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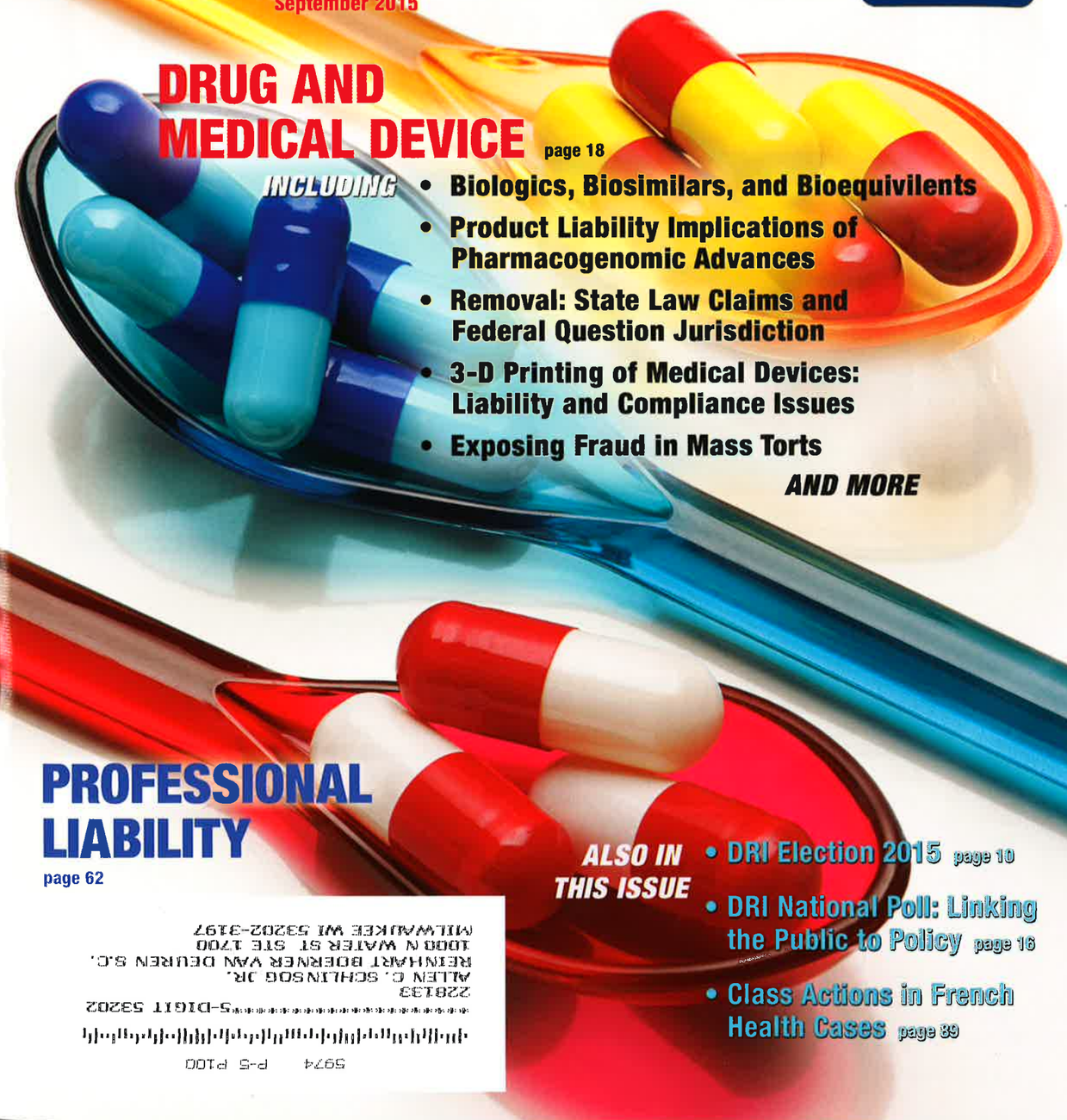

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Safeguarding the Law

Exposing Fraud in Mass Torts

By Allen C. Schlinsog, Jr.

