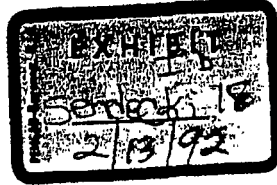


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DOCUMENT DESCRIPTION: Memo to Board of Directors, AIA, RE A Coordinated Industry Defense to Asbestos Disease Cases



March 24, 1976

TO: Board of Directors, Asbestos Information Association, Inc.

FROM: G. G. Gabrielson, Jr.

SUBJECT: A coordinated industry defense to asbestos  
disease cases

Pursuant to a request by the Executive Committee of the Board of Directors of the AIA, I have made a brief preliminary investigation of the possible merits of endeavoring to mount a coordinated industry defense to the proliferating number of suits at law asserting claims against asbestos manufacturers for alleged asbestos related injuries to the health of employees of the manufacturers' customers. In the course of the investigation, I have interviewed four attorneys, read several judicial decisions, and attended a meeting of defense counsel representing manufacturers and insurance carriers involved in 19 cases in Ohio.

The current wave of third party liability cases against asbestos manufacturers probably can be traced to a Fifth United States Circuit Court case, Fibreboard Paper Products Corporation, et al. v. Borel, 493 F. 2d 1076 (5th Cir. 1973), cert. denied 419 U. S. 869. This unfortunate decision imposed liability for injury to health upon the supplier to a plaintiff's employer on the theory that asbestos products are dangerous materials, that the danger has been known or should have been known to asbestos manufacturers for a long time and, therefore, that those manufacturers are under a duty adequately to warn workmen handling the materials and to instruct them in the precautions necessary to protect their health. The case holds that violation of this duty gives rise to liability for injury. Among other disappointing features of the Borel decision is a finding that there was knowledge of the serious health hazards of asbestos as a date much earlier than many attorneys of the subject would accept as valid.

Borel cases are popular among contingent fee attorneys because they provide an opportunity for suits against large corporations and their insurance carriers in circumstances where actions against the plaintiff's employer might be barred by the workmen's compensation statutes. Groups of plaintiff's can be organized, pleadings and discovery can be streamlined and jury awards typically are generous. The potential for profit to the litigating attorneys is obvious. They already have organized themselves across jurisdictional lines to effect



greater efficiencies and to save time and expense in the preparation of their cases. Unless some way can be found to make these ventures less profitable, the number of cases will continue to grow; and the trend will become more difficult to reverse.

Up to the present time, defense attorneys have made only half-hearted efforts to coordinate their responses. Local attorneys for insurance companies frequently have handled the defense with a concern only for the instant case and no regard for the long-range implications of the growing number of similar cases being brought across the country. The quality of the defenses offered often has been mediocre or poor and, as a consequence, some unfortunate precedents have been set. Because these precedents later may affect any asbestos manufacturer, each such manufacturer has a significant interest in the results of every suit, whether or not he is named a defendant. It is true that a majority of cases to date have involved insulation materials, but there is no practical or legal reason why the same kind of action cannot be brought with respect to the sale and use of any product containing asbestos. At first impression, it would seem then, that the desirability of a higher quality coordinated defense by industry is obvious.

At this time there appears to be a disposition on the part of several companies, encouraged no doubt by their insurance carriers, to settle cases singly or in groups. Payments being offered in this effort are in the general order of \$50,000 per plaintiff, and the companies settling assert that they are "looking for a good case in another circuit to create a conflict with Borel." While it is logical and proper to seek a strong case for appeal on the "state of the medical art" issue (when should industry have known of the hazards of asbestos), there is something to be said for a strategy of litigating at the trial court level all or nearly all cases of this type. My concern with the settlement approach is that \$50,000 per plaintiff is an attractive recovery for any lawyer; he probably will earn \$25,000 or more on a contingent fee basis at no more cost in time and effort than the preparation and serving of a complaint and the preparation and filing of pleadings. To settle in this manner surely will encourage further suits, with the very real possibility that the whole problem may get out of hand. There are literally tens of thousands of potential plaintiffs awaiting the blandishments of ambitious personal injury attorneys. It seems to me obvious that there is here the potential for severe damage to the asbestos industry.

