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Gravy Train of Asbestos Suits May Soon Stall

Congress Works to Stanch Money Flow In Lucrative Litigation

Reckoning of Reform

By Lawrence Hurley
Daily Journal Staff Writer

WASHINGTON — Veteran plaintiffs attorney Steven Kazan says he's thinking about taking up golf.

That's because Congress is considering legislation that would put him out of business.

Oakland-based Kazan has worked on asbestos cases for 30 years, but the proposal being debated in Washington would end all such litigation with the stroke of a pen.

Claimants would be forced to seek compensation from a \$140 billion fund, to be paid for by defendant companies.

End in Sight?

Should the proposal pass Congress — and survive expected constitutional challenges — an area of expertise that previously attracted high-powered trial lawyers would become a legal backwater where courtroom savvy is less relevant than a keen eye for administrative procedure.

The push for reform, led by some business groups and moderate senators, has been sparked by a recent upsurge in asbestos cases following a decline in the mid-1990s.

Courts are struggling to keep up with the workload amid concerns from defendants that some claims are being paid out even when there is little proof of asbestos exposure.

Kazan, who has actively opposed the bill, said the implications are stark for him and the 500 or so lawyers in California who focus on asbestos litigation.

Time to Retire

His firm, Kazan, McClain, Abrams, Fernandez, Lyons & Farris, which employs 75 workers — 18 of which are lawyers — would probably disband, he predicted.

"I have threatened one of my partners that his full-time job will be to teach me how to play golf," he said. "I will probably retire."

Passage of the new law would mean the end for the legal community's asbestos gravy train, which — through 2002 — has eaten up \$70 billion nationally, including \$40 billion in legal fees. The legislation would restrict fees for plaintiffs attorneys to five percent.

FindLaw.com lists 50 firms in California that specialize in asbestos litigation on behalf of victims.

The Bay Area has traditionally seen a large number of cases, having been at the forefront of the asbestos litigation boom in the 1970s and 1980s.

The region was home to a large number of plaintiffs who were exposed to asbestos while working in shipyards.

Kazan was one of the pioneers, filing

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suit against Johns Manville Corp. in 1974.

The company became one of the first of about 70 defendants to file for bankruptcy as a result of litigation nationwide.

Firms other than Kazan's that would be affected if the legislation passes include Brayton Purcell in Novato; Paul, Hanley, & Harley in Berkeley; Harowitz & Tigerman in San Francisco; and Clapper & Patti in Sausalito.

Some defense firms that specialize in asbestos cases might also need to adjust their business plans.

They include Jackson & Wallace, with around 50 lawyers, and Morgenstein & Jubelirer, with 35 lawyers.

Both firms, each based in San Francisco, do not concentrate solely on asbestos litigation but are known for their work in that field.

Eliot S. Jubelirer, of Morgenstein & Jubelirer, said his firm will be "just fine" because, although asbestos has been an important practice area, it makes up less than 25 percent of the firm's workload.

"We do a lot of things," he added. "We would try as much as we could to avoid layoffs."

Big law firms would also be insulated from the changes, according to Gary Justice, a partner in the Los Angeles office of Gibson Dunn & Crutcher, who has represented defendants in numerous asbestos cases over the years.

"We do so many diverse things," Justice said. "I don't think it would affect us."

Justice and other attorneys in California who have litigated asbestos cases said they expect a small, specialized and lower-profile bar to form in order to handle the hundreds of claims.

Change in Plans

Stanford Law School professor Deborah R. Hensler, who co-authored a recent Rand Institute for Civil Justice study on asbestos litigation, agreed with Kazan that some small plaintiffs firms that specialize in asbestos litigation may have to change their business plans.

"If they can no longer win large amounts, they may stop," she said.

Hensler said she expected what she described as "opportunistic" plaintiffs firms, referring to those that deal with less serious claims, to be the ones in the biggest trouble.

At the same time, though, she said more established practitioners who focus on "stronger claims" may also have found a new area of law to practice in.

Kazan said he is hoping he won't have to make a career change any time soon.

He believes the compensation proposal will prove unworkable, in part because the \$140 billion, in his view, won't be enough.

"It will be bankrupt in two or three years," he said.

Trial attorneys are actively campaigning against the legislation, formally known as the Fairness in Asbestos Injury Resolution (FAIR) Act.

The political battle will heat up in 2006, as Senate Majority Leader Bill Frist, R-Tenn., has described it as his number one legislative priority.

The Senate Judiciary Committee has already endorsed the plan, which also has the support of the White House.

Money Trouble

Kazan is not the only person to have expressed concerns about the long-term viability of the fund, despite the insistence of the Congressional Budget Office that the \$140 billion figure is realistic.

A report conducted by consulting firm Bates White concluded that the entitlements created by the act would actually cost at least \$300 billion and, in a worst case scenario, could even rise to \$695 billion.

Bates White predicted that the fund would be bankrupt in three years and left with a debt of \$45 billion.

"It's a short-term patch at best," Bates White partner Charles H. Mullins said at a



Steven Kazan, a longtime asbestos litigator, says reforms in Congress could put him out of business. "I have threatened one of my partners that his full-time job will be to teach me how to play golf," he said.

conference on the issue in Washington, D.C., in early December.

