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COMMERCIAL UNION v. PITTSBURGH CORNING

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMERCIAL UNION INSURANCE COMPANY	: CIVIL ACTION
vs.	:
PITTSBURGH CORNING CORPORATION	:
PPG INDUSTRIES, INC.	:
CORNING GLASS WORKS	:
THE TRAVELER'S INDEMNITY COMPANY	:
INSURANCE COMPANY OF NORTH AMERICA	:
LUMBERMANS MUTUAL CASUALTY COMPANY	: NO. 81-2129

Philadelphia, Pennsylvania
June 24, 1982

Before HONORABLE JAMES T. GILES, J.

REPORTED BY:
Sidney S. Rothschild
Dale J. Varallo

OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106

APPEARANCES:

JAMES LEWIS GRIFFITH, ESQ.
EDWARD J. SCHWABENLAND
for Commercial Union Insurance Company

RICHARD H. SEGSTERMAN, ESQ.,
JOHN J. MURPHY, JR., ESQ.,
for Insurance Co. of North America

ANDREW C. HECKER, JR., ESQ.,
WILLIAM E. BLACK, ESQ.,
for Travelers Indemnity Company

JOHN McS. CRAMER, ESQ.,
JOHN J. RESTIVO, JR., ESQ.,
for Pittsburgh Corning Corporation

MARK WILCOX, ESQ.,
STEWART DALZELL, ESQ.,
for Lumbermens Mutual Casualty Co.

DAVID J. ARMSTRONG, ESQ.,
GEORGE E. McGRANN, ESQ.,
DANIEL P. STEFKO, ESQ.,
for PPG Industries, Inc.

MARK C. RASDERT, ESQ.,
for Corning Glass Works

AFTERNOON SESSION

THE COURT: Good afternoon. Please be seated.

We shall now turn our attention to the motion by Pittsburgh Corning and PPG Industries for partial summary judgment as to Count J of the Complaint.

Mr. Armstrong.

MR. ARMSTRONG: Yes, your Honor.

May it please the Court, both Pittsburgh Corning and PPG Industries filed motions for partial summary judgment on Count J, that would entirely dispose of Count J and both Mr. Cramer and I wish to address the Court on our respective motions.

Count J, your Honor, in the original Complaint, which I believe was filed May 21, 1981 seemed to be kind of an add-on, there's been an amended Complaint since then and I'll simply remind the Court that J, and I count J to be the tenth letter of the alphabet was the tenth and the last count in the original Complaint. Since that time, there were two additional counts added by the first amended Complaint. I think they dealt with stacking and some other issues of the policy interpretation were also declaratory judgment in nature as I recall.

So, your Honor, I think that the first

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BAC MD
21217
Ph - 301 462-5135

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nine counts deal either with interpretations of the policy or deal with whether Travelers in some way improperly expanded the primary coverage or deal with whether the insureds, PPG and Pittsburgh Corning, failed to maintain some underlying insurance required one way or the other.

They sought from the Court a declaration concerning coverage, indeed the Court has already ruled in an earlier motion for summary judgment on one of the counts having to do with exposure versus manifestation.

I might also mention parenthetically that the argument this morning in renewal of the motion to bring in additional parties, which sought to tie that to the recision count really points up how different the recision count is from the other eleven because indeed those parties were sought to be joined because they would be in some way affected by a declaratory judgment, when in fact recision is a totally different aspect without which they have no interest, that points up, your Honor, that while the Complaint is lengthy, it kind of rambles and as I see it, in all the counts but one, threshold union, seeks the Court declaration that for one reason or another that the policy that it has issued, that it embraces as it's a contract and that it seeks to have the Court declare that under that contract it doesn't have this obligation or that obligation or the next obligation but nevertheless it embraces it as its insurance contract but in this one count, recision, there is a totally and I think reversed position of saying that the contract was void aditio and thus recision is sought and that, your Honor, is a cause of action based in equity in which the equitable powers of the Court are sought to go back and state that no contract ever existed.

Your Honor, the company which sought this insurance is PPG Industries, Inc., then known as Pittsburgh Plate Glass and the first policy of excess insurance with Commercial Union then known by a predecessor name was in 1959 and it carried -- PPG carried policies some three or four that spanned the period from 1959 until 1978.

One of the named insureds under one of the endorsements of these policies was Pittsburgh Corning Corporation. As your Honor knows, PPG had and presently owns 50 percent of the stock of Pittsburgh Corning and Corning Glass Works, another defendant here owns 50 percent of the stock of that corporation. That corporation was formed in 1937, these matters are all in the record, your Honor, and manufactured various products, not including any asbestos-containing product until 1962.

Your Honor, PPG has never manufactured any asbestos-containing product, it never has and it doesn't at this time. But Pittsburgh Corning at one point acquired the assets of the UNARCO Corporation and that's a very interesting connection, your Honor, because as I will show later in the argument, Commercial Union has insured UNARCO asbestos manufacturing activities for many, many years, including the time period which I am addressing, knowing that it was in the asbestos manufacturing business and so stating on its policy that it was.