Another factor which also might be taken into account is the possibility that the law may develop in a way which could

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impose liability for damages, and even criminal liability, upon asbestos industry corporate officers and other responsible management personnel for failing to use their authority to see that the employees of customers were adequately warned. The recent United States Supreme Court case, United States v. John R. Parker, 95 S. Ct. 1903 (1975) imposed criminal sanctions upon the chief executive officer of a retail food chain for failing to use his authority to assure that food handled by his company did not become contaminated. The same rationale for individual liability could be used in the asbestos situation.

It is my impression that one reason why several corporate defendants are "waiting for the right case" to re-litigate the Borel issues, is that we really are not prepared, even today, properly to present the "state of the medical art" issue. The history of the development of our knowledge of the health hazards of asbestos is contained in literally hundreds of scientific papers, some of which may be written in foreign languages. This voluminous body of literature has yet to be analyzed systematically. It should be reviewed critically, each paper should be summarized to indicate what it does and what it does not prove, and a chronology of the evolution of our understanding of asbestos and health should be developed. Ideally, then, a scientist of national stature should prepare a paper which describes and evaluates each major step in the development of this body of knowledge. If we could find a man, preferably one having no connection with the asbestos industry, to write and publish a paper of this kind, the document thereafter might constitute a useful item to be introduced into evidence at trial, even if the author should not be available to testify.

But even if we are unable to encourage the preparation of a scholarly paper on asbestos and health, we should arrange for the review and analysis of the literature, perhaps by a medical student; and the chronology thus developed should be studied thoroughly by a qualified attorney. Finally, we need to identify and have available expert witnesses who can testify to the state of the medical art. I do not believe that any of these things have yet been done or, at least, done adequately.

On the four attorneys whom I interviewed, I was very favorably impressed by three. These three all were intelligent and well-trained, and all had had significant exposure to the asbestos/health issue. Any one of them would be qualified to develop and coordinate an industry defense against Borel theory cases. All had interesting ideas to contribute. Two were members of large law firms and one a member of a small firm. None of them were interested in severing their connections with their firms; all were interested in the assignment which I discussed but wanted their law firms to be retained in the matter. There appeared to be little difference among the estimates of costs which each gave to

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me; the small firm was no less expensive than the large. With difficulty, I finally have made a personal choice, largely subjective, among the three. If AIA enters upon this program, I propose that we use Wendell B. Alcorn, Jr. of the New York office of Cadwalader, Wickersham and Taft. For your information, I attach hereto a memorandum sent to me by Alcorn.

Because I believe that the growing number of Borel theory cases presents a serious threat to the asbestos industry, I recommend that AIA retain Wendell B. Alcorn, Jr. of Cadwalader, Wickersham and Taft as special counsel to the Association to advise members and non-members alike on the defense of these cases. I propose that Alcorn's work be supervised by a new standing committee, called perhaps the Legal Committee, of the Board of Directors; and that the Association fund the cost of taking the following steps:

1. Review and analysis by counsel of all past and current cases pertaining to asbestos and health, the pleadings filed, issues raised, defenses offered, holdings as to law and fact, results of appeal, damages awarded, settlements reached, etc. All this information might be entered into the Cadwalader computer for facility of retrieval in the months ahead.
2. Preparation, perhaps by a medical student, of a chronology of the development of our knowledge of asbestos disease. It may be appropriate to do this work at the offices of the IOEH in Montreal.
3. Opinion of counsel concerning strengths and weaknesses of the industry position in Borel type cases, and a recommendation of an industry strategy or strategies to be followed.
4. Development by counsel of standard forms of pleadings to be offered by defendants on those issues which are common to all cases of this type, interviews by counsel of prospective expert witnesses on the state of the medical art issue, and preparation by counsel of a file of materials which might be of general utility as documentary evidence in Borel type cases.

The cost of completing all the above steps might be \$50,000 (the cost of settling one Borel theory case). If, however, at any step in the process, the AIA were to decide that the program was not worth pursuing, it could be terminated at that time, with no further costs incurred.

After the above steps had been taken, I would endeavor to find a reputable medical scholar to embody in a published treatise a critical evaluation of the development of medical knowledge concerning the effects of asbestos and health. In any event, the AIA then would publicize to the industry that it had available for use by any company, experienced special counsel, prepared and equipped to advise corporate attorneys and local trial counsel on

