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Judicial Efficiency in Asbestos Litigation

Honorable Alfred Chiantelli

You have heard and will hear arguments regarding policy. It is like listening to people talk about recipes on tort refinement. I am not here to talk about the recipe. I am the cook. Let me tell you about the City and County of San Francisco. We have 750,000 people and fifty judges. Thirteen judges exclusively hear civil cases.

In the 1980s, we decided that the California Code of Civil Procedure would not work with complex litigation, so we started issuing our own general orders in San Francisco in order to get asbestos cases to court. One thing we found is that our settlement conferences did not resolve asbestos cases. Given this situation, we decided that we had to move these cases to trial, because we were not going to sweep them under a rug and allow them to collect dust.

We have a caseload of approximately two thousand mesothelioma cases in San Francisco. Lately, we have seen a lot more mesothelioma and other cancer cases than in the past. We also find that our cases have shifted from asbestos exposures around docks to cases based on exposures on land.

In dealing with the large inventory of asbestos claims, we decided to consolidate the plaintiffs' cases. Eleven months after the filing of a complaint, our master calendar judge will conduct a status-setting conference where he or she will consolidate anywhere from five to about twenty-five cases, and then we set a trial date. To avoid matching diamonds with zircons, we consolidate cases according to similar injury. Each plaintiff firm is assigned its own consolidated cases. So, if plaintiffs' lawyer Alan Brayton has a case, or several cases in San Francisco, we will consolidate all his asbestosis cases in which the plaintiffs are still living. Then we will have another Brayton group that will include all wrongful death asbestos cases, and so on.

With these consolidations, each plaintiff's case will have anywhere from two to fifteen defendants. Consolidating cases by disease categories is not a

gold mine, but it is not a land mine either, which does occur when you begin to consolidate cases without attention to the commonality of diseases. That has happened in other states where judges have joined cases that do not belong together; the cases have been mixed in a judicial cuisinart. Many of you law students have taken courses in criminal law. You know that the courts will not consolidate a death penalty murderer with a petty theft arrestee. In asbestos cases, courts have to consolidate with consideration of the seriousness of the disease and sometimes according to the plaintiff's occupation.

Moreover, through a special order, we decided to have one master complaint and one master answer. We told the plaintiffs they should put down each and every theory of recovery on their master complaint. We also told the defense attorneys to put down every affirmative defense and to deny as much as possible. Now, when an attorney files a case, he or she files a sheet of paper and simply refers to the standard complaint. Defendants refer to the standard answer. This saves time and money.

We also discovered that we, as superior court judges, had an inherent power to do certain things that the California Civil Code of Procedure would not allow us to do because we were involved in complex litigation. That issue went up to the court of appeals, and we won. The appellate court indicated that we had the inherent power, derived from the California Constitution, to issue such an order. In exercising reasonable control over complex litigation and discovery matters, we could act with the inherent managerial powers of the court in reference to this type of work.

We were able to issue a general order appointing a law firm as designated defense counsel to perform primarily administrative functions, such as scheduling medical expert witness depositions and medical exams for all the defendants. We also tailored several other procedural rules for asbestos litigation. In order to make discovery automatic, we ordered that standard interrogatories be placed on file. We also require plaintiffs to respond to defense interrogatories within fifteen days of first service of any complaint. Interrogatories are to be answered without objection, except for attorney-client or work product privilege.

Within 120 days of a defendant's first appearance in a pending case, the defendant shall serve standard answers on all counsel. We have also allowed an expedited summary judgment procedure in which a defendant may file notice of a request for an expedited summary judgment claiming that the plaintiff has provided no information with respect to the identity of the product or site involved. This motion can be filed after the plaintiff's deposition. After signing such a certification, the plaintiff must respond if there are triable issues of fact. If there is no response, the complaint is dismissed without prejudice.