Most plaintiffs' attorneys are very ethical attorneys; they would not risk their reputations with fraudulent conduct. Yet some would. Looking for fraud will help maintain honor in the profession. Learn how.

Mass tort cases can involve hundreds or even thousands of plaintiffs. Individual cases might be consolidated, or several plaintiffs could join together in the same complaint. Despite the pleading format, it remains that these cases are a collection of individual claims. Yet the size of a mass tort can allow most plaintiffs to proceed with a very low profile. How often do we try the claims of *each* plaintiff in a mass tort? It's rare, and for good reason—given the large number of plaintiffs, trying all of their claims would be very expensive.

So what do defendants typically do? If we cannot have a case dismissed, we deploy economical strategies to verify and to liquidate the claims. We test plaintiffs' exposure and injury through product identification and causation discovery. We demand that plaintiffs answer written discovery or provide plaintiff fact sheets (PFS). But how often do defense counsels actually meet the plaintiffs and scrutinize their individual claims? Given the huge transactional costs, defendants rarely follow the type of discovery plan that we would pursue in a stand-alone case. Are we really going to take the deposition of each plaintiff and his or her treating physicians in a mass tort case? Will we demand independent medical examinations of more than a few bellwether plaintiffs? Because the attorneys' fees and experts' costs can be staggering, as the number of claims increases, it becomes less likely that defendants will fully discover or try all the individual claims.

Plaintiffs' counsel might understand this better than we do. They often assume that defendants will not depose each plaintiff. And although we might rely on bellwethers or other evaluation methods to help us resolve the claims, plaintiffs' attorneys are convinced that defense attorneys will not try each individual case. And they certainly don't want us to. When we push for numerous depositions and trials, the plaintiffs' attorneys vigorously fight to prevent individual case work-up—and a court usually agrees with them.

This is a huge advantage for plaintiffs and their attorneys. First, as we all know well, plaintiffs' counsel's asset (their

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portfolio of claims) grows in value as the number of claimants increases. Most plaintiffs' counsel hope to build inventory, and then use the weight of the attorneys' fees required to defend a proceeding to leverage a global settlement as soon as possible.

But failing to take robust discovery on each plaintiff opens the door to the possibility of plaintiff fraud. Do a plaintiff's PFS or written discovery responses prove that an individual has a cognizable claim? Can defense attorneys conclude without depositions or trial testimony that the names in the caption are truly plaintiffs in a case? Have you ever wondered whether these people even exist?

When we push for numerous depositions and trials, the plaintiffs' attorneys vigorously fight to prevent individual case work-up—and a court usually agrees with them.

This might sound alarmist, but these concerns are very real. Below we discuss three recent cases in which plaintiffs or their counsel prosecuted fraudulent claims, and we will discuss how we might prevent this type of fraud from happening again.

Phony Plaintiffs and Forged Signatures

Most defendants and their counsel would not normally think that it would be necessary to verify the identity—or the actual existence—of a plaintiff, but that very thing was required in *Trevino v. Cummins, Inc., et al.*, No. BC462323 (Los Angeles County Superior Court). In *Trevino*, numerous longshore workers sued the manufacturers of trucks used to move shipping containers around the Ports of Los Angeles and Long Beach. Third Am. Compl. 11:5–10. The plaintiffs alleged that the trucks exposed them to harmful diesel exhaust. Third Am. Compl. 12:7–14. The original complaint was brought by several plaintiffs' law firms. *See* Compl. 1. It originally listed many separate plaintiffs in a single action, but the number of plaintiffs grew over time. *See* Compl. (naming 17 plaintiffs); First Am. Compl. (naming 17 plaintiffs); Second Am. Compl. (naming 44 plaintiffs); Third Am. Compl. (naming 292 plaintiffs). With plaintiffs' counsel finally facing a hard deadline to amend the complaint for what was expected to be the final time, many more plaintiffs were named, bringing the total number to 292. *See* Third Am. Compl.