Pittsburgh Corning went into the asbestos insulation pipe business in 1962, after one of the policies had already been in effect for two or three years and it was at that business from 1962 until 1972 when it completely got out of the asbestos insulation business.

Your Honor, with that just rough sketch of the background, I want to point out to the Court that we think for four totally independent reasons that the Court would be justified in dismissing the count on summary judgment.

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The first one is on laches. Your Honor, the first thing in this case concerning asbestos exposure was Borel in the Fifth Circuit and I forget the exact year of the circuit's decision, I think is about 1973, that decision, as your Honor knows, is the watershed of the asbestos litigation, not only in terms of exposure and the pathology of the disease, but coverage and which defendants, and it didn't directly address exposure with regard to manifestation, but which defendants in terms of exposure and one of the defendants was Johns-Manville.

Johns-Manville the document show is a company that Commercial Union has insured on the excess for many years, well knowing their asbestos manufacturing activities, and indeed were the insurers at a time when they would have had some interest in the Borel case itself.

To bring it to more immediate parties, your Honor, the first case in the United States against either Pittsburgh Corning or PPG to my knowledge was the case of Yandle versus PPG, Pittsburgh Corning, and other defendants, it was filed in the Eastern District of Texas, specifically in the City of Tyler, Texas, and was presided over by the Honorable Judge William Steeker in the federal Court in Tyler, and that or outgrowths of that litigation remain to this very day, your Honor.

That lawsuit against Pittsburgh Corning and PPG was filed in January of 1974, which would be what, eight years and some months now until this time, or this, being filed in 1971, seven years and January to May, that many months before this case was filed.

As soon as Yandle versus PPG and Pittsburgh Corning was served upon PPG, for example, PPG sent that complaint to its brokers who in turn sent it to Commercial Union. The records that we attach as part of the exhibits there as I recall, your Honor, have Commercial Union receiving a copy of the Yandle complaint in I think January or February of 1974, and in that complaint, Pittsburgh Corning was alleged to be manufacturing asbestos containing products, and PPG was alleged to have the ability to control Pittsburgh Corning's exposure of its employees to the risks and hazards — I think the very words risks — I know risks was used in the complaint, perhaps the word hazzard wasn't but the same kinds of allegations were made about PPG and Pittsburgh Corning in exposing those workers that are now said to be matters that have just now come to the attention of Commercial Union on the part of either Pittsburgh Corning or PPG.

Your Honor, the document that we attached to the appendex show that not only did Commercial Union send memoranda and letters back and forth between Boston and I think it was their Dallas claim manager, be they actually sent a representative to attend meetings in the City of Pittsburgh on the Yandle case. In fact, their representative was in these gentlemen's law firm conference room I think on April 17 of 1974, and exhibits are attached which shows his attendance and gives his name; I think he was the Pittsburgh claims manager of Commercial Union Company, attended a meeting of counsel for Pittsburgh Corning and PPG, and representatives of

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COMM UNION'S 1937 ENG. MANUAL

all of their carriers, in fact, the people here.

There was a representative from INA, a primary carrier, Hartford and so forth, and Commercial Union was there considering the defense of that case. That was a very important case. It started out as a class action. It alleged, according to Commercial Union's own records in the spring of '74, to have potentially 600 plaintiffs in it, your Honor.

Although the class was denied by Judge Steaker ultimately, before I settled that litigation for a total of $20 million paid by all of the defendants, including the United States at the end of 1977, there were 445 plaintiffs in the case.

From the beginning, Commercial Union not only considered that it was a very serious case and it knew exactly what it involved, it talked about should we have our own lawyer, but interestingly enough, even had a source in Texas that we didn't know about. It's now in the records there, but their Dallas claim manager came across a lawyer by the name of Otto Gritter. Apparently Otto Gritter was a lawyer for Aetna in some way, and he knew all about what was going on in the Yandle litigation. As early as 1974 for awhile they had information thatwe didn't have in the defense of those Yandle cases, and so they fully knew, your Honor, from that time until May of 1981 that they were exposed potentially to claims, the very kind involved in the underlying litigation that consumed the underlying coverage, and which exists to this very day.

On a total separate basis for their having knowledge of the risks and hazards of asbestos, your Honor, our discovery has unearthed their own 1937 group engineering manual. This was a document that employees of Commercial Union created, a very impressive document about hazards in the work place in which asbestos and asbestosis is one of the first products and conditions dealt with. I think it is set up in an alphabetical way, and if not the first, the second product was asbestos, and my reading of it, and again we attached that, your Honor, suggests to me that if anything, in 1937 Commercial Union's knowledge on the hazards of asbestos and the potentional of asbestosis, including death, was far ahead of perhaps the average current state of the art or knowledge of the art at that time.

