

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

1 BISHOP, BARRY, HOWE, HANEY & RYDER
2 NELSON C. BARRY
3 JAMES D. TAYLOR
4 465 California Street, 11th Floor
5 San Francisco, California 94104
6 Telephone: (415) 421-8550

7
8 Attorneys for Defendant
9 COMMERCIAL UNION INSURANCE
10 COMPANIES
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ENDORSED
FILED
San Francisco County Superior Court

OCT 20 1987

DONALD W. DICKINSON, Clerk
BY: JENNIFER W. MACK
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

In re

ASBESTOS INSURANCE COVERAGE
CASES,

Included Actions:

Armstrong vs. Aetna, et al.

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 1072

COMMERCIAL UNION INSURANCE COMPANIES'
POST TRIAL BRIEF ON THE
EXPECTED OR INTENDED DEFENSE TO COVERAGE



PLAINTIFF'S
EXHIBIT

70180.00

PLAINTIFF'S
EXHIBIT

WV-012660

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

TABLE OF CONTENTS

Page

1	I	<u>INTRODUCTION</u>
2	II	<u>STANDARDS ON REVIEW OF THE EVIDENCE</u>
7	III	<u>ARMSTRONG PRODUCED HIGHLY DANGEROUS ASBESTOS-CONTAINING PRODUCTS AS EARLY AS THE 1940'S WHICH GAVE RISE TO INJURY AND DEATH AMONG ITS EMPLOYEES AND THIRD PARTY USERS</u>
10	IV	<u>ARMSTRONG WAS ACUTELY AWARE OF THE DEADLY PROPENSITIES OF ASBESTOS AS EARLY AS 1952, AND INCREASINGLY THEREAFTER, BUT TOOK ABSOLUTELY NO SUBSTANTIVE STEPS TO PROTECT ITS OWN WORKERS OR THIRD PARTIES, OR TO IN ANY WAY CURTAIL ITS OWN USE OF ASBESTOS PRODUCTS</u>
19	V	<u>CONCLUSION: ARMSTRONG INTENDED TO CAUSE INJURY WHEN THEY PURPOSEFULLY EMPLOYED MEN TO WORK WITH PRODUCTS THEY KNEW WOULD RESULT IN ASBESTOS-RELATED DISEASE AND DEATH</u>

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1981
TELEPHONE (415) 421-8550

1 BISHOP, BARRY, HOWE, HANEY & RYDER
2 NELSON C. BARRY
3 JAMES D. TAYLOR
4 465 California Street, 11th Floor
5 San Francisco, California 94104
6 Telephone: (415) 421-8550

7
8
9 Attorneys for Defendant
10 COMMERCIAL UNION INSURANCE
11 COMPANIES

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

12 In re	)	JUDICIAL COUNCIL COORDINATION
13 ASBESTOS INSURANCE COVERAGE	)	PROCEEDING NO. 1072
14 CASES,	)	
15 Included Actions:	)	COMMERCIAL UNION INSURANCE
16 <u>Armstrong vs. Aetna, et al.</u>	)	COMPANIES' POST TRIAL BRIEF
	)	ON THE EXPECTED OR INTENDED
	)	DEFENSE TO COVERAGE

17
18
19 I

20 INTRODUCTION

21 During the weeks of September 11, 1987, through September
22 23, 1987, the court heard nearly six full days of testimony and
23 took under submission scores of documents on the issue of whether
24 Armstrong World Industries, Inc. (hereinafter referred to as
25 "Armstrong", which is also intended to include the predecessor
26 entity "Armstrong Cork Company") "expected or intended" injury

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

1 arising out of its manufacture, sale or distribution of asbestos
2 products. To the extent that such injury was intended, then
3 coverage may be excluded under Commercial Union's excess layer
4 policy for the years 1966-1969.

5
6 The evidence having been submitted and ruled upon, it is
7 now for the court to decide, based on the standards set forth in
8 its Phase III Tentative Decision, whether Armstrong's insurers in
9 this instance, Travelers Insurance Company (hereinafter referred
10 to as "Travelers") and/or Commercial Union Insurance Companies
11 (hereinafter referred to as "Commercial Union") have demonstrated
12 to the trier of fact, by a preponderance of the evidence, that
13 Armstrong intended to cause injury through its manufacture and use
14 of asbestos containing products. The burden of proof is upon
15 Travelers and Commercial Union pursuant to the court's Tentative
16 Decision which held that the "expected or intended" clause, while
17 within the grant of coverage, acts as an exclusion upon the
18 policy. (Ten. Dec. 72:20-73:1)

19 II

20 STANDARDS ON REVIEW OF THE EVIDENCE

21 To assist the court in its determination of whether
22 Travelers and/or Commercial Union have met their evidentiary
23 burden we will briefly review the standards set forth in the
24 Tentative Decision, phrased merely "in the abstract to determine
25 what level of likelihood, knowledge or intent is necessary on the
26 part of the insured in order for coverage to be precluded by the

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8350

1 clause." (Ten. Dec. 72:1-3) These standards are to be applied to
2 the fact - specific application of Armstrong's conduct. (Ten.
3 Dec. 72:4-5)

4 The general rule is that the clause applies where the
5 insured acted either willfully, intentionally, or maliciously for
6 the purpose of causing injury. (Ten. Dec. 74:5-8.) The intent
7 behind the act must involve an element of wrongfulness or
8 misconduct. (Ten. Dec. 74:9-11.)