As is common in mass torts, the court first pursued product identification issues. As a case management tool, rather than have each individual plaintiff answer discovery propounded by several defendants, the plaintiffs were required to complete a product identification questionnaire (PIQ). *See* Proposed First Am. Joint Case Management Order No. 2 at 1:19–28; Court's Ruling and Order on Order to Show Cause at 3:21–4:1 (3/19/2014). The plaintiffs were not allowed to pursue discovery from the defendants until all PIQs were completed. *See id.* To maximize the evidentiary value of the PIQs, the defendants insisted that the plaintiffs verify their responses. *See* Proposed First Am. Joint Case Management Order No. 2 at 3:15–28; Court's Ruling and Order on Order to Show Cause at 3:21–4:1 (3/19/2014). Although it was not foreseen at that time, requiring verifications ultimately exposed brazen fraud by the plaintiffs' counsel.

After the plaintiffs' counsel represented to the court that the plaintiffs had completed all PIQs, they asked for permission to seek discovery from the defendants. *See* Heller Letter to Court at 1 (filed 7/30/2013) (stating "Defendants state that 'Phase I Discovery - Product Identification' is incomplete. That statement is incorrect."); Court's Ruling and Order on Order to Show Cause at 4:10–5:1 (3/19/2014) (discussing plaintiffs' counsel's representation that all PIQs were completed and individually verified). But the defendants noticed red flags in the plaintiffs' PIQ responses. Many contained nearly identical answers and several appeared to have been "verified" by the same person. *See* Dec. of Julia Swanson at 4:15–18 (stating "At the hearing on August 2, 2013… Cargotec counsel Al Schlinsog stated in court that it appeared the signatures on the verifications were all by the same person."). The lead plaintiffs' counsel, relying on a co-counsel's assurance, vehemently denied that the verifications had been forged, assuring the court that each of the PIQs had been individually verified by the plaintiffs themselves. *See* Court's Ruling and Order on Order to Show Cause at 4:13–5:1 (3/19/2014) (noting that attorney Heller, after checking with attorney Swanson, advised the Court that all PIQs were individually verified).

Two weeks later, however, the plaintiffs' lead counsel submitted a declaration and wrote to the court to correct the record, admitting that "at least 150 verifications for Plaintiffs' responses to the PIQs which were filed with the Court were not signed by clients, but by a person or persons other than the clients." Dec. of Stephen Heller at 3:3–6 (filed 8/16/2013). The defense counsel later learned that the plaintiffs' co-counsel deliberately lied when she assured the lead counsel that the PIQs were properly verified. *See* Court's Ruling and Order on Order to Show Cause at 5:6–7:11 (3/19/2014) (discussing events that occurred subsequent to the August 2, 2013, status conference showing, despite to her contradictory statements to the court, that attorney Swanson was aware the PIQs were not individually verified before the status conference).

The offending plaintiffs' counsel claimed that she had no idea that the verifications were forged, but that she investigated the defendants' suggestion after it was raised. *See* Dec. of Julia Swanson at 2:7–20. The offending plaintiffs' counsel claimed that she was surprised to learn that the verifications had not been signed by the plaintiffs themselves: "Until it was pointed out by defense counsel at the last CMC [case management conference]… that many Verifications appeared to have been signed by the same person, I was entirely unaware such an improper filing had taken place." *Id.*at 2:911.

The plaintiffs' counsel blamed the forgeries on her paralegal. *See id.* at 4:21–5:9. She claimed that "[t]his was never at [her] direction or with [her] knowledge" and she "never had any intention to defraud the defendants with false verifications"; and had she "seen what was being filed, [she] would never have allowed it to happen." *Id.* at

2:14–15; 5:1–3. She also claimed that after this came to light, she immediately fired her paralegal. *See id.* at 5:10–11.

