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also the text of memo

PLAINTIFF ATTORNEYS MAKE COUNTER OFFER TO JOHNS-MANVILLE

Plaintiff attorneys comprising the Asbestos-Related Litigants and/or Creditors Committee Wednesday morning made a counter-offer to Johns-Manville Corp. executives to settle all pending asbestos claims against the company.

The offer was presented verbally to JM, with explanations of the various methodology used to arrive at the final figure. While the offer is confidential, it is known that it is below the $850 million originally demanded by the plaintiff attorneys to settle the current cases. It was also well in excess of the $400 million that had previously been put on the table by JM.

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CURRENT SUBSCRIPTION PERIOD CONCLUDED

This issue of the Asbestos Litigation Reporter concludes the current six-month subscription period, and subscribers are reminded that they must renew their subscription if they wish to continue receiving the publication.

The next six-month subscription period runs from August through January, 1984. Cost remains $350 for the period, or $700 for a full year. Annual renewals will avoid a price increase that is being considered for the subscription period beginning February, 1984. To renew, notify Andrews Publications today at PO Box 200, Edgemont, PA, 19028, or telephone (215) 353-2565.

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JM officials were planning to work on the proposal over the next several days, comparing it to past settlements and judgments against it. Both sides will meet next Wednesday in a continuing effort to reach a compromise.

There is optimism on both sides, however, that a settlement might be worked out, resulting in a consensual reorganization plan for JM sometime this fall. That optimism yesterday resulted in an approval by Bankruptcy Judge Burton R. Lifland of another extension of the period in which JM has the exclusive right to file a reorganization plan. The latest extension was for 52 days, to Sept. 15--only eight days shorter than the 60-day extension sought by JM. It also marked a departure by Judge Lifland to limit extensions to only 30 days.

Attorney John Jerome of Milbank, Tweed, Hadley & McCloy, representing the unsecured creditors, said that he expected by Sept. 15 that an agreement for a plan will be worked out among all parties. If an agreement is not reached by that date, he told the court, he would oppose any further extensions of the exclusivity period. G. Earl Parker, senior vice president of JM, told Judge Lifland the company expects to know by Labor Day whether it can achieve a consensual plan.

Parker, assistant corporate counsel Dennis Marukusson and various other JM officials and attorneys received the counter offer at Wednesday's meeting. They agreed not to disclose it even to other committee officials until after next Wednesday's session, when the two sides discuss the offer in detail.

The offer provides a trust fund for medical research, but did not go into any detail about how the overall settlement fund would be administered. "We have our ideas on that," one plaintiff attorney said, "but there is no use in discussing how to disburse something until you know you have something to disburse."

Meanwhile, in Washington D.C., meetings were being held by producers this week in an attempt to work out agreement on a scheme to settle coverage disputes with their insurers. The meetings are part of the ongoing efforts of the so-called Asbestos Claims Counsel to resolve coverage issues and establish alternative dispute mechanisms to handle asbestos litigation (See Asbestos LR 5/13/83, P. 6,589).

There is optimism that the insurers and producers can eventually agree to at least an interim scheme, but some producers are said to be inflexible about making any concessions to the insurance industry. Hardliners are said to be holding out for complete coverage through 1983, but are being pressured to soften that stance.

Rapid progress is reportedly being made by Edward K. Hamilton of Hamilton, Rabinowitz & Szanton, a consulting firm, to draw up the plans for a central claims facility for the ACC that would arbitrate asbestos

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claims. There is some question over whether such a facility could be established without at least an interim resolution of the coverage question, however, some feel the two are not interdependant.

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TYLER I DOCUMENTS UNSEALED BY TEXAS JUDGE

Federal Judge William Steger last week signed an order removing all Tyler I discovery materials from under seal, ruling that they were fully discoverable without application to his court (See P. 6,947).

In his July 14 order, Judge Steger said he originally sealed the documents to keep Tyler I discovery materials protected until all litigation surrounding Pittsburgh Corning's Owentown Plant had been concluded. He said that the Tyler II settlements had substantially ended the Owentown litigation (See Asbestos LR 6/24/83, P. 6,791), therefore "the original purposes justifying the sealing of the Tyler I discovery materials are no longer present."

Judge Steger said he had been "inundated" with requests for access to or release of the sealed documents from litigants throughout the United States, but that he had generally refused to grant the requests because Tyler II was still pending before his court.

The documents were returned under his order to the clerk of the Eastern District of Texas.

Meanwhile, the final settlement document between the U.S. and Tyler plaintiff attorney Blake Bailey releasing the U.S. from the Tyler II litigation was still being reviewed for submission to the court, although there are no hitches in the agreement.

Under terms of that settlement, the U.S. will pursue any default judgment obtained by the plaintiffs against Cape Asbestos Industries of England, and any of its subsidiaries. Bailey reportedly has served notice on Cape and its subsidiairies that he is pursuing a default judgment before Judge Steger, and a hearing will likely be held on that motion in September.

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1942 EAGLE-PICHER DOCUMENTS DISCUSS ASBESTOS HAZARDS

Documents produced by Eagle-Picher Corp. in conjunction with litigation in Washington State reveal that a salesman for the company in 1942 alerted the company to articles dealing with the hazards of asbestos (See P. 6,949).

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Plaintiff attorney Ronald Motley of Blatt & Fales of Barnwell, SC, who is working with the Seattle law firm of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz on the Washington cases, said that in his opinion, the documents make Eagle-Picher "a prime target for punitive damage claims." He said he was not aware of the documents surfacing previously. Motley and Ted R. Willhite of the Levinson firm were among those conducting the discovery.

The documents were written by salesman H.M. Aber in April, 1942. In one, a memorandum, Aber says that while in the office of a Texas State health officer, "I had the opportunity to read a section in 'Occupation and Health,' as compiled by the International Labor Institute, on asbestos, compiled in 1938. This article was by Dr. S.R. Gloyne of London, England and Dr. E.R.A. Meriweather of Birmingham, England. If you think mineral wool is dangerous you should read this."

He continues, "You may secure a copy of this article by writing the International Labor Office in Washington, D.C. and request a copy of the article on Asbestos by the two doctors as published in the Occupation and Health Supplement, dated 1938. I urge you to read this as it is very informative. I also read an article in a magazine by the name of 'Industrial Medicine' written by Dr. Walter J. Siebert, which apparently covers some very exhaustive research on handling glass wool by workmen."

Aber was in the office of W.B. Wardlow, a chemical engineer in charge of the Texas State Board of Health Laboratories to ask him to clarify a letter sent to Humble Oil & Refining Co. by the State Health Office regarding possible hazards of Eagle-Picher's Supertemp Block, in which he quoted from "Occupation and Health" about mineral wool, without naming the source.

The memorandum says, "Mr. Wardlow readily saw that we had been placed in an awkward and costly position and he has promised to help straighten things out in our favor. He told me that he doesn't feel that Supertemp is any more harmful than the majority of insulations now being used. He says that he did run a spectograph test and could not find any free silica, therefore, in his opinion silicosis would not result from handling this material. At this point I prevailed upon him to write Mr. Wiler of Humble Oil & Refining Company's safety Department in Baytown, Texas, advising him that silicosis would not occur to workmen handling the material. He promised to do this and to also point out that the opinions voiced in his letter were meant to deal with mineral wool in general rather than with a specific product."

Aber explains in the memorandum that he requested Wardlow in writing to clarify his earlier letter to Humble, then relates the information he read in "Occupation and Health." He concludes the memorandum: "I should mention that Wardlow will contact Humble in person to make any reasonable test on Supertemp relative to its being injurious to workmen, if requested by either Humble or ourselves. If we are sure of ourselves on this product this might be the thing to do, as his opinion would be worth having in an authoratative report. Let me know if you would like to have him visit the Humble plant, as I believe it can be easily arranged.

There is one thing to remember, however, Mr. Wardlow being in the employ of the State is going to be a bit reluctant to make any definite statements with regards to any product being absolutely harmless to workmen, as his position with the State Department more or less forces him to 'ride the fence' so to speak."

Later that month, Aber wrote to Humble's Safety Department to tell him that he could procure the "Occupation and Health" article on asbestos by writing the International Labor Office.

An Eagle-Picher official told of the Aber documents in an interrogatory, and said that the Corporate Legal Department procurred a copy of the asbestos article from "Occupation and Health" in 1980.

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CALIFORNIA JUDGE RULES CELOTEX NOT LIABLE AS SUCCESSOR CORPORATION

Chief Judge Robert F. Peckham on June 30 granted Celotex Corp.'s motion for partial summary judgment, dismissing the plaintiffs' claim of punitive damage liability in U.S. District Court in California (In Re Related Asbestos Cases, ND CA, No. C-79-358 RFP, See P. 6,963).

The claim of punitive damage liability against Celotex was premised upon the activities of a predecessor corporation. In its motion for partial summary judgment, Celotex argued that under California law, punitive damages can be imposed upon a successor corporation only if the successor is so similar to its predecessor as to be indistinquishable.

Judge Peckham, in addressing successor liability in regard to punitive damages, specifically cited Ray v. Alad Corp. (19 Cal. 3d 22, 28; 1977) and Moe v. Transamerica Title Insurance Co. (21 Cal. App. 3d 289; 1971).

California law, Judge Peckham determined, adheres to the general rule that a corporation which purchases the principal assets of another corporation does not assume the latter's liabilities unless: 1) there is an express or implied agreement of assumption; 2) the transaction amounts to a consolidation or merger of the two corporations; 3) the purchasing corporation is a mere continuation of the seller; 4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

The court concluded that "the fact that Celotex has continued several of the Carey (Corp.) product lines does not raise a material issue of fact sufficient enough to resist summary judgment on the punitive damage issue."

In Moe v. Transamerica, the court held a successor corporation liable for the fraudulent conduct of an employee of the predecessor. In Moe,

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however, Judge Peckham pointed out that the successor/defendant made no attempt to establish its separateness from the original corporation.

Celotex has demonstrated that it is not a mere continuation of Carey, Judge Peckham wrote. Celotex was an ongoing concern when it purchased the stock of its predecessor. None of the predecessor shareholders became shareholders of Celotex.

The plaintiffs, according to Judge Peckham's memorandum, "plan to introduce evidence to establish how the corporate changes occurred, that certain key Carey employees continued to work for Celotex and that Celotex continued manufacturing many of the same product lines of its predecessors."

Judge Peckham, however, cited Cermetek Inc. v. Butler Avpak (573 F.2d 1370, 1377; 9th Cir. 1978) and ruled that in order to defeat the motion for summary judgment, plaintiffs must produce the evidence now; they are not entitled to a denial of the motion "upon unsubstantiated hope they (they) can produce evidence at trial."

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JUDGE ORDERS JM SETTLEMENT TRUST TURNED OVER TO PLAINTIFF

Bankruptcy Judge Robert L. Hughes of the Northern District of California last week ordered that $150,000 being held in trust to pay off Johns-Manville's share of an asbestos settlement when the company filed for Chapter 11 protection last August be turned over the the plaintiff's estate (Mitchell v. Johns-Manville, et al., Adversary No. 4-82-1691AH, Bankruptcy No. 82-B-11656, See P. 6,937).

In issuing his order, Judge Hughes rejected arguments that the funds belonged to JM's bankruptcy estate. JM said its law firm, Moore, Clifford, Wolfe, Larson & Trutner, was holding the $150,000 for JM's benefit, and that the plaintiff had failed to meet the full conditions of the settlement by failing to forward a release by plaintiff Albert Mitchell's minor daughter. Those arguments were rejected by Judge Hughes.

Albert Mitchell agreed to settle his claim against JM and several other defendants on June 30, 1982 for $206,500, including $150,000 from JM, and the Moore, Clifford firm agreed to act on behalf of all parties in consumating the settlement. Subsequently, it paid Mitchell $56,500, and asked for a release from Mitchell's minor daughter, which was a condition of the settlement. The law firm subsequently received $150,000 from JM to pay off its share of the settlement, but was notified shortly after JM filed for Chapter 11 protection not to disburse the funds.

In rejecting JM's arguments that the law firm was holding the $150,000 for JM's interest, and had no fiduciary duty to Mitchell or his estate (he died 30 days after JM's Chapter 11 filing), Judge Hughes noted

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that it is "quite common for the attorneys representing one party in a dispute to assume the role of an escrow agent or stake holder for purposes of executing the terms of a settlement after a settlement is reached." He continued, "There can be no doubt from the record that Moore, Clifford assumed this role on behalf of all parties to the settlement.... It accepted funds from each of the participating co-defendants."

Judge Hughes concluded, "I have no trouble finding that Moore, Clifford accepted a fiduciary duty to Mitchell, which required the firm to disburse the $150,000 to Mitchell once Mitchell satisfied all conditions of the settlement." He said that in sum, JM had neither legal nor beneficial interest in the funds, and could not unilaterally rescind its instructions to Moore, Clifford to disburse those funds.

As for JM's contentions that Mitchell had failed to meet all the conditions of the settlement by failing to forward a release from Mitchell's minor daughter prior to Aug. 26, Judge Hughes found that it was not a condition precedent to Mitchell's entitlement to the settlement funds. "The clearest evidence in support of this finding," he said, "is the fact of payment by Moore, Clifford of all the monies received from each of the several other defendants, both before and after Johns-Manville's bankruptcy." The release was sent to Moore, Clifford subsequent to the Chapter 11 filing.

Judge Hughes ordered the law firm to turn over the $150,000, plus accumulated interest.

Mitchell and his estate were represented by Steven Kazan and Aaron Paul of Kazan's law firm in Oakland, California.

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SEVENTH CIRCUIT UPHOLDS STATUTE OF LIMITATIONS DISMISSAL

The Seventh U.S. Circuit Court of Appeals has upheld the summary judgment dismissal of a wrongful death claim against various asbestos manufacturers on grounds it was barred by Indiana's statute of limitations (Pitts v. Unarco Industries, Inc., et al., No. 82-2071, See P. 6,951).

The action was brought against 16 defendants by Janet E. Pitts 20 months following the death of her husband, allegedly from asbestos-related lung disease. Her husband, an insulator, was exposed between 1950 and 1979. Nine of the defendants subsequently settled, another was dismissed for want of service, while six others won summary judgment dismissal under Indiana's statute of limitations provision.

Indiana law provides that any product liability action must be commended within two years after the cause of action accrues, or within 10

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years after the delivery of the product to the initial user or consumer, except that, if the cause of action accrues more than eight years but not more than 10 years after that initial delivery, the action may be commenced at any time within two years after the cause of action accures.

Mrs. Pitts appealed on a number of grounds--that she did not have an opportunity to oppose the summary judgment motions; that the 10-year statute of limitations was tolled by defendants' fraudulent concealment of their tortious conduct; that the 10-year statute of limitations in the Product Liability Act is unconstitutional, because it deprived her of property without due process of law; and that application of the statute denied her equal protection of the laws guaranteed by the Fourteenth Amendment. The three-judge panel from the Seventh Circuit rejected all those arguments.

The opinion, written by Chief Judge Walter J. Cummings, said that Pitts had ample time to respond to the summary judgment motions, and did so in a motion to reconsider and two supporting briefs. As for her claim that fraudulent conduct tolled the statute of limitations, the court held that the fraudulent concealment count was dismissed four weeks before summary judgment was granted, and the dismissal was not challenged.

The opinion continued that even if Mrs. Pitts had a property right, "We cannot accept plaintiff's argument that the Indiana Product Liability Act's ten-year statute of repose violates due process under federal and Indiana Constitutions." It cited similar holdings by the Indiana Supreme Court, which held in one case that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Finally, in rejecting Pitts' claim that the statute denied her equal protection of the laws, the court said the statute has "a legitimate legislative purpose, and it is not the courts' business to instruct the Indiana legislature when it is better for consumers than producers" to bear the risk of defective products.

Judge Cummings concluded, "Pitts was not left without recourse by this statute of limitations. Since nine defendants could not take advantage of the statute, they were not immunized and indeed settled with plaintiff, thus vitiating Pitts' claim that the statute contravened the Indiana privileges and immunities clause by conferring blanket immunity to all producers. Instead the statute must be sustained as reflecting the legislative twin goals of repose and reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence."

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JOHNS-MANVILLE SUES U.S. IN CLAIMS COURT

Johns-Manville Corp. and Johns-Manville Sales Corp. last Tuesday filed suit against the United States in the U.S. Claims Court, alleging that the its contracts to supply the U.S. Government with asbestos during World War II implied that the government would hold JM harmless from any and all liability (No. 465-83C, See P. 6,954).

The suit alleges that the government was aware shipyard workers were being exposed to dangerous levels of asbestos dust, but that no steps were taken to either warn them of those dangers, or to alleviate the hazard.

The complaint says, "As a direct and proximate result of Johns-Manville's compliance with Government orders and directives and Johns-Manville's supply of strategic asbestos-containing materials pursuant thereto, Johns-Manville has incurred costs and expenses in connection with the suits and proceedings brought by the World War II asbestos claimants. By reason of its agreement to indemnify and hold Johns-Manville harmless, the Government is liable to Johns-Manville for all such damages sustained by it."

The suit is narrow in its scope, in that it seeks damages and attorney fees arising out of settlements and judgments paid to about 50 plaintiffs who worked in government owned or controlled shipyards prior to or during World War II. Specifically, JM wants $768,361.09 in settlements and judgments and $185,741.55 for attorneys' fees, costs and expenses.

JM said the suit followed an intensive review of government documents, including recently declassified papers, which show the U.S. was aware that shipyard workers were being exposed to dangerous levels of asbestos dust, but failed to correct conditions, or warn the workers of the hazards. It quoted one document written by the Navy Commander of Preventive Medicine, which read, "Asbestosis. We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy Yards."

Dennis H. Markusson, assistant corporate counsel for JM, said the documents "demonstrate that the U.S. Government is responsible for injured shipyard workers and, thus, should share with the asbestos industry in the social and financial responsibility for properly compensating the injured wartime shipyard workers." John A. McKinney, chairman and president of Manville Corporation, said, "The practical effect of these wartime regulations and contracts upon Johns-Manville was such that our entire business was essentially being operated for the direct benefit of the U.S. Government with criminal sanctions if we did not do so. Although almost half of the asbestos lawsuits against Manville are shipyard workers, the government has not shared any of the responsibility. Yet

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the government has accepted responsibility in other health related areas. It's time for the government to acknowledge and accept responsibility for these war related injuries."

JM announced its action at a press conference Tuesday morning, hours before the complaint was filed in the Claims Court by the firm of Becker & Chameides.

The action triggered a strong response from the Justice Department. J. Paul McGrath, assistant attorney general who heads the Civil Division, issued the following statement:

"I have been advised that the Manville Corp. publicly announced today its intent to file yet another suit against the United States in its five-year unsuccessful campaign in the press, media, legislature and the courts to shift responsibility for injuries due to exposure to its asbestos products to the shoulders of the taxpayers. I have not had the opportunity to review any legal documents or to benefit from the courtesy of the information given to the media in advance by Manville. Therefore, specific comment will have to wait until appropriate study can be given to the matter. Based upon reports of Manville's positions as set out in its press release it appears that its latest theory is that the taxpayers should bear the burden of any corporate liability because Manville and its predecessor corporations were serving the war effort by meeting the demand of the military for asbestos products. Such a theory ignores the fact that Manville, as a publicaly-owned corporation, was in business for the profit of its shareholders and was not a public service organization.

"Indeed, one searches the record in vain for any indication that public welfare rather than maximization of corporate profit motivated corporate decisions. As demonstrated in cases tried to date, Manville developed and introduced its asbestos products into the stream of commerce and work sites all over the country. It spurred demands for its products and maintained this demand by withholding vital information about the risks associated with asbestos. Having promoted the use of asbestos products with great corporate success and profit, Manville now, from the haven of bankruptcy court, contends that the taxpayer ought to pay Manville creditors. Manville's theory has no foundation in reality or in the law, and will not justify a shifting of corporate responbilility to the taxpayer."

JM says in its complaint that, after a diligent search, it has been unable to locate or obtain from the government copies of the war supply contracts, but maintains that they implied JM would be held harmless from "any and all liability" for the supply of asbestos-containing materials.

The complaint at length spells out the desirability of including asbestos in wartime ships, and the efforts expended by JM to meet the government's demands. Then, it goes on to spell out the U.S. Government's knowledge of the dangers posed, relying first on a report by Waldemer C. Dreessen, former Assistant Surgeon of the Public Service, that was issued in 1938 by the U.S. Public Health Service. In that report, Dreessen wrote, "Above five million particles per cubic foot,

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numerous cases of well-marked asbestosis were found. It would seem that if the dust concentration in asbestos factories could be kept below five million particles (the engineering section of this report has shown how this may be accomplished), new cases of asbestosis probably would not appear."

The complaint then quotes the March 11, 1941 memorandum by the Navy Commander of Preventive Medicine regarding asbestosis, and asserts that by July 1942, Navy and Maritime Commission officials became aware of reports of unfavorable accident situations relating to asbestos, triggering confidential studies that showed conditions far worse than officials originally believed.

"The United States failed to satisfy its statutory and contractual obligations with regard to the safe use of asbestos materials in shipyards," JM says.

***

6th CIRCUIT REFUSES TO EXTEND STAY TO CO-DEFENDANTS OF JM, UNARCO

Co-defendants of Johns-Manville Corp. and Unarco Industries, Inc., may not invoke the stay provision of the Bankruptcy Code, the Sixth Circuit U.S. Court of Appeals held on July 1 (Lincoln Lynch, et al., v. Johns-Manville Sales Corp. et al., and Raymark Industries, defendant-appellant, et al., 6th Cir., No. 83-3118, 83-3119, 83-3120, 83-3121, 83-3122, 83-3123, 83-3124, 83-3125, 83-3126, 83-3127, See P. 6,973).

The appellate panel concluded that the interests of plaintiffs, some of whom are dying, clearly outweigh benefits that the co-defendants could derive from a stay. If duplication of litigation results, it is congressionally sanctioned, the court held. Even the prospect of relitigation of issues is not strong enough to force plaintiffs to wait, the court said.

The cases were on appeal from the Southern District of Ohio where Judge S. Arthur Spiegel denied a stay of asbestos proceedings against two co-defendants of JM and Unarco--Raymark Industries, Inc., and Keene Corp. on Oct. 5, 1982. The order was later adopted in denying similar motions by other co-defendants of the debtors.

The appellate panel said there was no basis in law or equity for staying proceedings of solvent co-defendants of JM and Unarco until the debtors have been reorganized or liquidated. Section 362 of the code that stays proceedings against a debtor fails to intimate, even tangentially, that the stay includes any defendant other than the debtor, the court said.

The co-defendants had urged a judicial classification of the Chapter 11 debtors as "indispensible" and therefore subject to a stay under Rule 19 of Federal Rules of Civil Procedure that relate to joining other

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parties. However, the panel said that since the debtors and co-defendants are joint tortfeasors, the debtors are not indispensible.

Co-defendants had argued that to continue the lawsuits without JM and Unarco would result in multiple and piecemeal litigation on a scale unknown in American jurisprudence. The Sixth Circuit, however, said that any duplication that may exist is congressionally created and sanctioned as a byproduct of bankruptcy law.

Finally, the court said, "(A)ny benefits which may derive to the solvent co-defendants from a stay are clearly outweighed by the countervailing interests of the plaintiffs."

The panel quotes the First Circuit as saying: "In a number of those (asbestos) cases, plaintiffs and crucial witnesses are dying. We are not persuaded that the hardship to defendants of having to go forward on this appeal without Unarco, or the interests of judical economy in avoiding relitigation of the issues, are strong enough to justify forcing plaintiff and a number of other plaintiffs to wait until bankrupt defendants are successfully reorganized in order to be able to pursue their claims."

Bankruptcy judges presiding over the JM and Unarco cases have also refused to broaden the automatic stay of proceedings to co-defendants throughout the country.

The co-defendants also argued that the automatic stay for JM precludes discovery on the debtors and seriously compromises their cases. In this regard, the panel said: "This judgment is without prejudice to the appellants to seek, in the appororiate forum, authorization to conduct discovery upon Johns-Manville and Unarco."