9 Nevertheless, several qualifications are extremely
10 important in interpreting the evidence as applied to the general
11 rule. First, the "injury" intended may be of an entirely
12 different nature or magnitude from that which was actually
13 contemplated by Armstrong. (Ten. Dec. 74:13-16.) Thus, all that
14 is required is a showing that some of the claimed "injury" was
15 willed or intended. It is immaterial that the number or dimension
16 of asbestos related injuries swelled beyond previously anticipated
17 proportions.

18 The clear meaning of this qualifying rule is that
19 Armstrong cannot hide behind the fact that they may have only
20 intended, albeit wrongfully, a few injuries to occur from their
21 asbestos products, but were unexpectedly overwhelmed by the number
22 of claims which actually resulted. Indeed, Commercial Union
23 concedes that it would be ludicrous to argue that Armstrong
24 anticipated the ground swell of third party claims out of which
25 this and other litigation has resulted. But this is not the
26 question, the issue is whether they initially intended such

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8350

1 injuries, however relatively small in number.

2 Commercial Union's fundamental argument that the expansive
3 world wide operations of a large corporate entity such as
4 Armstrong World Industries, including its predecessors, successors,
5 divisions and subsidiaries, when coupled with its actual knowledge
6 of a legally sufficient number of horrendous injuries, placed
7 Armstrong in the position, as early as the 1950's, of willfully
8 and maliciously producing a product which they intended to cause
9 an acceptable number of asbestos-related injuries. Basic to our
10 argument is that the "acceptability" of even one death, disease
11 and diffusion of health would be unconceded by any victim of an
12 asbestos-related disease. Therefore, it would take knowledge of
13 only a few asbestos injuries to infer that its continued,
14 unmitigated use was wrongful.

15 Finally, the most important qualification upon the general
16 rule concerning "expected or intended" injury is the one which the
17 court itself directly related to evidentiary matters. Found on p.
18 24 of the Tentative Decision, the court held:

19 "An insurer is not required to produce
20 express testimony or documentation as to
21 the insurer's subjective wrongful intent to
22 cause injury, but may show that reason
23 mandates by the very nature of the act
24 undertaken, coupled with the knowledge
25 actually in possession of the insured, harm
26 must have been intended." (Ten. Dec.
74:24-77:1.) (Emphasis added.)

24 This is an extremely important instruction for the trier
25 of fact, a role in which this court sits, since if it were not for
26 the ability of the fact finder to review the circumstances

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-9950

1 surrounding Armstrong's internal conduct, the sufficiency of
2 evidence required to prove any "expected or intended" injury would
3 be tantamount to proof of a conspiracy at the top levels of
4 Armstrong management. Although we believe that a conspiracy "of
5 sorts" occurred at Armstrong, it must be viewed in the context of
6 corporate management, organization and decision making
7 structures. Commercial Union does not argue that any particular
8 level of Armstrong management periodically gathered together for
9 the purpose of devising products for distribution behind which was
10 the sole intent of causing injury. This would be madness far
11 beyond mere wrongful conduct.

12 What Commercial Union does argue is that the "very nature
13 of the act undertaken", producing products containing life
14 threatening asbestos fibers, coupled with the "knowledge actually
15 in possession" that there was a direct causal relationship between
16 the diseased and dying Armstrong employees and their use of
17 asbestos products manufactured by the company, gives rise to a
18 presumption that, considering these circumstances, at some point
19 in time the corporate decision making process at Armstrong made an
20 intentional, willful and malicious decision to forge ahead with
21 dangerous asbestos use despite the carnage that would undoubtedly
22 continue.

23 Commercial Union cannot understate the importance of this
24 concept of "corporate intent". If one may analogize a corporate
25 structure as merely an extended fractal of one individual human
26 being's own decision making process, it is simple to conceptualize

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1681
TELEPHONE (415) 421-8550

1 how a corporation may have a malicious intent to injure, which
2 arises out of its dogged persistence in pursuing a course of
3 conduct knowing full well its actions will kill and maim innocent
4 people. After a reasonable time, any person who fails to correct
5 a known hazard for which they are responsible, crosses over the
6 line of innocence, into the zone of malicious intent. This
7 presumption arises here merely by the fact that Armstrong made a
8 conscious decision not to discontinue its harmful asbestos
9 exposure.

