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Alternatives to Asbestos Impairment Standards

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As I sit and listen to everything talked about today, I have to express my concern with what I see happening in asbestos litigation. I have seen a change in the litigation over the past twenty years. I have seen a change in the nature of the cases that started in the 1980s with World War II shipyard workers. I watched the litigation move to construction workers out of the building boom in the 1950s and 1960s. Then, I watched it move to what have been called "peripheral defendants," those who are named when plaintiffs' lawyers lose primary defendants and look for other defendants that might be held responsible. For example, because none of the traditional defendant manufacturers are still around, auto manufacturers and brake suppliers, so-called friction defendants, play a much bigger role in the litigation today. Friction cases are now actually some of the better cases we pursue for a remedy.

I have also seen changes in the theories of liability. In the 1980s, oftentimes plaintiffs' lawyers would bring strict product liability claims. That has changed as the product manufacturers have disappeared. More negligence claims are starting to be brought. When you make such claims, there is a lot more work to put those cases together.

I also found that the number of defendants named in cases has increased incredibly. When you have a shipyard case or a refinery exposure case, you have a set group of defendants. That group was fairly well defined and did not change. But, when you have a construction case and a plaintiff that maybe worked at 300 or 400 job sites over a thirty or forty year career, one must try to determine all the products to which that individual was exposed. The amount of investigation that must go into that case is vastly different and much more substantial.

The litigation environment was also changed in California by Proposition 51, which eliminated joint and several liability for non-economic damages. That law changes the dynamic of against whom you go

to trial and what kind of cases you can take to trial, because if you do not have large economic damages, and you only have a one percent responsible defendant, it is not economically viable to take that case to trial.

The litigation environment influences much of what lawyers do. As Judge Chiantelli indicated, lawyers look for ways to expand liability across the board. As I see what is happening today, I am concerned by the attempts to federalize tort law. One of the evils of the federalization of tort law is that Congress takes what is the law in many of the fifty states and tries to make it the law throughout the country. Those efforts are dangerous because they may restrict access to the courthouse and access to justice. Judge Chiantelli said, and I agree with him, the right to a jury trial is important, and it is something that we have to keep our eyes on. You keep your eye on the prize, and that is the prize.

When you start drawing threshold injury levels and start requiring people to be this sick before they can have access to the court system, I think one must ask: "Is this the kind of substantive change that we really want in the tort system?" If moving from an injury to an impairment standard is done for asbestos, what are the implications for other kinds of tort cases in the future?

For example, my firm represents a number of children whose pediatrician decided he would save money by giving them saline injections instead of vaccinations. There were 4,000 of these children and, thankfully, only two of them got sick from not being vaccinated because the problem was found and remedied. But, we had 4,000 children who went through a whole series of reinoculations and antibody testing. They were not impaired. Thus, if an impairment standard were applied, the answer to their claims would be: "there is no harm, so there is no remedy." I do not think that is right. If you talk about a sexual assault victim, there may be no impairment of daily living. Sometimes a sexual assault will result in extremely serious emotional distress, but, in many cases, it does not. No one would suggest that such an individual should not have a remedy in the tort system.

There are individuals who were exposed to asbestos for thirty years and developed scarring over perhaps twenty-five or thirty-percent of their lungs before it could even be detected on a chest x-ray. They live the rest of their lives knowing that they are at an increased risk of developing latent sickness. They should be medically monitored so that they receive appropriate treatment and perhaps a cure if a malignancy should be determined. Those individuals have been injured. To politely say that just because the scar is on the inside, they do not have to worry about it, begs the real question. I believe the impairment issue in asbestos gets a lot of attention because many major American corporations and insurance companies are in the mix and beating the drum. They have the right to do that.

We have to look at the true implications of making these kinds of very basic, substantive changes to the rights of victims. I represent about 2,000 asbestos victims. About forty-percent of these cases are the serious malignancy cases that Mr. Kazan spoke about. The rest are varying degrees of non-malignant cases. The criteria programs that have been discussed would wipe out about seventy-percent of those non-malignant cases. Over

the last five years, forty of those cases have gone to verdict. All of them were supported by full medical exams, high resolution CT scans, and board-certified specialists. All forty of the cases resulted in a plaintiff verdict that found the claimants to be injured. They would all be banned by the current ABA criteria. That is not an answer.

How do we deal with the abuses? How do we deal with the screeners? I sit on many of the same committees that Mr. Kazan does, and it is a huge problem. I think we have to target the abuses and not the victims. We should not run the risk of cutting off remedies for those who have truly been injured.

How do we do this? One way is to look at jurisdictions that do not have a problem, such as California. One of the reasons is that California judges, including Judge Chiantelli, have become involved and have actively managed the litigation using general orders and a rational consolidation program. There are actually eight different kinds of groups, which avoids different kinds of cases being joined together. At the end of the day, the cases are only consolidated for pretrial purposes because each claimant receives his or her own individual trial with a jury, and each defendant receives an individual trial. What happens along the way is that ninety-five percent of cases settle. As a result, there is not a large problem. This system works exceptionally well because it handles a large volume of cases and still preserves everyone's individual rights.

Consolidation can be abusive of individual rights. If you put 10,000 cases together, it is very hard to get a fair trial. There are ways, however, that judges can consolidate, use court management techniques, use general orders, and create solutions that effectively manage the litigation without destroying the rights of either side. California does not have this problem because our statute of limitations is somewhat enlightened. It requires both disability and knowledge that the disability was caused by asbestos before the statute runs. If a similar statute were adopted in every state, then there would be no requirement for plaintiffs to file a lawsuit before they are actually significantly impaired.

Another alternative would be to have a voluntary pleural or unimpaired registry where someone could say: "I volunteered to do this, but you may not force it on me." The individual who wants his or her day in court, who does not want to wait until he or she is dying of an asbestos-related disease to get a trial date, or who does not want to wait until he or she needs oxygen to get compensation for his injuries, he or she can go forward. But if another plaintiff wants to wait, there is no harm in doing that. These are two ways to take pressure off the system.

We need to let the court system regulate itself and encourage judges to become more involved in helping to solve the problem. This is a far better solution than going out and impairing people's rights. The other thing I

think that everyone should try and do is to encourage alternative dispute resolution. That should hit a responsive cord at this institution.

We sit down with twenty-five defendants and routinely settle 600 to 700 cases a year with those defendants. We do it without ever spending a day in the courtroom. We do it because we have settled thousands of cases in the past. Surprisingly, once you have settled thousands of cases and a new one comes along, you can usually find one you have done in the past that looks pretty close, or it is a little better or a little worse. This provides a framework for resolutions. There is no reason in today's world that courts should not try and encourage that type of alternative dispute resolution for everyone, and create incentives in the system for people to resolve claims by alternative dispute resolution versus going into the court system to resolve them. Asbestos is a mature litigation. There are very few surprises.

Everyone knows what different physicians are going to say as expert witnesses. Everyone has a pretty good idea what the product identification is in different sites, and they certainly have it by the time they complete the plaintiff's deposition. With regard to discovery, there is no reason that we all have to be in the mode of starting trials before we can solve these cases.