In JM's case, the U.S. Bankruptcy Court in Manhattan on April 14 barred discovery or production of JM's trade secrets or confidential research, development or commercial information or documents of a scandalous or defamatory nature.

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COMMERCIAL UNION FILES ANOTHER DECLARATORY JUDGMENT ACTION AGAINST PC

Commercial Union Insurance and Falcon Insurance Co., have filed a declaratory judgment action asking the Philadelphia Common Pleas Court to declare that their policies to Pittsburgh Corning Corp. do not cover punitive damages (No. 1489, See P. 6,935).

The two insurers say they believe Pittsburgh Corning will demand that they pay for costs for defending punitive damages, as well as any awards, but claim that those costs are not covered in their policies.

The action notes that Pittsburgh Corning was recently ordered to pay $300,000 in punitive damages in Foster v. Pittsburgh Corning Corp. in the Eastern District of Texas (See Asbestos LR 5/13/83, P. 6,586). As a result, the insurance companies say, Pittsburgh Corning will seek coverage from them.

James L. Griffith of Griffith & Burr filed the action on behalf of Commercial Union and Falcon.

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JUDGE LAMBROS FORMALLY APPOINTS SPECIAL MASTERS

Federal Judge Thomas D. Lambros of the Northern District of Ohio, Eastern Division, last week signed an order officially appointing two special masters to devise a plan to better manage the pretrial and trial phases of asbestos cases in his court. While the appointment was to have been made jointly with Cuyahoga County Common Pleas Judge James J. McMonagle, the two jurists, in a joint memorandum, noted that rules of civil procedure governing the state court made that plan impossible. Instead, Judge McMonagle said his court would cooperate fully with the federal court to achieve "just, speedy and inexpensive resolution of asbestos cases" (See P. 6,941, and Asbestos LR 7/8/83, P. 6,589).

Named were Eric D. Green, associate professor of law at Boston University, and Francis E. McGovern, visiting professor of law at the same university. The two are to come up with a plan by Oct. 21 to manage the pretrial and trial phases of asbestos litigation, and any proposal to expedite settlements.

Judge Lambros gave the special masters broad powers that will permit them to schedule and preside over discovery proceedings, as well as examine all documents relevant to their appointment. They also may coordinate all proceedings, and adopt rules and procedures "to accomplish their task efficiently and fairly."

Each will be paid at the rate of $70 per hour, for a total of 1,000 hours between them. Total expenses were budgeted at $18,000. Judge Lambros ruled that compensation for the two will be assessed to the litigants later, under Rule 54 of the Federal Rules of Civil Procedure.

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JUDGE DENIES FLINTKOTE MOTION TO JOIN COORDINATED CALIFORNIA ACTIONS

San Francisco Superior Court Judge Ira A. Brown Jr. refused a petition by Flintkote to permit its declaratory judgment action against American Mutual Liability Insurance Co. and 26 others to be coordinated with the other insurance disputes before him. At the July 14 hearing, Judge Brown also disallowed a motion for his disqualification, and fined an attorney for Johns-Manville Corp. $414 for a motion the jurist characterized as "stubborn and bullheaded."

The hearing, attended by more than 25 attorneys, began with American Mutual's motion for the peremptory disqualification of Judge Brown. The motion, argued by Kenneth Ward of Capps, Staples, Ward, Hastings & Dodson, maintained that once a judge was properly challenged, he was precluded from hearing the matter. Ironically, Ward's brief quoted California Practice Guide, Civil Procedures Before Trial, co-authored by Judge Brown and Judge Robert Weil, which said "once an affidavit is filed under Section 170.6, the judge is disqualified for all purposes of the action. Therefore, that judge cannot hear any later motion or procedure in the case...."

Judge Brown asked Ward if he wanted a trial judge appointed for the entire case, simply because American Mutual did not want him to hear Flintkote's petition to be added on to the coordinated case later that morning. Then he denied the motion, saying "I am the only judge who can decide whether this can or should be added on," and gave Ward 20 days to file a 170.6 challenge. He also denied Ward's request for a 30-day stay, and granted American Mutual's two motions for admission pro hac vice to the California State Bar.

Judge Brown then heard Flintkote's petition for coordination of an add-on cases. E. Judge Elderkin of Brobeck, Phleger & Harrison argued for Flintkote that the motion should be granted because there were common matters of fact and law in the case insofar as it dealt with the interpretation of insurance policies as applied to asbestos claims (See Asbestos LR 5/13/83, P. 6,587). Elderkin said that Flintkote would be that much behind the other cases in the coordinated action if its petition were denied, but said that the case was still in the document production stage, and that Flintkote would have documents ready within 30 days if the court granted the Flintkote petition.

Opposing the motion for American Mutual, Ward argued that litigation was already underway in New York between the two parties, with motions pending that may be expositive. Should Flintkote's petition for coordination be granted, he said, the pending New York litigation may have to be moved to California as well--and the California action, he said, was already unduly complicated. The add-on, he said, would make the coordinated litigation "almost without reason."

Judge Brown said it would be "nice if all asbestos litigation could be wound up in one lawsuit," but denied the motion, commenting that he

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was not afraid of the challenge but that it would cause an "unmanageable situation" for both counsel and the court.

A motion by Johns-Manville Corp. for reconsideration of a motion for relief from the pretrial discovery order and for an order to produce witnesses at depositions brought Judge Brown's sanction. Robert Venning of Heller, Ehrman, White & McAuliffe argued that JM should be allowed to depose one witness because he is over 65 years old.

Judge Brown interrupted to say that "there is no evidence he is in bad health. Lots of people live past 65, thank Heaven, Mr. Venning."

Gary Anderson of Pillsbury, Madison & Sutro opposed the motion for Marsh & McLennan on grounds that because the court was scheduled to hear the matter of depositions in three weeks, there was no reason to give JM's motion a special hearing.

Judge Brown denied the motion and imposed the $414 in sanctions because the motion resulted from the "stubborness and bullheadedness on the part of the moving party, without substantial justification."

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PLAINTIFF FILES APPEAL TO INTERVENE IN CA INSURANCE LITIGATION

A 70-year-old plaintiff has asked the California Court of Appeal to order San Francisco Superior Court Judge Ira A. Brown, Jr., to allow him to intervene in the Johns-Manville insurance coverage litigation. Paul Johnson claims that none of the parties in the action represent his interest (Paul Johnson v. San Francisco Superior Ct., et al., CA Appeal Ct., 1st Appellate Div., No. A023216).

His petition for mandate and/or prohibition was filed June 27 by Harry F. Wartnick of Cartwright, Sucherman, Slobodin & Fowler in San Francisco. It argues that if JM is declared bankrupt, Johnson's ability to be compensated for his asbestos-health injury will depend solely on the outcome of the insurance litigation.

"Since Johns-Manville has its stay, it may no longer have an incentive to speedily resolve its dispute with the insurance companies in the action below," the petition says. "Neither the insurance companies nor Johns-Manville has the same incentive as does intervenor to seek a speedy resolution, maximizing recovery."

Johnson was a shipyard worker and longshoreman from 1942 to 1974 when he retired. He claims he suffers from restrictive pulmonary disease as a result of exposure to asbestos manufactured by JM. His suit alleges negligence, strict liability, enterprise liability, and false representation. Compensation must be prompt for it to be meaningful during his lifetime, the petition says.

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MARYLAND COMPANY DISMISSED UNDER WORKMEN'S COMPENSATION PROVISIONS

Baltimore Circuit Court Judge Martin B. Greenfeld granted summary judgment dismissal July 7 to McCormick Asbestos Co. on grounds that it could not be held liable under Maryland's Workmen's Compensation Act for asbestos injuries alleged by a former employee who subsequently was exposed to asbestos products at another job (Lucille P. Lowery, et al v. Johns-Manville, et al, Baltimore Circuit Court No. 82190811/32258, See P. 6,925)

Attorneys for Lucille P. Lowery, widow of George W. Lowery, maintained that the "last employer" provision of the Maryland act transforms former employers into non-employers. They also argued that the exclusivity provision of the act was meant to apply only where that particular employer is liable for workmen's compensation benefits to the employee.

Judge Greenfeld rejected the first argument on grounds that the exclusivity (or last employer) provision "does no more than designate which of several employers--all of which are subject to the Act--is ultimately liable for compensation benefits. It merely renders the last employer liable but does not, as Plaintiffs suggest, transform a prior employer into a non-employer."

The argument that the exclusivity provision of the act was meant to apply only where that particular employer is liable for workmen's compensation benefits to the employee, he said, was not without force. However, he said, that rationale has been adopted by other courts throughout the country "only where the worker's injury or disease itself is not covered by the workmen's compensation act."

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SETTLEMENTS REACHED IN PHILADELPHIA PRIOR TO JURY TRIAL

Settlements of three asbestos-injury suits were concluded just as they were to begin jury trial in Philadelphia Common Pleas Court, setting what several sources believe will be a pattern for the cases being referred to juries.

Under procedures set by Common Pleas Court this year, all asbestos suits are first tried without a jury--usually in separate damages and liability phases. The rules allow any nonjury verdict to be appealed by virtue of jury trials, and nearly every verdict has resulted in such appeal.

Jury trial was to begin July 18 before Judge Lois G. Forer in John Diehl v. JM (7809-88 [123]), when settlement was reached for an undisclosed sum. Diehl, 60, died of lung cancer in 1981. He had been a Philadelphia Naval Shipyard worker and smoked two packs of cigarettes a day for 35 years. On April 11, Judge Richard B. Klein assessed damages at $575,000. Defendants were GAF Corp. and Keene Corp.

Settlement in the case of Thomas Warren v. Pittsburgh Corning Corp. (7901-4052 [131] Case No. 9) came during jury selection before Judge Berel Caesar. Plaintiff attorney Martin Greitzer of Greitzer & Locks would not disclose the amount. However, another attorney said it was more than the $125,000 set by Judge Berel Caesar in the nonjury trial.

Warren, 66, who worked at the Philadelphia Naval Shipyard for 35 years before retiring in October 1978, was alleged to have asbestosis. In the nonjury trial, Judge Caesar entered judgment against Eagle-Picher Industries, Inc., Forty-Eight Insulations, GAF, Keene, Pittsburgh Corning and Raybestos-Manhattan, Inc.

Another settlement came in the case of Timothy McIntyre v. JM (7901-54052 [131] No. 7) which was scheduled for jury trial July 11 before Judge Richard B. Klein. Plaintiff attorney Marc Weingarten of Greitzer & Locks said the amount was substantially in excess of Judge King's $75,000 nonjury verdict on April 7. That verdict was against H.K. Porter, Inc., Southern Asbestos, Pacor, Inc., Eagle-Picher and Keene. Let out on compulsory non suits were GAF, Nicolet Industries, Inc., Fibreboard Corp. and Armstrong Cork Co.

At the nonjury trial, Dr. Krishna Mohan, plaintiff medical expert, testified by videotape that McIntyre, 53, had asbestosis. Dr. Paul Epstein testified live for the defense that McIntyre had bilateral pleural thickening. McIntyre was a Philadelphia Naval Shipyard worker from 1966 to 1981. He smoked three packs of cigarettes a day for up to 30 years and had smoked one pack a week in the past five years.

In a nonjury trial, Judge Forer entered judgment in favor of all defendants for insufficient product identification evidence after she had set medical damages at $54,000 on April 14 in the case of Ollie Tansimore v. JM (7901-4051 [131] Case No. 54). Tansimore, who is in his late 50s, was alleged to have asbestosis. He continues to work at the Philadelphia Naval Shipyard.

Judge Forer entered a verdict for $31,500 against Keene in the case of John Pressley v. JM (7901-5052 [131] Case No. 33). Pressley, 74, retired after 29 years at the Philadelphia Naval Shipyard. He is a non smoker. His medical expert, Dr. G. William Atkinson, said he has asbestosis. No medical defense was presented.

A $393,500 judgment against Raybestos-Manhattan was entered by Judge Forer in the case of Henry Bottinger v. JM (7901-4052 [131] Case No. 38). Bottinger, 63, a smoker, worked for up to 25 years at the Philadelphia Naval Shipyard. Dr. Atkinson testified that Bottinger had asbestosis.

Judge Forer found GAF and Eagle-Picher liable for a $412,550 judgment in the case of Ronald Krajewski v. JM (7901-4052 [131] Case No. 11).

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Krajewski, 47, worked at the Philadelphia Naval Shipyard for about 20 years. Dr. Atkinson, plaintiff medical expert, testified that Krajewski has asbestosis. There was no defense medical expert. Martin Greitzer of Greitzer & Locks reprsented plaintiffs in the four nonjury cases before Judge Forer.

Judge Julian F. King on July 7 found Eagle-Picher and Raybestos-Manhattan liable for a $125,000 judgment in the case of Orazio Cancila v. JM (7901-4053 [131] Case No. 29). They were the only two defendants whose products Cancila, a former Philadelphia Naval Shipyard Worker, was able to identify. He quit smoking in 1972 after smoking two packs of cigarettes a day for 30 years.

The nonjury trial in the case of John Cook v. JM (7901-4052 [131] Case No. 68) ended abruptly on July 13 when Judge Caesar granted compulsory non suits on procedural grounds to all defendants. The trial started July 11 and medical testimony had just concluded. Cook, 62, worked at the Philadelphia Naval Shipyard for six months in 1945 as a cleaner, and from 1953 to January 1982 as a rigger, when he retired due to shortness of breath. He was alleged to have asbestosis.

James Pettit of Greitzer & Locks said the case has been appealed. Defendants were Raybestos-Manhattan, Pittsburgh Corning, Keene, Eagle-Picher, H.K. Porter, Southern Textile, GAF, Forty-Eight Insulations, Fibreboard, Nicolet, Pecor, Armstrong, Owens-Corning and Celotex Corp.

Judge Caesar entered a $140,000 judgment on July 20 in the case of Edward Cuscavage v. JM (7904-3176 [134]). Cuscavage, 68, worked at the Philadelphia Naval Shipyard as a coppersmith's helper, coppersmith and pipefitter for intermittent period beginning in the 1940s. He retired in 1981 but not on disability. Plaintiff expert Dr. Joseph Sokolowski testified by videotape that Cuscavage had interstitial fibrosis of a progressive nature, calcification and pleural thickening and clubbing of the fingers. No defense medical expert was presented.

The judgment, which includes $5,000 for Cuscavage's wife, Josephine, for loss of consortium, was against Pittsburgh Corning, Pecor, Eagle-Picher and Keene. Plaintiff attorney Alan I. Reich of Shein and Brookman said plaintiff had settled with Owens-Corning, Uniroyal, Southern Asbestos, Turner and Newell, Celotex, Armstrong Cork, Nicolet, Forty-Eight Insulations, H.K. Porter and Southern Asbestos.

Judge Klein issued a defense verdict in the case of Harry Huff v. JM (7905-5640 [140]) on July 8, saying there was not enough evidence of asbestos-related disease. Huff, 43, smoked one pack a day for 15 years. His medical expert testified that he had pleural thickening. Huff worked at naval shipyards in the Philadelphia area from 1966 to 1981.

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ACTION ONCE DISMISSED SETTLED FOR $157,500

A complaint that was once dismissed on Ohio's statute of limitations then reinstated when the Sixth Circuit Court of Appeals ruled that manifestation of the disease rather than exposure tolled the statute, was settled last Wednesday with all defendants but Johns-Manville.

The action was by Catherine Mesker, widow of James L. Mesker, a factory worker employed in an aluminum cast foundry for 20 years, who died at the age of 56 of bronchogenic carcinoma. Meskers' attorney, Robert Sweeney of Cleveland, contended Mesker's disease resulted from his exposure to asbestoform talc. Settling the litigation were R.T. Vanderbilt Co., Georgia Pacific Co., U.S. Gypsum--those defendants named in addition to JM (Mesker v. Johns-Manville et al., No. C-78-1326, ND OH, Eastern Div.).

The federal court originally dismissed the action on grounds the statute of limitations barred it. However, it was revived after the Sixth U.S. Circuit Court of Appeals ruled two years ago that manifestation of a disease--rather than exposure to a product--tolled that statute (See Clutter, Asbestos LR 5/8/81, P. 3,254).

Sweeney on the same day settled another asbestos claim for $47,500. That action, on behalf of an Akron insulator, Ben Worster, in Cuyahoga County Common Pleas Court (No. 016154) involved a claim of interstitial fibrosis and rales from asbestos exposure, but did not show evidence of disability. The action was settled against all defendants but JM and Unarco.

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PA COURT SUBJECTS FOREIGN HOLDING COMPANY TO PERSONAL JURISDICTION

A Pennsylvania appellate court has ruled, in a personal injury action brought by asbestos workers, that the state's long-arm statute does give it personal jurisdiction over a foreign holding company which did business within the state through two operating subsidiary corporations (Barber v. Pittsburgh Corning Corp., Super. Ct., No. 139).

In an opinion issued July 1, the Pennsylvania Superior Court said that Charter Consolidated, Ltd., a British corporation, could be sued because two of its industrial subsidiaries had been conducting business in the state.

"[W]e first find it evident," the opinion by Judge Montgomery said, "that Charter has purposely availed itself of the privilege of acting within Pennsylvania and thus invoked the benefits and protections of our laws. Charter did this constantly and repeatedly over the years

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preceding the filing of this suit in its conduct of recurring business affairs through its (subsidiary) operations as well as the individual acts of various representatives."

The court's ruling came in an appeal by Charter Consolidated of a lower court's denial of its preliminary objections which raised the jurisdictional issue. The Superior Court affirmed the denial and remanded the case to the Allegheny County Court of Common Pleas.

Charter Consolidated is just one of 17 defendants named in a suit brought by current and former employees of the Pittsburgh Corning Corp. and their spouses. The workers, represented by George H. Cohen with Bredhoff & Kaiser in Washington, DC, are claiming to have contracted asbestosis from exposure to asbestos dust and fibers while working at Pittsburgh Corning's Port Allegheny Pennsylvania plant.

One of Charter Consolidated's subsidiaries, Cape Industries, Ltd., owns asbestos mines in South Africa and, according to the court's opinion, sold thousands of tons of asbestos to Pittsburgh Corning for use at the Port Allegheny Pennsylvania plant between 1964 and 1972. Two thirds of Cape's stock is owned by Charter Consolidated.

The other subsidiary, Pandrol International, Ltd., manufactures and sells railroad track equipment. Wholly owned by Charter Consolidated, it was registered to do business in Pennsylvania between 1975 and 1978.

In affirming its jurisdiction over the corporation, the court said that personal jurisdiction under Pennsylvania's long-arm statute could be based upon a finding that a company had "availed itself of the privilege of acting within the state, thus invoking the benefits and protections of its laws," or upon a finding that the plaintiffs' cause of action arose from the company's activities within the state.

The court had no difficulty in finding that both of the subsidiaries had sufficient business activity within the state to justify exercise of its authority over them. It also said that the workers' claims arose, in part, from Pandrol's sale of asbestos within the state and that jurisdiction could be based on this finding as well.

Charter Consolidated, represented by Werner L. Polak of Shearman & Sterling in New York, has argued that it could not be subjected to the jurisdiction of the Pennsylvania courts because its subsidiaries were independent corporations, not subject to its direction and control.

The court rejected this argument, noting that Charter had exercised full control over the subsidiaries through their boards of directors. "It cannot be foregotten," the court concluded, "that Charter is itself only a holding company which has chosen to perform all its business functions through operational arms that happen to be set up legally as separate corporations. Despite such separate incorporation, Charter's total control over Cape and Pandrol is so clear, that to reach any other conclusion in this case would be to blindly exhault form over substance."

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FOUR CASES SETTLED PRIOR TO TRIAL IN WASHINGTON

Four asbestos suits in Washington--two in the Tacoma Division of federal district court and two in the state's King County Superior Court--were settled prior to trial earlier this month.

In district court, the case of William Kinsman v. Johns-Manville, et al. (C.A. C-80-631-T) was settled in the amount of $202,500 with 12 asbestos-manufacturing companies.

The estate of Kinsman, an asbestos insulator who died allegedly from mesothelioma at age 70 after filing suit, will receive $49,250 from Fibreboard Corp., $35,000 from Owens-Corning Fiberglas and $30,000 from Raymark Industries. Also contributing to the settlement were Celotex ($20,000), Eagle-Picher ($18,250), Forty-Eight Insulations ($2,500), H.K. Porter ($12,500), Keene Corp. ($5,000), Nicolet ($2,000), Owens-Illinois ($11,750), Pittsburgh Corning ($15,000) and Turner & Newall Ltd. ($1,250).

A.C.&S Inc. and Armstrong Cork were let out of the case and claims remain against Unarco and JM.

Another case filed in district court, Joseph Weiler v. Johns-Manville et al. (C-80-631-T), was settled with 13 defendants prior to trial for $86,000. Weiler, 67, is a former boilermaker alleging asbestosis.

Contributing to the settlement were Armstrong ($1,250), Celotex ($12,000), Eagle-Picher ($9,000), Fibreboard ($8,500), Forty-Eight ($1,500), H.K. Porter ($9,000), Keene Corp. ($4,500), Nicolet ($2,000), Owens-Corning ($15,000), Owens-Illinois ($4,000), Pittsburgh Corning ($9,500), Raymark ($8,500) and Turner & Newall Ltd. ($1,250).

The case of Arthur Russell v. Ruvere Corp. et al. (No. 83-2-06733-2) was settled with 13 defendants prior to trial in King County Superior Court for $80,050. Russell died at age 80, allegedly from mesothelioma.

The contributors to the settlement were Armstrong Cork ($1,250), Celotex ($10,000), Fibreboard ($10,000), GAF ($2,000), Garlock Inc. ($1,000), H.K. Porter ($2,500), Keene Corp. ($12,500), Nicolet ($2,000), Owens-Corning Fiberglas ($10,000), Owens-Illinois ($5,000), Raymark ($17,500), Eagle-Picher ($4,000) and Pittsburgh Corning ($2,780). A.C.&S., Forty-Eight and Standard were let out of the case. Claims against Unarco, JM and Amatex remain.

In another case scheduled to be tried in King County, plaintiff Claudia Ireland settled for $134,750 with 11 defendants (No. 82-2-11417-1). Ireland is a 68-year-old women who served as a pipe-fitter's helper for an 18-month period from 1943 to 1945 at the Tacoma Division of the Sea-Tac Shipyard. A non-smoker, she alleges asbestosis.

Fibreboard ($35,000), Raymark ($26,500) and Keene ($24,500) are the major contributors to the settlement. Also contributing were Armstrong

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($1,250), GAF ($2,000), H.K. Porter ($2,500), Garlock ($1,000), Nicolet ($2,000), Unarco ($4,000, pre-bankruptcy), Celotex ($20,000) and Eagle-Picher ($16,000). A.C.&S, Owens-Corning, Owens-Illinois and Pittsburgh Corning were released from the case.

All of the plaintiffs were represented by attorneys Harold Vhugen and Ted Willhite of the Seattle firm of Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz and by William S. Bailey of the Barnwell, SC firm of Blatt & Fales.

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ALABAMA SUPREME COURT SAYS PLAINTIFFS MAY SEEK FULL MEASURE OF DAMAGES

Alabama asbestos plaintiffs are entitled to seek a full measure of damages for injuries, not just for those attributable to within one year of the filing of their complaints, the Alabama Supreme Court ruled on July 8 (Clyde Cazalas, et al., v. Johns-Manville Sales Corp., et al., AL Supreme Ct., No. 81-605).

The ruling came in the consolidated cases of 25 Mobile shipyard workers. Mobile County Circuit Court had dismissed all counts in the suits that failed to allege exposure to asbestos after May 19, 1979. On that date a new "discovery rule" became effective, allowing plaintiffs to recover damages for injuries discovered during one year prior to filing a suit.

Although about 10 of the 25 cases will be barred by the Supreme Court's decision, the others will be entitled to a full measure of damages. Almost all the plaintiffs worked at shipyards in Mobile. They are represented by Richard F. Pate of Pate & Peters in Mobile.

Two issues were at stake: whether the trial court was correct in ruling that plaintiffs were entitled to recover only damages for injuries caused during one-year prior to filing suit, and whether fraud allegations tolled running of the statute of limitations. The plaintiffs had alleged fraud in an effort to toll the statute.