The paralegal subsequently denied the attorney's version of the facts and provided a declaration stating that the attorney ordered her to forge the signatures and even suggested that she use different pens to make the signatures appear as if they had been signed by different people. *See* Notice of Errata re: Dec. of Christina L. Brace, Ex. A at 2:8–24. The paralegal claimed that she was told to "just sign the names," that "it would not matter," and that "nobody will ever know the difference." *Id.* at 2:16–18. The paralegal further stated that the plaintiffs' counsel knew *at the time that the verifications were filed* that they were not signed by each respective plaintiff. *See id.* at 2:25–3:1.

The plaintiffs' counsel also lied to the court about terminating the paralegal's employment. The paralegal stated that her employment with this attorney ended before the initial case management conference. *See id.* at 1:21–22 (stating that attorney Swanson terminated the paralegal's employment on July 30, 2013). As such, it could not possibly be true that she was fired the day after that hearing, as the plaintiffs' counsel claimed.

Ultimately, the plaintiffs' lead counsel moved to withdraw from the case for reasons that he was unwilling to put on the record. *See* Notice of Motion and Motion for Permission to Withdraw as Co-Counsel for Plaintiffs; Dec. of Stephen Heller at 4:10–14. Presumably wanting to get to the bottom of this, the court held an *in camera* hearing with all the plaintiffs' counsel. *See* Court's Ruling and Order on Order to Show Cause at 11:12–12:2. Tellingly, after the *in camera* hearing, the court issued an "order to show cause" why the plaintiffs' counsel should not be held in contempt. *See id.* at 12:3–7.

In preparing for the order to show cause hearing, the defendants learned for the first time that many of the persons named as plaintiffs never agreed to be a party to the case. As described in a declaration by the paralegal, the plaintiffs' counsel organized a meeting at a hotel for longshore workers interested in learning about the litigation. *See* Notice of Errata re: Dec. of Christina L. Brace, Ex. A at 3:16–18. All who attended the meeting signed *in*, and those who wanted to become a plaintiff signed *up*. *See id.* at 3:16-25. At the deadline to amend the complaint, this same counsel filed suit on behalf of everyone who attended the meeting—not just those who indicated that they wanted to be a party to the case. *See id.* at 3:26–4:3.

The defense counsels now understood that the plaintiffs' counsel had been disguising phony plaintiffs. She provided false "verified" PIQ responses for people who never wanted to be parties to the case, with whom she did not have a retention agreement, and for whom she did not even have contact information. But rather than come clean and admit that people were improperly named as plaintiffs without their consent, the plaintiffs' counsel falsified discovery answers, forged verifications, and repeatedly lied to the court. Although only truth could find purchase on such a slippery slope, she continued to make the problem worse with additional lies.

The defendants received a copy of private correspondence between the plaintiffs' counsel at the order to show cause hearing. In that correspondence, the plaintiffs' lead counsel asked for confirmation that the verifications were, in fact, signed by their clients. *See* Court's Ruling and Order on Order to Show Cause at 5:13–17. In response, the plaintiffs' other counsel, the offending attorney, admitted that they were not:

> We had to sign on behalf of those people who we could never reach, never had any contact with but had filed at the last minute to meet the deadline. If we had retainers [from] those people, it would have said we had the right to sign on their behalf, but we did not even have retainers for a whole lot of them. It was a mess, as you know, since we were so rushed that there were a lot of people we never had contact with later. But all of these people are going to be dismissed anyway, so it will never come up as to their Verifications. The issue is moot.

See id. at 6:1–9.

If the plaintiffs' offending counsel had been truthful, perhaps the issue might have been moot as she hoped. But that never happened. Despite this private admission, this plaintiffs' counsel lied at the following case management conference and numerous times afterward. At the evidentiary hearing on the "order to show cause," the plaintiffs' lead counsel was represented by personal counsel. *See id.* at 11:20–22 (court noting that Mr. Heller came into chambers at this hearing with his personal counsel). Ultimately, he and his firm were allowed to withdraw, the claims of the phony "plaintiffs" were to be dismissed, the offending plaintiffs' counsel ultimately withdrew as well, and the court referred her to the state bar for possible discipline. *See* Court's Ruling and Order re: Motion to Withdraw as Counsel of Record by Plaintiffs' Counsel Heller LaChapelle at 3:18–21; Court's Ruling and Order on Order to Show Cause at 15:9–17:23; Notice of Withdrawal as Attorney of Record by Julia Swanson.