10 By analogy, if a potter uses lead in the clay from which
11 he produces dishes or other food bearing utensils, and he becomes
12 reasonably well informed and himself believes that people are
13 becoming ill after eating off of his lead ceramics, yet despite
14 this knowledge he continues to produce, sell and distribute his
15 lead filled ceramics over months or years, it is obvious that he
16 would have at some point formed a malicious intent to injure his
17 customers. There mere fact that he gains profit from the use of
18 these dangerous ceramics underscores the maliciousness of his
19 activity. This is especially true when he utterly fails to warn
20 his customers of the possible dangers and/or fails to seek any
21 less dangerous alternatives to the use of lead in his clay
22 compound.

23 No less is true of Armstrong and its related subsidiaries
24 or divisions. Logic mandates the conclusion that if Armstrong
25 gained sufficient knowledge to know that it had a commercial
26 product which was causing injury and death, yet it continued to

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8850

1 use this product notwithstanding such knowledge and in the absence
2 of any effort to make the product safer or to warn of its
3 dangerous propensities, it had a choice of whether to withdraw or
4 to continue injuring people.

5 In this regard, motive is completely irrelevant. Everyone
6 would concede that Armstrong's motive was not to injure people.
7 Their motive was profit.

8 Therefore, the court must draw a line of demarcation
9 between ignorance and intent. The formulation of Armstrong's
10 malicious, willful intent took place on the day that they must
11 have conceptually said to themselves, "We know we have a dangerous
12 product, we know that people are dying, but we must make a
13 profit. Therefore, we will proceed making this dangerous product
14 with the full knowledge and intent that, yes, some will be
15 injured, some will even die, but we believe that this is an
16 acceptable consequence of preserving the vitality of our balance
17 sheet."

18 With these precepts in mind, we turn to the evidence.

19 III

20 ARMSTRONG PRODUCED HIGHLY DANGEROUS ASBESTOS
21 CONTAINING PRODUCTS AS EARLY AS THE 1940'S
22 WHICH GAVE RISE TO INJURY AND DEATH AMONG ITS
23 EMPLOYEES AND THIRD PARTY USERS

24 There are two fundamental questions which must be answered
25 in order for the court to apply the "expected or intended"
26 exclusion: first, what did Armstrong do and when did they do it?;
second, what did Armstrong know and when did they know it?

The question of what Armstrong did relates to their

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8350

1 production and/or use of "friable" asbestos containing products.
2 The relevant dates of specific products and their use have not
3 been the subject of great controversy during the trial.

4 There appear to have been a number of asbestos products
5 and uses that Armstrong engaged in from the 1940's through the
6 early 1970's. These include insulation operations generally, and
7 products known as "LT Cork Covering", "Limpet" and a later product
8 known as "Armaspray".

9 Mr. Wallace Bruce Hofferth, who joined Armstrong's
10 insurance department in 1954 and stayed in various capacities
11 until retiring in 1987, testified at trial that Armstrong and
12 Armstrong Contracting engaged in the installation of asbestos
13 containing insulation from the early 1940's up to and including
14 the sale of Armstrong Contracting in 1969. This was a very large
15 portion of Armstrong's contracting division which later became a
16 separate subsidiary of Armstrong in 1957, known as Armstrong
17 Contracting and Supply, Inc. (hereinafter referred to as
18 "Armstrong Contracting"), which was, according to Mr. Hofferth,
19 the largest installer of insulation in the entire United States.
20 (Tr. Tran. 30688:20-24.)

21 The insulation portion of Armstrong's business consisted
22 of a variety of forms of asbestos-containing insulation including
23 "blocks" or "sheets" of asbestos covering, spray-on asbestos
24 products (e.g., "Limpet" and "Armaspray") and fitted or molded
25 pipe coverings (e.g., "LT Cork Covering"). Much of the work was
26 done on naval ships in the early 1940's but branched out later to

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-9550

1 include insulation in commercial buildings and residential
2 construction.

3 William B. King, an employee as branch manager of
4 Armstrong Contracting since 1958, and whom in 1966 became
5 Armstrong's marketing manager for industrial insulation products,
6 testified that Armstrong Contracting began using spray-on asbestos
7 containing insulation products at least as early as the late
8 1950's when Armstrong Contracting became a subsidiary corporation
9 of Armstrong. (Tr. Tran. 31008:16-31009:18.) At that time, a
10 product known as "Limpet" was used, primarily on outdoor
11 insulation projects. Ibid.

12 In 1966 the product known as "Armaspray" was placed on the
13 market which was also a spray-on type asbestos product. The
14 product was removed from sales in 1969 and was considered a
15 "flop". (Tr. Trans. 31012:24-26.)