We contend that we didn't have that kind of information at the time, but it doesn't make any difference. Actually in terms of this summary judgment motion, your Honor can assume I think the insureds knew all the risks and hazards. They did not, but for purposes of the motion since there is this outcry -- I don't know whether your Honor saw the brief that was filed this week. That certainly is a tremendous outcry, and I think an offensive document, absolutely hysterical in tone, completely unprofessional, but in any event assume that the insureds had knowledge of risks and hazards so that the defendant has been deprived of nothing in terms of discovery. The knowledge of Commercial Union reflected in its 1937 manual I think is so impressive that your Honor will come to the conclusion that there was hardly anything else Commercial Union could be told about asbestos or asbestosis at that time in light of what they published themselves.

Your Honor, what is a reasonable time concerning laches in an equitable proceeding? It is a question of law, and while there is no case that can tell the Court unerringly that in every situation an unreasonable amount of time is over two years, three years, four years, or whatever, clearly the statute of limitations itself is a guide, and it is a rare equity case in which the Court for example would permit an action to be filed more than say six years after knowledge of the cause of action. Here we had as I said well over seven years, seven years and some months before it was filed.

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Frankly, I would argue that say by the end of 1974, certainly by the end of 1975, even if you looked at the Yandle case as complex and uncertain, certainly by the time that I settled it for all of the defendants for $20 million, and an immediate indication of refiling by hundreds of additional plaintiffs, we were up to over 2000 plaintiffs in Tyler II, and the new plaintiffs in Tyler began to be sued in the federal court there in 1978, your Honor, the second wave started in, as I said, went well over 2000 just there.

THE COURT: When was the case settled?

MR. ARMSTRONG: The end of 1977. The actual money was disbursed out of escrow in early 1978, and by March of 1978 Commercial Union was being invited to meetings of counsel on the new waves of litigation. I think it started in March, and we began to meet again with the carriers in mid-1978.

If you didn't hold them to January 1974, they knew their policies, they discussed them in their memos by the end of 1975, and certainly by the end of 1977 when everybody has to be aware of the horrendous possibility of exposure out there, they had to know their policies, they had to know what they insured.

In the case that's been cited to your Honor long before that date -- well, I am not sure of the date, but about that timeframe they were taking the position in the Alabama or Mississippi case as has been called to your Honor's attention, they were taking the position in some parts of the country that exposure and not manifestation controlled, so within their own ranks they were well aware they could be liable on an exposure basis, they were aware of the underlying policies were being used, they knew they were in excess, they knew what their policies held. How in the world can they sit back until all of the underlying insurance is expended and then say recision?.

Now, I can understand how you sit back until underlying insurance is expended, although you closely monitor it, but you come in and say declaration. That I understand because as your Honor said this morning, there has to be a point arrived when you have a case or controversy, and maybe you don't have a case or controversy on that declaratory judgment until underlying is expired. I won't say maybe you do or don't, maybe you don't, I understand perhaps you do not, but how could that possibly the case in recision?

In recision you say because of conditions that existed at the time of the contract, in this case fraudulent misrepresentations, I guess, you no longer have a contract, and certainly by the time you know that your contract would be involved in something, you can't sit back and wait until somebody wants your money eight years later, or seven and a half years later, and then say now I don't have a contract. I mean, I still had one in '74, I still had one in '75, I still had one when it paid $20 million of underlying coverage, the government money and so forth in '77, but when it's finally all used up and you want mine, then I didn't have a contract.

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It's very clear what they did.

THE COURT: Well, did Commercial Union participate in the settlement?

MR. ARMSTRONG: They didn't pay anything because we didn't get up above the primary, your Honor. Actually of the 26 million, 6-1/2 million of it was expended by the United States Government, another 5-1/2 million was by the suppliers from England and Africa and so forth, so there was not a huge amount of it that came from the primary policy, but it certainly reflected the nature of the risk.

I think what they have done is clear from the memos.

We hope we won't be exposed and so we'll lay back. But then when it was all used up, they had taken the risk and they had lost, and now what they want to do, your Honor, is shift the prejudice of their running the risk that they wouldn't be exposed to PPG and to Pittsburgh Corning.

If they had come into this Court in 1974, your Honor, after Borel had gone through the Fifth Circuit, and after Yandle was filed concerning their own excess coverage, and they were getting notices and going to meetings, if they had come into your Honor in 1974 and you had granted recision, these companies may have been able to buy insurance. As a matter of fact, your Honor knows in that Boston case that I think was in the federal court in Boston, that Eagle-Picher brought manifestation insurance from a manifestation company, Liberty Mutual. You know, there were still some companies that contend in spite of all the circuits that they're selling manifestation coverage, and Eagle-Picher, the insured in the Boston case, went to a manifestation company, Liberty Mutual, and bought manifestation insurance after the exposure fact, after the people were exposed, they bought it and covered future years so that then when people began to have asbestosis, Liberty Mutual is stepping forward and providing coverage.

PPG could have gone into the market and could have attempted in some way, if recision had occurred -- and, your Honor, that's important, because in the consideration of laches, that is the other aspect of it: Was it unreasonable and does it prejudice the other party to the contract?

THE COURT: You contend it would be impossible for you to obtain replacement coverage?

MR. ARMSTRONG: It is now, yes. We put in an affidavit in the record which does establish that.