It's not just plaintiffs and their attorneys who have problems with the legislation.

The debate over whether the fund will work has led to a split in the business community as well, with some groups, such as the National Taxpayers Union, actively opposing the bill.

Perhaps surprisingly, if the act passes Congress, the legal challenge to the legislation is expected from business groups rather than plaintiffs.

They will argue that the requirement that asbestos defendants pay into the fund is a violation of the takings clause of the Fifth Amendment.

Theodore B. Olson, President Bush's first Solicitor General, has already been lined up to take the case, which would question whether it is constitutional for the government to force companies to pay into the fund.

But some defendant companies, such as Dow Chemical Company and the Industrial Association of Manufacturers, are in support of the bill.

James L. Stengel, a partner at Orrick, Herrington & Sutcliffe in New York, who represents Dow Chemical Company, was forced to defend his client's position at the Washington conference, which was organized by the American Legislative Exchange Council.

He stressed that the act would reduce fraud because the administrative nature of the procedure would be more likely to detect unworthy claims.

Currently, companies facing numerous suits often settle with claimants regardless of the merits, he added.

"There are people with cancer claims who have nothing to do with asbestos exposure," Stengel said. "They get paid under this system."

Deterrent Factor

This would change if the bill became law, he said, in part because of the restriction on lawyers' fees.

This would deter unscrupulous lawyers from filing claims, Stengel said.

But it's not just plaintiffs lawyers who make money from asbestos litigation.

Of the \$40 billion that was spent on asbestos litigation nationwide up until the end of 2002, plaintiffs lawyers took \$19 billion, while \$21 billion went to the defense bar.

To put that total in perspective, claimants received \$10 billion less than lawyers did.

If the status quo remains, "the beast will get fed," Stengel warned.

According to the Rand report, a total of 730,000 people filed asbestos claims against 8,400 entities from when litigation began up until the end of 2002.

The number of filings each year, particularly those with claims of less-serious nonmalignant injuries, has increased in recent years.

Claimants suffering from mesothelioma have also increased, although the number is small.

This rise in litigation toward the end of the 1990s is what led to senators to gear up for another attempt at reform.

It's been a long time coming.

Retired Alameda Superior Court Judge Ken M. Kawaichi, who presided over the asbestos docket for 12 years, thinks it should have been done years ago.

"It's kind of late now," he said. "If they were going to have a workers' comp type of thing, the time would have been right after the first cases started to lit."

Crushing Caseload

The one issue that most stakeholders can agree on is that the courts have failed to deal with the sheer volume of asbestos cases.

On the one hand, plaintiffs suffering from sometimes-terminal cancer are forced to wait for years for their cases to be resolved; on the other hand, defendant companies — some which never manufactured asbestos — are forced to either settle or run up huge legal expenses.

Congress has been examining the problem since 1984, but as Sen. Arlen Specter, R-Pa., the chairman of the Senate Judiciary Committee, remarked in his report on the bill, a solution has "been very elusive."

The current effort is the closest Congress has come to passing a law on the issue.

Previously, most observers had assumed that the asbestos problem would lessen as the generation that suffered the most exposure passed away and defendant companies went bankrupt.

But plaintiffs attorneys injected new life into litigation by advertising aggressively and filing suits against multiple defendants, including what defense lawyers describe as "innocent bystanders," such as car manufacturers.

It wasn't just defendants who wanted some type of reform.

From 2000 to 2003, Kazan and some other trial attorneys were on the same

side as the business community, working on a proposal to prevent fraudulent claims by forcing claimants to meet certain medical criteria before they filed suit.

But in 2003, those same business groups decided to support the compensation fund proposal instead, which Kazan has always opposed.

The question now is whether Frist can engineer the passage of the bill next year despite the outspoken opposition.

Feinstein on Board

He has the support of some Democrats, including Sen. Dianne Feinstein, D-Calif., a co-sponsor of the bill, but some conservative Republicans and left-wing Democrats may oppose it.

The bill passed the judiciary committee 13-5, with five Democrats voting against it.

The House is considering two similar bills, but both are still in committee.

Feinstein, once again showing her moderate credentials, not to mention a willingness to stand up to the trial lawyer lobby, has said she believes there is a need for legislation in order to provide "a no-fault system that compensates victims in a fair manner without high transaction costs."

Putting a stop to defendant companies going bankrupt, with resulting job losses, would benefit everyone, she argues.

Not everyone agrees.

One of the dissenters is Paul Zygielbaum, a client of Kazan's, who has malignant peritoneal mesothelioma.

The 55-year-old engineer from Santa Rosa has already won a substantial settlement, but for other sufferers of asbestos-related cancer — and lawyers who work in the field — the prospects aren't looking so good.

The highest payment possible under the FAIR Act would be \$1.1 million for those, like Zygielbaum, with the most serious forms of cancer.

But even that sum would be "substantially less" than what he received in his confidential settlement after filing suit, Zygielbaum said.

He, for one, hopes the bill will fall by the wayside.

"It's really an insult to the people who died," he said of the proposal. "It's an insult to the people who are sick."

As for Kazan, he is not yet giving up the fight.

"It would have a devastating impact," he said. "It's something against which we are working diligently."