When I was a presiding judge in the San Francisco Superior Court, I decided to take a snapshot of the number of cases that went to a jury trial. Between January of 2001 and July of 2001, I counted the cases sent to jury trial. They were all consolidated cases. I counted the number of plaintiffs and the number of defendants that corresponded to each plaintiff's case. I counted them each as a separate trial. Next, I sent them to the jury trial

department. There were approximately 450 sent out to jury trial. There were only twelve verdicts, which demonstrates that when asbestos cases are sent for jury trial, most settle or are dismissed, but not before cases are set for trial. These cases must be sent to the trial department because the parties want to see the whites of the jurors' eyes. Therefore, an order was issued.

Addressing the loss of jurors under our new jury rules, jurors serve one day or one trial. Under this system, any juror not picked to serve on a jury trial on the first day of service is exempt from service for the year. Jurors used to ask for excuses from service, saying: "I'm not sure if I can serve on a trial that is going to last six to eight months." So we issued an order instructing judges that asbestos trials may not extend longer than thirty days. The judge's first reaction was: "What do you mean thirty days? We have fifteen plaintiffs and 100 defendants." It is possible, because if you look at my snapshot picture, the court is only going to receive two verdicts from that consolidated case. So we tell the jurors that the trial will not take four to six months and that it will not last more than thirty days. One smart defense attorney asked: "What happens if they go beyond thirty days?" We responded that we would declare a mistrial.

In any event, we have been fairly successful in getting a big turnover in our asbestos cases. Let me tell you some other things. What are some of the new theories that we are seeing? In San Francisco, plaintiffs' lawyers have tried to push the envelope. They have been successful with some new theories, but not with others.

For example, let's discuss the substantive law of conspiracy. In criminal law, we all know that conspiracy is a crime in itself. You have an agreement, you have an overt act, and then you have a crime. The fact that the target offense of the conspiracy cannot be achieved due to impossibility is no defense to a crime of conspiracy. Conspiracy is a crime by itself.

In civil law, however, conspiracy is not even a cause of action. It is used to create vicarious liability. In asbestos cases, some of the plaintiffs' firms will charge a defendant manufacturer with the theory of conspiracy. They will claim that the manufacturer did not produce the asbestos-containing product, but was a member of a trade guild that included a company that did manufacture the product. Plaintiffs' firms use this connection to argue that the defendant company, who is not the perpetrator, should be held vicariously liable for the actions of another company. Our appellate court recently held that one company cannot be liable for the actions of another under a theory of conspiracy. Although it did not use these words, the appellate court might have meant that, if it is impossible for a company to be liable for a tort because it owed no duty, it is legally impossible for the defendant to commit that tort. A company cannot be liable for belonging to a trade guild with the actual perpetrator. It appears

that the conspiracy theory has been removed from consideration by plaintiffs' lawyers.

The appellate court still must address many other issues. For example, plaintiffs pursue premises owners, including refineries, shopping malls, and commercial centers on the theories of retained control and negligent provision of unsafe equipment. The plaintiffs argue that the premises owners had a non-delegable duty.

Plaintiffs have also shifted their focus away from large manufacturers and distributors that are now bankrupt to general contractors. This has caused plaintiffs' lawyers to shift from product liability law to the common law theory of negligence in pursuing new defendants. Plaintiffs are also bringing strict liability claims against makers of small appliances, such as hair dryers and toasters. Finally, they are bringing cases against so-called friction defendants, such as those who manufacture automobile or airplane brakes.

There is one other matter that I want to talk about, and that is the issue of "what it means to have an injury?" I remember in law school torts class we learned that a person must have a physical injury in order to get into court. I have looked at some of the proposals for reforming tort law. If, because of someone's negligence, a person is injured and has a scar on his or her leg, but still can walk and run and jump, can that person get into court because of a disfigurement? An asbestos claimant might not have interstitial fibrosis, but there is some biological change inside that person. I do not like the theory that allows only the most seriously injured into court. What about the people who are less seriously injured? I rue the day when such people lose their right to jury trials.