



Defending Cases Based on Circumstantial Evidence

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Over the years, asbestos litigation has transformed and evolved considerably. Exposure scenarios have graduated down from insulation-based and industrial-based exposures, to home remodeling-based exposures, to home automotive-based exposures, and have now fallen into very specific and unique exposure scenarios, many of which are based predominantly on circumstantial evidence. There are many potential reasons for such a shift in testimony profile including but not limited to defendant bankruptcies, changes in the scientific literature, and natural evolutions in demographics and exposure settings for younger plaintiffs suffering from diseases alleged to be asbestos-related. Regardless of the reasoning, these cases are becoming more and more common across the country and actually resulting in trials previously unimagined. Herein, we will evaluate how to defend against this recent wave of cases based on circumstantial evidence.

Cases rooted in circumstantial evidence come in all shapes and sizes. One of the most common scenarios that may be encountered includes a situation where a witness testifies that he or she is familiar with the plaintiff and the job site, but never actually saw the alleged work being accomplished. Instead, they make assumptions about the work that was conducted, the asbestos content of products, and even the presumed dust levels created. In such a case, one may hear testimony about what a plaintiff “must have done” or what his or her “general duties” were at the work location. This testimony is often not supported by further evidence, and thus it falls upon defense counsel to disprove this testimony by investigating into additional witnesses and developing evidence on independently in order to defend the case. It is essential to take these cases seriously and explain anticipated concerns with your client as soon as the testimony is provided. Whereas this sort of vague testimony may have resulted in dismissal as recently as five years ago, it may trigger a large settlement demand today. In order to properly defend these cases, intensive investigation is often necessary to explore the array of potential defenses available to a particular defendant. An attorney must not be lulled into a false sense of security, but rather must actively develop and understand all aspects of asbestos litigation including having a working knowledge of the most relevant medical defenses and knowing how to locate and develop alternate causative exposures. It is also critically important that an attorney understand all potentially relevant case law as well as Federal and State regulations at issue given the alleged exposure circumstances. In cases with basic and undisputed exposures, a case may resolve without the need for hearing on complex motions, but circumstantial evidence cases tend to be extremely motion intensive and being prepared on historical case law and regulatory developments in the given jurisdiction will be key.

Another important consideration with circumstantial evidence cases is that Plaintiff’s counsel is likely to attempt to have your client help them make Plaintiff’s case. Heavy written discovery and a request for a corporate representative deposition is to be expected. Plaintiff’s hope is to prove the existence of asbestos on a jobsite or to find conduct that a jury may frown upon in order to help them get beyond the vague nature of the actual testimony in the case. Thus, a full

understanding a client's corporate conduct and corporate document collection is vital. Plaintiff's counsel should never know more about your client or your client's documents than you do. The attorneys representing a given defendant must know their client's story inside and out well before a corporate witness is subjected to providing sworn testimony. During heated exchanges in a corporate representative deposition is not the time to learn about difficult corporate documents or other challenging aspects of a defendant's corporate history. It is also not the time to figure out that your corporate testimony or corporate documents support and, in fact, fill in the puzzle pieces to Plaintiff's case.

In many ways, to defend a circumstantial evidence case a defense attorney must become part investigator and part plaintiff's attorney. As an investigator, the attorney must run down all potential witnesses that may dispute, confirm, or expand upon the current exposure allegations. This is an intensive process that requires creative thinking. Once the attorney identifies the type of witness he/she needs to find, the investigation process begins. The process often begins with internet searches for witnesses in Plaintiff's occupational, military, family, or friend circles in order to assess the available evidence in the case. At some point, a professional investigator may be necessary to supplement these efforts. These investigations may result in all allegations merely being confirmed, but they may also result in evidence directly contrary to testimony in the case. Either way, it provides the defendant with vital information to the valuation of the case. It is also important to utilize publicly available information from governmental organizations, unions, military units, or other groups that may have information or records directly relevant to the alleged exposures. Again, investigative efforts could prove or disprove testimony, or they may supplement existing testimony by the addition of exposures that were not appreciated or thoroughly explored within the confines of witness depositions. Fortunately, most of this information is free to those ready to put in the effort to dig around long enough online or even at traditional libraries for those willing to brave the stacks.

Likely the most important goal to keep in mind when defending a circumstantial evidence case is to determine where the trial themes are headed and understanding how to get there. Are you going to be able to defend the case based on the medical evidence alone? Was there another cause for Plaintiff's disease? Can the exposures be disputed by witnesses or documentary evidence? Even if exposure existed, was it enough to cause disease? Did the defendant follow safety regulations applicable to the given the circumstances? These are all essential questions to explore with your client and your trial team in order to be able to refine your defense themes throughout the investigation process. Once the anticipated themes are in place, the legal team can organize and distribute work to allow for efficient information gathering that leads to eventual evidentiary support for those themes. Still, even after the evidence is gathered, the case needs to get to the finish line, which requires finding the best witnesses to establish foundation for the evidence that has been gathered. Expert witnesses, fact witnesses, and corporate witnesses all come with different concerns and different preparation needs prior to providing

testimony. The available evidence needs to be divided up into categories and assigned to the appropriate witnesses. A fact witness may merely provide first-hand testimony and be able to establish foundation for photographic evidence or site maps relating to alleged exposure locations, whereas an expert witness may be necessary to discuss the mineralogy of a mine determined to be a concern for exposure, a Superfund site located in Plaintiff's neighborhood, or potential exposure doses from alleged or discovered occupational or home activities.

Circumstantial evidence cases are not going away, and in fact, are likely to continue to be on the increase in asbestos litigation. These cases must be taken seriously and defended zealously. The days of clear exposures with a high volume of viable shares from which plaintiffs may gather settlement dollars are limited. Defendants that existed on the periphery for years are now coming to the forefront of asbestos litigation. Witnesses who may never have seen the light of day in deposition years ago are now, in some cases, all that plaintiffs have available with which to build their case. Do not make the mistake of assuming that weak witness testimony today will result in the dismissal of yesterday.