

AFFIDAVIT OF LAWRENCE MADEKSHO

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned notary public, on this day personally appeared LAWRENCE MADEKSHO, who after being duly sworn by me, upon his oath deposed and stated as follows:

1. "My name is LAWRENCE MADEKSHO. I am over the age of 18 years and fully competent to make this affidavit and all of the facts stated herein are within my personal knowledge."

2. "I am an attorney licensed to practice law in the State of Texas since 1972. I am also licensed to practice before the United States Supreme Court, the United States Fifth Circuit Court of Appeals and all federal courts in the southern district of Texas. I have practiced law in the city of Houston, Harris County, Texas since 1972. I started representing clients with asbestos-related diseases in the early to mid-1970's and I have continued to represent clients with asbestos-related diseases in various federal and state courts."

3. "This affidavit concerns two documents that were produced to me by Armstrong World Industries, Inc. in 1991 in the cases of *Tommie L. Heathman and wife, Dixie Heathman v. Owens-Corning Fiberglas Corporation*, Cause No. 87-C-1934; In the District Court of Brazoria County, Texas, 23rd Judicial District; and *Sherman A. Searls, Jr. v. Owens-Corning Fiberglas Corporation*,

Cause No. 88-C-0615; In the District Court of Brazoria County, Texas, 23rd Judicial District. The two documents concerning this affidavit are identified as documents No. 63 and 99. Document No. 99 was produced in redacted form. These two documents, which are attached to my affidavit, have been on my exhibit list for my asbestos cases since approximately 1992. These two documents were produced without limitations after I had requested the production of same in the two cases referenced above. These same two documents were produced after I filed Motions to Compel and had several hearings in these discovery matters."

4. "I have also attached a copy of the affidavit of A. Earl Mays which was filed by Armstrong World Industries, Inc. in the *Heathman* and *Sears* cases in the 23rd District Court of Brazoria County, Texas. In his affidavit, A. Earl Mays identifies document Nos. 63 and 99."

FURTHER, AFFIANT SAITH NOT.

LAWRENCE MADEKSHO

SUBSCRIBED AND SWORN TO BEFORE ME on this the 12th day of July, 2000.

ANGELA MADEKSHO
Notary Public, State of Texas
My Commission Expires
DECEMBER 12, 2003

NOTARY PUBLIC in and for
the State of Texas

PLAINTIFF'S EXHIBIT AC-84

DOCUMENT #63

PRODUCED IN HEATHMAN V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

6/11/77
63

We have a problem. That problem relates to the asbestos-related disease litigation. We do not know how big it is, we do not know how long it will be with us, nor do we know what it will cost. However, we felt we should bring you up to date on the status of this litigation.

SLIDE 1

. . . Armstrong has been named as a defendant in a total of 1,577 suits involving asbestos insulation products. Of that number, 44 suits have been dismissed, 219 suits have been settled, and judgments have been rendered in 3 suits. Dismissals have been obtained where there was no exposure to Armstrong's asbestos insulation material or where plaintiff did not file suit within the legally required period of time.

In the 219 suits we have settled, payments have ranged from $500 to $30,000. The average settlement amount is $4,200. These different settlement amounts generally reflect the relative strengths and weaknesses in the particular cases.

Armstrong has been involved in three trials. Two were lost and Armstrong's share of the verdicts was $6,700 and $8,000 respectively. In the case that was won, the trial judge later granted a motion for a new trial because after that trial, evidence was discovered which tended to show that Johns-Manville and Raybestos-Manhattan may have had knowledge of the hazards of asbestos in the 1930's. The ruling was appealed but the case has since been settled as part of a package settlement of 63 cases.

PRODUCED IN [redacted] V. [redacted] PURSUANT TO COURT ORDER DATED 05/22/01

At the present time, there are 1,312 cases pending against Armstrong with some 1,769 plaintiffs involved, since some cases have multiple plaintiffs.

SLIDE 2

Of these cases, three are class actions, with the number of plaintiffs being unknown. Earlier we had four class action suits, but the well-publicized class action suit in California has been dismissed. We believe that the three pending suits will also be dismissed. Class action suits are particularly dangerous, since they seek money for medical examinations and demand injunctive relief to prevent asbestos products from being produced.

These asbestos-related suits have been filed in nearly every state . . .