The verification requirement in and of itself might be enough to deter fraud. But if not, it will provide a firm record on which you can base further actions.

Plaintiffs Scheme for Double Recovery

In re Garlock Sealing Technologies, LLC, Case No. 10-31607 (Bankr. W.D.N.C.), shows how certain asbestos plaintiffs engineered a process to pursue multiple actions for the same alleged injury. Garlock is a limited liability company that manufactures asbestos-containing industrial products. *See* Information Brief of Garlock Sealing Technologies LLC at 1. Because Garlock was a relatively minor player in the asbestos industry, the plaintiffs focused on other larger defendants for many years. *See id.* at 2. In approximately 2000, however, Garlock's fate changed. *See id.* Many target defendants previous asbestos actions filed for Chapter 11 protection. *See id. See also* Order Estimating Aggregate Liability at 3. After their Chapter 11 reorganizations, the

plaintiffs had only one avenue for recovering from them. *See* Information Brief at 4. They were forced to file a claim with the reorganized defendants' post-confirmation trusts. *See id. See also* Order Estimating Aggregate Liability at 29-30.

After these businesses filed for bankruptcy, Garlock noticed a steep increase in both the number of mesothelioma cases that it was named in and the dollar value of the settlements and jury verdicts against it. *See* Information Brief at 3–4; 49–50; Order Estimating Aggregate Liability at 3. Although Garlock felt that it was paying more than its fair share of these claims in the short term, it expected that once the trusts were funded, its tort exposure would decrease because plaintiffs would once again seek reimbursement from the top tier defendants through their trusts. *See* Information Brief at 4, 62. But that never happened.

Consider using independent medical examinations (IMEs) to allow experts to verify plaintiffs' injuries.

Instead, Garlock discovered that the plaintiffs were often concealing evidence of their exposure to the bankrupt defendants' products to maximize their recoveries from both Garlock and the trusts. *See, e.g.*, Information Brief at 52; Order Estimating Aggregate Liability at 30. First, these plaintiffs would file claims against Garlock and other solvent defendants. *See* Information Brief at 65. To maximize their recovery, plaintiffs denied being exposed to other asbestos products. *See id.* By removing evidence of exposure to other products, the plaintiffs subjected Garlock to greater liability. *See id.* at 64–65.

But once the plaintiffs recovered in their cases against the solvent defendants, they would pursue claims against the trusts of the same top tier defendants whose products they had denied being exposed to. *See id.* at 65. As one attorney stated: "My [ethical] duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies." *See* Order Estimating Aggregate Liability at 30–31.

The plaintiffs managed to conceal their fraud because the trusts had very generous timelines for filing claims. *See* Information Brief at 65. The plaintiffs could file and often resolve tort actions against defendants such as Garlock before they were required to file a claim with the trusts. *See id.* In addition, the confidentiality of the trust procedures allowed plaintiffs to conceal from Garlock the fact that they filed a claim with the trusts. *See id.* The truth could not be discovered until this confidentiality was removed.

When Garlock finally was able to access the trust claims information, it discovered the fraud. One particularly troubling finding related to a $9 million verdict that Garlock had suffered. *See* Order Estimating Aggregate Liability at 31–32. In that case, Garlock argued that the plaintiff had been exposed to Unibestos amphibole insulation manufactured by Pittsburgh Corning. *See id.* at 31. The plaintiff denied this exposure, and the plaintiff's counsel objected to listing Pittsburgh Corning on the verdict form. *See id.* at 31–32. The plaintiff's counsel even affirmatively represented to the jury that there was no Unibestos insulation present where plaintiff had been exposed to asbestos. *See id.*