16 Mr. King testified that from 1966 through 1969 Armstrong
17 also produced a variety of other products containing asbestos,
18 including floor tile, gaskets and sheet board with 40% asbestos
19 felt. Armstrong Contracting also used other manufacturers'
20 insulation products with asbestos from 1958 through its sale in
21 1969. (Tr. Trans. 31000:2-31002:3,)

22 According to Lawrence J. Keating, an attorney employed by
23 Armstrong since 1978 to manage asbestos litigation, both LT Cork
24 and Armaspray have been identified in asbestos-related product
25 injury claims. (Tr. Trans. 31239:22-31240:20.) Mr. Keating
26 stated that over 60,000 asbestos claims have been filed against

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8250

1 Armstrong as of September 17, 1987, the date of his testimony.
2 (Tr. Trans. 31239:9-12.)

3 In summary, Armstrong had a consistent base of operations
4 and sales in the asbestos industry from the early 1940's until
5 approximately 1969 when Armstrong Contracting was sold and became
6 AC&S, Inc., a corporation no longer associated with Armstrong.

7 The introduction of Armaspray in 1967, probably the most
8 dangerous of all the asbestos products Armstrong ever produced or
9 used, underscored the fact that they had a clear profit motive
10 behind the sale and use of asbestos products. Moreover,
11 considering the fact that Armstrong sold Armstrong Contracting in
12 1969, there is at least an inference that Armstrong would have
13 continued on an aggressive course of product development, with
14 possibly the introduction of new and even more wide ranging
15 asbestos uses. Certainly Armstrong cannot argue that there was
16 any tapering off, winding down or even a leveling of the use of
17 "friable" asbestos products up to the point that it sold its
18 contracting subsidiary to AC&S.

19 The principal question thus becomes whether Armstrong
20 knew, and to what extent, of the dangerous propensities of
21 asbestos and what they did with that knowledge.

22 IV

23 ARMSTRONG WAS ACUTELY AWARE OF THE DEADLY
24 PROPENSITIES OF ASBESTOS AS EARLY AS 1952,
25 AND INCREASINGLY THEREAFTER, BUT TOOK ABSOLUTELY
26 NO SUBSTANTIVE STEPS TO PROTECT ITS OWN WORKERS
OR THIRD PARTIES, OR TO IN ANY WAY CURTAIL ITS OWN
USE OF ASBESTOS PRODUCTS.

Armstrong first became aware of the dangers of asbestos in

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

1 1952 with the case of Mr. Richard Rothwell. On September 17,
2 1952, Mr. E. M. Wegman, Manager for Armstrong's Insurance and Real
3 Estate Department sent a letter to its insurance broker, Alexander
4 & Alexander, Inc., regarding Mr. Rothwell's "occupational disease
5 supposedly contracted while working for our company" (Trail Ex.
6 2024). This was preceded by a letter from Thomas N. Nunan,
7 District Manager for Armstrong's building materials division,
8 dated September 12, 1952, sent to the Travelers Insurance Company
9 enclosing a report by the Commonwealth of Massachusetts Department
10 of Labor and Industries, Divisions of Occupational Hygiene,
11 concerning a study made at an Armstrong insulation site on the
12 exposure of workers to asbestos dust during insulation operations.
13 (Trial. Ex. 2409).

14 A summary of the state report contained within Trial
15 Exhibit 2409 indicates that it was inconclusive because "no mixing
16 operation could be found in actual progress, thus prohibiting the
17 taking of air samples." Nevertheless, the report is relevant for
18 the purpose of demonstrating that Armstrong was on notice that at
19 least Mr. Rothwell, who was seriously ill, claimed to have had an
20 injury related to asbestos inhalation at an Armstrong worksite.
21 The cover letter from Mr. Nunan is also curious in that it notes
22 the report "should be helpful in disposing of the above (Rothwell)
23 case."

24 The Rothwell case obviously posed difficult problems for
25 Armstrong. It was apparently the first time that they had ever
26 been faced with documented evidence of an asbestos-related claim

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1861
TELEPHONE (415) 421-8550

1 of injury by one of their own employees. Indeed, the handling of
2 the claim itself was carried out under extremely mysterious
3 circumstances. Although in Trial Exhibit 2024 Mr. Wegman asks:
4 "Since this is the first case of this type which we have had, we
5 are anxious to follow it closely and should appreciate your
6 securing for us periodical reports on its status, ". Mr. Hofferth
7 testified that very scant follow-up was actually done. (Tr.
8 Trans. 30869:10-23.

9 The only follow-up reflected in the file included two
10 documents. One is found in Trial Exhibit 2410 where Alexander &
11 Alexander, Inc., wrote to Mr. Wegman on March 5, 1953, advising
12 him that Travelers had declined Rothwell's worker's compensation
13 claim on the basis that "we do not feel that the deceased's
14 employment with our assured aggrieved his pre-existing carcinoma
15 of the left lung." The second, after Mr. Rothwell's death,
16 included an interoffice communication between Mr. Nunan and Mr.
17 Wegman dated May 6, 1954 (Trial Ex. 2384), which refers to a
18 photostat copy of the decision of the Member of the Industrial
19 Accident Board investigating Rothwell's worker's compensation
20 claim. (Trial Ex. 2384, transcribed at Trial Ex. 2384A.)