SLIDE 3

. . . as the map on the screen shows. However, the bulk of the suits have been filed in Los Angeles, San Francisco, Houston, Knoxville, Charleston, Birmingham and Philadelphia, which, in the case of the coastal cities, is due for the most part to suits filed by shipyard workers.

The suits are filed by plaintiffs who are insulation workers and their wives, occasionally wives in their own right, and other tradesmen, who claim they were exposed to asbestos insulation materials which were manufactured and/or distributed by Armstrong. The diseases alleged are asbestosis or various cancers.

In these cases, the number of defendants ranges from 3 to 42. . .

PRODUCED IN HEATHROW V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

SLIDE 4

These are the primary defendants. Some of the other defendants, in addition to Armstrong, are GAF Corporation, Nicolet Industries, H. K. Porter Company, Keene Corporation, Forty-Eight Insulation, and Philip Carey. Armstrong has to date generally been considered one of the minor defendants primarily because we manufactured only a limited number of asbestos insulation products.

As a matter of fact, Armstrong manufactured two asbestos insulation materials:

SLIDE 5

LT Cork Covering was manufactured in the late 1950's and Armaspray, a spray-on insulation product, from mid-1966 through 1968. LT Cork Covering only had asbestos in the paper laminate which covered the product. We do not know how much LT Cork Covering with the asbestos paper was sold. We sold approximately 900,000 pounds of Armaspray for $63,000. The asbestos content was about 9%. All the Armaspray was sold to Armstrong Contracting, who sold some of it to other insulation contractors.

Prior to the formation of Armstrong Contracting in 1958, Armstrong distributed asbestos insulation products. These distributed products are cited as frequently in the suits as the manufactured products - and in some cases, even more frequently.

SLIDE 6

These products fall into four basic categories: insulation products containing raw asbestos, insulation products containing asbestos paper or felt, cements, and sundries. Some of these products may be familiar to some of you, such as 85% Magnesia Pipe Covering and Block, Kaylo and Kaytherm. A few of

PRODUCED IN BEAUMONT V. GAF PURSUANT TO COURT ORDER DATED 05/22/90

these products were sold under Armstrong's private label. Armabestos is an example. These products were installed and distributed from the late 1930's until the formation of Armstrong Contracting in 1958.

The tempo for the receipt of these suits has increased significantly in the past couple of years. . .

SLIDE 7

. . .The first suit was filed in 1969. In 1975, the number of suits doubled from what we had in 1974. The same thing happened in 1976. Again, in 1977, the number of suits almost doubled. Between 1977 and 1978, the number tripled. So far this year, we have received 636 suits, and we still have four months to go.

We believe the increase results from three factors. . .

SLIDE 8

. . . First, Government agencies have sounded a hue and cry about asbestos, increasing public awareness. Second, press coverage has been very extensive and biased in favor of plaintiffs. Third, unions promote litigation by referring workers to attorneys and assisting them with their cases

As you can see. . .

SLIDE 9

. . . Since at least the mid-1940's, Armstrong has carried product liability insurance, with excess coverage provided since 1952. However, since January 1, 1977, there has been a $50,000 deductible per claim with no excess coverage. This is very significant since Liberty Mutual, our current carrier,

PRODUCED IN [redacted] PURSUANT TO COURT ORDER DATED 05/22/91

assigns coverage from the date the disease became manifest as opposed to the date of exposure to a product. . .

SLIDE 10

. . . To date, the two courts which have faced the issue of "date of manifestation" versus "date of exposure" have reached opposite conclusions. If the "date of exposure" theory or some modification thereof is eventually accepted by the courts, then product liability coverage would apply as of the date or dates the plaintiffs were exposed to a product, rather than on the date the disease was diagnosed. Since adoption of the "date of exposure" theory could improve our insurance coverage situation, we are currently reviewing with outside counsel whether that theory is legally supportable under the insurance policies.

SLIDE 11

Since the first suit was filed in 1969, our various insurers have paid out or reserved $1,800,000 in excess of our premiums. $2,900,000 has been charged back in premium adjustments to Armstrong over the past nine years. Thus, the total cost of the asbestos cases to date is $4,700,000.

With respect to disclosure, Armstrong reported in the 1978 Annual Report and in our 10-K that it did not foresee that the asbestos litigation would have a material adverse effect on the Company's financial position or operating results. We continue to monitor the potential impact of this litigation in light of the disclosure requirements.