However, Garlock later discovered that this plaintiff filed 14 trust claims after the verdict. *See id.* at 32. Moreover, the plaintiff's counsel participated in the bankruptcy proceedings of Pittsburgh Corning, the same company whose products the plaintiff claimed were not present where the plaintiff was exposed to asbestos. *See id.* The plaintiff's counsel even filed a ballot in the Pittsburgh Corning bankruptcy that certified under penalty of perjury that his client had been exposed to Unibestos insulation. *See id.* The plaintiff's counsel submitted this ballot seven months before he represented to the Garlock jury that his client could not have been exposed to the Unibestos product. *See id.*

Garlock uncovered evidence of similar fraud by many additional plaintiffs. In total, Garlock was allowed full discovery related to 15 closed cases. *See id.* at 34. Garlock determined that the 15 plaintiffs withheld exposure evidence in *every one* of those cases. *See id.* Garlock has filed federal racketeering suits against four of the law firms that represented these asbestos plaintiffs to gain access to more extensive discovery and determine the extent of these evasive activities. *See Garlock Sealing Technologies, LLC v. Simon Greenstone Panatier Bartlett, PC, et al.*, No. 3:14-CV-00116 (W.D.N.C.); *Garlock Sealing Technologies, LLC, et al. v. Belluck & Fox, LLP, et al.*, No 3:14-CV-00118 (W.D.N.C.); *Garlock Sealing Technologies, LLC, et al. v. Waters & Kraus, LLP, et al.*, No. 3:14-CV-00130 (W.D.N.C.); *Garlock Sealing Technologies, LLC, et al. v. Shein, et al.*, No. 3:14-CV-00137 (W.D.N.C.).

Fraudulent Solicitation of Plaintiffs

A third case shows the potential dangers of plaintiff solicitation—*In re Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, Case No. 2:12-md-02327 (S.D.W.V.). *In re Ethicon* is a pending multidistrict product liability action related to certain mesh products. *See id.* Through the course of this litigation, counsel for Ethicon, Inc., a subsidiary of Johnson & Johnson, became aware of suspicious plaintiff solicitation activities. *See* Johnson & Johnson's and Ethicon's Motion to Revise Case Management Procedures and for Discovery Related to Plaintiff Solicitation at 1.

The defendants were told that numerous women were being contacted by a call center that promised them a $30,000 to $40,000 payout for their participation in lawsuits related to their bladder sling or mesh implant surgery. *See id.* at Exhibit 1, Affidavit A, Attachment 5 at 3:2–9. Yet most of these individuals had never undergone any such procedure. *See id.* at 3:13–4:8. After one woman admitted that she never had either of the relevant surgeries, a call center employee essentially told her in a recorded conversation that it did not matter: "I know, [name redacted] you never had done this surgery, but if you are interested to receive 30 up to 40 thousand dollars, you just have to tell my compensation officer that I had a bladder sling surgery and after that I had a complication." *See id.* at 4:1–8.

When this information came to light, the defense was understandably concerned

that other individuals who had not used their products were improperly named as plaintiffs in the multidistrict litigation. *See id.* at pg. 1–2; Johnson & Johnson and Ethicon Inc.'s Reply in Support of Motion to Revise Case Management Procedures and for Discovery Related to Plaintiff Solicitation at 4. Given the number of plaintiffs involved, however, it would be impossible for the defendants to know which plaintiffs had used their products and were suffering from real injuries and which were fraudulent plaintiffs who had suffered no injury at all without protracted discovery. *See* Johnson & Johnson and Ethicon Inc.'s Reply in Support of Motion to Revise Case Management Procedures and for Discovery Related to Plaintiff Solicitation at 4–5.

