Mass Tort Screenings: The Legislative Options

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Courts[1] and commentators[2] have scrupulously documented the abuses occurring in mass tort screenings. Screenings and the masses of claimants that they produce constitute the raw materials for pernicious mass torts. Plaintiff lawyer generation of massive volumes of claims through screening is the predicate for the process of overwhelming courts and administrative claim systems in order to preclude any accurate assessment of the merits of individual claims. As a result, the sheer numbers of claims produced, coupled with the presumption of value which accompanies them creates what in many cases are irresistible levels of risk for defendants leading to payments of weak or invalid claims which serve only to perpetuate the process. Identifying the problem does not, however, prescribe a solution.

The purpose of this paper is to provoke further thought and analysis by suggesting some potential legislative responses to the mass tort screening problem. These suggestions are by no means intended to be exclusive; they address the issue generically in ways which would cut across disparate products, devices, etc. These proposals should be viewed as supplemental to

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* The views expressed are those of the author and not the firm or any client.

[1] In re Silica Products Liab. Litig. (MDL No. 1553), Order No. 29: Addressing Subject Matter Jurisdiction, Expert Testimony and Sanctions, June 30, 2005 (Jack); In re Joint E. & S. Dist. Asbestos Litig., 237 F. Supp. 2d 297, 328 (E.D.N.Y. 2002); Raymark Indus., Inc. v. Stemple, 1990 WL 72588 (D. Kans. 1990).

[2] Lester Brickman, "On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality," 31 Pepperdine L. Rev. 323 (2004) (hereafter, Brickman, Theory Class); Griffin B. Bell, National Center for the Public Interest, "Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis" (2002); American Bar Assoc. Commission on Asbestos Litigation, ABA Report to the House of Delegates, Recommendations and Resolutions (2003); Roger Parloff, "Diagnosing for Dollars," Fortune, May 31, 2005; Alison Frankel, "Still Ticking," The American Lawyer, March 2005.

ongoing efforts to address specific mass tort situations comprehensively (e.g., the FAIR Act, S. 852),[3] rather than preclusive alternatives. Several options will be presented here:

(1) maintenance of the status quo; (2) comprehensive federal level reform either by: (a) the creation of a federal cause of action with associated procedural and evidentiary requirements; or (b) the imposition of those same standards as to state law causes of action; (3) state-by-state reform efforts; and (4) a uniform diagnostic procedure approach which, rather than dictating the requirements of proof in tort cases themselves, establishes standards and enforcement mechanisms which are directed at the medical personnel involved in the screening process.

Maintenance of the Status Quo

Viewed in the abstract, it would appear that there exist more than sufficient legal and professional standards to deter the abuses associated with the mass screening process. The deterrents which currently exist include limitations on scientific evidence, such as the federal Daubert (Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)) standard, and the equivalent state standards. Those requirements that scientific evidence, including medical evidence, conform to scientific standards and exhibit a reasonable degree of reliability would seem, on their face, to preclude reliance upon the end product of most mass screening processes, such as medical tests like X-ray evaluations of asbestosis claims which are demonstrably unreliable.[4]

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[3] The FAIR Act, S. 852, should end private asbestos screening by virtue of the medical and diagnostic requirements for compensation coupled with fee limits which should eliminate any economic incentive to harvest large numbers of speciously generated asbestos claims. The Act also provides for medical review and audit procedures which would be anathema to the anti-medical characteristics of the current asbestos screening process. Whether elimination of asbestos screening will have a material impact on other screening processes remains to be seen.

[4] Gitlin, et al., "Comparison of 'B' Readers' Interpretation of Chest Radiographs for Asbestos Related Changes," 11 Acad. Radiol. 843 (August 2004); Carl B. Rubin and Laura Ringenbach, "The Use of Court Experts in Asbestos Litigation," 137 F.R.D. 35 (1991); Cf. In re Paoli R.R. Yard PCB Litig., 35 F. 3d 717 (3d Cir. 1994) ("[A]ny step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step

In addition, the requirement that exposure to a substance or device be a cause of injury would, in the context of situations where medical conditions are demonstrably subject to a variety of causes, seem to render a "consistent with" "diagnosis" meaningless. It simply fails to answer the relevant legal question.[5] In addition to evidentiary requirements, which should, in a rational world, be fatal to screened claims, ethical constraints on lawyers should preclude mass screening operations to generate questionable or bogus claims. Lawyers cannot knowingly or otherwise suborn perjury as in suggesting to claimants that they have exposures which they do not. Lawyers cannot ethically advance "expert" materials which they know to be misleading or false.