As a matter of fact, we would have been very tightly hemmed in because in about 1975 -- and we put this in the record earlier -- insurance companies began to decline to write it. Certainly insurance companies -- well, I can't make a distinction in terms of whether the manifestation or the exposure people first began to get out of it, but insurance companies began to decline to write asbestos insurance in 1975, and certainly you can't get it today. If your Honor rescinds this contract today, tomorrow, this year or next year, not only does PPG, Pittsburgh Corning -- it is the same life and death argument we made the last time, they're gone, and nothing can be bought, and in fact the companies haven't even been able to make reserves.

Even then, even if insurance hadn't been available say in '75 or '76, these companies can at least do something to try to create reserves, but to wait until your coverage is involved and then go in to the court and say we really didn't have a contract seven and a half years ago, it's unconscionable.

THE COURT: What's the effect with respect to the excess carriers about Commercial Union?

MR. ARMSTRONG: That's a very serious problem.

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I can't say to your Honor that they would not have coverage, because in fact if your Honor would grant recision, we would probably go to those other excess insurance companies and ask them to provide insurance and maybe perhaps litigate that by declaratory judgment, but it is possible that we could lose all of it. The coverage began to be built up when such large excess coverage began to become available in the industry during the 1960s. Today I think, your Honor, it's like $200 million. During the relevant times here it was climbing to $30 million on one occasion, $50 million on another.

These policies are following policies. You have your primary and you have your first excess, which is Commercial Union, and each of those is sort of unique. Policies above that in the various layers that they earlier, with different companies and different names and there's a mountain of insurance shown in one of the diagram are following policies, most of which provide there has to be certain underlying coverage.

Now, possibly if PPG or Pittsburgh Corning filled in the $64 million of coverage, which would be lost, if these contracts were rescinded, they may then come into play, so we would argue they would drop down.

I think they have a strong argument that they don't drop down and they would probably argue, your Honor, that the millions and millions above that would not apply at all.

So, certainly the excess layers are at risk, your Honor, and the recision, the granting of the recision, if you take it year by year, we are talking about 10 to 11 years of coverage, your Honor, probably an average of the 10 to 11 years of coverage. I can look at the chart and be more precise, probably an average of $40 to $50 million per year excess above the primary and if that whole thing were wiped out by recision, I think you would be talking about a loss of around half a billion dollars of insurance, possible loss, and I think they would contend that it no longer applies, and I think the excess layers would say, you know longer have insurance, you didn't maintain the first excess policy and they would defend on the same grounds and it would all fall, they contend they are following policies and if this is the basis for recision there, it's the basis of recision for all the excess.

I think that the Court is being asked to take from these two insureds, 500,400, $500 million worth of insurance over those 10 years by rescinding specifically $64 million worth of coverage provided by Commercial Union.

THE COURT: Let me ask you a couple of questions about the umbrella policy application submitted in 1963.

MR. ARMSTRONG: Yes.

THE COURT: The Texas, the Tyler, Texas plant was acquired when?

MR. ARMSTRONG: 1962.

THE COURT: At the top of the application form --

MR. ARMSTRONG: Yes.

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THE COURT: -- there's a direction to enclose a products brochure catalog with the application. Do you know if that was done?

MR. ARMSTRONG: I don't know if that was done, your Honor. I don't think that discovery disclosed that, your Honor. There was -- I'm informed -- there was a PPG facilities folder which I think was really focusing on plants and properties and you will note one of the other sections in here wants to know where you have plants and in how many states and so forth. I think it really related to more directly to that.

THE COURT: Paragraph 6 was the Texas power plant listed on it as one of the producing plants?

MR. ARMSTRONG: Excuse me, your Honor.

(Pause.)

MR. ARMSTRONG: Your Honor, I'm told that's a listing of states and that Texas was included on the list.

THE COURT: Are there any other plants in Texas other than the Tyler, Texas plant?

MR. ARMSTRONG: Yes, indeed there are. I think there are glass plants and also chemical plants in Texas along the Gulf Coast there.

I think those things, your Honor, were focusing on states of operation and the extent of operation. There wasn't anything supplied on the details of your manufacturing operation or the specific products within the divisions to our present knowledge.

Your Honor, this application comes out of our discovery of Commercial Union.

THE COURT: Was there -- was a 1962 Annual Report submitted with the application?

MR. ARMSTRONG: By recollection --

THE COURT: And would the 1962 report have reflected the acquisition of the Texas plant?

MR. ARMSTRONG: No, it would not, because I think the Annual Reports were provided from time to time upon renewal were PPG Annual Reports and not annual reports of any of the, let me call them, affiliated companies, your Honor. There was a long list like 20 or so subsidiaries or affiliates, some of which were wholly-owned and some were controlled, some in the case of Pittsburgh Corning were 50 percent stock ownership, so I call them affiliated.

I don't believe that affiliated companies' Annual Reports were submitted. I think PPG's Annual Reports were submitted by PPG having less than the 51 percent ownership of Pittsburgh Corning did not consider it controlled and it provided the insurance for it under its policies, but it did not list it among its consolidated financial reports nor its activities.