21 Although the report of the Industrial Accident Board
22 certainly caught the eye of Mr. Nunan, who stated in his May 6th
23 memo: "This is a very interesting document on the subject of
24 asbestosis", its contents, and indeed all memory of Mr. Rothwell's
25 case seemed to mysteriously disappear for over twenty years until
26 found in 1978 by Mr. Hofferth in preparation for this litigation.

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

(Tr. Trans. at 30744:10-14.)

The 1954 Workman's Compensation decision in the Rothwell case stated, in part:

"There is evidence upon which I find that the decedent's work exposed him to the inhalation of asbestos dust particles. I find he did inhale these particles.

It is also a fair and reasonable inference - and I so infer - that asbestosis is a disease contracted only by people who are exposed to the inhalation of asbestos fibers in their work. It is common knowledge that persons who are not so exposed do not suffer from this progressive disease for which there is no known cure.

There is additional evidence that the employee died on December 3, 1952, and the further evidence upon which I find that death was due to bronchogenic carcinoma, secondary to asbestosis." (pp.52:53 of Tr. Ex. 2384A.)

The report also draws several additional causative correlations between asbestos exposure and Rothwell's injuries including:

"...Dr. Hardy testified - and I so find - the work the decedent performed as a pipe cutter and heat and frost insulator and the disease that resulted in his death 'fall in together.'

I accept and adopt the opinion of Dr. James Stewart Rooney, who testified that 'Sometime during 1951 (when he was working for A. W. Bancroft Company) this man developed a malignancy of his lung as secondary to his asbestosis, the asbestosis was a factor in causing the malignancy to start.

I find, therefore, that the asbestos dust which the employee inhaled at his work resulted in asbestosis. This, I find constitutes a personal injury arising out of and in the course of his employment. I find further that the asbestosis caused a lung malignancy which resulted in his death on December 3, 1952." (pp. 53-54 of Tr. Ex. 2384A.)

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8350

1 Nevertheless, despite these startling conclusions, the
2 Rothwell case apparently never again surfaced in any occupational
3 disease lists gathered by Mr. Hofferth. See, for example, Trial
4 Exhibits 2391 and 2015. What other cases may also have been
5 omitted from the records of Mr. Hofferth may never be known.

6 In any event, by January 17, 1962, Mr. Hofferth reported
7 no less than thirty-six additional occupational disease cases
8 filed since 1953. (Trial Ex. 2391.) In a letter to Mr. John H.
9 Keller of Armstrong Contracting, dated January 17, 1962, Mr.
10 Hofferth stated that "we have a rather imposing list of cases
11 which have been shown below." Indeed, Mr. Hofferth testified
12 during the trial that he used the term "imposing" to "suddenly
13 call Armstrong Contracting's attention to this" (Tr. Trans.
14 30769:1-8). The claims were coming in so fast in 1962 that the
15 letter was amended with handwritten additions to the named
16 injured. (Trial Trans. 30769:9-19.)

17 Subsequent documents from Armstrong personnel reveal an
18 increasing awareness of the asbestos problem in the early 1960's
19 [Trial Ex. 2393, 2392 (2392A).]

20 By March 26, 1963, barely a year later, Mr. Hofferth
21 composed and sent to Fred L. Gardner at Armstrong Contracting, a
22 new list entitled "Subject: Asbestosis" (Trial Ex. 2015). Again,
23 Hofferth refers to his own concern over the growing number of
24 asbestosis cases. He states on Page 2 of the letter:

25 "This is a rather imposing list of cases and
26 will serve to indicate the importance of this
type of claim in the over-all workman's
compensation insurance cost picture. Claims of

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-9550

1 this nature are on the rise ... There isn't much
2 you can do to defend successfully a valid
3 occupational disease claim. Obviously
4 prevention is the key." (Emphasis added.)

5 By 1967 asbestosis claims had more than doubled with
6 eighty-two reported claims on record. (Trial Ex. 2396, 2397.)
7 The alarming increase in cases was reflected in the corresponding
8 concern expressed by personnel at Armstrong. On February 6, 1967,
9 A. L. Stokely sent a memo to J. E. Zeller, wherein Mr. Stokely
10 states, "I really wonder if we have been sufficiently realistic in
11 our thinking concerning asbestosis. Originally, we half-way
12 assumed that only those with a high intake of alcohol contacted
13 [sic] the disease, and that most of them were quite happy to live
14 on compensation without further effort." (Tr. Ex. 2399.)