The economics of the screening process would also seem to run afoul of ethical constraints, as the multitude of lawyers involved in processing the large number of screened claims seems inevitably to involve what may be described as co-counsel situations, but in reality are the sale of personal injury claims. Experience shows that the lawyers involved in the screening process, or the screening companies themselves, are rarely capable of prosecuting an ultimate disposition of the case. Therefore, in essence, the claims are sold to a law firm with the resources to do so. There is perhaps no more striking disconnect than that between the rules of ethics for lawyers and the role of attorneys in mass screenings. Despite the years of experience in hundreds of thousands of cases, the clear issues related to solicitation and the attention to and

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completely changes a reliable methodology or merely misapplies that methodology."). Id. at 745, cited in In re Silica Products Liab. Litig., supra, note 1 at 128.

[5] The "consistent with" diagnosis as an adequate basis for compensation appears to be a product of mass tort litigation generally and asbestos litigation in particular. See Brickman, "Theory Class", supra, note 2, notes 77-78 and 61. See also, e.g., In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 769 (3d Cir. 1994); Turpin. Merrill Dow Pharm., 959 F.2d 1249, 1359-60 (6th Cir. 1992); In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1250 (E.D.N.Y. 1985).

analysis of this problem, there appears to have been no activity, organized or otherwise, directed at ethical violations on the part of attorneys involved in mass tort screenings.[6]

Similarly, ethical constraints on medical professionals should also have a substantial impact on mass tort screenings.[7] Medical professionals should not subject individuals to invasive or potentially dangerous medical procedures unless they are medically indicated. They should not raise the belief on the part of individuals that they are receiving medical care when they are not by virtue of the rejection of a physician-patient relationship.[8] The diagnostic processes involved in screening, whether they are X-rays, pulmonary function tests or echocardiograms, as examples, are also subject to regulations regarding the conduct of the examination and the licensing of the professionals administering the tests and in the case of certain procedures, e.g., X-ray radiation, are subject to exposure limits.[9] In each case, the enforcement of these rules would seem to substantially impair the high volume of claimant through-put necessary for mass tort screening.

There are also fraud provisions, although these seem to fail by virtue of the infinite regression into assertions of differences of medical opinion or judgment. The claim of honest differences of opinion is used to defeat accusations of fraud.[10] Similarly, RICO on its face would seem to be applicable to the mass tort screening process if conducted as described. However, the

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[6] See Brickman, "Theory Class," n. 109 at 72, citing Model Rules of Prof'l Conduct, R. 7.2(c), 7.3 (solicitation)..

[7] See Brickman, "Theory Class," n. 109 at 72, citing Model Rules of Prof'l Conduct, R. 7.2(c), 7.3 (solicitation).

[8] Brickman, "Theory Class," supra at n. 2, n. 163 at 86. See also Adams v. Harron, 191 F.3d 447, 1999 WL 710326 (4th Cir., Sept. 13, 1999) (unpublished per curiam decision – no doctor/patient relation – "The defendant doctors were retained by a law firm to give that firm consulting advice about which employees would qualify as plaintiffs in their solicitation efforts for asbestos litigation." Id. at 2.

[9] It has been observed that asbestos screeners "administer . . . X-rays in violation of state and federal safety regulations" and that the doctors evaluating the X-rays are "not . . . licensed to practice medicine in the state where the X-rays are taken." American Bar Assoc. Commission on Asbestos Litigation, ABA Report to the House of Delegates, Recommendations and Resolution (2003), note 10, at 8 ["ABA Report"], citing to Brickman, Theory Class, supra, at 66. As the ABA Report recognizes, there is nearly unanimous medical opinion that X-rays and the concomitant radiation exposure are not medically indicated" for asymptomatic claimants. ABA Report at 11-12; see also, Brickman, "Theory Class," n. 97, 98 at 66-67..

success of RICO as an enforcement mechanism in a related context has thus far been limited.[11] The failure of these rules and standards to adequately address and constrain the mass tort screening process is demonstrated by the continuing vitality of that process.