The Alabama legislature in 1979 amended the state's statute of limitations, allowing the cause of action in asbestos cases to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury. The effective date was May 19, 1979.

In 1981, the Alabama Supreme Court, in Tyson v. Johns-Manville Sales Corp., held that under the one-year law in effect before the amended statute became effective, all actions for damages caused prior to May 19, 1979 were already barred and could not be revived. The reason was that the state constitution barred retroactive application of the new statute. Therefore, the court reasoned, the new "discovery rule" applied only to claims based on exposure on or after May 19, 1979.

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As a result, the trial court in the 25 Mobile cases dismissed all counts that did not allege exposure to asbestos subsequent to May 19, 1979. In those cases which were not dismissed, the trial court limited damages for which recovery was possible to exposure-caused damages occurring within one year of filing suit.

In their appeal, appellants urged an interpretation of the "full measure of damages" language in the new statute which would allow plaintiffs who fall within the period of the statute to recover for all injuries caused by asbestos. Appellees, however, argued that any construction of the statute that would allow for injuries before May 19, 1979 would violate the state constitution.

If allowed to stand, the trial court's ruling would emasculate the "discovery rule," the Supreme Court said. In fact, plaintiffs would only be allowed to recover the damages to which they would have been entitled had the discovery rule not been enacted, the court added.

There is no constitutional requirement that damages be apportioned to conform with the prescriptive period for filing an action, the court said. For example, the state workmen's compensation statute does not require apportionment of benefits commensurate with the one-year period to bring an action.

Moreover, the intention of the act's framers, the high court said, was to allow plaintiffs to recover a "full measure of damages." As a result, the court ruled that plaintiffs should not be limited to a recovery for injuries occurring after May 19, 1979.

On the issue of fraud alleged by plaintiffs to toll the statute of limitations, the Supreme Court said: "We rule that a mere failure or refusal to warn, without more, while acitoable, does not rise to the level of fraudulent concealment and, hence, does not toll the running of the statute."

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EPA FILES SUIT TO CLEAN UP CONTAMINATED MOBILE HOME PARK

The United States, at the request of the Environmental Protection Agency, filed suit May 23 against the owner-operators of a now-defunct asbestos mill and a land development coorporation, alleging that the mobile homes of residents in a subdivision are located on soil contaminated with asbestos tailings (U.S. v. Metate Asbestos Corp., et al. AZ, C.A. 83-309 GLO).

Also named in the suit as defendants are Jaquays' Mining Corp. and D.W. Jaquays Mining and Contractors Equipment, which presently operate an asbestos mill on property adjacent to the Mountain View Mobile Home Estates.

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The U.S. seeks an injunction which will require the defendants to abate the releases of asbestos at Mountain View, correct the conditions that exist and reimburse the government for $290,000 of Superfund money spent for "response, removal and remedial action" at the site.

The Metate mill crushed asbestos ore to produce asbestos for commercial purposes. The unusable tailings were dumped in to uncovered piles at the mill site until it closed in 1972 according to the government.

The complaint says that in 1972 Neal, Capper, Neal Land and Development Corp. purchased land adjacent to the Metate mill. Neal Development and Metate jointly filed an application for approval of a subdivision and in May 1973 the city of Globe, AZ approved the subdivision and the property was graded for development of a mobile home park.

The suit contends that asbestos tailings produced by the Metate mill, which was shut down by the Superior Court of Arizona in April 1974, were used as the primary fill material to level the site, and the tailings were subsequently covered with a thin layer of soil.

In 1979, Arizona health officials advised residents of asbestos contamination and on Jan. 16, 1980, the Governor of Arizona declared a state of emergency at Mountain View and residents were instructed to temporarily vacate the site.

In early 1980, the vacant Metate mill was demolished and buried near the subdivision, according to the suit. A six-inch soil cover was spread over most of the accessible areas of the subdivision. After the spreading of the six-inch cover, Metate and Neal Development continued to sell lots in the subdivision, the U.S. alleges.

Many of the residents returned to their homes in March of 1980, but the suit contends that surface water runoff, human activity and other normal natural forces have resulted in the erosion of the six-inch soil cover. Additionally, asbestos tailings from the Metate mill are exposed in open areas around the concrete pad where the mill was located, the suit states.

The U.S. also contends that since 1958 asbestos fibers carried through the air from the Jaquays mill site, which still operates intermittently, have also added to the contamination of the Mountain View subdivision.

All of the 130 residents of the subdivision have been relocated, according to the EPA Office for Public Affairs in San Francisco.

A suit brought by the residents in October 1981 to force EPA compliance with Superfund was dismissed in 1982 on grounds that Superfund does not contain a provision for citizens' suits.

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SEMINAR ADDRESSES INSURANCE COVERAGE DISPUTES

The Practising Law Institue will sponsor a two-day seminar both in New York and San Francisco entitled, "Insurance, Excess and Reinsurance Coverage Disputes." The seminar will be Aug. 25 and 26 at the Waldorf Astoria in New York, and Oct. 6 and 7 at the Holiday Inn-Financial District in San Francisco.

Sessions will include a review of cases affecting insurance coverage disputes, the reservation of rights and denial of coverage, "occurrence" policy coverage for mass tort claims, current problems in reinsurance, bankruptcy problems facing the insurance coommunity, coverage for punitive damages and alternative resolutions.

Co-chairmen are Thomas R. Newman of Siff & Newman and Barry R. Ostrager of Simpson Thatcher & Bartlett, both of New York. Faculty members include Roy Babitt, former bankruptcy judge and now with Barst Mukamel & Babitt of New York; Robert Buell, senior vice president of Fireman's Fund; Curtis M. Caton of Heller, Ehrman, White & McAuliffe of San Francisco; and John F. Larking III of Mendes & Mount of New York.

Cost of the seminar is $360. Course books are available for $35. For information, contact Practising Law Institute, 810 Seventh Ave., New York, NY 10019, (212) 765-5700.

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	:	PHILADELPHIA COUNTY
and FALCON INSURANCE COMPANY One Beacon Street Boston, Massachusetts 02108	:	Filed July 11, 1983
vs.	:	
PITTSBURGH CORNING CORPORATION 800 Presque Aisle Drive Pittsburgh, Pennsylvania 15239	:	TERM, 1489

ACTION FOR DECLARATORY JUDGMENT

1. Plaintiff herein, COMMERCIAL UNION INSURANCE COMPANY, is a corporation duly organized and existing under the Laws of the Commonwealth of Massachusetts, has its principal place of business in the Commonwealth of Massachusetts at One Beacon Street, Boston, Massachusetts, is the successor in interest to EMPLOYER'S LIABILITY ASSURANCE CORPORATION, and at all times relevant hereto issued insurance policies within the Commonwealth of Pennsylvania.

2. Plaintiff herein, FALCON INSURANCE COMPANY, is a corporation duly organized and existing under the Laws of Delaware, has its principal place of business in the Commonwealth of Massachusetts at One Beacon Street, Boston, Massachusetts, is the successor in interest to EMPLOYER'S SURPLUS LINES INSURANCE COMPANY, and at all times relevant hereto issued insurance policies within the Commonwealth of Pennsylvania.

3. Defendant herein, PITTSBURGH CORNING CORPORATION, is a corporation duly organized and existing under the Laws of the Commonwealth of Pennsylvania, has its principal place of business in the Commonwealth of Pennsylvania at 800 Presque Aisle Drive, Pittsburgh, Pennsylvania, and at all times hereinafter mentioned was engaged in the business, inter alia, of the manufacture of "Unibestos," an asbestos containing, high temperature insulation product as well as other chemicals, coatings, resins and fiberglass products.

4. On or about July 15, 1959, Plaintiff, FALCON INSURANCE COMPANY through its predecessor in interest, EMPLOYER'S SURPLUS LINES INSURANCE COMPANY entered into a contract of insurance titled Umbrella Policy Number S-10167 insuring PITTSBURGH CORNING CORPORATION. A true and correct copy of Policy Number S-10167 is attached as Exhibit "A" and is incorporated herein by reference.

5. On or about October 1, 1963, Plaintiff, COMMERCIAL UNION INSURANCE COMPANY through its predecessor in interest, EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LIMITED entered into a contract with Defendant, PITTSBURGH CORNING CORPORATION. This policy is identified as E14-8056-001. A true and correct copy of Policy Number E14-8056-001 is attached as Exhibit "B" and is incorporated herein by reference.

6. On or about October 1, 1966, Plaintiff, COMMERCIAL UNION INSURANCE COMPANY through its predecessor in interest, EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LIMITED entered into a contract with the PITTSBURGH CORNING CORPORATION. This policy is identified as E14-8056-004. A true and correct copy of Policy Number E14-8056-004 is attached as Exhibit "C" and is incorporated herein by reference.

7. At all times material to this Complaint, Defendant acted through its agents, servants, workmen and/or employees, acting within the course and scope of their employment on behalf of the Defendant and in furtherance of the business of the Defendant.

8. At the aforesaid times, the insurance contracts identified above in paragraphs (4), (5), (6) were negotiated, bargained for, and entered into, in the Commonwealth of Pennsylvania and furthermore, the parties in prior pleadings to the Court represented that Pennsylvania Law would govern interpretation of said Contracts.

9. Plaintiff FALCON INSURANCE COMPANY in the first paragraph under liability of the policy Number S-10167 identified above in paragraph four (4) and entered into on

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1983 A

or about July 15, 1959, limits its liability to "... be obligated to pay by reason of the liability imposed upon it by law or assumed by it under contract for damages, direct or consequential and expenses, hereinafter called "Ultimate Net Loss."

10. Plaintiff, COMMERCIAL UNION INSURANCE COMPANY in the first paragraph under "Coverages" of the policy Number E-14-8056-001 identified above in paragraph five (5) and entered into on or about October 1, 1963, limits its coverage to "indemnify the insured for all sums which the insured should be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of "Ultimate Net Loss."

11. Plaintiff, COMMERCIAL UNION INSURANCE COMPANY in the first paragraph under "Coverages" of the policy Number E-14-8056-004 identified above in paragraph six (6) and entered on or about October 1, 1966, limits its coverage to "indemnify the insured for all sums which the insured should be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of "Ultimate Net Loss."

12. At the aforesaid times, the Plaintiffs entered into the three insurance contracts identified above, consistent with the Laws of the Commonwealth of Pennsylvania which preclude insuring against punitive damages as being against public policy.

13. At the present time, Pittsburgh Corning is a named defendant in several thousand asbestos cases in which underlying asbestos plaintiffs have demanded punitive damages.

14. In FOSTER V. PITTSBURGH CORNING CORPORATION ET AL. CA H-81-1172 (S.D. TX, Eastern Div., 1983) a jury awarded punitive damages against Defendant for $300,000.

15. Plaintiffs believe and therefore aver that defendant PITTSBURGH CORNING in FOSTER V. PITTSBURGH CORNING CORPORATION ET AL. CA H-81-1172 (S.D. TX, Eastern Div., 1983) will seek to receive from Plaintiffs insurance coverage for the punitive

n. P. 6,936

damages awarded against Defendant by the Texas jury and for the defense costs of defending said punitive damages award.

16. Plaintiffs believe and therefore aver that due to the exigent circumstances of the thousands of pending asbestos cases against Pittsburgh Corning that defendant will demand that plaintiffs COMMERCIAL UNION INSURANCE COMPANY and FALCON INSURANCE COMPANY pay both for its punitive damage award and that plaintiffs pay for the costs of defending the punitive damage claims and therefore plaintiffs request a judicial interpretation at this time of their insurance policies.

COUNT I

IN ASSUMPSIT

17. Plaintiffs, COMMERCIAL UNION INSURANCE COMPANY and FALCON INSURANCE COMPANY hereby incorporate by reference the allegations contained in paragraphs one (1) through sixteen (16) as if set forth herein at length.

18. Plaintiffs believe and therefore aver that defendant PITTSBURGH CORNING CORPORATION will seek remuneration from Plaintiff under the contracts identified above in paragraphs (4), (5), and (6) and attached hereto as Exhibits A, B, and C for both the punitive damage award and for the costs of defending punitive damage claims.

19. These contracts, indentified in paragraphs (4), (5) and (6) and attached hereto as Exhibits A, B, and C did not include coverage for either punitive damages or defense payments for punitive damage claims.

20. Plaintiffs believe and therefore aver that the actions of the Defendant as stated above in attempting to recover for punitive damages and for the costs of defending punitive damage claims from Plaintiffs constitute a misapplication of the insurance contracts and exceed the scope of the contracts between Plaintiff and Defendants.

WHEREFORE, Plaintiffs, COMMERCIAL UNION INSURANCE COMPANY and FALCON INSURANCE COMPANY herein respectfully pray as follows:

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(a) that this Court enter a Declaratory Judgment construing the provisions of the various policies of insurance referred to herein and determining the respective rights and liabilities of the Plaintiffs and the Defendant thereunder and under all of the circumstances hereinbefore set forth;

(b) that this Court enter an Order declaring any payment made by an insurance company for punitive damages to be against public policy and therefore void under the provisions of plaintiffs' insurance policies.

(c) that this Court enter an Order declaring that plaintiffs COMMERCIAL UNION and FALCON INSURANCE COMPANY has no obligation to pay the defense costs for claims against Pittsburgh Corning for punitive damages.

GRIFFITH & BURR, P.C.

BY: ______________________

JAMES LEWIS GRIFFITH
Attorney for Plaintiffs,
Commercial Union Insurance Company
and Falcon Insurance Company
800 Chestnut Street
Suite 200
Philadelphia, Pennsylvania 19107
(215) 923-1900

MITCHELL

ORIGINAL FILED

JUL 1

BANKRUPTCY COURT
OAKLAND, CALIFORNIA

UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF CALIFORNIA

In re JOHNS-MANVILLE CORPORATION, et al, Debtor.	Bankruptcy No. 82-B-11656
GAIL MITCHELL, Personal Representative of the Estate of ALBERT MITCHELL, Plaintiff, v. JOHNS-MANVILLE CORPORATION, MOORE, CLIFFORD, WOLFE, LARSON and TRUTNER, Defendants.	Adversary No. 4-82-1691AH

MEMORANDUM OF DECISION

This proceeding questions whether $150,000 held in trust by debtor's attorney for payment in settlement of an asbestos-based personal injury action is property of the bankruptcy estate. 11 U.S.C. §541(a). I hold that it is not.

I

The relevant facts are undisputed. The law firm of Moore, Clifford, Wolfe, Larson & Trutner represented Johns-Manville and related companies in a large number of actions brought by persons

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who suffered toxic tort injuries from exposure to asbestos. Located in Oakland, the law firm's representation was essentially limited to claims and actions arising in Northern California.

One of the claimants was Aaron Mitchell, whose action in the Alameda County Superior Court had advanced to the point of a settlement conference before the court. Settlement was reached on June 30, 1982 between Mitchell and several defendants, including Johns-Manville, and was announced to the court. Put most simply, Mitchell agreed to release all of his claims in exchange for $206,500. The various defendants allocated the total among themselves. Johns-Manville agreed to contribute $150,000.

Moore, Clifford -- Johns-Manville's attorneys in negotiating the settlement -- also agreed to act on behalf of all parties in consumating the settlement after it had been effected. To this end, the law firm ordered a draft for $150,000 from Johns-Manville on July 7, 1982 and prepared the settlement in written form together with a dismissal with prejudice. It forwarded the latter package to Mitchell's attorneys on July 9, 1982. The executed Compromise and Release and Dismissal with Prejudice were returned to Moore, Clifford on July 30, 1982 together with a request for the defendants' settlement checks.

Moore, Clifford replied on August 6 with $52,500 (representing contributions of all but one of Johns-Manville's co-defendants) and a request for a court order authorizing compromise and release as to Mr. Mitchell's minor daughter.

Moore, Clifford received the $150,000 draft from Johns-Manville on August 9 and deposited it to a trust account the next day. The account declared that it was held by Moore, Clifford "for the benefit of Albert Mitchell..."

Johns-Manville and its related companies filed bankruptcy on August 26, 1982, and shortly thereafter Moore, Clifford was directed by a representative of the debtor not to disburse the $150,000 to Mr. Mitchell.

Moore, Clifford transmitted $4000, representing the remaining contribution from the other defendants to Mr. Mitchell's attorneys on September 13.

Mr. Mitchell died of his injuries on September 27 and his wife instituted this litigation against Moore, Clifford and Johns-Manville in November 1982 on behalf of his estate. In response, the law firm interpleaded the $150,000. Johns-Manville's motion to dismiss or to transfer venue was denied and the matter was tried between the debtor as debtor-in-possession and the Mitchell estate.

The question is whether the debtor held a legal or equitable interest in the funds held by Moore, Clifford on August 26, 1982.

II

The Mitchell estate contends that Johns-Manville held no interest in the $150,000 on the date of bankruptcy because Moore, Clifford held legal title and the estate of Albert Mitchell held the beneficial or equitable interest. Johns-Manville contends that (1) Moore, Clifford held the $150,000 for the benefit of its one and only client, Johns-Manville, and that it could not (and presumably did not) assume any fiduciary duty to Mr. Mitchell or his estate, adversaries of Johns-Manville. The debtor also contends that (2) in any event the Mitchell estate did not have a

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right to disbursement of the $150,000 until all of the conditions of the settlement had been satisfied and that one condition was unsatisfied as of the date of bankruptcy.

A

Johns-Manville does not accept the proposition that Moore, Clifford could, in faithfully representing its client, assume a fiduciary duty to others. However, it is quite common for the attorneys representing one party in a dispute to assume the role of an escrow agent or stake holder for purposes of executing the terms of a settlement <u>after a settlement is reached</u>. For purposes of executing the settlement terms, the law firm is a fiduciary to all of the parties, not merely its client. There is and can be no conflict of interest at this point; all parties have the common interest of executing the exact terms of the settlement agreement. This practice and principle is well recognized, and the Mitchell estate has cited several cases so holding.

There can be no doubt from the record that Moore, Clifford assumed this role on behalf of all parties to the settlement <u>after the settlement was reached</u>. It accepted funds from each one of the participating co-defendants, i.e., from non-client defendants as well as its client. It accepted the dismissal with prejudice from Mitchell. It disbursed all of the funds it received -- except for the $150,000 from Johns-Manville -- to Mitchell (or to the Mitchell estate). In doing so, it acted on behalf of the co-defendants and Mitchell. I have no trouble finding that Moore, Clifford accepted a fiduciary duty to Mitchell, which required the firm to disburse the $150,000 to

Mitchell once Mitchell had satisfied all conditions of the settlement.

Johns-Manville contends that even if Moore, Clifford had assumed this role it did not bind Johns-Manville unless it agreed and there is no evidence in the record that it agreed. While there in no evidence of an express agreement between Moore, Clifford and its client as to this particular transaction, there is evidence that the law firm regularly accepted this stakeholder role in settlements and there is no evidence that Johns-Manville ever disapproved. Indeed, Johns-Manville has never disapproved of the practice in this case. Nor is it apparent why it would disapprove; given the need for the services of a stakeholder, it is likely that Johns-Manville would prefer its attorneys over plaintiff's attorneys as stake holders.

I find that Moore, Clifford acted with Johns-Manville's authority in acting as escrow or stake holder.

B

Assuming that all of the terms and conditions of the settlement agreement were met as of August 26, the date of bankruptcy, Moore, Clifford held the $150,000 for the benefit of Mr. Mitchell and had a duty to disburse these funds to Mr. Mitchell. If so, Johns-Manville could not unilaterally rescind its instructions, Ogdahl v. Title Insurance Trust Co. 72 Cal.App. 3d Supp. 41, 140 Cal.Rptr. 148 (1977). In sum, Johns-Manville had neither legal nor beneficial interest in the funds.

Johns-Manville contends, however, that all terms and conditions were not met. It points out that the settlement agreement expressly required that a minor's compromise order be obtained from the state court. This order had not been obtained by Mitchell as of the date of bankruptcy, although it has since been obtained.

The Mitchell estate contends that this was merely a term of the settlement and not a condition precedent to its effectiveness. It characterizes the evidence as excusing or waiving the order approving the minor's compromise before the money was payable.

I find that although an order approving the minor's compromise was required by the settlement agreement, it was not a condition precedent to Mr. Mitchell's entitlement to the $206,500. The clearest evidence in support of this finding is the fact of payment by Moore, Clifford of all the monies received from each of the several other defendants, both before and after Johns-Manville's bankruptcy, in the absence of the order. In addition, the Moore, Clifford secretary who controlled the trust funds testified that she discussed the absence of the order with the responsible Moore, Clifford attorney and was told she could send the checks without awaiting the order.

Mr. Lyman, the responsible attorney, testified on direct and cross-examination that he never expected any problem in obtaining the minor's compromise order. On one occasion, he explained that this was because both the settlement and the minor's compromise were before the same judge. Earlier he testified that he was anxious to disburse as much money as possible to Mr. Mitchell before he died.

I find that the minor's compromise order was a condition of the settlement but not to Mr. Mitchell's right to the funds.

Holding as I do that it was not a condition precedent, I do not address the alternate theory that the condition was waived.

III

In summary, I hold that Moore, Clifford held the $150,000 in trust for Mr. Mitchell as of the date of bankruptcy because all conditions precedent to his right to the funds had been satisfied. I further hold that Johns-Manville had neither legal nor equitable title to the $150,000 as of the date of bankruptcy and that the funds were not property of the estate pursuant to 11 U.S.C. §541(a).

The Mitchell estate is directed to prepare, serve and lodge a form of order disposing of the $150,000 and accumulated interest.

Dated: July 11, 1983

ROBERT L. HUGHES
Bankruptcy Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	OAL
	)	
OHIO ASBESTOS LITIGATION	)	ORDER NO. 3

LAMBROS, DISTRICT JUDGE

As set forth in General Order No. 67, dated June 1, 1983 this District Court has determined that the majority of the cases arising out of asbestos-related diseases shall be consolidated on my docket for pretrial supervision and ultimate disposition.

I have determined that the exceptional attributes of this class of litigation requires the appointment of Special Masters to aid this court in the performance of its judicial duties, and that the circumstances make such an appointment particularly appropriate. Rule 53(b), Federal Rules of Civil Procedure, provides in pertinent part:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Furthermore, the recent proposed revisions to Rule 16, Fed. Rules of Civil Procedure, explicitly recognizes the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.

There can be no doubt that this genre of litigation is of an exceptional nature. Nationwide, approximately 20,000 of these cases have been filed, and while each represents an individual cause of action, not one can be viewed in a vacuum. Action against two major defendants has been stayed by bankruptcy proceedings. The potential liability of some defendants may amount to several times their available insurance coverage, and there are already complex third-party suits among insurers, reinsurers, and excess insurers. The lack of any prefiling claims procedure has resulted not only in the large number of cases filed, but also in a complex, and sometimes duplicative discovery process.

It is therefore my finding that close supervision by individuals who are intimately familiar with all the pertinent factors and recent developments in asbestos litigation on a nationwide basis will best promote the mandate of Rule 1, Fed. R. Civ. Proc., in securing the just, speedy, and inexpensive determination of these actions.

Accordingly, I hereby appoint as Special Masters Eric D. Green, Associate Professor of Law, Boston University, and Francis E. McGovern, Visiting Professor of Law, Boston University. Each of these Special Masters brings to this litigation unique expertise in the areas of case management, dispute resolution, products liability, and asbestos litigation that will assist me in ensuring the most appropriate resolution of the cases filed in both courts with a minimum amount of delay and expense. In addition, the exceptional aspects of asbestos litigation involving hundreds of plaintiffs alleging progressively severe personal injury justify

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the appointment of these extremely well-qualified Special Masters.

This appointment is made pursuant to Rules 16, 26, and 53, Federal Rules of Civil Procedure, and the inherent authority of the Court to supervise and administer pending cases. This reference is made for the purposes set forth herein in order to preserve the ability of the court to fulfill its primary judicial function of providing, in those cases that require it, trials on the basic issues involved in the litigation.