I think it's very important, your Honor under Item 5, your Honor, to note at that time that the description did cover the Pittsburgh Corning operation in that it listed the manufacture and distribution of paint, glass, chemicals, brushes, cement, fiberglass and insulation materials.

Now, insulation materials is what Pittsburgh Corning made at Tyler, that's all it made. Asbestos insulation material and in Commercial Union's own 1937 manual or some other documents, they called the attention of their employees to the fact that asbestos is a risk and hazard you should watch out for in the insulation business.

C.U.'S 1937 ENG. MANUEL

Now, we didn't say under paints there that there are solvents in the paints that are sold, and yet about 1978 there were a thousand plaintiffs from the American Can plant in New Jersey that commenced litigation against PPG and one hundred other paint and solvent suppliers in which Commercial Union was also put on notice not only as an insurer for PPG, but others. No claim there that those policies had to be rescinded because PPG didn't say solvent. PPG in its chemical division, your Honor, makes VCM. VCM, it is claimed is

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a carcinogenic. If there are actions brought against PPG some day because of exposure to vinyl chloride monomer, is this case rescinded because we said chemicals instead of listing the 180 chemicals that the company makes? And the company was sued for degreasers, those are ethylene products, and some people contend are used in cleaning establishments and perhaps caused damage to respiratory systems. Those would be under the chemical division. Is there a claim that there is no coverage under this policy because that product was listed?

There are products under all of these headings, some people have sued for fiberglass now and there are products under all of these headings that potentially can lead to claims of exposure and I think it makes as much sense to say, well, under insulation materials, you had to put down there, paren "asbestos" close paren. It makes as much sense to do that as to say under Paints, we have to list polyurethane foam and solvents and hundreds of other products and under Chemicals, hundreds of products there, and I don't think there's ever been any case which has required that.

Your Honor, the law in Pennsylvania on these disclosures is that insureds need not volunteer anything and how Commercial Union reads the law any other way, we don't understand, but we think it's clear in Pennsylvania and indeed the majority throughout the United States, that insureds do not have to volunteer anything. They have to answer the questions. You have to put the questions and Commercial Union has to decide what questions it thinks needs to be answered, to have sufficient disclosure for it to write the risk and I think I know the reason why this was an adequate disclosure for them. They did not underwrite excess on the basis of detailed investigations.

We think the evidence and the record shows, your Honor, that Commercial Union's underwriting policy was based upon who was the underlying insurance company. Was there a Hartford or the big Aetna or Travelers, all large well-considered insurance companies. Who was the primary company was the first consideration. What was the volume of sales. Indeed that's really why the Annual Reports were obtained, we think the record shows to see what was the volume of sales.

And, three, competitive conditions in the market, in terms of pricing it.

We think, under our fourth reason for dismissal, your Honor, there's a total absence of materiality or reliance on the thing because they didn't write excess on the basis of finding out what the risks were and evaluating. When they wrote primary, they got the details and they went to the plant, your Honor. They have an Engineering Department. They went out and looked and they found out whether you made asbestos. When they wrote the primary on UNARCO, your Honor, they knew that UNARCO made asbestos because they specifically asked because they were underwriting that risk, they were evaluating the risk as a primary insurer, but they didn't do it that way on excess. Indeed, that's one of the grounds for our fourth independent reason for their not being able to make out a cause of action because by their own procedures they did not seek or rely upon such information. They didn't care simply, your Honor, to get into those kinds of specifics because other criteria were followed in making the decision as to whether or not to issue the policy.

Your Honor, our second totally independent grounds for dismissal is that Commercial Union hasn't satisfied the prerequisite by recision in two ways. One is that they have to show the Court that the parties can be put in substantially the condition they were before the contract. And has already been mentioned, if you were to remove the $64 million worth of coverage, not only do you remove that and clearly PPG is not in a position to replace it now as

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they might have then, you threaten the excess, and the discussion we had earlier about the statute of limitations point is equally applicable here, not only is there prejudice but the parties can't be put back there and that's the prerequisite of recision, and the other is technical and in passing, they were required to tender back the premium as a prerequisite to setting forth a cause of action.

