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## STATE REGULATORS IMPOSE SANCTION FOR UNLAWFUL SILICOSIS SCREENINGS

by  
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In February 2002, Texas invaded Pennsylvania. No conventional weapons were fired. The Texans took up positions in mobile vans in motel parking lots across eastern Pennsylvania. Without prescriptions, physicians' orders, or regulatory approval, the Texans directed unlawful X-ray radiation at Pennsylvania workers in the hopes of creating evidence to be used in lawsuits for silicosis. To help establish their litigation beachhead, the Texans hired local mercenaries – a New Jersey company in the business of providing mobile X-ray screenings. Dozens of silicosis lawsuits were created and filed in Philadelphia as a result of the invasion.

On January 25, 2007, the Commonwealth of Pennsylvania, through its Department of Environmental Protection (DEP), responded by fining the New Jersey company, MOST Health Services, Inc. The DEP found that MOST violated Pennsylvania law by conducting X-ray screenings without physician or regulatory approval. For having unlawfully exposed 161 persons to ionizing radiation, DEP assessed a civil penalty of \$80,500.00, against MOST.

MOST's participation in unlawful litigation screenings was not a momentary lapse in judgment. Back in 2000, defense counsel in asbestos cases compelled the testimony of MOST principal Kenneth Warner, who acknowledged then that MOST had not been in the practice of complying with screening regulations. Mr. Warner, however, claimed that the company was in the process of filing appropriate applications to comply.

Workers were invited to the February 2002 MOST screenings by their unions, but the invitation letters were written by Texas lawyers. To participate in the screenings, the workers had to sign a retainer agreement to engage the Texas-based law firm. The workers were told that "legal ethics" required that they hire the sponsoring law firm to represent them before "the attorneys can provide [them] with medical tests."

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Of course, the law in no state permits attorneys to provide medical tests, and especially not X-rays. DEP, like most other states' regulatory agencies, has promulgated comprehensive regulations that govern virtually every aspect of the use of medical radiation. Anyone proposing a "healing arts screening" with X-rays must submit, in advance, a comprehensive, written proposal with details of the proposed screening, the description of the population to be examined, the qualifications of the radiation technician and operator, the quality control to be used, the qualifications of the supervising physician, and the identity and qualifications of the physician who will interpret the radiographs.

The MOST screenings, commissioned by the Texas lawyers, were never authorized by the DEP. No physician was present on site. None of the workers presented prescriptions or physicians' orders before being unlawfully exposed to radiation. The identity of the physician slated to receive the chest radiographs was never disclosed to DEP.

Ultimately, the films created by MOST were sent to a West Virginia physician, well known and well compensated in dust-disease litigation. This off-site physician diagnosed a majority of the workers with both asbestosis and silicosis, although he never examined the workers, never interviewed them, and never reviewed their medical records.

In December 2005, the defendants in the silicosis cases that arose from the MOST screenings moved to dismiss on grounds that the claims were the direct result of unlawful activities that violated Pennsylvania public policy. The trial court denied the motion without opinion. The defendants also sent a copy of their motion to the DEP, which took the matter under advisement, and which ultimately levied a significant fine upon MOST, but not upon the sponsoring law firm.

The predatory screening practices decried in federal Judge Janis Graham Jack's now famous opinion, *In re Silica Products Liability Litigation*, have resulted from conspiracies among lawyers, physicians, and mobile screening companies. These conspiracies have thrived in part because of the entrepreneurial enthusiasm of the conspirators, and the failure of courts, bar associations, adversary counsel, state and federal regulators, and medical societies to condemn the screening practices. In the context of silicosis litigation, the "red flags of fraud," go beyond the manufacturing of diagnoses for money; they mark as dubious the entire enterprise of suing sand suppliers for failure to warn about hazards that were well known to government, industry, labor, and academia from the 1930s, forward.

MOST has appealed the penalty on several grounds, including the remarkable claims that it had no history of previous violations, and that it believed that regulatory approval was not required. There are some judgments, however, from which there can be no appeal.