PRODUCED IN BEATRAM V. GAF PURSUANT TO COURT ORDER DATED 5/22/91

In defending the Company's interests, we endeavor to minimize the costs of these suits. We can do this by managing these cases as effectively as possible.

SLIDE 12

Our objectives are listed on the screen.

Upon filing of suits with multiple plaintiffs, we immediately instruct local counsel to have each plaintiff's claim severed into an individual suit.

Where there has been no exposure to either our manufactured or distributed products, we move for the dismissal of those cases.

As a general rule, we explore the prospects of settlement unless the plaintiff has a very weak case, or unless some very important principle of law is at stake. By going to trial, a defendant runs an unpredictable risk of a substantial verdict. Earlier this year, Keene Corporation refused to pay $5,000 in settlement of a case, went to trial and ended up with a verdict of $410,000 against it.

However, we do not intend to merely settle cases. We continually assess the prospects of winning or losing at trial. We also try to avoid being left in as the sole defendant where all other defendants elect to settle. Surprisingly, in those cases where there has been only one defendant, such as in the Keene case, the juries have awarded the largest amount of damages.

In this litigation, we utilize one or more of the following defenses:

PRODUCED IN HEATHMAN V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

SLIDE 13

. . .The plaintiffs did not bring their actions within the time required by law; there was no exposure to an Armstrong product; the plaintiffs do not have an asbestos-related disease; the plaintiffs assumed the risk of contracting a disease; and we had no knowledge that asbestos was hazardous at the time the plaintiffs were exposed--the "State of the Art" Defense. As a result of occupational disease claims filed against Armstrong as early as 1952, plaintiffs are in a better position to attack our arguments that we did not have knowledge of the dangers of asbestos in the 1930's.

In coordinating these cases, we work closely with local counsel and through our Insurance Department, with the insurance carriers involved. We provide technical information, answer interrogatories, and undertake to keep local counsel around the country advised of developments with the asbestos-related litigation. We coordinate strategy with local counsel and become actively involved in taking depositions of Armstrong personnel, and others, in settlement discussions, and in the trial of cases.

In addition to the daily activities I've discussed so far and the current investigation involving the controlling theory for product liability insurance coverage, we also are closely monitoring the asbestos-related legislative and agency activity at the national and state level. Various bills have been introduced to alleviate the burden of these suits. . .

SLIDE 14

PRODUCED IN [redacted] PURSUANT TO COURT ORDER DATED 6/22/91

. . . Johns-Manville has been promoting the "White Lung" Bill, which would set up a government and industry funded compensation scheme for the victims of asbestos-related diseases. The Workers' Compensation Reform Bill would set minimum standards under state workers' compensation and limit workers' rights to bring third party suits. And there is the Product Liability Risk Retention Bill, which will probably be introduced later this year to allow companies to self-insure. Payments into such self-insurance funds would be tax deductible. While we do not believe there will be any major legislative solution in Congress in the near future, it should be noted that the government's becoming increasingly involved as a defendant in this litigation. This involvement may down the road provide the impetus for a legislative solution. Legislative action at the state level may assist somewhat but such action will probably not provide any major relief.

CLICK SLIDE THROUGH AT THIS POINT - SHOULD HAVE DARK SCREEN HERE

. . .Well, that defines the problem, our involvement in it, what we are doing about it, and where we can take positive steps in the handling of these cases. We will closely monitor and keep management apprised of new developments, handle the case load as effectively as we can; and as the need arises, we will seek management advice and counsel to minimize losses occasioned by this litigation.

Now, I will be happy to answer any questions you may have.

PRODUCED IN HEATHMAN V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

DOCUMENT #99



PRODUCED IN HEATHMAN V. CAE PURSUANT TO COURT ORDER DATED 05/22/01

99

1

L. A. Jensen, Pres Off March 3, 1979

A. L. Mays, Legal

Asbestosis Cases

CONFIDENTIAL
[illegible] PRIVILEGE

There are presently 317 court actions pending against Armstrong involving asbestosis, cancer, or other serious lung diseases. A few of these actions contain multiple plaintiffs. A total of 212 cases have been filed since January 1, 1977. There have been 74 cases that were either settled, dismissed or otherwise disposed of since Armstrong has been named a party in these cases.