U.S. District Court Judge Janis Graham Jack's recent opinion in the Silica MDL[12] provides substantial evidence of the limitations of current legal standards in attempting to deal with abuses in the screening context. In that case, there was a judge willing to address the difficult issues associated with medical screening, the cases were in a federal court subject to Daubert, the Court took the time, aided by the parties, to do a full factual development of the record with respect to the screened silica claims, and the facts as developed were stark in terms of the clarity with which the medical screening process had been used to generate bogus claims. Despite this unfortunately unique combination of factors, the limitations on the Court's jurisdiction, as she perceived them, means that with the exception of a limited number of cases, Judge Jack's extensive work has resulted in what is essentially an advisory opinion for the benefit of the courts, state and federal, who will eventually oversee these cases.

The history of state court regulation of the screening process is not a happy one. If, under the best of circumstances, which the Silica MDL in some ways did present, courts are unable to deal with the problems created by mass tort screening, there is no reason to believe that less inclined or less well-equipped courts will do any better, leading ultimately to the conclusion that an additional set of legal constraints or requirements is necessary. This unhappy conclusion is further bolstered by the spread of screening to new "markets" (e.g., asbestos to silica), the fact that claims facilities have historically been ripe targets for screened claims, and, indeed, may

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[10] The history of Owens Corning's efforts to assert fraud claims against various entities and individuals is described in detail in Brickman, "Theory Class," n. 289 at 117-119.

[11] Cf. G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529 (S.D.N.Y. 2001), discussed in Brickman, "Theory Class," n. 503 at 164-65.

bear some responsibility for the problem,[13] and the lengthy period of time over which "screening" has been recognized as a problem.[14]

Legislative Reform Options

The current system clearly creates a set of economic incentives to engage in screening in order to generate huge numbers of tort claims. Ironically, many of these claims have value only when the volume of claims is so great as to overwhelm the system. The economic reward for lawyers and medical professionals involved in mass screenings can be tremendous, while the risks, even for those who help manufacture specious claims, have, at least historically, been minimal. Any effective legislative response must alter these basic economic incentives by addressing both the rewards arising from specious claiming via mass screening and the risks associated with the claims manufacturing process. Comprehensive solutions address both sides of this equation, while proposals to regulate the medical professionals involved are focused on creating more certain risks for medically inappropriate behavior.

Comprehensive Federal Tort Reform

Comprehensive tort reform would be designed to make clear the requirements for stating a personal injury or product liability claim in the mass tort context. There are two alternative approaches available. The two approaches are essentially divergent paths to the same end, which is to find a demonstrable basis in the Commerce Clause to support federal activity involving

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[12] In Re Silica Products Liab. Litig., supra at n. 1.

[13] The experience of the Manville Personal Injury Settlement Trust is instructive in this regard. The liberal criteria reflected in prior versions of the Trust's qualifying standards or Trust Distribution Process created rich opportunities for screened claims and may very well have created perverse economic incentives which fueled the latest explosion in screened claims. As the Court supervising the Trust observed: "screenings arranged by plaintiffs' lawyers mass produce claims involving no impairment on the basis of no real medical evidence, and that the revenues received by attorneys from these claims divert Trust assets from the sick and dying and are used in part to fund more inappropriate screenings." In re Joint E. & S. Dist. Asbestos Litig., 237 F. Supp. 2d 297, 328 (E.D.N.Y. 2002). Cited in Brickman, Theory Class," supra, n. 2, at n. 190. The process by which lax standards prompted a dramatic increase in claims is also analyzed id. at 128-37.

what has historically been viewed as the province of state law tort claims. One path would be to create an explicitly federal cause of action for personal injury or product liability. It would be, in essence, a generic federal claim supplanting and pre-empting state tort law claims. The second alternative would be to establish a comprehensive set of standards and requirements to be imposed on both federal courts sitting in diversity and state courts. The premise for Congressional action and a limitation on the reach of this legislation would be that these cases, albeit state tort law claims, have a substantial impact on interstate commerce.