The Special Masters are directed to propose a plan for the management of the pretrial and trial phases of these cases. In carrying out this mandate, the Special Masters are directed to familiarize themselves with the cases filed and to study the various methods, models and systems that have been suggested or may be developed by the various national groups studying the asbestos litigation problem and by other judges, legal scholars, and interested parties. The Special Masters shall also meet with the representatives of the interested parties in a manner they deem appropriate, including meetings ex parte, in order to ensure that they have the benefit of all available input in making their recommendations. They may schedule and preside over discovery proceedings and examine and inspect all data, facts, documents and other materials relevant to their appointment. They may act to coordinate all proceedings not otherwise agreed to by the parties. The Special Masters may adopt appropriate rules and procedures to accomplish their task efficiently and fairly.

In addition, the duties of the Special Masters shall encompass the formulation of a methodology for facilitating a resolution by settlement, either as to designated parties, as to entire causes of action, or as to all pending cases.

Privileged information presented to the Special Masters shall remain privileged and confidential, and shall be disclosed to the Court only upon consent of counsel.

Nothing in this reference shall be construed as abrogating the litigants' right to a trial by jury.

The Special Masters shall draft their recommendations for the handling of these cases, provide an opportunity for interested parties to comment, and submit final recommendations to me by October 21, 1983 with a plan to manage the pretrial and trial phases of these cases and any formulations by which settlement may be achieved.

Pursuant to Rule 53, compensation for the Special Masters shall be as follows:

1. The Special Masters shall be paid $70.00 (seventy dollars) per hour for performing their assigned duties. This rate has been determined by the Court to be fair and equitable in light of the complex and difficult tasks assigned them. The designated rate is one-half the rate that would normally be charged by the Special Masters for private consulting work of this nature, less than one-half the highest Cleveland rate for private attorneys in litigation, and approximately two-thirds the average rate of experienced Cleveland trial attorneys.

2. The total time expended by both Special Masters combined shall not exceed 1000 hours without prior authorization of the Court.

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3. The Special Masters shall be reimbursed for reasonable expenses incurred in connection with their assignment based on an estimate for travel, administrative, secretarial, research and computer expenses. The total expenses for both Special Masters combined shall not exceed $18,000 without prior authorization by the Court.

4. Compensation for the Special Masters shall be charged to the parties under Rule 54.

The parties and their counsel are hereby directed to cooperate with and assist the Special Masters in these tasks.

IT IS SO ORDERED.

Thomas D. Lambros
Thomas D. Lambros
United States District Judge

DATED: July 14, 1983

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAMBROS, DISTRICT JUDGE

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

McMONAGLE, COMMON PLEAS JUDGE

IN RE:	)	FEDERAL-STATE
	)	MEMORANDUM OF ACCORD
OHIO ASBESTOS LITIGATION	)	ON ASBESTOS LITIGATION

Litigation associated with asbestos-related disease has had an unprecedented impact on the American judicial system. Transcending jurisdictional distinctions, to date approximately 20,000 individual cases have been filed in state and federal courts. Of these less than 250 have gone to trial and less than 4,000 have settled. A substantial number of such cases are pending in the Common Pleas Court of Cuyahoga County, Ohio, and in the United States District Court for the Northern District of Ohio, and have been assigned to the dockets of the above-named judges.

We are well-aware that numerous attempts are being made by diverse groups, including the Judicial Administration Working Group on Asbestos Litigation of the National Center for State Courts, the Federal Judicial Center, the Center for Public Resources Judicial Panel, and various bankruptcy judges to resolve asbestos cases on a national or regional level. Because of the large numbers of these cases, not only on our dockets, but on the dockets of federal and state courts nationwide, and because these cases have been assigned to us over a short period of time, it is crucial that there be significant coordination between our courts to assure uniform, fair, and efficient justice consistent with the laws and procedures

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applicable to state and federal courts.

The parties hereto have attended the joint sessions held by us on June 13 and June 20, 1983 regarding the possible joint appointment of Special Masters to supervise and coordinate the pretrial aspects of these cases. These hearings were undertaken out of our belief that the problems associated with asbestos litigation cut across jurisdictional lines insofar as high litigation costs, liability issues, and pretrial discovery problems are concerned. It was our purpose to explore better ways of handling this unique class of litigation in our region, with a hope that any plan we implement may ultimately be of use on a nationwide basis. At the hearings, we were immeasurably aided by the information conveyed by counsel regarding efforts already taken to coordinate discovery, and their candid expressions regarding the concurrent appointment of Special Masters.

Because of differences in our respective rules of civil procedure, we have determined that the proposed concurrent appointment will not be undertaken. By the Order dated July 14, 1983, the Special Masters have been appointed to serve in regards to the federal cases, although no order will issue at this time in regards to the state cases. Nonetheless, it is our desire that there be a coordinated and uniform treatment of the asbestos cases pending before our two courts, and that the approach developed by the Special Masters will aid in the resolution of cases on both dockets. We are mindful of our jurisdictional distinctions, and nothing in this memorandum shall be construed as a delegation of any authority possessed by either of us or as a commingling of jurisdiction.

We believe that it is our duty as judges to instill in the public the confidence that our judicial system will function to resolve these cases honorably and effectively in a manner most compatible with the public interest. It is our hope that this memorandum of accord will achieve that goal.

/s/ Thomas D. Lambros	/s/James J. McMonagle
THOMAS D. LAMBROS United States District Judge	JAMES J. MCMONAGLE Judge, Common Pleas Court

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STATE OF OHIO)
(SS:
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS

JUDGE JAMES J. McMONAGLE

15

IN RE:)
(ORDER
OHIO ASBESTOS LITIGATION)

oooo0oooo

In furtherance of the intentions expressed at the Joint Sessions, and in light of the proposed order issued with regard to the appointment of special masters, this Court announces as follows:

Pursuant to Ohio Superintendence Rule 9 and Cuyahoga County Local Rule 22, the Court of Common Pleas of Cuyahoga County will cooperate fully with the United States District Court, Northern District of Ohio, Eastern Division, in its efforts to achieve a just, speedy, and inexpensive resolution of asbestos cases.

All counsel litigating the asbestos cases in this jurisdiction are hereby instructed to cooperate with the Federal Court and with its litigation-management plan.

IT IS SO ORDERED.

James J. McMonagle

JAMES J. McMONAGLE, JUDGE

DATED: July 11 1983

RECEIVED FOR FILING

JUL 14 1983

GERALD E. FUERST
BY M. M. Hunt Dep.

WORKMEN'S COMPENSATION

LUCILLE P. LOWERY, et al	*	IN THE
vs.	*	CIRCUIT COURT FOR BALTIMORE CITY
JOHNS-MANVILLE, et al	*	82190811/32258

* * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

GREENFELD, J.

This is a motion for summary judgment filed by one of the defendants, McCormick Asbestos Company ("McCormick"). For purposes of this motion the facts are not in dispute. Plaintiffs' decedent, George W. Lowery, was employed in Maryland by McCormick, a supplier of asbestos products, for short intervals of time in 1943, 1950, 1962 and 1970. At all such times, McCormick complied with the appropriate provisions of the Maryland Workmen's Compensation Act ("the Act"), Md. Code, Article 101. The decedent also worked for other companies in Maryland where he was exposed to asbestos products. His last occupational exposure to asbestos products occurred while he was employed by Wallace and Gale in 1975. It is alleged that the decedent contracted an occupational disease resulting from his exposure to asbestos products. This disease manifested itself after 1975. Most of the defendants in this case are manufacturers of asbestos products which were used by the decedent's various employers.

Sec. 23(b) of the Act provides as follows:

> "When compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease, and the insurance carrier if any, on the risk when the employee was last so exposed under the employer, shall be liable therefor..."

The parties to this motion agree that because of Sec. 23(b), Wallace and Gale, being the decedent's last asbestos-related employer, is the only employer liable for the payment of workmen's compensation benefits.

Sec. 15 of the Act requires that every employer subject to the Act "shall pay or provide as required herein compensation according to the schedules of this article" for such employee dis-

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ability or death as is covered by the Act. The very next paragraph provides that "[t]he liability prescribed by the last paragraph shall be exclusive," except where the employer fails to secure the payment of compensation (an exception not applicable in this case).

McCormick contends that the exclusivity clause of Sec. 15 immunizes it from common law liability, since the decedent's disease was covered by the Act, and McCormick had fully complied with the Act.

Plaintiffs, on the other hand, first contend that the Act only protects an "employer" from common law liability, but that in the case of occupational diseases, the term "employer" is limited to that one employer who is actually liable for payment of workmen's compensation benefits (namely, the employer of last exposure); and that all prior companies for whom a claimant may have worked are, by a "legal fiction," not considered "employers" and are therefore not protected by the Act. Plaintiffs read too much into Sec.23(b). This provision does no more than designate which of several employers--all of which are subject to the Act--is ultimately liable for compensation benefits. It merely renders the last employer liable but does not, as Plaintiffs suggest, transform a prior employer into a non-employer.

Plaintiffs also contend that the exclusivity provision of Sec. 15 was meant to apply only where that particular employer is liable for workmen's compensation benefits to the employee. Historically, the workmen's compensation act was enacted as a tradeoff which subjected an employer to liability without regard to fault but at the same time limited the monetary amount of the employer's liability. Wood v. Aetna Cas & Surety Co., 260 Md. 651, 660 (1971); Baltimore Transit Co. v. State, 183 Md. 674, 677 (1944). Plaintiffs assert that this *quid pro quo* which underlies the Act is not present here, since the Act shields McCormick from liability for compensation.

This argument is not without force. However, the *quid pro quo* rationale has been adopted by other courts throughout the country only where the worker's injury or disease itself is not covered by the workmen's compensation act. See Hubbard v. Reynolds Metal Company, 482 F.2d 63,64 (9th Cir.,1973); and Tysenn v. Johns-Manville Corp., 517 F.Supp. 1290,1293 (E.D.Pa., 1981) and the cases cited therein. In the present case, by contrast, the decedent's occupational disease was in fact covered by the Act, and the decedent was entitled to collect workmen's compensation benefits. That the Act limits recovery of compensation benefits to the last employer is not important. The determinative aspect of the exclusivity provision in these out-of-state decisions is whether the employee's injury or disease is compensable under the workmen's compensation statute rather than which employer may be liable therefor.

In any event, the rule in Maryland appears to be even more protective of employers. Victory Sparkler Co. v. Francks, 147 Md. 368 (1925) was a common law action for damages against an employer for an occupational disease. At that time occupational diseases had not been specifically included in the Act. In that case, the Court of Appeals of Maryland initially assumed that the plaintiff's disease was not covered under the Act. On this assumption, the Court nevertheless held that an employer who complied with the Act could not be sued at common law by an employee whose injury arose out of and in the course of his employment, even if the injury were not compensable under the Act. Id., at 376. Although the Court did ultimately conclude that the plaintiff's occupational disease was compensable under the Act, its dictum is so unequivocal as to be dispositive here.

It must be concluded that the employer's compliance with the Act, rather than the fact of liability for payment of compensation, triggers the exclusivity provision.

CONCLUSION

McCormick is shielded from common law liability because it was an employer in compliance with the Act, and because Plaintiffs'

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decedent's illness was covered by the Act. Merely because McCormick, under the facts of this case, is not liable for workmen's compensation payments does not subject it to common law liability. Accordingly, it is this 7th day of July, 1983, ORDERED that Defendant McCormick Asbestos Company's motion for summary judgment be GRANTED. There being no just reason for delay, the clerk is directed to enter a final judgment in favor of this Defendant, pursuant to Md. Rule 605a. Plaintiffs' time for filing an appeal shall run from this date.

Martin B. Greenfeld
Judge

cc: all counsel

TYLER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

HERMAN YANDLE, ET AL vs. PPG INDUSTRIES, INC., ET AL	Civil Action No. TY-74-3-CA
vs. LESTER KAY, ET AL vs. PPG INDUSTRIES, INC., ET AL	Civil Action No. TY-74-13-CA
vs. WILLIAM B. McNEECE, JR. vs. UNITED STATES OF AMERICA	Civil Action No. TY-75-22-CA

O R D E R

On May 24, 1978, the Court entered an order authorizing the Liason Attorney for the Defendants to withdraw from the Tyler Division office of the United States District Clerk for the Eastern District of Texas, all or any designated portion of, the discovery materials on file in the above entitled and numbered causes. Subsequent to the entry of the above mentioned order the discovery materials were removed from the Clerk's files and thereafter placed in the custody of the United States Attorney for the Eastern District of Texas. On January 4, 1982, the Court

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further ordered that the discovery materials in the custody of the United States Attorney, not be released, produced, disclosed, or in any way made available to anyone except pursuant to further order of the Court. The principal reason for the entry of this order was to keep the "Tyler I" discovery materials under seal until the Owentown asbestos litigation had been substantially concluded.

Since the entry of the order of January 4, 1982, the Court has been inundated with requests for access to, or release of the withdrawn discovery materials from litigants throughout the United States. The Court has, with few exceptions, refused to grant any of these requests because litigation involving the operation of the Pittsburgh-Corning asbestos plant at Owentown, Texas, has been pending before the Court. However, in January, 1983, the "Tyler II" litigation, that is, Elmer Allen, et al v. PPG Industries, Inc., et al, No. TY-78-104-CA and its companion cases, were compromised and settled as between the plaintiffs and all the industry defendants, except E.G.N.E.P. Ltd. and the Cape asbestos companies, which are in default in these cases and Unarco Industries, Inc., which is presently in bankruptcy. Further, as of June 20, 1983, the Court has been on notice that a settlement between the plaintiffs and the United States of America, a third party defendant in the Tyler II cases, has tentatively been reached. This last development has served to effectively terminate the Tyler II litigation, excepting, of course, any default judgment proceedings that might be brought against E.G.N.E.P. Ltd. and the Cape companies, or any post-bankruptcy actions by the plaintiffs against Unarco Industries, Inc.

Although cases arising out of the operation of the Owentown asbestos plant are still pending before the Court, the Court believes that the settlement of the Tyler II litigation has substantially concluded the major Owentown asbestos litigation. Because of this, the Court has determined that the original purposes justifying the sealing of the Tyler I discovery materials are no longer present. In recognition of that determination, the Court will vacate the order of January 4, 1982, and lift the seal on the Tyler I discovery materials and return them to the custody of the United States District Clerk of the Eastern District of Texas.

It is, therefore, ORDERED that all discovery materials filed in the above entitled and numbered causes and in the custody of the United States Attorney for the Eastern District of Texas, be released from such custody and returned to the files of the Tyler Division office of the United States District Clerk for the Eastern District of Texas. The discovery materials returned to the custody of the United States District Clerk by virtue of this order shall, thereafter, be fully discoverable without application to this Court.

SIGNED this 14th day of July, 1983.

William M. Steger
UNITED STATES DISTRICT JUDGE

EAGLE PICHER

ADDRESS ____ CITY Austin STATE ____

INTERVIEWED ** POSITION ____

BUSINESS ____ REQUIREMENTS ____

EAGLE-PICHER SALES COMPANY

INDUSTRIAL CONTACT REPORT

YOUR QUOTATION ____ SALESMAN H. M. ABER DATE ____

YOUR LETTER ____ COPIES TO: Mr. T. C. Carter

MY LETTER ____ Mr. Douglas Vie

CUSTOMER'S LETTER ____ Mr. G. B. Lynde

WE ARE GETTING ____ % OF THEIR BUSINESS

(CHECK THE FOLLOWING SUMMARY)

OF CALL	✓	PRICES QUOTED	SOLICITED FOR	✓	PRODUCT DISCUSSED		✓	RESULT OF CALL	✓
PROSPECT		T-	DIRECT F.O.B.		WOOL	MISC. CEMENT		WILL CALL BACK	
CALL			DISTRIBUTOR F.O.B.		BLANKETS	BLOCK		DIST. WILL CALL BACK	
USER			APPLIED CONTRACT		INSULSEAL	FELT		SOLD	
APPLY CONT.			E. P. CONTRACT		SUPER 66			DEAD	
NEW ACCT.			NEW DISTRIBUTOR		PIPE COVER'G				

SALESMAN—DO NOT WRITE IN THIS COLUMN

TYPES OF EQUIPMENT

PRODUCT NOW USED AND CURRENT PRICES:—

SALESMAN'S COMMENTS

** Mr. Kirby, Asst. to Dr. Cox, State Health Officer.
Mr. W. B. Wardlow, Chemical Engineer in charge of Texas State Board of Health Laboratories
Mr. Dabney, of Dr. Cox' office.

I tried to contact Dr. Cox but found him to be at home ill. I was referred to his assistant Mr. Kirby who later referred me to Mr. W. B. Wardlow of their laboratory. It seems that Mr. Wardlow, by his admission, wrote the letter to the two employees, Messrs. C. R. Cardiff, H. E. Harlson, of the Humble Oil & Refining Company, with regard to the sample of Supertemp Block which these two men sent to Dr. Cox for his opinion as to whether or not the handling of the block was injurious to workmen. However, the letter was signed by Dr. Cox.

Mr. Wardlow and I reviewed their entire file on the Supertemp test, which in reality was not a test. Mr. Wardlow had answered the letter written to Dr. Cox by Messrs. Cardiff and Harlson by quoting from a book — "Occupation and Health" as compiled by the International Labor Office, which dealt with slag and mineral wool hazards to users in a general way. However, this letter did not mention the authority on which his opinion was based, therefore, his letter which incidently was over the signature of Dr. Cox, has been badly misconstrue by Messrs. Cardiff and Harlson and also the Humble Oil & Refining Company.

Mr. Wardlow readily saw that we had been placed in an awkward and costly position and he has promised to help straighten things out in our favor. He told me that he doesn't feel that Supertemp is any more harmful than the majority of insulations now being used. He says that he did run a spectograph test and could not find any free silica, therefore, in his opinion silicosis would not result from handling this material. At this point I prevailed upon him to write Mr. Wiler of Humble Oil & Refining Company's Safety Department in Baytown, Texas, advising him that silicosis could not occur to workmen handling the material. He promised to do this and to also point out that the opinions voiced in his letter were meant to deal with mineral wool in general rather than with a specific product. He has asked that I write his Department a letter in the form of a formal request for a clearer definition of his letter. As a matter of form I have done this while in his office. He is to write his letter to Mr. Wiler of Humble the latter part of this week and is to send two copies to me in Houston. As soon as I receive them I will contact Humble.

While in Mr. Wardlow's office I had the opportunity to read a section in "Occupation and Health", as compiled by the International Labor Institute, on asbestos, compiled in 1938. This article was by Dr. S. R. Gloyne of London, England and Dr. E. R. A. Meriweather of Birmingham, England. If you think mineral wool is dangerous you should read this. You may secure a copy of this article by writing the International Labor Office in Washington, D. C., and request a copy of the article on Asbestos by the two above doctors as published in the Occupation and Health Supplement, dated 1938. I urge you to read this as it is very informative. I also read an article in a magazine by the name of "Industrial Medicine" written by Dr. Walter J. Siebert, which apparently covers some very exhaustive research on handling of glass wool by workmen. This is in the January 1942 issue of this magazine, I believe. It might be well that you read this also.

Please send a copy of the U. S. Navy Report, showing chemical analysis of Eagle Wool to W. B. Wardlow, State Department of Health, Austin, Texas.

EXHIBIT X

Page No. 3 Texas State Board of Health, Austin, exas.

I should mention that Wardlow will contact Humble in person to make any reasonable test on Supertemp relative to its being injurious to workmen, if requested by either Humble or ourselves. If we are sure of ourselves on this product this might be the thing to do, as his opinion would be worth having in an authorative report. Let me know if you would like to have him visit the Humble plant, as I believe it can be easily arranged. There is one thing to remember, however, Mr. Wardlow being in the employ of the State is going to be a bit reluctant to make any definite statements with regards to any product being absolutely harmless to workmen, as his position with the State Department more or less forces him to "ride the fence" so to speak.

April 27, 1942.

Mr. L. J. Wieler,
Safety Department
Humble Oil & Refining Company
Baytown, Texas.

Dear Mr. Wieler:

Complying with your request, when I was in your office recently, that I furnish you information as to where you could procure the article on asbestos, as compiled by Dr. S. R. Gloyne of London and Dr. E. R. A. Merriwether of Barmingham, England.

You may write the International Labor Office in Washington, D. C., and request a copy of the Occupation and Health Supplement, dated 1936, containing the article on Asbestos as compiled by the above doctors.

Mr. Wieler I have written Dr. Cox' Office in Austin, Texas, requesting that he furnish you copy of Messrs. Cardiff and Harlson's letter which started all the controversy regarding our Supertemp Block.

Again thanking you for the interest shown in our behalf, we are

Yours very truly,

THE EAGLE-PICHER SALES COMPANY

H. M. Aber
Insulation Division

HMA/s

cc: Mr. T. C. Carter
cc: Mr. Douglas Via
cc: Mr. C. B. Lyade

In the
United States Court of Appeals
For the Seventh Circuit

No. 82-2071

JANET E. PITTS,

Plaintiff-Appellant,

v.

UNARCO INDUSTRIES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 81 C 1334—Cale J. Holder, *Judge.*

ARGUED JANUARY 19, 1983—DECIDED JULY 11, 1983

Before CUMMINGS, *Chief Judge*, COFFEY, *Circuit Judge*, and ASPEN, *District Judge.**

CUMMINGS, *Chief Judge.* The principal issues in this appeal are whether plaintiff was denied a fair opportunity to oppose defendants' motions for summary judgment and whether an unaccrued cause of action for wrongful death is a species of property protected by the Fourteenth Amendment and abrogated by the applicability of a ten-year Indiana statute of limitations.

Some 20 months following the death of her husband from lung disease, plaintiff, a resident of Indiana, commenced this wrongful death diversity action against 16 corporations, all residents of other states. Plaintiff alleged that each did business in Indiana and was involved at some stage in the production and distribution in Indiana of products containing asbestos. Plaintiff's husband had been an asbestos insulation mechanic during the years 1950 through 1979 and she claimed that asbestos-containing products produced and distributed by defendants caused his death. She sought $1,500,000 in compensatory damages and $1,000,000 in punitive damages. Her complaint was in five counts: Count I charged negligence; Count II, strict liability; Count III, breach of implied warranties of merchantability and fitness; Count IV, conspiracy to keep from the public information about the health risks associated with asbestos; and Count V charged loss of consortium. Plaintiff abandoned Count V and on May 13, 1982, the trial court dismissed with prejudice Counts III and IV for failure to state a claim for relief, and struck from the complaint plaintiff's prayer for punitive damages. This appeal does not question these rulings. But on June 9th, the court granted final summary judgment in favor of six defendants on Counts I and II.[1] This appeal is from that summary judgment.

I

Plaintiff first claims that she did not have an adequate opportunity to oppose the remaining six defendants' summary judgment motions. On June 1st before granting those motions, the trial court ruled that the ten-year statute of limitations in Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 (1981),[2] applied to plaintiff's wrongful death suit, and that under that statute unless it appeared that each defendant had delivered an asbestos-containing product to plaintiff's husband or his employer within the ten-year period preceding the date plaintiff filed suit, her claim against that defendant would be time-barred. When the trial court issued this ruling, plaintiff had yet to present her argument about which statute of limitations should apply, and she claims that she was entitled to an opportunity to do so. But the ruling was not a judgment of any sort; it was simply a preliminary statement of the court's understanding of the law after having read several defense motions and supporting memoranda that had been filed five days earlier. Plaintiff had ample opportunity to respond to those motions and to challenge the court's understanding of the law and did so by filing a motion to reconsider on June 3 and two supporting briefs and affidavits on June 4 and 7. On June 7 and 8 the court considered the respective submissions and oral arguments of the parties in open court (plaintiff's App. 231-236; defendants' App. 89-92) before determining whether any defendants had delivered asbestos-containing products during the 10 years preceding the commencement of this suit and whether the ten-year statute of limitations barred suit. Plaintiff thus fully responded to defendants' motions—by

* The Honorable Marvin E. Aspen, District Judge of the Northern District of Illinois, is sitting by designation.

[1] A seventh defendant had been dismissed for want of service and the other nine settled with plaintiff.