15 Stokely expounds upon this reasoning in later paragraphs
16 by way of example: "Nonetheless, six of our men in Richmond have
17 enough asbestosis to require considerable additional investigation
18 by a pretty-well-thought of doctor from the University of Virginia
19 Medical College. They are not men of high alcoholic intake or
20 frankly of any great desire not to put in a good day's work."
21 (Tr. Ex. 2399A.) Stokely later notes, in a rare note of
22 compassion within this letter: "... I think we owe our workmen
23 every effort to investigate and to see if we can avoid this
24 disease, which is bound to be somewhere between partly disabling
25 and fatal." (Trial Ex. 2399, 2399A.)

26 Nevertheless, Armstrong's management chose to allow the
injuries to mount. On April 10, 1967, Hofferth wrote a note to
file regarding an asbestos claims meeting between himself,

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

1 Gardner, Zeller and Dick Hamilton. (Tr. Ex. 2383.) Dick Hamilton
2 was a loss prevention engineer in Reading, Pennsylvania, employed
3 by Aetna Casualty & Surety Company, a worker's compensation
4 carrier for Armstrong. (Tr. Trans. at 30726:16-23.)

5 At the meeting, it was mentioned by Dick Hamilton that
6 Armstrong "needed a continuing educational program to keep this
7 problem before those who are in a position to do something about
8 it." Mr. Hofferth testified at trial that "those" who were in a
9 position to "do something about this" referred to management
10 within the Armstrong Contracting organization, principally Mr.
11 Zeller in his position as manager of the district and branch
12 offices of Armstrong Contracting. (Tr. Trans. 30728:1-17.)

13 On August 16, 1967, Mr. Hofferth, in an apparent quandary
14 over the entire asbestos problem at Armstrong, wrote to Fred L.
15 Gardner at Armstrong Contracting. (Tr. Ex. 2382.) The letter
16 notes that "the problem of asbestos claims and what to do to
17 prevent them has been kicked around since 1961 ... all of us have
18 given some attention to the problem, but none of us have seemingly
19 been willing to meet it head on." The letter further details how
20 "the ball was passed" from one person, department and office to
21 another, without even one positive, concrete step to halt the
22 injuries from asbestos, which had reached to eighty-six known
23 claims as of the date of the letter.

24 As the number of worker's compensation claims continued to
25 rise, Armstrong noted, but did nothing about the ever increasing
26 problem of asbestos dust. Although dust had always been a problem

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
463 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8330

1 in the ship yard operations and other dry installations, the
2 spray-on asbestos products such as Limpet and Armaspray had
3 particularized problems with dust because of the very nature of
4 their air-borne application. (See Tr. Ex. 2413 regarding Limpet.)

5 This was especially true with regard to Armaspray, for
6 which Armstrong received severe complaints at least as far back as
7 June of 1967. (Tr. Ex. 2421A.) Mr. King was aware of numerous
8 dust complaints which contributed to customer dissatisfaction with
9 the product. The Dupont Company, whom Armstrong courted as a
10 possible user of Armaspray, adopted rules in its insulation
11 fabrication shop which precluded a product as dusty as Armaspray.
12 (Trial Trans. at 31077:9-31079:9.) (Tr. Ex. 2419.)

13 Documents produced at trial portray a continuing problem
14 with dust, especially associated with Armaspray. Numerous tests
15 of Armaspray, including different procedural formulas in the
16 mixing and use of the substance, as well as nozzle changes, failed
17 to produce a satisfactory application of the product; undoubtedly
18 a substantial factor in its final demise. (See Tr. Ex. 2420,
19 2421A, 2435, 2423, 2424, 2418A, 2427 and 2429A.)

20 Moreover, although in his testimony Mr. King denied that
21 there were any dust problems with Limpet, he stated that
22 respirators were used because of conditions created by what he
23 characterized as "nuisance dust" (Tr. Trans. 31152:27-31153:10,
24 and Tr. Trans. 31157:13-27.)

25 Amid the dust and increase in asbestos-related worker's
26 compensation claims, Armstrong did precious little in the way of

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8890

1 preventative, and/or corrective safety measures.

2 Although there was a lot of talk about respirators, Mr.
3 Hofferth testified that many of the men installing asbestos
4 products were temporary employees hired out of union halls. Their
5 tenure with Armstrong lasted anywhere from one week to one year.
6 The effect of this, according to Hofferth, was that the men
7 wouldn't wear respirators.

8 In fact, neither Hofferth nor King had any firsthand
9 knowledge of any employee of Armstrong or Armstrong Contracting
10 using respirators on an asbestos spraying job. (Tr. Tran.
11 30823:8-30824:7.) Even Armstrong's own promotional material
12 indicates photographs illustrating a person identified as Mr.
13 Yeager, mixing Armaspray over a bin with no respirator on. (Tr.
14 Ex. 2438.)