All complaints allege negligence and breach of warranty in the manufacture and sale of asbestos insulation products. Armstrong is one of a number of defendants in those cases who have either manufactured, sold or distributed insulation products containing asbestos. No Armstrong asbestos-containing products other than insulation have been identified in the suits.

Most of the plaintiffs in the suits have been workmen who worked with asbestos insulation products. There are a few plaintiffs who allege that they worked in the vicinity where asbestos insulation products were used and that they were thereby injured by that exposure. A few suits have been brought by spouses of workmen who, allegedly as the result of laundering clothes or otherwise being subjected to asbestos dust and fibers from their husbands' work clothes, contracted asbestosis or other diseases. It is conceivable that we will, in the future, be joined in suits filed by other family members. There is also the possibility that suits may be filed involving asbestos containing products other than insulation.

As I reported earlier, the two asbestos insulation products our Company manufactured were Ll Cork Covering and Armaspray. Ll Cork Covering with an asbestos paper covering was manufactured from 1956 to 1959. Armaspray was produced from on or about July 1964 to December 1968, although sales were made until about July 1969. All sales of Armaspray were to Armstrong Contracting & Supply Corporation. Particularly prior to the formation of Armstrong Contracting & Supply Corporation, we distributed and used a number of asbestos insulation products that were manufactured by various companies. One of the companies from whom we purchased a considerable quantity of such insulation products was Keasbey-Mattison which is no longer in business.

With respect to the distributed products, the plaintiffs contend that Armstrong should be chargeable with the knowledge of an expert and that this knowledge could have been obtained by testing and thereafter warning customers and users about the hazards involved. However, the asbestos insulation products we manufactured were distributed generally prior to 1956, before Armstrong Contracting was

PRODUCED IN HEATMAN V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

formed; and therefore, we should, at a minimum, be charged only on the basis of knowledge that was available at that time regarding the alleged hazards of asbestos. The argument here is that the 'state of the art' was such that we were not aware of the dangers of asbestos during the time we manufactured and distributed asbestos insulation products. In other words, our Company should be judged only by the standards generally prevailing and in existence at the time those products were produced. Although plaintiffs refer to medical literature as early as the 1920's that discuss the dangers of asbestos, nevertheless, manufacturers were not generally aware of the dangers of asbestos until the 1960's, and for various companies, at various times in that period, with respect to the degree of danger. Even today there is debate over the degree of exposure that is hazardous to health. It is a jury question, however, as to whether or not employers did have such knowledge.

PRODUCED IN HEATHMAN v. GAF PURSUANT TO COURT ORDER DATED 05/22/91

Our Company has been dismissed from a few cases. The basis for the dismissals has been that the plaintiffs were not exposed to our products. However, it is difficult to obtain dismissals since plaintiffs' counsel are in a position to educate their clients on the insulation products our company produced. We have conferred extensively with personnel at ACandS, and they do not have records detailing the jobs and locations where our Armaspray was used. In addition, ACandS sold some Armaspray to other contract users, which, even if ACandS had records, would not completely tie down where this product was used. Further more, we have no records as to the customers who purchased and used LT Corn Covering.

One of our strongest defenses is to establish that there is no causal connection between the exposure and alleged injury. This requires use of medical experts. The insurance companies have been somewhat reluctant to incur major expenditures in obtaining such experts, particularly if the insurance companies believe the cases may be settled prior to trial.

PRODUCED IN HEATHMAN V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

L. A. Jensen - 4 - March 3, 1977

PRODUCED IN [redacted] V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

(9) Coordinate the asbestosis cases with outside counsel to make certain that all defenses which we can advance are pursued vigorously. We will want to develop the 'state of the art' defense establishing that, at the time Armstrong produced and distributed asbestos insulation products, we did not know that asbestos was hazardous to health.

