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The Legislature Should Not Pass CSSB 1123

TEXAS'S CAUSATION STANDARD IN MESOTHELIOMA CASES IS BASED ON SOUND SCIENCE

- The causation standard applicable in mesothelioma cases is set out in the unanimous Texas Supreme Court decision in *Borg-Warner Corp. v. Flores* (June 2007) and the First Court of Appeals decision in *Georgia-Pacific Corp. v. Stephens* (August 2007).
- *Borg-Warner* appropriately recognizes the current state of scientific knowledge about asbestos-related diseases.
 - *Borg-Warner* recognizes that asbestos-related diseases are dose-responsive diseases, which means that the more someone is exposed to asbestos, the greater the risk the person will get an asbestos-related disease.
 - This is true for all asbestos-related diseases, including mesothelioma.
 - *Borg-Warner* therefore affirms that expert evidence showing approximate dose is necessary to prove that it is more likely than not that the disease was caused by the asbestos fibers from a particular defendant's product or conduct.
- *Borg-Warner* adopts the *Lohrmann* causation standard in an asbestosis lawsuit. The *Lohrmann* standard was established by the federal Fourth Circuit Court of Appeals in 1986, applying the law of the State of Maryland. The Texas Supreme Court, however, adapts that standard to reflect advancements in scientific knowledge that have occurred in the two decades since *Lohrmann* was decided.
- *Georgia-Pacific* correctly applies *Borg-Warner* to mesothelioma cases.

THE LOHRMANN STANDARD IS TWO DECADES OLD AND SUBJECT TO INCONSISTENT APPLICATION

- The standard from the *Lohrmann* decision, standing alone, is not sufficient for modern litigation.
 - Cases interpreting *Lohrmann* hold that *Lohrmann* requires evidence of the frequency of exposure, the regularity of exposure, and the proximity of the plaintiff to the asbestos.
 - How frequent is frequent? How regular is regular? How proximate is proximate? *Lohrmann* does not answer these questions.

- Because *Lohrmann* does not require any quantification for its three-part standard, it is subject to inconsistent application.
- Further, because *Lohrmann* does not require any quantification for its three-part standard, it is difficult for defendants who should not have been sued in the first place to extricate themselves from litigation without paying a coerced settlement or incurring defense costs all the way through trial.
- For years, asbestos litigation has been drifting away from the truly culpable defendants (almost all of which produced and distributed products producing high levels of asbestos dust and have filed bankruptcy) and toward less culpable defendants whose products contained low quantities of encased asbestos.
 - To continue to reach and extract money from more and more marginal defendants, the mesothelioma plaintiff attorneys need a low causation standard, like the one found in CSSB 1123.

MESOTHELIOMA PLAINTIFFS RECEIVE FAIR COMPENSATION

- The debate over whether to create an exception to the causation law applicable to all other litigation for mesothelioma cases has failed to acknowledge that mesothelioma victims receive fair compensation under current law.
 - Mesothelioma is a terrible disease and those inflicted with the disease suffer greatly. Monetary compensation cannot remove the pain and emotional trauma inflicted on the claimant and his or her family. Litigation, however, is intended to seek compensation for the ill person and his or her family from parties who are shown to be responsible for causing the injury.
 - The proponents of CSSB 1123 have failed to bring forward evidence that mesothelioma victims are under-compensated under current law.
 - Most mesothelioma claimants receive \$2 to \$5 million through litigation and payments from litigation trusts set up by bankrupt companies.
 - The payments from the litigation bankruptcy trusts are semi-automatic, requiring relatively little time or work by the claimants' lawyers.
 - Mesothelioma claimants are significantly compensated, especially when compared to the litigation recoveries typically obtained by people who have been injured in other ways and who also may have suffered greatly.
 - Typically, mesothelioma claimants receive significant settlements without the time delay and expense of going to trial.

CSSB 1123 FLIPS THE BURDEN OF PROVIDING RELIABLE SCIENTIFIC EVIDENCE

- All credible experts agree that mesothelioma is a dose-responsive disease and that fiber types vary significantly in potency.
- Proof that mesothelioma is a dose-responsive disease is provided by the fact that asbestos fibers are present in the ambient air, yet most of us do not get mesothelioma because the dose we receive through breathing the ambient air is not sufficient to cause mesothelioma.
- Scientific studies prove that some forms of asbestos are more potent than others and, consequently, more likely to cause mesothelioma. In other words, a lower dose of some asbestos fibers is more likely to cause mesothelioma than a higher dose of other kinds of asbestos fibers.
- Even though mesothelioma is a dose-responsive disease, CSSB 1123 provides that a plaintiff need not present *any* evidence of the dose (approximate or otherwise) of asbestos attributable to a specific defendant or any other person.
 - » This provision negates the requirement that the plaintiff carry the burden of establishing that his case is scientifically supported. Instead, the provision shifts to the defendants the burden of showing that the plaintiff's case lacks scientific validity.
 - » This shifting of the burden contradicts established case law in Texas barring junk science (known as the *Havner* jurisprudence). In all other toxic tort cases, a plaintiff *must* support his case with reliable science.

CSSB 1123 DOES NOT ADOPT THE LOHRMANN STANDARD

- The causation standard from the *Lohrmann* decision is this:
 - “To establish proximate causation ..., the plaintiff must introduce evidence which allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.”
 - “The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause”
 - “To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.”
 - “We have spoken to the question of the sufficiency of circumstantial evidence required so support a finding of causal connection and have concluded that there must be evidence of a reasonable and rational nature upon which a jury can make the necessary inference that there is a causal connection between a defendant’s action and a plaintiff’s injury.”

- CSSB 1123, on the other hand, provides:
 - “A defendant’s product or conduct was a substantial factor in causing the exposed claimant’s injury if the claimant presents qualitative proof that the asbestos exposure attributed to the defendant was substantial, and not merely de minimis, when considering: (1) the frequency of the exposure; (2) the regularity of the exposure; and (3) the proximity of the claimant to the source of the asbestos fibers.”
- What is “qualitative proof”?
 - The *Lohrmann* decision never mentions “qualitative proof.”
 - No Texas appellate court has used the phrase “qualitative proof.”
 - The United States Supreme Court has never used the phrase “qualitative proof.”
 - No federal appellate court has used the phrase “qualitative proof.”
- The *Lohrmann* decision mentions “de minimis,” but not as part of its actual holding, not as an attempt to water-down its holding, and not to minimize the word “substantial.” And *Lohrmann* does not modify “de minimis” with “merely.”
 - CSSB 1123’s use of the phrase “merely de minimis” as a descriptor of “substantial” is obviously intended to minimize the word “substantial.”
 - By describing substantial as “not merely de minimis,” CSSB 1123 will replace the “substantial factor” standard with a “not merely de minimis” standard.
- *Lohrmann* requires evidence where CSSB 1123 only suggests *consideration* of evidence:
 - *Lohrmann* requires evidence of exposure “to a specific product on a regular basis.” In contrast, CSSB 1123 merely provides that “the regularity of the exposure” should be *considered*.
 - *Lohrmann* requires evidence of exposure “to a specific product ... over some extended period of time.” CSSB 1123, on the other hand, provides that “the frequency of the exposure” should be *considered*.
 - *Lohrmann* requires evidence of exposure “to a specific product ... in proximity to where the plaintiff actually worked.” CSSB 1123 provides that “the proximity of the claimant to the source of the asbestos fibers” should be *considered*.