15 Moreover, Hofferth testified that he was wasn't aware one
16 way or another whether Armstrong Contracting ever put a warning
17 label on any asbestos product advising workers, or third parties,
18 that asbestos might be hazardous to one's health. (Tr. Trans.
19 30823:2-7.)

20 Armstrong briefly did explore one safety measure, that of
21 pre-employment X-rays, which was to inure entirely to their own
22 benefit. Even this slight preventative measure, however, was
23 scrapped by Armstrong because it was considered too costly. (Tr.
24 Trans. 30807:6-25.) (Tr. Ex. 3403A, 3400 and 2382.)

25 Therefore, in all of the years of Armstrong and Armstrong
26 Contracting's involvement in asbestos products, whether sprayed or

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8350

1 not sprayed, not one safety measure was undertaken to prevent
2 asbestosis nor were any warnings given to employees of Armstrong
3 concerning the dangers of asbestos. The was true even in light of
4 the fact that asbestos claims began back in 1952 with the Rothwell
5 claim and continued to multiply by the scores over the years.

6 V

7 CONCLUSION: ARMSTRONG INTENDED TO CAUSE INJURY
8 WHEN THEY PURPOSEFULLY EMPLOYED MEN TO WORK WITH
9 PRODUCTS THEY KNEW WOULD RESULT IN ASBESTOS-RELATED
10 DISEASE AND DEATH.

11 We began this brief by outlining two fundamental issues
12 necessary to a determination of the application of the "expected
13 or intended" "exclusion" within Commercial Union's policy.
14 Reduced to their simplest form, those questions were: (1) what
15 did they know; and, (2) what did they do.

16 What they did was manufacture, distribute and install
17 products containing asbestos, primarily in the field of
18 insulation. These type of products can easily be associated with
19 the most dangerous form of asbestos: the free flowing or friable
20 asbestos materials. From the early 1940's through the early
21 1970's Armstrong continued a course of conduct which was
22 unrelenting in its quest for profit over the health concerns of
23 its employees or third parties.

24 While it is not a crime for any corporation, in this free
25 market society, to be competitive and seek a profit, it is
26 altogether malicious and utterly reprehensible to willfully pursue
that profit over the demonstrably grave health hazards associated
with a particular product.

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

1 We have discussed here in some detail the history and
2 application of the product "Armaspray". Although all forms of
3 asbestos products are inherently dangerous to some degree, those
4 that are in the form which would allow free floating fibers to be
5 inhaled are logically the most hazardous. This is nowhere more
6 true than in the insulation business where workers constantly come
7 into direct contact with asbestos fibers.

8 Armaspray's introduction therefore demonstrated the
9 willfulness with which Armstrong pursued its most dangerous line
10 of products, spray-on asbestos. Unlike its predecessor, Limpet,
11 Armaspray was to be used primarily indoors, increasing its
12 associated risks. Therefore, rather than attempting to steer a
13 course towards safer products, with less associated health
14 hazards, Armstrong took a tact which charted the most dangerous
15 and tragic health scenario. This was done nearly simultaneous to
16 Hofferth's letter of August 16, 1967 (Tr. Ex. 2382), outlining a
17 serious lack of internal concern and effort to address rising
18 asbestosis claims.

19 On the final day of trial, September 23, 1987, Commercial
20 Union submitted testimony from Armstrong employees Wegman, Nichol
21 and Gardner. These excerpted portions of previous testimony are
22 brief. Nevertheless, the points conceded by Armstrong therein are
23 important ones.

24 For instance, Edward M. Wegman became insurance manager at
25 Armstrong in 1946. In those early years he has his first
26 recollection of asbestos dust. Although the denies knowledge of

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
485 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 431-8550

1 the hazards of the dust, he does state "there were dust hazards in
2 the plants. Now, my first recollection of asbestos was that it
3 was just like any other dust." (Tr. Trans. 24961:18-23.)
4 Nevertheless, Mr. Wegman received his first notice of an
5 asbestos-related disease in 1954 in a letter from Travelers to
6 himself. (Tr. Trans. 24962:4-24963:6.) Later, Wegman admits that
7 documents refreshed his recollection that he was aware, in the
8 early 1950's, that Armstrong products would contribute to
9 asbestos-related diseases. (Tr. Trans. 25070:12-16.)

10 George W. Nichol, who was a plant chemist for Armstrong
11 during the mid 1950's likewise admits that he understood sometime
12 between 1956 and 1957 that asbestos was a toxic material. (See
13 Deposition Testimony of 10/29/84, 25:24-27:7.) Mr. Gardner makes
14 similar admissions which have already been referred to in Trial
15 Exhibits discussed earlier.