Your Honor, the third independent ground one also that I already adverted to and I apologize for the argument being a bit disjointed, because some of the inquiries relate to one or another of the four grounds, but the third basis is that under the case which we cite to your Honor, you have to make election about your contract. You can't have it both ways. You cannot allege breaches of the contract and many of the counts are based upon breaches by the insureds, Pittsburgh Corning and PPG, you can't allege breaches and you can't seek declaratory judgments about the contract and means this and the contract means that, and it means the next thing and seek its recision. The cases hold that those are inconsistent causes of action and you must make your election. If you will seek recision, you come into the Court, and you ask the Court to rescind it, but to embrace it by saying the other side breached it, and thus we are entitled to avoid this or to avoid that, that's to embrace the thing and your Honor very recently, they have indicated that the declaratory judgment route is the way to go, and that's what they are embracing in terms of these contracts, they ask your Honor to 1229(b) your exposure manifestation ruling. Does your Honor recall the earlier motion to that effect? To do that is to allege to your Honor and they did so, that your ruling was a controlling matter that would dispose of the case. Now that isn't the exact language of 1229 (b) but your Honor is very familiar with the elements of 1229 (b) and you know what I mean, they had to assert to your Honor that the appeal--apparently a reversal of your decision which will never happen and three circuits have now been absolutely flat and the Supreme Court of the United States has now denied all petitions for cert. There is no disagreement among the circuits and your Honor's opinion will never be reversed by the circuit, but their contention is that it would be reversed by the circuit and that it was controlling and that this was of the litigation. I should use the correct term but, you know what I mean by those references and that means to me, you had to embrace the declaratory judgment here, that's what you are here for with the 11 counts and this one they threw in as count J, something someone thought up on the way to the courthouse and ran back and typed it back in there and it is not only clear, they ran the risk of waiting until too late, putting these insureds in an impossible position from which they could not extract themselves if your Honor declared the insurance policies null and void and ran that risk of knowingly, knowing that you put these two companies at great risk and when it was all over and were finally

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exposed and finally paying some money to come and shift the great loss of what they did over to the insureds.

Your Honor, there's a startling thing about this count that I want to quote to your Honor's attention.

Your Honor asked earlier whether certain things were disclosed and there is a contention -- there is a contention inthe brief, your Honor, that one of things being argued to your Honor is that these insureds did not disclose that Pittsburgh Corning was operating the Tyler Plant, your Honor and that's not alleged in the count.

If your Honor looks at count J and the various subsections under it, no paragraph or subsection there alleges that the Defendants failed to inform Commercial Union that Pittsburgh Corning was operating an asbestos plant, and there is no allegation there. That isn't even a relevant argument.

I think it is not there intentionally. I have a hunch they knew Pittsburgh Corning was operating an asbestos plant, and I can't establish that in the record.

THE COURT: Is there any specific allegation of fraud?

MR. ARMSTRONG: No. Fraud? Well, I thought you were asking another question when I quickly said no.

There is no allegation that the defendants failed to inform Commercial Union that Pittsburgh Corning was manufacturing asbestos products.

I think it suggests fraud.

THE COURT: Now, not suggest, does it state?

MR. ARMSTRONG: I can't find it.

THE COURT: Fraud or material misrepresentation?

MR. ARMSTRONG: Well, it A, is we had an affirmative duty to learn of risks and hazards.

THE COURT: It says you didn't tell all you knew about asbestosis.

MR. ARMSTRONG: First we start out by saying we didn't learn what we should have learned; the second is you knew it all and didn't tell about the risks and hazards is the way I understand B, a failure to disclose risks and hazards.

If you look at C, there was a mutual good faith code, you violated mutual good faith by failing to disclose your risks and hazards, and if you look at D, risks and hazards non-disclosure was --

THE COURT: Let's assume for the sake of argument purposes of recision that the Complaint does allege fraud.

MR. ARMSTRONG: All right, your Honor.

THE COURT: What supports fraud, or what must be there to support recision? Mustn't there be fraud?

MR. ARMSTRONG: Well, there can be a mutual mistake of fraud, but there are three basic grounds for recision, and one of them is fraud. The nearest they get to this is fraud.

That's why I say I kind of imply or infer

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fraud into that count because it's the nearest it's to. There is no mutual mistake of fact.

So if you take fraud, what do you need? First you need a misrepresentation.

Well, now, that's the point I've been trying to make for about five minutes. There is no allegation that the defendants failed to tell Commercial Union that Pittsburgh Corning was operating an asbestos plant. It isn't made. They don't allege a failure to tell me you're making this stuff, that isn't in there.

As nearly as I can see it, your Honor, the misrepresentation is that we didn't tell Commercial -- first we didn't learn it, we didn't tell Commercial Union of the risks and hazards, so let's assume that PPG knew all of the risks and hazards that anybody knew in 1963 when the renewal came up. Let's say 1963, because the plant was in operation then. It was a subsidiary plant or affiliate, but let's assume PPG knew anything everyone knew, as much as Dr. Selikoff knew at that time.

Now, first you have to have the misrepresentation. I don't know what it is that we said. We apparently didn't say anything. They don't point to what was said. As nearly as I can tell, it's a nondisclosure.

Your Honor, there's only two ways you can have a nondisclosure: One is if you have a fiduciary or confidential relationship, the cases specifically hold an insured does not, and the other one is if you disclose something like a 10(b)(5) sort of definition, you disclose something, and then the absence of some other information makes what you disclose misleading.

What is it that we said? As a matter of fact, when we said insulation business, by their own definition we were calling their attention to this was a business that could have asbestos in it, just like when we said the chemical business, we were saying there's a business that could have ethylene oxide in it, and in paints, there's a business that could have solvents in it.

So I don't know what the failure to disclose — and I hope your Honor will ask that same question of Mr. Griffith, because I'll be very interested in his answer.