In the context of claims arising out of mass tort screenings, it is hard to imagine a contrary argument that the claims are local in nature and have only intrastate impact. The entire purpose of mass tort screening is to have a substantial interstate financial impact. Whether a federal cause of action is created or a set of standards imposed on state tort claims, the evidentiary and procedural requirements of the legislation would be the same. At a minimum, legislation would prescribe the following:

- test results and diagnoses must be reliable and conform to medical science;
- all tests and diagnostic procedures must conform to applicable professional standards and regulations;
- diagnoses require existence of doctor-patient relationships;
- tests and other diagnostic procedures must be "medically indicated";
- diagnoses must involve taking of personal medical and social history by the diagnosing physician; and

[14] Some pessimism is justified by the length of the period of time during which screening has been a problem. See, e.g., Raymark Indus. Inc. v. Stemple, 1990 WL 72588 (D. Kans. 1990); see also Rubin and Ringenbach, supra, n. 3.

- diagnosis must be that the disease is caused by exposure to substance or device and must explicitly exclude alternative causes.

In addition, the Daubert standards of fit (meaning that appropriate diagnostic methodologies are used in each instance) and reliability would be imposed so that even where, for example, an ILO reading was generated which met the other requirements, there would have to be a further demonstration that the ILO readings, particularly at lower levels, were sufficiently reliable to constitute valid medical evidence. In addition, to address an obvious current need, these standards would be explicitly binding on bankruptcy courts and would be applicable to the threshold issue of whether an individual holds a "claim" for voting purposes.

State-by-State Comprehensive Tort Reform

Under this approach, state court reform obviously avoids some of the federalism issues which inhere in federal legislative efforts, but it suffers from a deficiency in terms of how comprehensive state reform can be. History has shown that cases can and do migrate with great flexibility to avoid restrictions imposed by some, but not all, states. For that reason, state tort reform along these lines, while always desirable, is rarely a complete solution.

Uniform Diagnostic Procedures Approach

The prior federal legislative proposals are comprehensive in scope and directed at the operation of the tort and claiming systems relevant to mass tort screening. In the event that for political or other reasons it is not feasible to directly legislate procedural and substantive standards for screened claims in federal and/or state courts, there is a remaining alternative, which is perhaps the most focused of the options advanced here; that is, to aim directly at the conduct of the medical professionals involved in the screening process. What such legislation

would provide is, in brief, that it would be illegal to administer diagnostic tests and/or procedures in aid of litigation, absent the appropriate medical professional in a physician/patient relationship making the medically appropriate decision as to the propriety of the diagnostic test or procedure. It would also preclude contingent fee arrangements for medical personnel involved in screening. By way of enforcement, it would provide for civil and criminal penalties with ascending levels of punishment in terms of recidivist medical professionals. It would also operate, in the first instance, to temporarily, but again in the event of recidivism, on a permanent basis, debar medical professionals from payment under the variety of federal medical insurance or compensation schemes and would further designate that violations of the Act be conclusively determined to be "predicate acts" under RICO. This package of reforms is designed to very specifically target the misconduct by medical personnel which facilitates mass screenings. As with all such enactments, there will be medical professionals who are indifferent, either because of economics or other reasons, to the existence of these provisions. On balance, however, given that it clearly creates very substantial risks for mass tort screening operations conducted in what is now the traditional fashion, it is expected that it would have a substantial deterrent effect.

Conclusion

Unfortunately, mass tort screening has become commonplace in mass tort litigation. Indeed, mass torts may be defined, in part, by the presence of claims generated by medically suspect screening processes. The problem cries out for a solution, one which in all likelihood will require legislative activity. As noted, this presentation of a non-exclusive list of potential legislative solutions to the mass tort screening problem is intended to precipitate discussion. In part because of the extensive history and scholarship which is uniquely available in the context of asbestos litigation, it is perhaps fair to characterize these proposals, despite the intent to

provide universal coverage, as being excessively "asbestos-centric." More analysis is no doubt necessary concerning how to make sure, to the extent possible, that any legislative approach adopted have sufficient scope to address not only the historical excesses we know too well but also future abuses of the mass tort screening process. In the end, however, while the form of the ultimate solution will and should be debated, neither the existence of the problem nor the need for a solution can be seriously disputed.