16 Yet despite all of this knowledge concerning the danger of
17 asbestos products being produced and used by Armstrong employees,
18 and despite the fact that known cases of worker's compensation
19 claims arising out of asbestos exposure exceeded eighty to ninety
20 claims between 1952 and 1967, Armstrong's response was not to
21 correct, warn, make safe or otherwise mitigate injuries, but to
22 expand its asbestos operations.

23 The question is why did it do this. Was it a mere
24 oversight, or was it the manufacture and use of an injurious
25 product with the intent that certain members of the employment
26 work force, as well as the general public, would be injured?

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 431-8550

1 Armstrong has attempted to defend their actions by
2 pointing to the conduct of others, including the insurers, in what
3 they call "similar circumstances." It is Armstrong's conduct,
4 however, under similar circumstances, which would be probative of
5 its culpability in this instance. Mr. Hofferth's trial testimony
6 at 30840:28-30842:13 dramatically answered that question and
7 points to Armstrong's clear knowledge of "right and wrong" under
8 similar circumstances.

9 When questioned by counsel for Commercial Union, Mr.
10 Hofferth stated that if Armstrong had used a "stamping machine"
11 which punched out a piece of aluminum, and a man lost an arm in
12 the process, Armstrong would have "investigated thoroughly". Mr.
13 Hofferth testified further that if twenty "arm off" cases among
14 ten or so machines occurred between the years of 1954 and 1960,
15 Armstrong would have "thoroughly investigated and explored and
16 precautions taken to prevent a reoccurrence." When asked if the
17 machine was so poorly designed that it couldn't be corrected, what
18 would Armstrong do, Mr. Hofferth testified: "Some other means
19 would have been found to manufacture that product."

20 In the case of asbestos, scores of men like Mr. Rothwell
21 have lost far more than an arm. Armstrong did not investigate.
22 Between 1952 and 1967 over eighty men succumbed to asbestos fiber
23 within Armstrong's own employ. Armstrong did nothing to prevent a
24 reoccurrence. When Hofferth wrote his smoking letter to Fred
25 Gardner on August 16, 1967, stating: "...I do strongly feel that
26 the time has arrived for us to take a position concerning... the

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8550

1 overall asbestosis claims situation which confronts us.",
2 Armstrong unveiled the most dangerous asbestos product it had ever
3 developed: Armaspray.

4 As we stated earlier, there must be a line of demarcation
5 where ignorance becomes a hindsight excuse for acceptable,
6 intentional injury. We ask the court to weigh the question of
7 intentional injury balancing the maimed and destroyed lives of
8 hundreds, perhaps thousands of asbestos workers on the one hand,
9 with the detailed and specific knowledge in the hands of people
10 who, by their own admission, could have chosen a different course,
11 but instead chose the lure of profits over the protection of their
12 own employees.

13 For these reasons, Commercial Union respectfully requests
14 the Court deny coverage, in part or in total, to Armstrong for its
15 intentional, willful and malicious injuring of persons with its
16 asbestos products.

17 Respectfully submitted,

18 BISHOP, BARRY, HOWE, HANEY & RYDER

19 Dated: October 19, 1987.

20 By

JAMES D. TAYLOR

21 Attorneys for Defendant COMMERCIAL
22 UNION INSURANCE COMPANIES.

23 0471z
24
25
26

LAW OFFICES OF
BISHOP, BARRY, HOWE, HANEY & RYDER
A PROFESSIONAL CORPORATION
465 CALIFORNIA STREET, ELEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-1881
TELEPHONE (415) 421-8250

PROOF OF SERVICE BY MAIL

1 I, Annette Michell, declare:

2 I am employed in the City and County of San Francisco,
3 California; am over the age of eighteen years and not a party to
4 within action. My business address is 465 California Street,
5 11th Floor, San Francisco, CA 94104.

6 On October 20, 1987, I served, in the manner
7 indicated below, the within:

8 COMMERCIAL UNION INSURANCE COMPANIES' POST TRIAL BRIEF ON
9 THE EXPECTED OR INTENDED DEFENSE TO COVERAGE

10 on the interested parties in said action by placing true copies
11 thereof, enclosed in a sealed envelope, addressed as follows:

12 All parties listed on Consolidated Service List (including
13 temporary addresses for purposes of trial).

14 X (BY REGULAR EXPRESS MAIL) I caused such envelopes with postage
15 thereon fully prepaid to be placed in the U.S. mail at San
16 Francisco, CA.

17 X I directed that copies of the foregoing document be placed in
18 the Court approved mail slots at Nourse Auditorium.

19 (BY FEDERAL EXPRESS) I caused such envelope(s) to be delivered
20 by hand to the offices of the addressee(s).

21 (BY PERSONAL DELIVERY) I caused such envelope(s) to be delivered
22 by hand to the offices of the addressee(s).

23 I declare under penalty of perjury that the foregoing is true
24 and correct.

25 Executed on October 20, 1987, at San Francisco, CA

26 Annette Michell

Annette Michell