[2] Indiana Code § 33-1-1.5-5 (Burns IC 34-4-20A-5) provides:

33-1-1.5-5 Statute of limitations

Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

filing affidavits and two briefs challenging, on constitutional and choice-of-law grounds, the applicability of the ten-year statute of limitations. Plaintiff had further opportunity to pursue those arguments during the June 7 and 8 hearings.

While plaintiff's motion to reconsider mentioned Local Rule 10 of the Southern District of Indiana providing 15 days to file opposition to a summary judgment motion, she merely requested

> "an opportunity to present a response to the motion for partial summary judgment and further, for an opportunity to present in open court argument and testimony regarding the issues raised in the motions for partial summary judgment filed on behalf of all defendants in this matter." (Defendants' App. 86.)

Since she was accorded that opportunity, no reversible error was committed in receiving her affidavits and briefs on June 4 and 7 and considering her submissions and oral argument on June 7 and 8 before granting the summary judgment motions on June 9.

II

Second, plaintiff contends that the ten-year statute of limitations was tolled by defendants' fraudulent concealment of their tortious conduct. This contention was not advanced below and therefore need not be considered for the first time on appeal. *Ohio Casualty Insurance Co. v. R.J. Rynearson*, 507 F.2d 573 (7th Cir. 1974). Nevertheless, plaintiff argues in her reply brief that Count IV of the complaint contains an allegation of fraudulent concealment, but that Count was dismissed with prejudice on May 13, almost four weeks before summary judgment was granted, and plaintiff has not challenged that dismissal on this appeal. In any event, the allegations in Count IV are insufficient to charge defendants with fraudulent concealment.[3]

Rule 9(b) of the Federal Civil Rules requires that fraud be pleaded with particularity. The only particular conduct charged in Count IV is that defendants withheld information from the public. Passive silence, however, is insufficient to trigger the fraudulent concealment doctrine. *Morgan v. Koch*, 419 F.2d 993, 998-999 (7th Cir. 1969); *French v. Hickman Moving & Storage*, 400 N.E.2d 1384 (Ind. App. 1980).

III

Plaintiff's third claim is that the ten-year statute of limitations in the Product Liability Act is unconstitutional as applied to her because it deprives her of property without due process of law. An accrued cause of action is a right of property, protected by the Fourteenth Amendment, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422; an unaccrued cause of action is not. *Silver v. Silver*, 280 U.S. 117, 122; *Munn v. Illinois*, 94 U.S. 113, 134; *Martin v. Pittsburg & L.E.R. Co.*, 203 U.S. 284, 295; *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir. 1978), certiorari denied, 439 U.S. 1002; *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970). The Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute, Ind. Code § 34-1-1-2 (1981), remains on the books in case their spouses are ever killed because of someone else's negligence. Such a hope is protected by the voting booth, not by the federal courts. *Munn v. Illinois*, 94 U.S. 113, 134. Plaintiff's cause of action had not yet accrued when the Indiana legislature adopted the ten-year statute of limitations contained in the Product Liability Act. Her right to sue for her husband's wrongful death vested when her husband died, *Fisk v. United States*, 657 F.2d 167 (7th Cir. 1981); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981), and he died some two years after the Product Liability Act was passed. The change in the law therefore caused her no loss of property.

Even if she had a property right in this unaccrued cause of action, we cannot accept plaintiff's argument that the Indiana Product Liability Act's ten-year statute of repose violates due process under the federal and Indiana Constitutions. An identical argument was rejected by

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[3] Paragraph 37 of conspiracy Count IV realleges paragraphs 1 through 36 of the complaint, but plaintiff does not assert that any of those paragraphs raised fraudulent concealment. The remainder of Count IV is as follows:

> 38. Defendants, collectively and individually, have possessed since at least 1929 medical and scientific data which clearly indicated that asbestos-containing products were hazardous to the health and safety of plaintiff's decedent, Donald E. Pitts, and others exposed to asbestos-containing products.
>
> 39. Defendants, collectively and individually, knew or reasonably should have anticipated that plaintiff's decedent, Donald E. Pitts, and others in his position would be exposed to the asbestos-containing products produced by the defendants.
>
> 40. Defendants, prompted by pecuniary motives, collectively and individually, ignored and failed to act upon said medical and scientific data and conspired to deprive the public, and in particular the users of asbestos-containing products and their families of this information, thereby denying plaintiff's decedent, Donald E. Pitts, and others exposed to asbestos-containing products of the opportunity of free choice as to whether to be exposed to the asbestos-containing products produced by the defendants.
>
> 41. Defendants' conduct complained of above directly and proximately caused the plaintiff's decedent's injuries and death.
>
> 42. By reason of the premises, defendants are liable, jointly and severally, to the plaintiff for the injuries and damages described above. (Plaintiff's App. 49-50.)

the Indiana Supreme Court in another asbestos case (after the briefing herein) as to the three-year limitations contained in the Indiana Occupational Diseases Act. *Bunker v. National Gypsum Company*, 441 N.E.2d 8 (1982). In *United States v. Kubrick*, 444 U.S. 111, 117, the constitutionality of a two-year federal statute of limitations was assumed for the following reasons:

> Statutes of limitations which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K. & T. R. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Bell v. Morrison*, 1 Pet. 351, 360 (1828).
>
> Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895); *Bell v. Morrison*, *supra*, at 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, a Minnesota six-year statute of limitations was sustained over charges that it violated the due process and equal protection clauses of the Fourteenth Amendment.

The above examples are sufficient to persuade us that plaintiff's due process argument must be rejected.

IV

Plaintiff's final claim is that applying to her suit the ten-year limitations statute denies her "the equal protection of the laws" guaranteed by the Fourteenth Amendment. The ten-year limitations rule creates two classes of people: those injured by products more than ten years old and those injured by products less than ten years old. Those in the first class are prevented from bringing suit upon the same causes of action that those in the second class can bring. The effect of this is to lessen the risk of loss—*i.e.*, from having to pay for injuries resulting from use of a defective product—manufacturers face when they place a product into the stream of commerce. That is a legitimate legislative purpose, and it is not the courts' business to instruct the Indiana legislature when it is better for consumers than producers to bear that risk. See *Simpson v. United States*, 652 F.2d 831, 833-834 (9th Cir. 1981); *DiAntonio v. Northampton-Accomack Memorial Hospital*, 628 F.2d 287, 291 (4th Cir. 1980).

In *Bunker v. National Gypsum Company*, *supra*, also involving an asbestos-related disease, the Indiana Supreme Court rejected an equal protection clause argument similar to plaintiff's.[4] And the Supreme Court of the United States did likewise in a related setting in *Chase Securities Corp.*, *supra*.

Since the privileges and immunities clause in Article I, Section 23 of the Indiana Constitution affords plaintiff the same protection as does the Fourteenth Amendment Equal Protection Clause, *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir. 1979); *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495 (Ind. 1972), we reject for the same reasons plaintiff's claim under that provision. And again *Bunker*, *supra*, is on point because there the three-year statute of limitations in the Indiana Occupational Diseases Act was held "to be constitutional in all respects" (441 N.E.2d 14) even though dissenting Justice Hunter thought its application would "defy * * * the privileges and immunities guaranteed our citizens * * *" (441 N.E.2d 18).

Pitts was not left without recourse by this statute of limitations. Since nine defendants could not take advantage of the statute, they were not immunized and indeed settled with plaintiff (note 1 *supra*), thus vitiating Pitts' claim that the statute contravened the Indiana privileges and immunities clause by conferring blanket immunity to all asbestos producers. Instead the statute must be sustained as reflecting the legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence.

Judgment affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] See also *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. Sup. Ct. 1980).

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JM v. U.S.

IN THE
UNITED STATES CLAIMS COURT

Filed 7/19/83

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION,
Plaintiffs,
v.
THE UNITED STATES OF AMERICA,
Defendant.

No. 465-83C

COMPLAINT

Plaintiffs Johns-Manville Corporation and Johns-Manville Sales Corporation (hereinafter collectively referred to as "Johns-Manville") for their claims against the United States of America (hereinafter "United States" or the "Government") respectfully allege as follows:

1. Johns-Manville claims damages against the United States for breach of express contracts and contracts implied-in-fact between Johns-Manville and the United States, acting through the United States Navy, the United States Maritime Commission and the War Shipping Administration. Johns-Manville was required by law during the national emergency occasioned by World War II (hereinafter "World War II") to agree and did in fact agree to supply strategic asbestos-containing insulating and fireproofing materials to Government-owned shipyards and to privately owned shipyards operated for the use and benefit of the United States. During this time, the United States had and assumed responsibility for providing a safe place to work for workers in these shipyards. Johns-Manville did not have any control over the method of work or the safety of the workers. By virtue of its actions and pursuant to the contracts which Johns-Manville was required to enter into by statutes and regulations, the United States expressly and impliedly agreed to reimburse Johns-Manville for liabilities, including expenses, arising out of Johns-Manville's performance of these contracts. Shipyard workers and their representatives have brought claims against Johns-Manville for injuries allegedly incurred as a result of exposure to asbestos-containing materials supplied by Johns-Manville pursuant to these contracts. These shipyard workers were not employees of Johns-Manville, but were employees of Government shipyards or private shipyards operating under Government control and supervision during World War II. On September 9, 1982, and on other occasions, the United States repudiated the above agreements and refused to perform them. Johns-Manville's claim against the United States is also founded upon Acts of Congress, namely the Selective Training and Service Act of 1940, as amended, and the statutes referred to in Paragraph 8 below, and the regulations issued pursuant thereto, as well as the Fifth Amendment to the Constitution of the United States.

2. This Court has jurisdiction over these claims for relief pursuant to 28 U.S.C. §1491.

PLAINTIFFS

3. Plaintiff Johns-Manville Corporation is a corporation organized under the laws of the State of New York, with its principal place of business in Colorado.

4. Plaintiff Johns-Manville Sales Corporation is a corporation organized under the laws of the State of Delaware, with its principal place of business in Colorado, and is a wholly-owned subsidiary of Johns-Manville Corporation.

5. On August 26, 1982, plaintiffs and other related corporations filed petitions for reorganization pursuant to the Bankruptcy Code, 11 U.S.C. §1101 et seq., in the Southern District of New York.

NATURE OF THE CASE

6. Johns-Manville sues to recover damages because of the Government's breach of its express contracts and contracts implied-in-fact set forth in Paragraph 1 hereof.

7. During World War II, Johns-Manville was engaged in the manufacture of strategic asbestos-containing materials pursuant to contracts with the Government or with others, all of which contracts the Government required Johns-Manville to accept and perform (hereinafter "war supply contracts"). The materials manufactured by Johns-Manville pursuant to these contracts were used by the Government and by Government contractors in the construction, conversion and repair of ships owned by the Government, operated on behalf of the Government, or owned or operated by the governments of countries entitled to give defense orders under Priorities Regulation No. 1 of the Office of Production Management, Priorities Division, 6 Fed. Reg. 4489 or any amendments thereto, (hereinafter called "allies") (all of which ships are hereinafter referred to as "Government ships"). These materials were manufactured by Johns-Manville from asbestos fiber expressly provided or allocated to Johns-Manville by the Government for such use and were manufactured in accordance with specifications established, promulgated or approved by the Government.

8. Statutes and other provisions relied upon and relevant to the claims asserted herein include U.S. Const. Amend V; First War Powers Act, ch. 593, 55 Stat. 838, approved Dec. 18, 1941; Second War Powers Act, ch. 199, 56 Stat. 176, approved March 27, 1942; Act of June 28, 1940, ch. 440, 54 Stat. 676, amended by Act of May 31, 1941, ch. 157, 55 Stat. 236; the Selective Training and Service Act of 1940, §9, ch. 720, 54 Stat. 885, approved Sept. 16, 1940; Act of May 2, 1941, ch. 84, 55 Stat. 148; Shipping Act, 1916, ch. 451, 39 Stat. 728, approved September 7, 1916; Merchant Marine Act, 1936, ch. 858, 49 Stat. 1985, approved June 29, 1936; Executive Order 8629, Jan. 7, 1941, 6 Fed. Reg. 191; Executive Order No. 8875, Aug. 28, 1941, 6 Fed. Reg. 4483; Priorities Reg. No. 1, Priorities Division, Office of Production Management, Aug. 27, 1941, 6 Fed. Reg. 4489; Executive Order No. 9054, Feb. 9, 1942, 7 Fed. Reg. 837; and Executive Order No. 9244, Sept. 16, 1942, 7 Fed. Reg. 7327. (Parallel United States Code citations to the above statutes have not been furnished either because the statutes have been repealed or so extensively amended since World War II that present United States Code citations, if available, would either be confusing or misleading. For the convenience of the Court, Appendix A to this complaint contains the statutes, executive orders and regulations set forth in this paragraph.)

THE WARTIME EMERGENCY DICTATED RAPID CONSTRUCTION OF GOVERNMENT SHIPS

9. World War II began in Europe on September 1, 1939, when Germany invaded Poland. On September 8, 1939, the President of the United States proclaimed a state of national emergency.

10. In 1940 the United States Navy had less than 1,300,000 tons of major combat ships in service. This was thought to be adequate for a one-ocean Navy. With the isolation of the United Kingdom by the Nazi invasion of most of Europe, together with Japanese aggression in the Pacific, the possibility of simulta-

neous Navy action in two or more oceans became clear. As a result, in June 1940, Congress approved additions to the Navy of 2,172,000 tons of major combat ships, which would triple the size of the fleet. After Pearl Harbor and by September 1942, a five ocean Navy was planned to bring the total combat tonnage of the Navy to approximately eight million tons.

11. The outbreak of war in Europe also intensified the Government's need for merchant ships by drastically reducing the amount of foreign flag shipping available for the regular water-borne commerce of the United States. Moreover, from September, 1939 through November, 1941, the American merchant fleet was reduced, due to sales or transfer of merchant ships to Great Britain and Panama. Accordingly, in addition to the increase in combat ships, it became necessary to engage in unprecedented construction of ocean-going ships of merchant types. Approximately 5,777 merchant-type ships were constructed during World War II.

12. The war in Europe engulfed the United States after the attack on Pearl Harbor on December 7, 1941. The United States recognized the existence of a state of war with Japan on December 8, 1941. On December 11, 1941, Germany and Italy declared war on the United States, and the United States declared a state of war with Germany and Italy.

13. As war threatened the security of the country, the United States required rapid construction of a vastly enlarged naval and merchant fleet to conduct naval and military operations, to provide for the transportation of extraordinarily large quantities of materials needed to meet the requirements of the troops overseas, and to maintain services essential for the war effort. The ships and shipyards which the United States had at the beginning of the war proved to be barely adequate to allow the United States to defend itself during the early days of the war. The existing fleet was deficient in both size and type of ship, and was largely outdated. The defense of the United States therefore required the rapid construction of a naval and merchant fleet. This construction program resulted in the deployment of the largest naval and merchant fleet in history. The Government's wartime need for ships accordingly dominated all aspects of ship repair and construction in the United States.

14. Because of the threat to the security of the country, the policy of the United States was to do everything possible to accomplish the construction and repair of combat and merchant ships as quickly as possible.

15. To satisfy the United States' need for ships, the Government effectively assumed control over the shipbuilding industry in the United States, and issued contracts, orders and directives binding on the shipbuilding industry and on its suppliers. Contracts, orders and directives issued by the Government required, by specification or otherwise, the use of substantial amounts of asbestos-containing materials in the construction and repair of Government ships. To ensure the availability of adequate supplies of asbestos for these purposes, the Government purchased, imported and stockpiled asbestos and strictly allocated the available asbestos supply among the manufacturers of asbestos-containing products essential to the shipbuilding program. The manufacturers of asbestos-containing products were compelled by the Government's exercise of its war powers to enter into contracts to supply these products for use in the Government's shipbuilding program. With regard to industrial hygiene considerations raised by this extensive and mandatory use of asbestos, the United States recognized the need to enforce the United States Public Health Service recommended standard for safe exposure to asbestos in the workplace. In its World War II shipbuilding program, however, the Government failed to adhere to the standard, thus causing shipyard workers to be exposed to excessive concentrations of asbestos. Moreover, the Government kept knowledge of these excessive exposures confidential. These acts of the United States led to the occurrence of asbestos-related disease in workers who were employed in shipyards during World War II. These workers or their representatives have sued Johns-Manville and others to recover damages allegedly incurred as a result of asbestos-related disease, although those damages were in fact proximately caused by acts of the United States, and not Johns-Manville.

THE GOVERNMENT CONTROLLED THE SHIPBUILDING
INDUSTRY DURING WORLD WAR II

16. Through the use of the statutes and regulations referred to in paragraph 8, the United States controlled the operations of the shipbuilding industry throughout World War II.

17. Construction and repair of combat and merchant-type ships took place in shipyards owned and operated by the United States Navy (hereinafter "Navy yards" or "Government owned shipyards"). Additional ship construction and repair took place in private shipyards operated pursuant to Government contracts and directives and in shipyards owned by the United States but leased to private companies for operation pursuant to Government direction and control (hereinafter "contract shipyards" or "Government controlled shipyards").

18. During World War II, the United States mandated to both Navy and contract shipyards its requirements for all combat and merchant ships, including the number of ships to be constructed at each yard, methods of construction, and shipyard working conditions. The Government also controlled access to the shipyards and the disclosure of information concerning the work done in the yards, including information relating to working conditions in the yards.

19. Due to the Government's efforts to increase ship construction during World War II, the number of shipyard workers increased ninefold, from 168,000 in June, 1940 to a peak of 1,500,000.

THE GOVERNMENT REQUIRED ASBESTOS IN
MERCHANT AND NAVY SHIPS

20. It was imperative to the war effort and to the safety of the crews that both combat and merchant ships be constructed, converted and repaired to protect them against enemy action and other casualty to the greatest extent possible. In particular, this required protection against fire. Asbestos was essential in construction, conversion and repair of ships because its fireproofing and insulating efficiency increased the battle-worthiness of ships and because its light weight resulted in improved speed, fuel economy, operating range, and load capacity. At all relevant times, there was no known substitute for asbestos satisfactory for these purposes, and the Government required the use of large quantities of asbestos in the construction, conversion and repair of Government ships.

21. It was further imperative to the war effort that ships and their components be standard and of uniform quality to the greatest extent possible. Accordingly, the United States prepared, established and approved specifications (hereinafter "Government specifications") for materials used in ship construction, conversion and repair. Government specifications were expressly incorporated into and made a part of war supply contracts for construction, conversion or repair of Government ships, and the Government prohibited all deviation from its specifications without its express approval.

22. The war supply contracts required, by incorporation of Government specifications, the use of strategic and critical

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asbestos fiber in materials manufactured and supplied by Johns-Manville for the use and benefit of the United States in construction, conversion or repair of Government ships. Government specifications relating to asbestos-containing materials required the use of certain types and specified percentages of asbestos. Asbestos-containing materials intended for use in ships were designated by the Government as implements of war.

THE GOVERNMENT PURCHASED AND SUPPLIED
<u>ASBESTOS TO INSURE ITS AVAILABILITY</u>

23. The need for asbestos fiber was deemed so critical that the United States controlled its use and became a major asbestos importer and supplier for contractors such as Johns-Manville.

24. Certain types and grades of asbestos were of particular strategic importance in protecting ships and their crews. These types and grades of asbestos were not available in North America, but could only be obtained from Africa or the Soviet Union. Accordingly, prior to the entry of the United States into World War II, the Government outlined a plan for asbestos procurement and recommended that the Government purchase African asbestos for stockpile to insure the availability of adequate types and grades of strategic asbestos in times of national emergency.

25. Within approximately eighteen months from the commencement of World War II, the Combined Raw Materials Board, composed of representatives of the United States, the United Kingdom and Canada, entered into an Approving Memorandum of Understanding, whereby that Board assumed the responsibility for the distribution of asbestos among the three countries. The Government assumed responsibility for the allocation and distribution of the share of asbestos assigned to the United States. Strategic and critical asbestos required by Government contracts and specifications for use in asbestos-containing materials was either allocated or supplied by the Government.

26. The African asbestos required by the United States was thereafter purchased or obtained by the Government from various asbestos mining concerns, and was transported to the United States by Naval convoy. Additional asbestos was obtained from the Soviet Union in exchange for war materials. The available supply of strategic asbestos was decreased by enemy sinkings of ships carrying asbestos.

THE GOVERNMENT CONTROLLED THE USE OF ASBESTOS
<u>BECAUSE OF ITS STRATEGIC AND CRITICAL NATURE</u>

27. Government enforced priority controls over the use of asbestos were essential to the war effort. The President had the power to authorize any wartime department or agency to enter into contracts or to modify existing contracts, without regard to the provisions of law, whenever deemed necessary to facilitate the prosecution of the war. First War Powers Act, ch. 593, 55 Stat. 838, 839 (1941). The President had the authority to issue and enforce national controls over the manufacture, use, purchase and sale of strategic and critical emergency wartime material, to the extent deemed necessary to further the war effort. Second War Powers Act, ch. 199, 56 Stat. 176, 177-178 (1942).

28. Shortly after the United States became involved in World War II, the Government determined that the national defense need for asbestos and asbestos-containing material was critical. In fact, the Government viewed asbestos as having a top priority among strategic and critical minerals. Accordingly, one month after the United States' recognition of a state of war, the Government issued the first of a series of orders which, for all practical purposes, restricted the use of asbestos to fulfillment of Government war supply contracts.

29. In order to ensure that the asbestos industry would be able to meet the continuing demands of the Government for the wartime supply of asbestos-containing materials, the Government requested members of the industry to establish liasons with the Government to make sure that necessary manpower would be available to maintain peak production. Nevertheless, in October, 1944, the Navy reported the existence of a continuing wartime shortage of certain strategic asbestos-containing materials because of insufficent manpower in the asbestos industry.

JOHNS-MANVILLE FULFILLED THE
<u>GOVERNMENT'S NEED FOR CRITICAL MATERIALS</u>

30. After August 27, 1941, up to the termination of the state of emergency which arose out of World War II, Johns-Manville was required by statute and Government regulations to comply with any order of the United States or of any shipyard operating for or on behalf of the United States to manufacture and supply asbestos-containing materials of the kind, quantity and quality ordered by the United States or such shipyard.

31. The failure of Johns-Manville or the responsible head or heads thereof to comply with any such order would render them guilty of a felony and subject them to a conviction punishable by imprisonment for not more than three years and a fine not exceeding $50,000.

32. Johns-Manville did in fact receive orders for, and entered into war supply contracts for the manufacture of asbestos-containing insulating and fireproofing materials for or for the account of the United States or its allies or for shipyards working for or on behalf of the United States or its allies. Some of Johns-Manville's war supply contracts were entered into directly with the Government. Other war supply contracts were entered into by Johns-Manville as a subcontractor to contract shipyards, and the Government was either a party to these contracts or mandated Johns-Manville's acceptance of them and dictated all material contract terms. Johns-Manville performed the war supply contracts in preference to all other contracts and orders, and in conformity with all requirements and specifications contained or adopted therein. After diligent search, Johns-Manville has been unable to locate or otherwise obtain from the Government copies of the war supply contracts and cannot, therefore, identify these contracts with greater specificity. The terms of the war supply contracts entered into by Johns-Manville are clearly established from the routine practice of the Government at all relevant times with respect to these contracts.

33. Pursuant to the war supply contracts, the strategic asbestos-containing materials manufactured by Johns-Manville were delivered to or for the account of the Government for use in construction, conversion and repair of Government ships. The actual application and utilization of the asbestos-containing products, as with other aspects of the operation of both Navy yards and contract shipyards, was under the control and supervision of the Government.

THE GOVERNMENT ESTABLISHED
<u>STANDARDS FOR SAFE USE OF ASBESTOS</u>

34. In 1938, the United States Public Health Service (hereinafter "USPHS") published Public Health Bulletin No. 241, authored principally by Waldemar C. Dreessen, former Assistant

Surgeon of the Public Health Service (hereinafter the "Dreessen Report"). The Dreessen Report was a study of asbestosis in asbestos textile workers and was prepared at the direction of the Surgeon General of the United States. One of the objectives of the Dreessen Report was to estimate the concentration of asbestos which could be tolerated without injury to health.