I don't know that we said something that was false. We didn't have to disclose except if we were asked, and the cases specifically hold they have to be specifically asked.

I don't see what we told them that misled them. If anything, when we put the insulation business on there in 1963, we were pointing out the thing instead of leaving it out. You listed chemicals, paints, glass, and yet didn't list insulation. Now maybe that's a 10(b)(5) type of nondisclosure, or the type of nondisclosure that might be argued here. In fact they did precisely the opposite thing, they pointed at it.

Then, your Honor, the next step in terms of a fraudulent misrepresentation is that it be material. We show that in writing their excess they didn't rely upon such representations, they frankly didn't care. That wasn't the way they established the risks that they wrote, and so there was no reliance either.

As a matter of fact, Judge, I can't find any of the elements of fraudulent misrepresentation alleged or established in the evidence. There is no material fact about which there is any genuine issue, and on four separate grounds as a matter of law the defendants are entitled to a declaratory judgment.

I might add, your Honor, I don't like to put it this way, but way of a couple odds and ends which I would like the Court just to be reminded of.

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Commercial Union insured Standard Asbestos, Raybestos-Manhattan, alleged to be one of the two parties to the big concealment of the dangers years and years ago, Johns-Manville, alleged to be the other party to it, Plant Asbestos, UNARCO, either primary or by way of excess over these same period of years, they filed a chart with the District Court in the District of Columbia in which they filed an equally hysterical amicus curiae brief in which they show these these charts, tens of insureds, including hundreds of years of asbestos coverage that they go back. Your Honor, I'm sure they can hand a chart up to you, they created it, and they filed it in the D.C. court -- I'm sorry, I just thought of it as I stood here -- but billions of dollars of asbestos exposure with companies that clearly made asbestos products such as Johns-Manville, that everybody has known made asbestos products for 50 years. They've been doing this right along, either primary or the excess, so any suggestion to your Honor that they wouldn't have written this policy if they had known of asbestos being made -- and they don't allege that they didn't know it -- or the risks and hazards, and my goodness, nobody in the industry knew the risks and hazards since 1937 better than by their own documents. It's positively a ludicrous argument, it's an argument that no one should come into this court and make to your Honor, it's offensive to make that argument to the Court.

I see no element at all, even if fraudulent misrepresentation was alleged, and thus I think, your Honor, that there are four entirely separate, each one has sufficient grounds, to grant summary judgment in favor of the defendants.

Thank you very much, your Honor, for your attention.

MR. MCN.CRAMER: May it please the Court, John Cramer representing Pittsburgh Corning.

THE COURT: I'm sure you won't repeat all of Mr. Armstrong's arguments.

MR. MCN.CRAMER: I'll try not to. There are some areas where there's going to be some parallel between my arguments and Mr. Armstrong's because I want to put the particular emphasis on certain points.

I think that despite the volume of paper and the amount of argument which has been addressed to Count J, there are three very basic points that require that summary judgment be entered against Commercial Union's belated attempt to rescind it's three contracts of insurance and attempt to belatedly not even appear in the May 13th, 1981 letter in which Commercial Union asserted reasons that it would not furnish a defense to Pittsburgh Corning.

First, Commercial Union had knowledge that exposure to asbestos could produce asbestos-related disease.

As Mr. Armstrong noted, Commercial Union had knowledge as early as 1937. Commercial Union's own 1937 Engineering Manual states, "Asbestosis is a disease caused by the inhalation of asbestos fibers."

Commercial Union's own 1937 Engineering Manual states, "A potential asbestos hazard is to be looked for wherever asbestos dust is created," and finally that same manual states, "Industries which have this exposure to asbestos dust include insulation."

Now, it's all there, all you need to know, and your Honor addressed to Mr. Armstrong a question about the element of fraud, and of course one of those elements is deception, and someone cannot be deceived with regard to what he already knows, and it could not be more clear that Commercial Union knew that an asbestos hazard was to be looked for wherever asbestos dust was created, and that insulation was an industry in which that exposure existed.

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Asbestos Litigation Reporter

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ALL CU WITS SAY INSULATORS @ RISK (WHO WERE THEY? WHERE ARE THEIR DEPL'S?)

In its lightest response to this point which we received yesterday, Commercial Union attempts to argue that the knowledge explicitly set forth in its 1937 manual should be disregarded, because according to Commercial Union, the manual dealt with workmen's compensation insurance, and because Commercial Union's excess underwriters did not take advantage of the opportunity that was available to them to use the services of the engineering group which created the manual.

However, we submit that it is clear that Commercial Union cannot avoid the knowledge reflected in its own internal publications by taking the position that it made no use of the knowledge when making the decision to underwrite excess insurance coverage.

Again, Commercial Union knew at the time it issued the policies in question that exposure to asbestos created a danger of the development of asbestos-related disease.

The second basic point is that Commercial Union developed an application form for excess insurance coverage. No application form is available for the first policy, but with regard to the second two policies, the form used is included in Appendix E to Pittsburgh Corning's motion for summary judgment.