Because the defendants believed that these solicitation efforts were ripe with fraud, they filed a motion to take discovery related to the solicitation of plaintiffs. *See* Johnson & Johnson's and Ethicon's Motion to Revise Case Management Procedures and for Discovery Related to Plaintiff Solicitation at 1–2. The plaintiffs objected to the discovery, arguing that there was no proof that the plaintiffs or plaintiffs' counsel were affiliated with these seemingly fraudulent call centers. *See* Plaintiffs' Opposition to Johnson & Johnson's and Ethicon's Motion to Revise Case Management Procedures and for Discovery Related to Plaintiff Solicitation at 3. The court never reached this issue because the defendants withdrew the motion to take this discovery. *See* Johnson & Johnson's and Ethicon's Motion to Withdraw Motion; Order Granting Johnson & Johnson's and Ethicon's Motion to Withdraw Motion.

Putting aside whether or not discovery related to solicitation of plaintiffs through the call centers would have been appropriate, the recording of the call center solicitation quoted above indicates that inappropriate plaintiff solicitation does exist, and it teaches that defense attorneys cannot ignore how plaintiffs come to be included in our cases.

Preventing Future Fraud

Although it might be impossible for defendants to prevent all future fraud, it would be wise for defense attorneys to use best practices designed to deter plaintiffs from lying, to learn the truth quickly, and to have an evidentiary record to support any action that we might wish to take to remedy fraud when it occurs. Although what is feasible will vary greatly depending on the nature of the cases, the *Trevino*, *Garlock*, and *Ethicon* cases demonstrate some techniques that will mitigate the risk that plaintiffs or their attorneys will commit fraud. Consider the following options as part of your initial case planning, and discuss them with your court as you help the court to craft early case management orders.

1. Insist on having the plaintiffs individually verify their discovery answers and plaintiff fact sheets. Any discovery responses that you receive must be in evidentiary form. The verification requirement in and of itself might be enough to deter fraud. But if not, it will provide a firm record on which you can base further actions.
2. Require notarization by a notary not employed by opposing counsel. This step should provide additional safeguards in confirming the identity of each plaintiff and the plaintiff's voluntary inclusion in the lawsuit. One would hope that the notary would not have an incentive to join in fraud.
3. Examine signatures for signs of forgery. Although this might appear obvious, the *Trevino* defendants would not have discovered the fraud if their teams had not scrutinized the signatures on the PIQs. If signatures appear to be made by the same hand, you should investigate further.
4. Request that a court require plaintiffs' counsel to attest to the genuineness and authenticity of the plaintiffs' verifications and any other signatures. Putting this obligation directly on the plaintiffs' counsel should cause them to reconsider before attesting to unfounded claims.
5. Whenever possible, take depositions of the plaintiffs to verify that they are legitimate parties to your case. This may be too expensive to do in some cases, but there is no better way to verify plaintiffs' claims than to meet them face-to-face. At the very least, consider deposing plaintiffs who cause the greatest concern.
6. Consider using independent medical examinations (IMEs) to allow experts to verify plaintiffs' injuries. These will give your defense team another opportunity to meet the plaintiffs and are one of the best ways to verify plaintiffs' injury claims and causation evidence.
7. Retain a private investigator or have your defense team research the plaintiffs' background. This might not be possible for all plaintiffs in large cases, but it should be considered for questionable plaintiffs.

Even if defendants do not catch the fraud during the merits of a case, additional verifications can be required while administering any settlement that might occur.

8. Hold plaintiffs' counsel accountable by requiring them to put their positions in writing or by having discussions on the record with your court.
9. Monitor settlement payments through a proof of claim process. Even if defendants do not catch the fraud during the merits of a case, additional verifications can be required while administering any settlement that might occur.
10. Ask plaintiffs to answer discovery requests about how they came to be plaintiffs—ask them were they contacted by a call center, did they respond to advertisements, and other questions designed to elicit how they came to become involved

Obviously, the real means to preventing fraud is to maintain honor in the profession. The great majority of plaintiffs' counsels are very skilled and ethical attorneys who would not risk their reputations with fraudulent conduct. Yet, as the cases discussed above demonstrate, fraud is a part of some attorneys' playbooks, and defense attorneys must guard against fraud in *all* cases—especially in mass torts. If we diligently look for fraud, we might deter those who might consider committing it in the future. FD