35. The Dreessen Report contained the following summary of its medical findings:

> Above five million particles per cubic foot, numerous cases of well-marked asbestosis were found. It would seem that if the dust concentration in asbestos factories could be kept below five million particles (the engineering section of this report has shown how this may be accomplished), new cases of asbestosis probably would not appear.

At all relevant times, the recommended standard for occupational exposure to asbestos remained at five million particles per cubic foot (hereinafter "USPHS/Dreessen standard").

THE GOVERNMENT ASSUMED THE RISK OF EXCESSIVE EXPOSURE TO ASBESTOS IN SHIPYARDS

36. As part of the wartime control over the shipbuilding industry, the United States had and assumed complete responsibility for control of working conditions and work practices and the prevention of industrial diseases in the shipyards. In addition, the Government specifically assumed responsibility for the initiation of any corrective action deemed necessary in either Navy or contract shipyards. In a 1942 agreement between the Navy and the United States Maritime Commission, health and safety responsibilities for contract shipyards were assigned to the Maritime Commission, while the Navy retained health and safety responsibilities for Navy yards.

37. Both the Navy and the Maritime Commission recognized that asbestosis could be an occupational hazard in the shipbuilding industry if the USPHS/Dreessen standard was not followed.

38. The Navy prevented other Government agencies from learning of working conditions in the shipyards because of its concern that the presence of other agencies in the shipyards would create a labor disturbance. On February 25, 1941, Navy Capt. C.N. Fisher wrote an internal memorandum to the Assistant Secretary of the Navy pointing out that the United States Public Health Service proposed to conduct a hygienic investigation of Naval shore establishments and recommending that work of this nature continue to be performed by the Navy. He stated further:

> This is one example among many others wherein other Government Departments are again expressing their desires to intervene in the conduct of our Navy Yards. I am strongly of the opinion that our Navy Yards and other shore establishments should be allowed to carry on their urgent and important work with as little interruption and interference as possible from any other agencies and trust that you will agree with this policy, which is, I understand, satisfactory to Secretary [of the Navy] Knox.

39. In a March 11, 1941 internal and confidential memorandum to Rear Admiral McIntire, Surgeon General of the Navy and physician to the White House, the Navy Commander of Preventive Medicine indicated the Navy's desire, supported by President Roosevelt, to retain complete control over working conditions in the shipyards, in order to avoid labor problems:

> I gave Mr. Bard [Assistant Secretary of the Navy] and the two officers present a complete story of the beginning of this controversy from the Federal Administrator's letter; that is, that the United States Public Health Service had four teams of traveling scientists alleged to be able to make surveys of all of the Navy Yards and make recommendations for the correction of such hazards as were discovered. I told Mr. Bard that this was not considered the best policy, due to the fact that we had medical officers in the Yards and that in practically all instances recommendations of sound character had been made by medical officers. We saw no need of inviting the United States Public Health Service on its own invitation to do this job.
>
> Likewise, I told him that I had spoken to you and that you had indicated that President Roosevelt thought that this might not be the best policy, due to the fact that they might cause disturbance in the labor element.

40. In the same March 11, 1941 memorandum, the Navy Commander of Preventive Medicine admitted that the Navy was not taking appropriate steps to prevent excessive exposure to asbestos in Government shipyards:

> Asbestosis. We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy Yards.

The Government did not reveal this memorandum to Johns-Manville.

41. By July, 1942, Navy and Maritime Commission officials became aware of reports of an unfavorable accident situation in both Navy and contract shipyards. As a result of these reports, the Navy Department and Maritime Commission commenced a series of joint surveys in an effort to evaluate their accident and occupational disease prevention programs. These confidential surveys revealed shipyard working conditions far worse than the Navy and the Maritime Commission originally believed existed.

42. In one of these surveys, Dr. Philip Drinker, Chief Health Consultant to the Maritime Commission, described a "very real asbestosis hazard" in the shipyards. This survey was never published in the scientific literature, nor did the Government reveal the survey to Johns-Manville.

43. Another shipyard health survey, dated December 19, 1944, was conducted at Bath Iron Works, a Navy contract shipyard, by Lt. Commander W.E. Fleischer, United States Naval Reserve and Assistant Chief Health Consultant to the Maritime Commission, and Dr. Waldemar C. Dreessen, the author of the 1938 USPHS report. This confidential study, entitled "Investigation of Asbestosis From Amosite Pipe Covering at Bath Iron Works, Bath, Maine" revealed numerous and substantial deviations from the USPHS/Dreessen standard. In some cases, there were exposures to concentrations of asbestos fiber in excess of ten times the recommended safe level of the USPHS/Dreessen standard. This survey was never published in the scientific literature, nor did the Government reveal the survey to Johns-Manville.

44. Throughout the war, the Government performed numerous additional confidential health and hygiene surveys in Government owned or controlled shipyards. Findings from these surveys indicated that shipyard workers were being exposed to excessive concentrations of asbestos according to the USPHS/Dreessen standard.

45. At all relevant times, the Government had exclusive control over operation of and access to the shipyards and had superior knowledge of potential health risks to shipyard workers who were being exposed to excessive concentrations of asbestos.

46. The Government controlled and limited the dissemination of information with respect to exposures to excessive concentrations of asbestos in the shipyards by classifying reports and documents containing such information, by prohibiting contract shipyards from disclosing information about the work done in the shipyards, and by failing to describe accurately the conditions in the shipyards in its public statements.

47. Scientific papers authored by Navy and Maritime Commission officials failed fully and accurately to report shipyard conditions. In September, 1945 an article, authored by Commander W.E. Fleischer, Assistant Chief Health Consultant,

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Maritime Commission, and others, was received by permission of the Navy by The Journal of Industrial Hygiene and Toxicology for publication. (hereinafter "Fleischer-Drinker Report"). The Fleischer-Drinker Report was based on health and hygiene surveys which were conducted in two Navy shipyards and two Government contract shipyards. This Report represented that virtually all asbestos exposures were below the USPHS/Dreessen standard and concluded that the pipe covering work in shipyards was not "a dangerous occupation."

48. The results of all health and hygiene surveys performed during World War II at Government owned or controlled shipyards were classified during all relevant times, within the meaning of the Espionage Act, 50 U.S.C. §§31 and 32. Any transmission of their contents to an unauthorized person was prohibited by law. The wartime restrictions on distribution of many of the confidential health and safety studies have only recently been removed.

49. The United States failed to satisfy its statutory and contractual obligations with regard to the safe use of asbestos materials in shipyards.

DAMAGES

50. In recent years, claimants (hereinafter "World War II asbestos claimants") have brought lawsuits and other proceedings against Johns-Manville seeking damages for injuries or death which claimants allege resulted from their employment, or the employment of their decedents, during World War II in Government owned or controlled shipyards. The World War II asbestos claimants have further alleged that they, or their decedents, contracted asbestos-related diseases as a result of exposure to asbestos-containing materials manufactured by Johns-Manville. In this suit, Johns-Manville seeks to recover for damages incurred in connection with lawsuits in which asbestos claimants' exposure to asbestos occurred in Government owned or controlled shipyards solely during and prior to World War II.

51. Although Johns-Manville has denied the allegations of all complaints seeking to impose such liability upon it, it has been held liable to some asbestos claimants. Johns-Manville has also paid reasonable settlements in appropriate cases, and has incurred substantial legal fees in the defense of suits brought by the World War II asbestos claimants. The amount spent to date in payment of judgments or reasonable settlements is approximately $768,361.09, plus $185,741.55 for reasonable legal fees in those cases in which judgments have been rendered or settlements concluded, all of which constitutes part of Johns-Manville's damages herein. Appendix B, attached hereto and incorporated by this reference, is a list of the cases, brought against Johns-Manville by or on behalf of the World War II asbestos claimants, which have been resolved by settlement or final disposition. The Appendix includes a statement of the amounts expended by Johns-Manville for settlements, judgments and costs of defense.

52. Johns-Manville believes that it may sustain further damages proximately caused by its manufacture and supply of asbestos-containing materials, as required by the war supply contracts, Government specifications, and other Government requirements and instructions by reason of additional judgments, settlements and defense costs associated with lawsuits now pending. Appendix C, attached hereto and incorporated by this reference, is a list of cases brought by World War II asbestos claimants which were pending against Johns-Manville as of the date of the filing of its Chapter 11 reorganization filing. A statement of costs of defense to date for each case, to the extent presently ascertainable, is included. Johns-Manville intends to supplement its pleadings periodically to assert any additional damages incurred in these pending cases.

53. Johns-Manville has also incurred additional unliquidated damages due to the burden this litigation has placed on it, including, but not limited to, increased insurance costs, increased business costs, loss of business reputation, and loss of business.

FIRST CLAIM FOR RELIEF

54. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 53 of this complaint.

55. The extraordinary circumstances existing immediately prior to and during World War II required the Government to take unprecedented steps in the interests of national defense, including the control of the shipbuilding industry and war supply contractors.

56. Pursuant to applicable wartime law and the requirements of national defense, strict compliance by Johns-Manville with Government orders and directives and with the orders of shipyards operating for or on behalf of the United States and its allies was mandatory in view of Johns-Manville's status as a war supply contractor of strategic asbestos-containing materials. Failure on the part of Johns-Manville to comply with all such orders would subject it and its responsible heads to the penalties set forth in paragraph 31.

57. By reason of the foregoing, a contract was implied in fact between Johns-Manville and the Government that the Government would hold Johns-Manville harmless from any and all liability resulting from Johns-Manville's compliance with Government orders and directives and from Johns-Manville's supply of strategic asbestos-containing materials.

58. As a direct and proximate result of Johns-Manville's compliance with Government orders and directives and Johns-Manville's supply of strategic asbestos-containing materials pursuant thereto, Johns-Manville has incurred costs and expenses in connection with the suits and proceedings brought by the World War II asbestos claimants.

59. By reason of its agreement to indemnify and hold Johns-Manville harmless, the Government is liable to Johns-Manville for all such damages sustained by it.

SECOND CLAIM FOR RELIEF

60. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 59 of this complaint.

61. Immediately prior to and during World War II, the United States exercised complete control and authority concerning specifications, approval and certification of the type and composition of strategic asbestos-containing materials to be used in the construction and repair of ships in Government owned or controlled shipyards.

62. The Government promulgated, approved and established specifications for the manufacture, labelling, packaging, and

shipping of strategic insulating and fireproofing materials intended for use in shipbuilding and ship repair. The Government specifications either expressly called for asbestos, or required the inclusion of asbestos in such materials by setting performance or other standards.

63. By the express provisions of the war supply contracts and other Government regulations, Johns-Manville was required to manufacture, label, package, and supply asbestos-containing materials in strict conformity with the requirements of the Government specifications.

64. The United States impliedly warranted that if the Government specifications were complied with, the products so produced would be free of all defects.

65. Johns-Manville complied in all material respects with Government plans and specifications concerning the manufacture of strategic asbestos-containing materials to be used in the construction and repair of ships in Government owned or controlled shipyards.

66. As a proximate result of the Government's strict requirements that Johns-Manville comply with the Government specifications, Johns-Manville manufactured asbestos-containing materials and delivered those materials to the Government and its contractors in compliance with those specifications. By virtue of such manufacture and delivery and the Government's breach of its warranty that compliance with Government specifications would result in the production of products that were free from defects, Johns-Manville has incurred costs and expenses in connection with the suits and proceedings brought by the World War II asbestos claimants.

67. By reason of the foregoing, the United States is liable to Johns-Manville for all such damages sustained by it.

THIRD CLAIM FOR RELIEF

68. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 67 of this complaint.

69. At all relevant times, the United States had and assumed the obligation of setting and enforcing health and safety standards in Government owned or controlled shipyards, and initiating corrective action where necessary.

70. By its conduct the Government undertook a contractual duty to Johns-Manville and warranted that the United States was enforcing the recommended standard for exposure to asbestos in Government owned and controlled shipyards.

71. In entering into the war supply contracts, Johns-Manville was required to accept the Government's express and implied warranty and representation that the Government would fulfill its obligations concerning the enforcement of the recommended standard regarding exposure to asbestos in Government owned or controlled shipyards.

72. Nevertheless, the United States continuously failed to maintain and enforce its own recommended standard for prevention of workers' exposure to excessive concentrations of asbestos during the use and handling of strategic asbestos-containing materials.

73. The costs and expenses incurred by Johns-Manville in connection with the lawsuits brought by the World War II asbestos claimants are the proximate result of the Government's breach of its warranty concerning the safe use, handling and removal of asbestos-containing products in Government owned and controlled shipyards.

74. By reason of its breach of warranty, the Government is liable to Johns-Manville for all such damages sustained by it.

FOURTH CLAIM FOR RELIEF

75. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 74 of this complaint.

76. The United States established the terms and conditions of the mandatory war supply contracts entered into by Johns-Manville.

77. Pursuant to the terms of the war supply contracts entered into by Johns-Manville, Johns-Manville was not liable for damages to persons or property which were caused by acts or omissions of the Government.

78. The United States established the terms and conditions of its mandatory defense orders and war supply contracts under the wartime priorities programs. If the parties intended Johns-Manville to assume liability for Government acts or omissions relating to the performance of the war supply contracts, the Government had the obligation to make that intent clear.

79. Although the Government had and assumed the obligation of ensuring compliance with the recommended standard for prevention of shipyard workers' exposure to excessive concentrations of asbestos during the use and handling of asbestos-containing materials, the United States continuously failed to maintain and enforce this standard.

80. The costs and expenses incurred by Johns-Manville in connection with lawsuits brought by World War II asbestos claimants are the proximate result of the Government's failure to enforce the recommended standard regarding exposure to asbestos in Government owned or controlled shipyards. Under the terms of the war supply contracts and pursuant to the intent of the parties, the Government has the obligation to hold Johns-Manville harmless for these costs and expenses.

81. By reason of the foregoing, the Government is liable to Johns-Manville for all such damages sustained by it.

FIFTH CLAIM FOR RELIEF

82. Plaintiff Johns-Manville repeats and realleges each and every allegation contained in paragraphs 1 through 81 of this complaint.

83. Prior to requiring Johns-Manville to perform each of the war supply contracts, the Government was aware, through its continuing health surveys, of the occupational health risk to shipyard workers from exposure to excessive concentrations of asbestos.

84. The United States did not correct the deviations from the recommended standard regarding exposure to asbestos, nor did it inform Johns-Manville, a wartime supply contractor, of the existence or the extent of these deviations. Knowledge of the risk of occupational disease in shipyard workers exposed to excessive concentrations of asbestos was a material fact which affected the cost of Johns-Manville's performance of the war supply contracts.

85. The Government had a duty to disclose to Johns-Manville its knowledge of the shipyard workers' exposure to excessive concentrations of asbestos during the use and handling of

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asbestos-containing materials manufactured by Johns-Manville pursuant to mandatory war supply contracts.

86. The Government breached its continuing duty by its failure to disclose the excessive concentrations of asbestos that shipyard workers were being exposed to in the course of their employment. Johns-Manville was required to enter into numerous war supply contracts relating to asbestos-containing materials without knowledge of this material fact.

87. As a proximate result of the Government's breach of its duty to disclose material facts, Johns-Manville has incurred costs and expenses in connection with the lawsuits brought by the World War II asbestos claimants.

88. By reason of the foregoing, the United States is liable to Johns-Manville for all such damages sustained by it.

SIXTH CLAIM FOR RELIEF

89. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 88 of this complaint.

90. Throughout World War II, African and other asbestos fiber was furnished, bailed, allocated or otherwise provided by the United States to Johns-Manville. All such asbestos fiber (hereinafter "Government supplied asbestos fiber") was provided to Johns-Manville exclusively for use in the wartime manufacture of asbestos-containing materials intended for the construction and repair of Government ships.

91. The United States retained actual or constructive title to and control of the Government supplied asbestos fiber while it was in the possession of Johns-Manville throughout the manufacturing process, and even after the fiber was incorporated into the finished asbestos-containing materials.

92. By retaining actual or constructive title to the asbestos fiber, a bailment was created whereby the United States expressly or impliedly assumed all risks associated therewith and agreed to hold Johns-Manville harmless from any losses arising out of the use and handling of the Government supplied asbestos fiber.

93. Any injuries to shipyard workers resulting from exposure to asbestos-containing products manufactured by Johns-Manville was proximately caused by the Government supplied asbestos fiber which was incorporated in such products by Johns-Manville in accordance with the war supply contracts, Government specifications, and other Government requirements and instructions.

94. Johns-Manville has incurred costs and expenses in connection with lawsuits brought by World War II asbestos claimants who were allegedly injured as a result of exposure to the Government supplied asbestos fiber incorporated into asbestos products manufactured by Johns-Manville pursuant to Government specifications.

95. By reason of the foregoing, the United States is liable to Johns-Manville for all such damages sustained by it.

SEVENTH CLAIM FOR RELIEF

96. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 95 of this complaint.

97. During all relevant times the United States established wartime insurance procurement requirements as one part of its entire wartime shipbuilding program. In administering that program, the United States determined the allowable contract cost for insurance coverage for every contractor, subcontractor and supplier. This cost determination was based upon the Government's evaluation of all of the risks involved in the required contract performance.

98. In accordance with that insurance procurement program, Johns-Manville was restricted, limited, or prevented from obtaining additional reimbursable public and products liability insurance coverage.

99. The United States thereby expressly or impliedly agreed to assume all risks and hold harmless all participants in the shipbuilding industry, including Johns-Manville, from any liability arising out of performance of the mandatory war supply contracts which exceeded the reimbursable insurance premiums allowed by the Government.

100. Johns-Manville has incurred costs and expenses which have not been compensated by liability insurance as a result of lawsuits brought against Johns-Manville by shipyard workers who claimed that they were injured by exposure to asbestos-containing materials manufactured by Johns-Manville pursuant to the war supply contracts, and intended for use in the wartime shipbuilding program.

101. Johns-Manville believes that some of the damages suffered by it were covered by insurance, and it has filed suits against its insurers to recover these damages. Johns-Manville's insurers have disclaimed liability. The United States is liable for Johns-Manville's costs and expenses which are uninsured or which exceed the amount of Manville's insurance coverage arising out of Johns-Manville's performance of the war supply contracts.

102. By reason of its assumption of such risks and its agreement to hold Johns-Manville harmless from such liability, the Government is liable to Johns-Manville for all such damages sustained by it.

EIGHTH CLAIM FOR RELIEF

103. Plaintiff Johns Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 102 of the Complaint.

104. During all relevant times, Johns-Manville was required by the war supply contracts to supply asbestos-containing materials in the amounts and in the forms and under the conditions required by the contracts and to do so in preference to all other contracts entered into by Johns-Manville.

105. As a result of the war supply contracts, Johns-Manville's primary business was substantially converted, throughout the relevant time period, into that of supplier to the Government of war-related asbestos-containing materials.

106. By virtue of Johns-Manville's compliance with the war supply contracts as required by law, Johns-Manville has incurred costs and expenses in connection with the suits and proceedings brought by the World War II asbestos claimants.

107. For the foregoing reasons, Johns-Manville is entitled to fair and just compensation, pursuant to the Selective Training and Service Act of 1940, as amended, for complying with the war supply contracts of the United States or of shipyards operating for or on behalf of the United States, including all such damages sustained by Manville.

NINTH CLAIM FOR RELIEF

108. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 107 of this complaint.

109. The Government's mandatory requirement for compliance with the war supply contracts constitutes a taking of Johns-Manville's property, and Johns-Manville is entitled under the Fifth Amendment of the Constitution of the United States to just compensation therefor.

TENTH CLAIM FOR RELIEF

110. Plaintiff Johns-Manville repeats and realleges each and every allegation set forth in paragraphs 1 through 109 of this complaint.

111. The incidence of asbestos-related disease among workers at Government owned or controlled shipyards was not foreseeable by Johns-Manville at the time of its entry into the war supply contracts or during its performance of those contracts.

112. The risk of such injuries to shipyard workers was not assumed by Johns-Manville, but was intended to be borne by the Government, which completely controlled all aspects of the supply, production, and use of asbestos fiber and strategic asbestos-containing materials.

113. Johns-Manville complied in all material respects with the war supply contracts and with the Government specifications for the production and supply of strategic asbestos-containing materials for use in the construction and repair of combat and merchant ships for or for the account of the Government during the national emergency.

114. Despite Johns-Manville's compliance with the war supply contracts and the Government specifications, and even though it was intended that the Government, and not Johns-Manville, would be responsible for injuries arising out of the use of Government supplied asbestos fiber and asbestos-containing materials manufactured pursuant to Government specifications and the war supply contracts, Johns-Manville has nevertheless incurred substantial damages as a result of suits brought against it by the World War II asbestos claimants.

115. By reason of the foregoing, Johns-Manville should not be required to bear the unforeseeable or unexpected costs which it has incurred, and is entitled to reformation or equitable adjustment of the war supply contracts to compensate it for the judgments and settlements it has paid and the costs and expenses it has incurred as a result of the lawsuits brought by the World War II asbestos claimants.

RELIEF

WHEREFORE, plaintiffs Johns-Manville Corporation and Johns-Manville Sales Corporation demand judgment against defendant United States of America as follows:

1. Damages in the amount of $768,361.09, for settlements and judgments paid to the World War II asbestos claimants;

2. Damages in the amount of $185,741.55, for attorneys' fees, costs and expenses paid in the defense of lawsuits brought by the World War II asbestos claimants;

3. Damages for increased insurance and business costs, and for loss of business and business reputation;

4. Equitable adjustment or reformation of the contracts between Johns-Manville and the United States;

5. Attorneys' fees and expenses incurred in the instant case;

6. Costs of this action;

7. Such other and further relief as this Court may deem just and proper.

DATED: Washington, D.C.
July 14, 1983

Respectfully submitted,

Arthur M. Becker
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FACT SHEET

Johns-Manville vs. United States of America

Johns-Manville's decision to sue the federal government followed a year-long review of declassified documents. The corporation's complaint, filed with the U.S. Claims Court, contends that the government must share responsibility for the asbestos crisis.

Johns-Manville is asking the court to award the corporation "monetary relief" from the U.S. Government "for damages arising from the breach of express and implied in fact contracts pertaining to the manufacture and supply of strategic asbestos-containing materials sold to the defendant during World War II."

In further outlining the government's responsibility for a major occupational disease crisis, the complaint asserts the following:

I. <u>During WWII, the Government controlled all aspects of the shipbuilding industry. This fact is reflected in the following official references:</u>

A. "The Naval and Maritime Shipbuilding Programs", prepared by the Policy Analysis and Records Branch, Office of the Executive Secretary, War Production Board, July 18, 1944.

B. "Ships for Victory - A History of Shipbuilding Under the U.S. Maritime Commission in World War II", by Frederic C. Lane, 1951.

C. Memorandum to All Commandants of Naval Districts less Sixteenth Naval District and All Supervisors of Shipbuilding, USN from Bureau of Ships, Feb. 1, 1941.

II. <u>Asbestos fiber was classified as critical and strategic and there was no satisfactory substitute.</u>

A. "Substitutes: There is no generally acceptable substitute for asbestos in specific applications where resistance to heat, electricity, acid erosion are prime considerations."

"Mineral wool, glass wool and the shorter fibers have been utilized for insulation in some instances in lieu of the critical grades. Asbestos is, however, being used in the war program as a substitute for other materials, e.g., asbestos pipe is being used in some applications in lieu of case iron and steel pipe. Short fiber in some instances is being used as a substitute for critical grades of long fiber."

"Since only African varieties of asbestos satisfy certain military requirements, the essential problem is that of maintaining uninterrupted imports from Rhodesia and Union of South Africa."

(Raw Materials Data Sheet prepared for Board of Economic Warfare by Department of Commerce, April 22, 1943)

B. "The recommendation of the Defense Commission of October 18, 1940, for the purchase of strategic minerals summarized in the following table:

Asbestos .....20,000 short tons ......$3,000,000"

(Memorandum to Mr. George M. Moffatt from C. K. Leith, February 25, 1941)

C. "Asbestos textiles are a non-substitutable component in all combat vessels.

...The largest single claimant is the U.S. Navy. ...In spite of the importance of asbestos textiles as a component, the industry is not a large one."

