to ferret out such invalid ''diagnoses,'' rather than ignore the issue until the diagnosing doctor is called at trial. As shown in all three of these mass tort litigations, aggressive pre-trial discovery of the certifying doctors, technicians, and, if necessary, law firm personnel who acted more as ''doctors'' rather than lawyers, can yield facts sufficient to invalidate such practices.

Second, the courts should accept the invitation of the *Daubert* Court and use their authority under Rule 706 of the Federal Rules of Evidence, and its counterpart in most states, to appoint independent experts to evaluate both the processes used by the plaintiff certifiers and

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[33] *In re Silica Products Liability Litigation* at 45.

[34] Reger. Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation. J. Occ. Med 32:1088 (1990).

[35] Parloff. Mass Tort Medicine Men. The American Lawyer. (Jan. 3, 2003).

[36] CRMC Release (Sept. 12, 2005).

[37] *In re Diet Drugs Products Liability Litigation*, 226 F.R.D. 498, 507 and n.11 (E.D. Pa. 2005).

[38] Gitlin. Comparison of ''B'' Readers' Interpretations of Chest Radiographs for Asbestos-Related Changes. Acad. Radiol. 11:843 (2004).

[39] *In re Silica Products Liability Litigation* at 60.

[40] *Id.*

[41] Egilman. Attorney-Directed Screenings Can Be Hazardous. Am. J. Industrial Med. 45:306 (2004).

[42] *In re Silica Products Liability Litigation* at 62.

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the diagnoses they rendered.[43] In *Diet Drugs*, Judge Bartle was initially assisted by an expert retained by the independent trust established as part of the class action settlement.[44] Judge Walsh similarly appointed his own panel of experts to review each challenged diet drug echocardiogram and relied on their findings in dismissing hundreds of invalid claims.

Third, the courts should honor requests for independent medical exams under the provisions in the Federal Rules and those of most states. While less efficient than a standing court-appointed expert, such examinations can also be effective in eliminating bogus claims—especially in the typical case where a plaintiff with a litigation-generated diagnosis of some disease nevertheless fails to have any true medical follow-up for years, as his or her case proceeds through the courts.

Fourth, when invalid diagnoses are uncovered, they should result in the prompt dismissal of the lawsuit rather than further extended discovery and mere exclusion of the opinion at trial. As the courts recognized in both the diet drug and silicosis contexts, such misdiagnoses are not mere matters of opinion to be vetted through cross-examination at trial, but rather—in these cases where no true health care provider has ever suggested the person is actually ill—go to the very core of the lawsuit.

Finally, when, as Judge Jack found, such practices truly cross the line, sanctions may be appropriate.[45] In this regard it is telling that many of the same plaintiff attorneys were deeply involved in all three of the invalid screening programs described above. Given that these screening programs are much more the product of the lawyers who created and paid for them, than the doctors they merely hired, it would seem appropriate for courts in the next mass screening litigation to consider the true source of the ''diagnoses''—and to reject them as such.

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[43] *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 595 (1993).

[44] *In re Diet Drugs Products Liability Litigation*, 236 F. Supp. 2d 445, 454 (E.D. Pa. 2000).

[45] *In re Silica Products Liability Litigation at 8995*.