PRODUCED IN HEATHMAN V. CAF PURSUANT TO COURT ORDER DATED 05/22/99

M. A. Jenson - 3 - March 3, 197.

J. L. Jones, Pres Off
[illegible]. Pulkrabek, Secy Off
W. L. Hofferth, Insurance

PRODUCED IN HEATHMAN V. GAF PURSUANT TO COURT ORDER DATED 05/22/91

NO. 87-C-1934

TOMMIE L. HEATHMAN, AND WIFE, DIXIE HEATHMAN	)	IN THE DISTRICT COURT OF
	)	
	)	BRAZORIA COUNTY, TEXAS
VS.	)	
	)	23RD JUDICIAL DISTRICT
GAF CORPORATION, ET AL	)	

NO. 88-C-0615

SHERMAN A. SEARLS, JR.	)	IN THE DISTRICT COURT OF
	)	
VS.	)	BRAZORIA COUNTY, TEXAS
	)	
OWENS-CORNING FIBERGLAS CORPORATION, ET AL	)	23RD JUDICIAL DISTRICT
	)	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA	)
	)
COUNTY OF LANCASTER	)

BEFORE ME, the undersigned notary public, on this day personally appeared A. Earl Mays, after being duly sworn did upon oath state the following:

1. My name is A. Earl Mays. I am over twenty-one years of age, of sound mind, capable of making this affidavit and am fully competent to testify to the matters stated herein and they are all true and correct.

2. I am a licensed attorney in the Commonwealth of Pennsylvania and have been so licensed since 1957.

3. Since 1962, I have been a lawyer in the Armstrong Legal Department and at times in the past have been responsible for the management of the asbestos litigation.

4. Privileged document Nos. 99, 103, 109, 151, 225, 323, 333, 344, and 346 are my memoranda to Senior Management which were communications reflecting my mental impressions and advice with respect to asbestos litigation matters, and which I considered to be confidential.

5. Privileged document Nos. 63 and 309 are my notes which I used in preparation for and during oral presentations to Armstrong Senior Management, in which I expressed my mental impressions, analysis and legal advice about

the Armstrong asbestos litigation. I considered those notes and the presentations to be confidential.

5. Armstrong is only one of numerous defendants in virtually all asbestos cases, so often Armstrong outside counsel were required or otherwise found it necessary to work with outside counsel for other companies concerning common legal issues. All participants understood that such discussions could only take place if all the participants treated the discussions as privileged and confidential pursuant to a joint defense privilege, and that each participant would assert privilege with respect to such discussions. Privilege Document Nos. 130 and 131 are handwritten and typed notes John Crisp of the Armstrong Insurance Department, who shared responsibility for management of Armstrong's asbestos litigation, prepared regarding a defense counsel meeting that both Mr. Crisp and I attended, where attorney mental impressions, analyses and legal advice were conveyed. I considered these notes and the meetings to be confidential.

7. In its management of the asbestos litigation the Armstrong Legal Department requested members of the Insurance Department to collect certain information. I considered their assistance comparable to that provided by experienced paralegals and considered their work product to be confidential attorney work product in the same way that paralegal work product would be. Privilege Document Nos. 134, 135, 136, and 185 are requests for or are summaries of information for use in the asbestos litigation that Messrs. Hofferth and Crisp of the Armstrong Insurance Department assembled at the direction of the Armstrong Legal Department. The underlying facts have been disclosed by Armstrong in the asbestos litigation, but these documents have not, because I considered them to be confidential.

8. During the course of management of Armstrong's asbestos litigation, members of the Legal and Insurance Departments communicated with each other about litigation issues. Privilege document No. 133 is a memorandum I wrote containing advice to John Crisp who was assisting me in gathering information in regard to the asbestos litigation in order to facilitate my rendering of advice to Armstrong. I considered this document to be confidential.

9. In the management of Armstrong's asbestos litigation, I communicated with outside counsel retained for Armstrong concerning asbestos litigation matters. Privilege Document No. 264 was sent by me to Armstrong

outside counsel for the purpose of seeking legal advice. I considered this letter to be confidential.

10. All Privileged documents set forth above were intended to be confidential. I have not distributed them beyond those managing Armstrong's asbestos litigation, except for inspection by Armstrong counsel in response to a request for production in asbestos insurance litigation.

11. All Privileged documents set forth above contained information that was considered by me to relate to the overall asbestos litigation as well as to the particular cases or jurisdictions noted therein.

12. All copyees on all Privileged Documents set forth above were individuals involved in managing Armstrong's asbestos litigation.

Further affiant saith not.

A. Earl Mays

SWORN TO BEFORE ME on this 17th day of May, 1991.

Notary Public

NOTARIAL SEAL
SHERRY L. PATTERSON, Notary Public
Lancaster, Lancaster County, PA
My Commission Expires May 3, 1993