(Memorandum to WPB Regional Directors and Production Orgency Committees in Areas where Asbestos Textile Plants are Located from Fred Sinclair, Procurement Policy Divisions, June 30, 1944)

III. <u>The Government controlled asbestos fiber during WWII in the following ways</u>:

A. <u>The Government purchased and imported asbestos fiber</u>.

"Instead of leaving the purchase and importation of asbestos, which is largely a foreign product, to private concerns, the <u>government has adopted the policy of buying and importing from England asbestos fiber</u> mined in South Africa and needed by the USA, and selling it to the domestic processors as and when required by them." (Memorandum to Mr. Irving Swordlow, Acting Chief Public Welfare and Facilities Division, Feb. 18, 1943.)

B. <u>The Government allocated the supply and restricted the use of asbestos fiber to the industry</u>.

1. Restrictions: Conservation Order M-79, as amended June 18, 1942, <u>restricts the use of fiber</u> from South Africa to priority rated orders and confines certain grades and types to specific uses. Asbestos from the Union of South Africa and Rhodesia was placed under General Imports Order M-63, January 13, 1942. Conservation Order M-123, as amended December 14, 1942, prohibits the use or delivery of asbestos textiles for certain nonessential uses. Conservation Order M-283 provides for the allocation of asbestos textiles. (Raw Materials Data Sheet prepared by Dept. of Commerce, April 22, 1943.)

2. "8944.11 Use of material obtained under allocation or preference rating. Any person who obtains a delivery of any material under an order or specific direction of the Director of Priorities, or a delivery of Material bearing a preference rating, <u>must use such Material</u> or an equivalent amount thereof, for the purpose specified in connection with and issuance of the Order, direction or rating." (Title 32 - National Defense, Chapter IX--Office of Production Management, Subchapter B--Priorities Division, (Priorities Regulation No. 1) Part 944--Regulations applicable to the operation of the Priorities System. January 28, 1941.)

C. <u>Manufacturers were subject to sanctions for violations of government restrictions</u>.

1. "<u>Violations</u>. Any person who wilfully violates any provision of this Order, or who by any act or omission falsifies records to be kept or information to be furnished pursuant to this order, may be prohibited from receiving further deliveries of any material subject to allocation, and such further action may be taken as is deemed appropriate, including a recommendation for prosecution under Section 35 A of the Criminal Code (18 U.S.C. 80)." (Title 32 - National Defense, Chapter IX - Office of Production Management, Subchapter B - Priorities Div. - Part 1064 - Asbestos, Jan. 20, 1942.)

IV. <u>The Government specified and required asbestos in wartime contracts</u>.

A. See Memorandum to Assistant Chief in Charge of Planning and Statistics, Office of Procurement and Material, Navy Department from Stacy May, Director, Statistics Division dated Dec. 4, 1942, titled "Asbestos Requirements of Bureau of Ships and Bureau of Yards and Docks."

B. "The requirements for the higher type of asbestos textiles (used for lagging over pipe coverings and for Navy cable, etc.) have not been met in full, for the industry has not had the manpower and facilities to provide for them. The use of Canadian Grade 1 and 2 and 3F through 3T employed for these higher types, has been limited by the industry's capacity to consume, but by means of a combination asbestos and fibrous glass cloth, together with an expansion in productive capacity of the industry which is now in process, it should be possible to meet the most important requirements from now on. The tight supply situation on packing, gaskets, and oil seals due to insufficent manufacturing facilities continues." (Also see Consumption by End Use List on page 9.) (Navy Dept., Office of Procurement and Material "Current Status of Critical Materials", Vol. No. 4, Oct. 1, 1944.)

C. "In conclusion the Bureau wishes to assure you that it does not prepare specifications in the interest of any manufacturing source. All changes in specifications are dictated by necessities of the Naval service and are made after careful consideration." (Letter to Ehret Magnesia Manufacturing Co. dated Sept. 13, 1933, from the Department of the Navy.)

V. <u>Government mandated compliance with asbestaos defense orders</u>.

A. "8944.2 - Acceptance of defense orders.
Defense orders for any material, whether or not accompanied by a Preference rating certificate, <u>must be accepted and fulfilled</u> in preference to any other contracts or purchase orders for such Material."

(Title 32 - National Defense, Chapter IX, Office of Production Management, Subchapter B - Priorities Division (Priorities Regulation No. 1), Part 944 - Regulations Applicable to the Operation of the Priorities System).

B. ".02 Criminal or Civil prosecution under the Second War Powers Act shall be the customary method of enforcing compliance. All willful and substantial violations of War Production Board orders or regulations are to be referred to the Department of Justice for criminal or civil prosecution in lieu of taking administrative action against the violator, unless the General Counsel determines that such prosecution is impraticable or inappropriate."

(WPB Manual of Policy and Procedures - Compliance Activities of War Production Board, Aug. 20, 1943.)

C. "Every worker and every factory, every bit of material and every machine is now part of the war program. No use of material is unimportant and <u>no company has a right to think of its own operations except in connection with the war program</u>. Priorities must be accepted on this basis, and a strict observance, not only of the letter, but also of the spirit of the priorities system, is a high patriotic duty."

(WPB "Priorities and Industry", Aug., 1942)

VI. <u>The Government was aware that WWII shipyard workers were being exposed to dangerous levels of asbestos dust</u>.

A. "A medical survey...was conducted recently with the object of ascertaining whether asbestosis in any stage could be detected...X-rays of the chest were essentially negative in all cases. However, it was not considered that the negative findings precluded the future development of asbestosis by continued exposure to present occupational conditions." (Annual Report of the Surgeon General, USN (Admiral R. McIntire), 1939)

B. "Points of great interest:...
(1) Asbestosis. We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy Yards."

(Memorandum for Admiral McIntire from C.S. Stephenson, Commander, USN, in Charge, Div. of Preventive Medicine, March 11, 1941.)

C. "The conditions in this shop present a very real asbestosis hazard and immediate steps should be taken to segregate the most dusty processes into a well ventilated area. Local exhaust systems of proper design should be installed; however, if conditions cannot be completely controlled in this manner, then suitable dust respirators should be worn by the workers. Periodic physical examinations of the chests of all workers should be made."

(Excerpts from "Report of Industrial Health Survey of 9/24/42"; Report on Investigation of Asbestosis from Amosite Pipe Covering at Bath Iron Works, Dec. 19, 1944.)

D. "We saw in one very well run yard on the west coast men exposed to dangerous amounts of asbestos dust used in pipe coverings and on breechings."

(Talk before MC on October 20, 1942, by Philip Drinker, Consultant to the Maritime Commission, and Professor of Industrial Hygiene, Harvard School of Public Health.)

E. "Both yards had shops where asbestos coverings were made for the pipes in the ships. The work involved was the cutting and pounding of the asbestos matting into desired shapes. The process created a very real asbestos hazard, as the dust and fibers were found all over the shops on rafters, benches, and on workmen's clothing."

(Industrial Health Survey of South Portland Shipbuilding Corporation and Todd-Bath Ironworks, Sept. 18, 19, 22, 1942.)

F. "Hazard stated that Dr. Goldman of the Bethesda Labs (U.S.P.H.S.) found the Amosite to be mostly asbestos. Dust counts in the room where the men were working were very much higher than anyone would recommend - they ran up to 25 million. A figure of 5 million for asbestos is recommended."

(Letter to Bureau of Ships from Philip Drinker, Chief Health Consultant, U.S. Maritime Commission, Jan. 8, 1944.)

G. "1. The two older workers referred to above, the appearance of whose chest x-rays was consistent with the diagnosis of well established asbestosis. Those plates also showed signs of typical advanced age, such as cardiovascular changes, etc."

"2. A group of four workers whose exposure was from two and a half to four years whose chest x-ray appearances were consistent with a diagnosis of asbestosis."

"3. A group of six workers whose exposure was from two to two and a half years and whose chest films showed minimal changes but not sufficient for a definite diagnosis of asbestos."

"4. A group of 26 workers whose exposure was from two to two and a half years and whose chest films were considered negative."

(<u>Report on Investigation of Asbestosis from Amosite Pipe Covering at Bath Iron Works</u>, Dec. 19, 1944.)

H. <u>ASBESTOS ... INSULATION</u>

"1. Institute a regular clean-up of Asbestos Shop.

"2. Provide satisfactory dust collection hood over the saws.

"3. Make use of water spray to keep down the dust when cutting amosite on the tables.

"4. Arrange to have respirators sterilized, cleaned and repaired and provide clean place for their storage."

"Comment: There has been no satisfactory compliance with any of these recommendations."
(<u>Industrial Health and Safety Re-Survey of Todd Pacific Shipyards</u>, July 12-20, 1945.)

I. During WWII, the Government controlled the distribution of information pertaining to shipyard occupational health and safety. Dissemenation of shipyard Industrial Health Surveys was expressly prohibited by the Government under the Espionage Act, as follows:

> "This document contains information affecting the national defense of the United States within the meaning of the Espionage Act. U.S.C. 50; 31 and 32. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law."

CELOTEX

FILED
Jun 30 6 36 PM '83
WILLIAM L. WHITTAKER
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CAL.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE RELATED ASBESTOS CASES	No. C-79-3588 RFP
	MEMORANDUM AND ORDER

In these asbestos-related personal injury cases, plaintiffs seek recovery of punitive damages against various defendants, including the Celotex Corporation, the moving party herein. The alleged punitive damage liability of Celotex is premised upon the activities of a predecessor corporation. Celotex, in this motion for partial summary judgment, seeks a ruling from this court that there exists no genuine issue of material fact concerning such purported liability. In support of its motion, Celotex advances two basic arguments. First, it asserts that, under California law, punitive damages can be imposed upon a successor corporation only if said successor is so similar to its predecessor as to be indistinguishable. Second, it urges that the imposition of punitive damages in industry-wide mass tort litigation is both contrary to law and unconstitutional.

I. FACTUAL BACKGROUND

The Phillip Carey Manufacturing Company ("Old Carey") was incorporated in Ohio in 1888. Through a public offer for tenders in February of 1966, and through subsequent open market

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purchases, Glen Alden Corporation acquired approximately 28% of the outstanding shares of Old Carey.

On December 1, 1966, a new corporation was formed in Ohio. It was named P.C. Company, Inc., but to resolve a conflict of name, its Articles of Incorporation were amended to change the name to XPCU Corporation on April 14, 1967. Subsequently, the name of the corporation was changed as of June 1, 1967, to the Phillip Carey Manufacturing Company ("New Carey").

On June 1, 1967, Old Carey was merged into Glen Alden in a transaction by which the other shareholders of Old Carey received a Preferred Stock of Glen Alden. Immediately after the merger, Old Carey transferred all its assets subject to liabilities to Glen Alden, and Glen Alden transferred to New Carey all the assets of Old Carey, subject to its liabilities, in exchange for all the outstanding shares of capital stock of New Carey. Thus, New Carey became a wholly owned subsidiary of Glen Alden.

On January 23, 1968, The Phillip Carey Manufacturing Company changed its name to Phillip Carey Corporation. On April 9, 1970, Phillip Carey Corporation was merged into Briggs Manufacturing Company. On the same date, Briggs, the surviving company, changed its name to Panacon Corporation. Panacon Corporation succeeded to all the assets and liabilities of Phillip Carey Corporation, which ceased to have corporate existence. After April 9, 1970, Panacon continued to operate "Phillip Carey" and/or "Phillip Carey Company" as a division which manufactured and sold roofing and insulation materials but which had no separate corporate or legal existence.

On April 17, 1972, Celotex Corporation purchased all the Panacon Corporation stock held by the Glen Alden Corporation, approximately 75%, for cash. The Glen Alden Corporation did not acquire any shares of Celotex stock as a result of that transaction; nor did Glen Alden acquire any share of the stock of Jim Walter Corporation, Celotex's parent corporation, as a result of that transaction.

Subsequently, Celotex offered to buy all remaining outstanding shares of Panacon Corporation from their respective owners for $6.00 per share. As a result of these transactions, Celotex bought all shares of the Panacon Corporation for cash, and no stockholders of the former Panacon Corporation became stockholders in Celotex or in any of Celotex's parent or subsidiary corporations. Celotex succeeded to all the assets and liabilities of Panacon, which ceased to have corporate existence.

Celotex, after June 30, 1972, continued to operate "Phillip Carey" as a division which manufactured and sold roofing and insulation materials but had no separate corporate or legal existence. This practice ceased at the end of 1973.

II. DISCUSSION

A. Constitutionality/Illegality of Punitive Damages

On June 2, 1982, this court issued an order addressing these issues. Therein we held that the questions of the illegality/unconstitutionality vel non of punitive damages in mass product liability litigation were not suitable for pretrial resolution in light of the possibility that the

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plaintiffs would be unable to establish a prima facie case of liability for punitive damages, rendering the issues moot. Hence, we denied without prejudice the defendants' motion to strike plaintiffs' prayer for punitive damages. This order applied to all related asbestos cases falling within the In Re Related Asbestos rubric, in which the present cases are to be included. This action is therefore controlled by the June 2 order. Neither Celotex nor the plaintiffs offer new legal authority for their respective positions. We therefore adhere to our previous ruling.

B. Successor Liability

Pursuant to California Civil Code § 3294(a), a plaintiff may recover punitive damages where a defendant has been guilty of "oppression, fraud, or malice." The purpose of punitive damages is to punish wrongdoers and to deter the further commission of wrongful acts. Egan v. Mutual of Omaha Insurance Co., 24 Cal. 3d 809, 825 (1979). In light of this purpose, punitive damage liability is not imposed on the basis of vicarious fault; California courts have recognized that punitive damages "will have no deterrent effect if awarded against a party not responsible for the wrong. (4 Witkin, Summary of California Law, 1974, Torts, § 855, p. 3147)." Hartman v. Shell Oil Co., 68 Cal. App. 3d 240, 249 (1977).

Punitive damage liability may be imposed upon a successor corporation under three possible theories: 1) under the doctrine of Ray v. Alad Corp., infra; 2) under the principles embodied in Moe v. Transamerica Title Insurance Co., infra; 3) by analogy to section 3294(b), that is, on the basis of the principal's knowledge, authorization or ratification of an agent's malicious act.

1. Ray v. Alad Corp.

California, whose law is applicable in these diversity cases, adheres to the general rule that a corporation which purchases the principal assets of another corporation does not assume the latter's liabilities unless:

> 1) there is an express or implied agreement of assumption;
>
> 2) the transaction amounts to a consolidation or merger of the two corporations;
>
> 3) the purchasing corporation is a mere continuation of the seller;
>
> 4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

Ray v. Alad Corp., 19 Cal. 3d 22, 28 (1977). In Ray v. Alad, the Court found that the successor therein did not fall within any of the four aforementioned exceptions; however, the Court held that the policies underlying strict tort liability for defective products called for a special exception to the general rule. The Court noted that the purpose of the doctrine of strict products liability "is to insure that the costs of injuries be borne by the manufacturers that put such products on the markets rather than by the injured persons who are powerless to protect themselves." Id. at 30. The doctrine rests upon the proposition that the risk of injury can be insured against by the manufacturer and spread amongst the consuming public as a cost of doing business. In light of these principles, the court concluded that strict liability could justifiably be imposed upon the successor to a manufacturer where 1) the plaintiff's remedies against the original manufacturer are effectively destroyed by the successor's acquisition of the business; 2) the successor is able to assume the original manufacturer's risk-spreading role; and 3) it is fair to require the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of its business. Id. at 31.

Under the facts of that particular case, the Court determined that the successor manufacturer could be held liable for injuries resulting from its predecessor's products. The plaintiff had been injured while using a defective ladder manufactured by the first Alad Corp. (Alad I). Prior to plaintiff's injury, Alad I had sold its inventory, equipment, trade name and good will to the Lighting Maintenance Corporation, which then took the name "Alad Corporation" (Alad II). Alad I dissolved shortly thereafter. Alad II, as a result of the transaction, acquired Alad I's plant, machinery, offices, and all other assets necessary to continue the manufacture of Alad ladders. Alad II, using essentially the same factory and office personnel, and continued to manufacture the identical model of ladder which had injured the plaintiff. There was little or no indication to the general public that a different entity was manufacturing the line of ladders.

In Rawlings v. D. M. Oliver, 97 Cal. App. 3d 890 (1979), the California Court of Appeal broadened Ray v. Alad to impose liability for a defective product upon a successor who merely continued the same general line of business although not the identical product. The Ninth Circuit has commented that

> The rationale of Ray v. Alad Corp. [and Rawlings] is consistent with California's strict liability policy of assigning responsibility for injuries arising from the manufacture of defective products to the enterprise which has received the benefit of doing busiess in a particular line of products, and which is in the best position to spread the cost of the injury among members of society.

Gee v. Tenneco, Inc., 615 F.2d 857, 864 (9th Cir. 1980).

Both Ray v. Alad and Rawlings imposed liability for compensatory damages upon successor companies. Neither case purported to extend the above principles to claims for punitive damages. Assuming, arguendo, that Celotex would be liable for compensatory damages, we conclude that California would not expand the reach of the above cases to hold Celotex liable for punitive damages under the present circumstances. The justifications underlying successor liability for compensatory damages articulated in Ray v. Alad simply are not present in the instant case. Punitive damages are not a part of a plaintiff's remedies for harm suffered, which Ray v. Alad feared would be destroyed unless a successor corporation were held liable. Punitive damages serve only to punish and deter the wrongdoer. Unlike compensatory damages, punitive damages provide a windfall to a plaintiff. If a plaintiff is unable to recover punitive damages, he will not suffer unrectified injury.

Moreover, the assets of a successor corporation could arguably suffer such serious depletion as a result of punitive damage suits, that the corporation would be unable to provide compensatory damages to future plaintiffs genuinely in need of monetary recovery. This danger, and the problems generally

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posed by the imposition of punitive damage liability in multiple-plaintiff products liability litigation, have troubled numerous courts. See Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832, 838-41 (2d Cir. 1967); Rosner v. Sears, Roebuck & Co., 110 Cal. App. 3d 740, 758-59 (1980) (Elkington, J., concurring).

Furthermore, Celotex cannot easily assume a risk-spreading role. The probability and amount of punitive damages would be extremely difficult to anticipate, and, moreover, California law does not permit insurance coverage to include liability for punitive damages. Cal. Insurance Code § 533 provides:

> An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.

In City Products Corp. v. Globe Indemnity Co., 88 Cal.App.3d 31 (1979), the court noted that, under California law, a corporation may be liable for punitive damages only for malicious acts done by its agents and with the knowledge or under the direction of its corporate officers having the power to bind the corporation. Id. Therefore, the court stated,

> It is apparent from the foregoing that under California law the imposition of punitive damages upon a corporation is based upon its own fault. It is not imposed vicariously by virtue of the fault of others.

Id. at 36. Because the corporation was assessed punitive damages on the basis of its own wilful acts, insurance coverage was prohibited by section 533. The court explained further that, unlike jurisdictions which permit punitive damages on the basis of gross negligence or reckless or wanton conduct, California limits punitive damages to cases involving fraud, oppression or malice; the latter jurisdictions have generally invalidated insurance coverage for punitive damages on policy grounds. California, the court found, fell into this category. Thus, in California, indemnification for punitive damage liability is violative of public policy.

Finally, the successor has sufficiently assumed the "burden" which "runs" with its enjoyment of the predecessor's goodwill when it is rendered liable for the product's defectiveness. Furthermore, if the predecessor's malice become apparent or publicized, the successor will have received less value for its original purchase price than it anticipated.

In light of the foregoing, we doubt that California would choose to expand the aegis of punitive damage liability in the context of mass product liability litigation. We therefore conclude that the fact that Celotex has continued several of the Carey product lines does not raise a material issue of fact sufficient to resist summary judgment on the punitive damage issue.

2. Moe v. Transamerica Title Insurance Company

California law has been quite restrictive in identifying those to be deemed "responsible for the wrong," within the meaning of 3294(a), finding a successor corporation liable for punitive damages only when the predecessor and successor are effectively one and the same entity. In Moe v. Transamerica Title Insurance Company, 21 Cal. App. 3d 289 (1971), the court held a successor corporation liable for the fraudulent conduct of an employee of the predecessor corporation. In Moe, however, the successor/ defendant made no attempt to establish its separateness from the original entity. Hence, the court concluded that:

> The record shows that in its answer to the complaint, appellant Transamerica designated itself as "Transamerica Title Insurance Company, a corporation, formerly known as City Title Insurance Company." Elsewhere in the answer, it was admitted that defendant Olsen was an employee and assistant secretary of "City Title Insurance Company, also known as Transamerica Title Insurance Company." Clearly, appellant Transamerica made no attempt in the trial court to contend that it was a corporation separate and distinct from City Title or that it was subject to a different standard of liability. To the contrary, the above-quoted portions of the answer are, in effect, admissions that the two corporations are one and the same.

Id. at 304.

In the instant case, defendant has demonstrated that it is not a mere continuation of Carey. Celotex was an ongoing concern when it purchased the stock of its predecessor. Thereafter, it continued to operate with its former board of directors. See Agreement and Plan of Merger at 3. The officers of Celotex in office upon the effective date of the merger were to continue as the officers of the surviving corporation. Id. at 4. None of the predecessor-shareholders became shareholders of Celotex. Declaration of Turbiville at 1. Defendant has therefore adduced sufficient evidence to distinguish itself from the situation and principles embodied in Moe.

Moreover, the agent/employee responsible for the culpable conduct in Moe apparently continued to be employed by Transamerica, the successor. In this case, plaintiffs have proffered no evidence that culpable and responsible officers of the predecessor corporations continued to be employed by Celotex. Plaintiffs contend that they "plan to introduce evidence to establish how the corporate changes occurred, that certain key employees continued to work for Celotex after the acquisition, and that Celotex continued manufacturing many of the same product lines of its predecessors." Plaintiffs' Mem. P. & A. at 3 (emphasis added). However, in order to defeat a motion for summary judgment, plaintiffs must produce sufficient evidence to raise a triable issue of fact now; they are not entitled to a denial of the motion "upon the unsubstantiated hope that [they] can produce such evidence at trial." Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1377 (9th Cir. 1978).

In support of their position, plaintiffs offer the declaration of Lewis Pechstein, who joined Phillip Carey in 1955 and remained in the employ of the various successors thereafter, to be elected secretary of Celotex in 1977. However, Mr. Pechstein, as secretary, cannot be considered, solely by virtue of his position, a culpable and responsible officer. By his deposition testimony, his duties and responsibilities at Celotex required him to safekeep its records and contracts, to handle the minutes of the meetings of the sole shareholder and the Board of Directors, and to prepare and review numerous contracts involving the corporation. From 1966 to 1972, his duties as secretary of new Carey and Briggs/Panacon were essentially the same as those just outlined. From 1956 to 1966, as assistant secretary of old Carey, Mr. Pechstein merely assisted the secretary in carrying out the above duties. Deposition of Pechstein at 45. Mr. Pechstein was never a member of the Board of Directors of old Carey. Id. at 46. Although Mr. Pechstein first became aware of a health hazard associated with asbestos in 1958, when one of the plant workers filed a worker's compensation claim asserting asbestosis, this fact--in light of Mr. Pechstein's position and in the absence of supportive or explanatory facts--does not itself create an issue of material fact.

Mr. Pechstein stated further that in 1967 the vice-president of sales for old Carey was Elmo A. DiSalvo, who is now, he asserted, the vice-president of the Celotex Corporation and president of one of the roofing divisions. Id. at 24-25. Arthur Mueller, who was involved in the 1969 decision-making process to eliminate asbestos from the formulation for high temperature insulation, and who worked for both old and new Carey--not as an officer, but with some responsibility for formulation, manufacture and quality control--is still with Celotex. Id. at 28-29. Again, these bare facts do not suggest that either individual was guilty of egregious conduct nor, more importantly, that Celotex was an entity indistinguishable from old or new Carey, under Moe, merely because it retained several individuals who possessed experience and expertise.

Although they have had ample opportunity to do so, plaintiffs have failed to offer additional declarations of these or other purportedly "key" employees or officers. The mere fact that several employees of Carey continue to be employed by Celotex is not significant or material, unless there is affirmative evidence--or a reasonable inference--that they were responsible for any egregious conduct of the predecessor corporation. Nor is the simple fact that Celotex continues to produce some asbestos-related products sufficient to resist summary judgment, in light of our refusal to extend Ray v. Alad to encompass the instant claim for punitive damages. There is no evidence, finally, that Celotex is perpetuating the allegedly malicious conduct that would have warranted the imposition of punitive damages against a predecessor.

3. Section 3294(b)

Section 3294(b) provides:

> An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

In Hale v. Farmers Insurance Exchange, 42 Cal. App. 3d 681 (1974), overruled on other grounds, Egan, supra, at 489 n.5, the court stated that:

> California follows the rule laid down in Restatement of Torts, section 909, which provides punitive damages can properly be awarded against a principal because of an act of an agent if, but only if "(a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting within the scope of employment, or (d) the employer or a manager of the employer ratified or approved the act."
>
> "Although there has been no fault on the part of a corporation or other employer, where a person acting in a managerial capacity either does an

> outrageous act or approves of such an act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions." Rest. Torts, § 909, comment (a).

Id. at 691. Where the employee follows the company's "usual procedures," the employee's acts may be considered part of employer policy. Id. at 156-57. Customary practice may be considered to have been known or authorized by those who dictate the policies of the corporation. Id. at 157. Otherwise, the evidence must show that the employer personally participated in the wrongful acts, or that he previously authorized them, or subsequently ratified them with full knowledge of the facts. Id. at 696. See also Hartman v. Shell Oil Co., 68 Cal. App. 3d 240 (1977) (ratification may be express or implied).

Celotex contends that it could not have possessed advance knowledge of any acts by employees of Phillip Carey Corporation eight to ten years prior to Celotex's purchasing one of Carey's successors. Furthermore, it asserts that the former corporation and its officers and employees were not agents of Celotex whose acts it could subsequently ratify. Indeed, section 3294(b) would seem to have, at best, an attenuated applicability to a successor corporation. A corporate employer theoretically possesses the power to control the future conduct of its employees, either by imposition of sanctions for malicious behavior or by dismisssal of the culpable employee. Moreover, the employer, upon discovering such outrageous conduct, may have the ability to abrogate or rectify the results thereof. However, if another entity or person should subsequently employ the culpable individual, even with awareness of his prior malfeasance, that employer would not, by the mere act of employment, "ratify" that malfeasance and render itself liable therefor.

Celotex has concededly retained several individuals who were employed by Carey. But this fact alone, without evidence of the employees' malicious conduct, without evidence of Celotex's knowledge thereof, and without evidence that Celotex was not a separate and distinct corporate entity, has little meaning and most certainly does not raise a genuine issue of material fact concerning Celotex's "ratification" of such alleged misconduct.

As previously noted, the very concept of ratification has an attentuated applicability outside the direct agent-principal relationship; in fact, we are aware of no case authority wherein the concept has been applied in the context of successor corporate liability. We are of the opinion that, in such a context, the concept would be relevant only in the extreme. A corporate employer, whose identity is distinct and separate from its predecessor, should generally be liable only if, with knowledge of the clearly malicious tendencies or recklessness of a predecessor's employee, hires such employee, who subsequently acts in accordance with those propensities. The fault of the successor at that point is personal; it is culpable for having recklessly employed such an individual. This, of course, is not the case before us. We conclude that, under the circumstnces, Celotex did not "ratify," within the meaning of section 3294(b), the prior acts of its predecessors'

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employees. Plaintiff has proffered no evidence or authority to suggest that a material issue of fact to the contrary exists.

Although the law is sparse concerning the issue presently before the court, the few jurisdictions which have addressed the matter have proceeded conservatively. In Wussow v. Commercial Mechanisms, Inc., 293 N.W. 2d 897 (Wis. 1980), the Court imposed punitive damages against both the original manufacturer and its acquiring corporation. Commercial Mechanisms, Inc. (CMI) had manufactured a pitching machine, which was sold to Antholone Industries, Inc., which in turn sold the machine to the Bangor Area School District in June of 1970. A young boy was injured by the pitching machine about two years later. The principal evidence which supported the imposition of punitive damage liability was provided by the testimony of an engineer, Arones, employed by both CMI and its purchasing company, Advance.

> Arones, although primarily an employee of Advance, spent several days each month at CMI's plant and he was an integral part of both companies' operations. He was an employee of both companies and received compensation from CMI and Advance.
>
> The record shows that, after the acquisition of CMI by Advance in 1971, all the members of the board of directors of CMI were also board members of Advance. . . . [A]fter the acquisition, [Arones] had general supervision of the pitching machine business conducted by CMI. Although Arones was a vice-president of Advance and had been an employee of Advance since the mid-1930's, he became an employee of CMI, as well as of Advance, following the acquisition.
>
> Arones' testimony revealed that both defendants had actual knowledge of the defective nature of the pitching machine prior to the injury of Ronald Wussow. Arones admitted that he and other employees of CMI and Advance were aware of other injuries and other lawsuits prior to July 3, 1972 . . . [and] . . .that, although he was aware that there were other injuries, he did not check CMI's safety records upon Advance's acquisition of CMI and he did not urge the

installation and manufacture of a safety guard even though he knew that other pitching machines had such guards. His examination also brought out the fact that the safety instructions which were distributed with the machines were misleading and inadequate. Although the testimony made it clear that it would have been prudent to have a formal safety review committee, Arones knew that CMI did not have such a committee.

> . . . At the time of Wussow's injury, CMI was wholly owned by Advance and the pitching machine operation was under the direct control of Arones, a vice president of Advance. During the year between the acquisition of CMI and Wussow's accident, Arones was aware of the hazards inherent in the design of the pitching machine and yet nothing was done by Advance to insure that prior purchasers of the machine were informed of the hazard. No attempt was made during the period to manufacture or distribute guard devices, even though Arones acknowledged that the design and manufacture of a guard device was a matter of routine engineering skill and required no design pioneering. The responsibility of Advance and its liability to answer in punitive damages is made clear by the record.

Id. at 905-07.

This case differs significantly from Wussow. There is no discrete product, the danger of which Celotex could have averted by providing warnings to prior purchasers. Plaintiffs have generally been exposed to asbestos dust in the course of their employment during a period of time which had already passed. In Wussow, the harm could have been prevented by the successor company had it made an effort to warn previous customers that the product was dangerous or to supply ameliorative guards. There is no evidence in this case of a key employee such as Arones, who admittedly had both knowledge of the dangers and control over the manufacturing operations and who failed to act upon this knowledge. Nor is the board of director membership the same in the instant case, as it was in Wussow. We agree that, on the facts of Wussow, the successor

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corporation was itself guilty of outrageous behavior, although the actual product had been manufactured by a predecessor. Wussow, however, is clearly distinguishable from the instant case.

In Drayton v. Jiffee Chemical Corp., 395 F.Supp. 1081, mod. on other grounds, 591 F.2d 352 (6th Cir. 1978), the court refused to impose punitive damages upon a successor corporation. The successor, Chlorox, had acquired the predecessor manufacturer of liquid drain cleaner after the plaintiff's accident. It had immediately reformulated the product to render it safe for home use. The court noted:

> Its efforts in this regard were in direct contradiction to the egregious conduct of the original Jiffee management. Thus, the "outrageous conduct" for which plaintiffs seek retribution is more properly attributed to Jiffee's original management personnel whose attitudes and marketing policies Chlorox, on its own initiative, has successfully purged from the company.
>
> Similarly, the evidence at trial showed that many of the drain cleaners presently on the market are uniformly characterized by safer formulation, crystalline form, and unit packaging thereby avoiding the hazards that contributed to [the plaintiff's] accident. Under these circumstances there would seem to be little deterrent value in inflicting punitive damages on the Jiffee Chemical Corporation. As a general rule punitive damages are disfavored in the law absent evidence of willful or wanton conduct by the defendant or the clear need for their imposition as a deterrent. [citations].

Id. at 1098. The instant case resembles that of Drayton. Thus, there would seem to be little purpose in punishing Celotex for the prior sins of its predecessors.

Under rule 56(c), F.R.Civ.P., the moving party has the intial burden of demonstrating the absence of a genuine issue of material fact, but if the moving party satisfies this burden, the opponent must come forward with specific facts indicating that a genuine factual issue remains for trial. Rule 56(e). Feldman v. Simkins Indus., Inc., 679 F.2d 1299, 1305 (9th Cir. 1982). That evidence must be "significantly probative" as to any allegedly disputed fact. Id. In accordance with Texas Partners v. Conrock Co., 685 F.2d 1116, 1119 (9th Cir. 1981), dismissed pursuant to S.Ct. Rule 53, 51 U.S.L.W. 3686 (Mar. 11, 1983), we have afforded the plaintiffs ample opportunity to proceed with complete discovery. Despite this opportunity, plaintiffs have failed to produce significantly probative evidence material to the legal theories applicable in the instant case.

IT IS THEREFORE ORDERED that the defendant's Motion for Partial Summary Judgment is hereby GRANTED.

Dated: June 29, 1983

Chief United States District Judge

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Nos. 83-3118, 83-3119, 83-3120
83-3121, 83-3122, 83-3123
83-3124, 83-3125,
83-3126, 83-3127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LINCOLN LYNCH, ET AL.,
Plaintiffs-Appellees,
v.
JOHNS-MANVILLE SALES CORPORATION, ET AL.,
Defendants,
RAYMARK INDUSTRIES, INC., ET AL.,
Defendants-Appellants. (83-3118, 83-3120, 83-3121, 83-3122, 83-3123, 83-3124, 83-3125, 83-3126),
ARMSTRONG WORLD INDUSTRIES,
Defendant-Appellant (83-3119),
NATIONAL GYPSUM COMPANY,
Defendant-Appellant (83-3127).

ON APPEAL from The United States District Court for the Southern District of Ohio.

Decided and Filed July 1, 1983

Before: ENGEL and KRUPANSKY, Circuit Judges, and BROWN, Senior Circuit Judge.

KRUPANSKY, Circuit Judge. These consolidated appeals join inquiry into the legal impact upon pending asbestos actions of petitions for reorganization which have been filed pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* (Code), by Unarco Industries, Inc. (Unarco)[1] and Johns-Manville Sales Corporation (J-M),[2] both of which are defendants in thousands of asbestos cases pending in the state and federal forums throughout the nation. As Chapter 11 petitioners, all proceedings against Unarco and J-M were automatically stayed by the mandate imposed by 11 U.S.C. § 362. The bankruptcy court presiding over J-M's petition has refused to broaden the automatic stay of proceedings afforded the debtor under § 362 to the co-defendants of J-M in asbestos actions pending throughout the country. It has also refused to permit the suits against J-M to proceed to judgment. *See*: *In re Johns-Manville Corporation, et al.*, Nos. 82-B-11656 to 82-B-11676, *adversary proceeding* No. 82-6221A, *Decision* No. 1 (Bankr. S.D. N.Y. Jan. 10, 1983). Similarly, the bankruptcy court presiding over Unarco's petition has refused to lift the stay against Unarco. *See*: *In re UNR Industries, Inc.*, 23 B.R. 144 (Bankr. N.D. Ill. 1982). The removal of Unarco and J-M as defendants in thousands of pending asbestos actions has generated concern by co-defendants who characterize themselves as "minor" defendants.

The two Chapter 11 debtors, Unarco and J-M, were party defendants in *Lynch* v. *Johns-Manville Sales Corporation, et al.*, No. C-1-82-358, pending before Judge Spiegel, United States District Court for the Southern District of Ohio. Two solvent defendants in *Lynch*, Raymark Industries and Keene Corporation, moved the court for a stay of the proceedings pending against them under 11 U.S.C. § 362, Rule 19, Fed. R. Civ. P., and the court's inherent powers. The motions were denied by memorandum opinion and order dated October 5, 1982. The order was subsequently adopted by reference in denial of similar motions by other solvent co-defendants of Unarco and/or J-M in other asbestos actions pending before Judge Spiegel. *Bender* v. *Johns-Manville Sales Corp., et al.*, No. C-1-81-900; *Burke* v. *Johns-Manville Sales Corp., et al.*, No. C-1-81-289; *Carle* v. *Johns-Manville Sales Corp., et al.*, No. C-1-82-214; *Chaddock* v. *Johns-Manville Sales Corp., et al.*, No. C-1-82-501; *Good* v. *Johns-Manville Sales Corp., et al.*, No. C-1-82-127; *Phillips* v. *Johns-Manville Sales Corp., et al.*, No. C-1-82-299; and *Milford* v. *Dana Corp.*, No. C-1-82-362. The foregoing orders denying motions to stay these asbestos proceedings were certified by the district court for immediate appeal pursuant to 28 U.S.C. § 1292(b) and this Court granted applications for permission to appeal. *Lincoln Lynch, et al.* v. *Johns-Manville Sales Corp., et al.*, 701 F.2d 42 (6th Cir. 1983).

Confronting the initial inquiry of whether the automatic stay provision, 11 U.S.C. § 362(a), may be invoked by the solvent co-defendants of Unarco and J-M to stay proceedings against them, it is noted that said provision facially stays proceedings "against the debtor" and fails to intimate, even tangentially, that the stay could be interpreted as including any defendant other than the debtor:

> § 362. Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of —
>
> > (1) the commencement or continuation, including the issuance or employment or process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

It is universally acknowledged that an automatic stay of proceeding accorded by § 362 may not be invoked by entities such as sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the Chapter 11 debtor. *See*: *In re Fintel*, 10 B.R. 50 (Bankr. Or. 1981) (surety); *Matter of Earth Lite, Inc.*, 9 B.R. 440 (Bankr. Fla. 1981) (guarantor); *In re The Van Shop, Inc.*, 8 B.R. 73 (Bankr. N.D. Ohio 1980) (co-obligor); *In re Aboussie Brothers Construction Co.*, 8 B.R. 302 (E.D. Mo. 1981) (individual partners of bankrupt partnership); *GMAC* v. *Yates Motor Co.*, 159 Ga.App. 215, 283 S.E.2d 74 (1981) (joint tortfeasors); *In re Smith*, 14 B.R. 956 (Bankr. D.C. Conn. 1981) (guarantor on student loan); *In re The Bank Center, Ltd.*, 15 B.R. 64 (Bankr. W.D. Pa. 1981) (partners of bankrupt partnership); *In re Larmar Estates, Inc.*, 5 B.R. 328 (Bankr. E.D.N.Y. 1980) (guarantors of loan); *In re Cloud Nine*, 3 B.R. 202 (Bankr. D. N.Mex. 1980) (co-debtors); *In re Trammel Road Townshouses, Ltd.*, 5 B.C.C. 314 (N.D. Ga. 1977); *Globe Construction Co.* v.

[1] Unarco filed its petition in the United States Bankruptcy Court for the Northern District of Illinois on July 29, 1982.

[2] J-M filed its petition in the United States Bankruptcy Court for the Northern District of New York on August 26, 1982.

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Oklahoma City Housing, 571 F.2d 1140 (10th Cir. 1978). *Contra: In re White Motor Credit Corp.*, 11 B.R. 294 (Bankr. N.D. Ohio 1981) (dictum), *rev. on other grounds*, 23 B.R. 276 (N.D. Ohio 1982).

The legislative history of § 362 discloses a congressional intent to stay proceedings against the debtor, and no other, to preserve the status quo of the estate in an effort to ultimately effect and implement, to the extent possible, a successful and equitable reorganization or liquidation.[3] The Notes of the Committee on the Judiciary identify the debtor as the intended primary congressional beneficiary of the stay:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

See: S.Rep. No. 95-989, 95th Cong., 2d Sess. 54-55 (1978) *reprinted in U.S. Code Cong. & Admin. News*, 1978, pp. 5787, 5840-5841. The stay of proceedings was intended to promote an orderly reorganization or liquidation of the debtor's estate thereby benefiting, secondarily, creditors of the estate:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 340 (1978), reprinted at *U.S. Code Cong. & Admin. News*, 1978, p. 6297.

Nothing in the legislative history counsels that the automatic stay should be invoked in a manner which would advance the interests of some third party, such as the debtor's co-defendants, rather than the debtor or its creditors. This Court concurs with the district court's conclusion that "It would distort congressional purpose to hold that a third party solvent co-defendant should be shielded against his creditors by a device intended for the protection of the insolvent debtor" and creditors thereof. *See also: In re Related Asbestos Cases*, 23 B.R. 523, 527 (N.D. Cal. 1982); *In re UNR Industries, Inc.*, 23 B.R. 144 (Bankr. N.D. Ill. 1982); *Ashworth* v. *Johns Manville, et al., Nos.* C78-470, C81-1545, C77-4088, C79-167 (N.D. Ohio Mar. 21, 1983) at 4.

It is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent. *See: Equal Employment Opportunity Commission* v. *Kimberly Clark Corp.*, 511 F.2d 1352, 1362 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). In particular, this Court has acknowledged the Bankruptcy Act as a detailed and calculated statutory scheme particularly appropriate to *in pari materia* construction. *See: In re Bell*, 700 F.2d 1053 (6th Cir. 1983) (construing Chapters 7 and 13 *in pari materia*); *In re Fulghum Construction Corporation*, — F.2d — (6th Cir. 1983) (construing subsections of 11 U.S.C. § 547 *in pari materia*). In the action *sub judice*, such a construction of Chapters 11 and 13 of the Code support the proposition that Congress did not envision or intend the automatic stay of proceedings to be available to solvent co-defendants of a Chapter 11 debtor. Particularly, Chapter 13 expressly stays proceedings of creditors against co-debtors of the petitioner, 11 U.S.C. § 1301(a), whereas similar language is significantly absent from Chapter 11. Not only is the absence of any expansion of the scope the stay in Chapter 11 probative of congressional intent but, further, the pronouncement which does appear in Chapter 13 is extremely limited; it applies only to co-*debtors* rather than, as in the action at bar, co-*defendants* of the petitioner. Accordingly, *in pari materia* construction of Chapters 11 and 13 counsel that Congress did not envision or intend the § 362 stay to be utilized in a manner other than for the purpose of protecting the debtor and its estate. *See also: In re Related Asbestos Cases, supra*, 23 B.R. at 526; *Pitts* v. *Unarco Industries, Inc.*, 698 F.2d 313 (7th Cir. 1983); *In re Massachusetts Asbestos Cases*, M.B.L. Nos. 1 & 2 (D. Mass. Sept. 23, 1982); *In re Stay of Proceedings Against Defendants Johns-Manville Corporation and Unarco Industries, Inc.*, 660 P.2d 271 (S.C. Wash. 1983)(en banc); *Clutter* v. *Johns-Manville, et al.*, No. C-78-1229 (N.D. Ohio Aug. 2, 1982); *In re UNR Industries, Inc., supra*.

The solvent co-defendants of Unarco and J-M also urge a judicial classification of the Chapter 11 debtors as "indispensible" so as to mandate a stay of proceedings under Rule 19, Fed. R. Civ. P.[4] Although the actions consolidated on appeal are uniformly predicated upon diversity, the issue of joinder and indispensability is one of federal law. *Provident Tradesmans Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 125, note 22, 88 S.Ct. 733, 746, note 22 (1968). It is beyond peradventure that joint tortfeasors are not indispensible parties in the federal forum. *See: Field* v. *Volkswagenwerk-AG*, 626 F.2d 293, 298 n.7 (3d Cir. 1980);

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[3] In *Paden* v. *Union for Experimenting Colleges & Universities*, 7 B.R. 289 (N.D. Ill. 1980), the stay was construed as designed to

> prevent the dissipation or diminution of the bankrupt's assets during the pendency of the Chapter XI proceeding . . . and to avoid the multiplicity of claims in different forms against the estate.

Id. at 290 (describing the predecessor to § 362). *See also: In re Holtkamp*, 669 F.2d 505 (7th Cir. 1982).

[4] Rule 19 provides in pertinent part:

> (a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
>
> (b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Herpick v. *Wallace*, 430 F.2d 792, 817 (5th Cir. 1970); *Windert Watch Co., Inc.* v. *Remex Electronics, Ltd.*, 468 F.Supp. 1242, 1246 (S.D. N.Y. 1979); 7 Wright & Miller, *Federal Practice and Procedure*, § 1623 at 241-42 (1973 & Supp. 1981); *Royal Truck and Trailer* v. *Armadora Maritime Salvadorena*, 10 B.R. 488 (N.D. Ill. 1981); *Jett* v. *Phillips & Associates*, 439 F.2d 987 (10th Cir. 1971); *Sandobal* v. *Armour & Co.*, 429 F.2d 249 (8th Cir. 1970); 3A Moore, *Federal Practice* ¶ 19.07(1)(2d ed. 1967). Indeed, the Advisory Committee Notes accompanying Rule 19 provide that " a tortfeasor with the usual 'joint and several' liability is merely a permissive party to an action against another with like liability" and "Joinder of these tortfeasors continues to be regulated by Rule 20". Since the complaints at bar allege conditions of asbestosis resulting from exposure to products of both the solvent co-defendants and Unarco and/or J-M, the Chapter 11 debtors are joint tortfeasors and accordingly not indispensible. *See also: In re Related Asbestos Cases*, 23 B.R. 523 (N.D. Cal. 1982); *Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983); *Ashworth* v. *Johns-Manville Sales Corp.*, Case Nos. C78-470, C81-1545, C77-1088, C79-167 (N.D. Ohio Mar. 21, 1983); *In re Stay of Proceedings Against Defendants Johns-Manville Corp.* v. *Unarco Industries, Inc.*, 660 P.2d 271 (S.C. Wash. 1983) (*en banc*).

Last, the solvent co-defendants of Unarco and J-M emplore this Court to invoke its inherent power to stay proceedings. *Landis* v. *North American Co.*, 299 U.S. 248 (1936). It is submitted that the factors incorporated in Rule 19(b), Fed. R. Civ. P., as interpreted in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), should be employed, by analogy, to determine of such inherent power should be exercised. Particularly, the solvent co-defendants conjecture that a continuation of proceedings in the absence of J-M and Unarco will result in multiple and piecemeal litigation on a scale heretofore unknown in the history of American jurisprudence; initial litigation would transpire in the state and federal forums and then duplicative litigation would issue in the respective bankruptcy forums for indemnity or contribution thereby adversely impacting upon valuable judicial resources and generating a risk of inadequate and conflicting adjudications. Additionally the solvent co-defendants assert that the automatic stay of 11 U.S.C. § 362 precludes discovery upon J-M and Unarco thereby seriously compromising their ability to successfully defend pending actions.

Confronting these arguments, it is initially observed that any duplicative or multiple litigation which may occur is a direct by-product of bankruptcy law. As such, the duplication, to the extent that it may exist, is congressionally created and sanctioned. More importantly, however, any benefits which may derive to the solvent co-defendants from a stay are clearly outweighed by the counterveiling interests of the plaintiffs. As the First Circuit has cogently observed:

> In a number of those [asbestos] cases, plaintiffs and crucial witnesses are dying. We are not persuaded that the hardship to defendants of having to go forward on this appeal without Unarco, or the interests of judicial economy in avoiding relitigation of the issues, are strong enough to justify forcing plaintiff and a number of other plaintiffs to wait until bankrupt defendants are successfully reorganized in order to be able to pursue their claims.

Austin, supra, 705 F.2d at 5. The First Circuit's implicit concern that time is of the essence in the prosecution of asbestos cases is further amplified by the unknown and potentially unlimited duration of the stay which, to successfully avoid duplicative litigation, must necessarily issue until reorganization is effected:

> A "temporary" stay which was keyed to the resolution of the pending "relief-from-stay" petitions in the bankruptcy courts could, indeed, become one of nearly "indefinite," or, at least, unpredictable duration. These plaintiffs should not be thus denied a forum in which to pursue their claims against those defendants who remain unshielded by the bankruptcy laws.

In re Related Asbestos Cases, supra, 23 B.R. at 532.

Accordingly, this Court finds no basis in law or equity for staying proceedings of the solvent co-defendants of Unarco and J-M until such time as said debtors have been reorganized or liquidated. The orders of the district court denying motions for stays are therefore Affirmed. This judgment is without prejudice to the appellants to seek, in the appropriate forum, authorization to conduct discovery upon Johns-Manville and Unarco.