The form, as the Court has had the opportunity to observe, is a very simple two-page document. It asks for a description of the operations of PPG and gives about three lines in which to complete the response, and the response was indicated by Mr. Armstrong.

All of Commercial Union's underwriting witnesses which Commercial Union designated pursuant to Rule 30(b)(6) have testified to the recognition that the insulation industry was one involving the risk of exposure to asbestos.

There are again, as Mr. Armstrong noted no questions on the form with regard to specific products manufactured by PPG. The form contains a single specific question with regard to a particular material: It asks about the use of radio active materials.

That shows, I think, that when Commercial Union had a sufficient concern about the use of particular materials in manufacturing or in a finished product, it knew how to make the inquiry. It made no such inquiry with regard to any other products or raw materials.

Now, I think there are three things that are important about the form and the completion of the form of application for excess insurance.

First, it was Commercial Union which decided what questions would be asked on its form. If Commercial Union wanted to ask more questions on its form or to follow up its form, that was a matter completely within Commercial Union's control.

Second as noted, the response to the questions that were asked were accurate. There is no contention in the case that the answers were not accurate.

Third, the logic of Commercial Union's position is to throw on the insured the burden of speculating as to what risks the insuror will claim to be material when the insuror is acting as Monday-morning quarterback many years after the events. It throws on the insurer the burden of making an inquiry of members of its organization which goes far beyond the areas as to which the insurer has specifically inquired in the form insurer has prepared.

Commercial Union is asking this Court to create law which would impose the duty to go beyond the form upon the insured. The Court should reject that attempt.

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The third basic reason why the summary judgment should be granted in favor of Pittsburgh Corning with regard to Count J is the testimony of Commercial Union's underwriting witnesses which clearly shows no reliance on information with regard to operations on particular insureds in writing excess coverage. The testimony showed that the considerations in underwriting excess coverage were gross sales, an evaluation of the underlying carrier, and competitive conditions in the insurance market.

The affidavit which Commercial Union has filed of Victoria Serita's creates no fact issue in this regard because that affidavit is cast solely in terms of the present tense and present underwriting practices. It purports to speak only to underwriting practices in 1982, and it's wholly irrelevant to the issues before the Court.

In short, the undisputed facts show that Commercial Union cannot make out the elements of its claim for rescission.

Commercial Union has continuously improvised and shifted its position to attempt to keep this rescission claim alive. The Court will recall that in the Complaint, the claim was based upon the failure to disclose risks and hazards of asbestos.

When Pittsburgh Corning in its brief in support of its motion for summary judgment demonstrated that Commercial Union knew of the risks and hazards of asbestos, Commercial Union changed its ground and in its responsive brief at that time it argued a failure to disclose Pittsburgh Corning manufactured an asbestos-containing product.

When Pittsburgh Corning pointed out that such a claim could not be sustained in light of the testimony of Commercial Union's designated witnesses that insulation products produced a potential for asbestos exposure, and that clearly any such claim was barred by the statute of limitations because Commercial Union had actual knowledge of litigation involving Pittsburgh Corning's asbestos containing insulation products since at least 1974, Commercial Union again shifted its ground. The new argument, which appears in the documents filed yesterday, is that the asbestos claims against Pittsburgh Corning are somehow excluded from coverage because they represent injuries which Pittsburgh Corning could have foreseen.

Now, there are two appropriate responses to this: First, that claim has nothing to do with rescission of the policy as a whole. No case that Commercial Union has cited in its latest reply brief dealing with that subject, or indeed in its earlier brief dealing with the subject, involved rescission of insurance policies. If anything, such a contention would be a defense to coverage on a particular claim.

Moreover, this defense also was not set forth in Commercial Union's original letter stating the reasons it was refusing coverage to Pittsburgh Corning, nor was it pleaded in the original Complaint, or the First Amended Complaint, or in the proposed Second Amended Complaint.

Either this contention has been waived under Simmons v. Safety Mutual Insurance Company, which appears at 277 Pennsylvania 280, or 120 A. 822, as a matter of substantive insurance law, or as a matter of federal civil procedure it requirements an amendment to the pleadings which has not ever been offered and which it would be prejudicial to allow at this point.

Second, Commercial Union's contentions in this regard misstate the substantive law as to the circumstances in which coverage can be avoided. A correct statement of Pennsylvania law on this subject can be found in Moffat v. Metropolitan Casualty Insurance Company, at 238 F. Supp. 165, decided by the Eastern District in 1964.

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It is clear that if industrial operations create the risk of injury in certain circumstances, the fact that the opportunity for the injury to occur is known does not make the resulting injury from the risk uninsurable.

To come back, Mr. Armstrong has emphasized the point that the claim is in any event lacking in merit required by laches. We join in that. We urge that the appropriate analysis is one of statute of limitations under the revisions that have been made to Pennsylvania Statute of Limitations, and that the action is clearly barred by the passage of time since Commercial Union was first notified as an excess carrier of claims based upon asbestos-related disease, and that for the reason set forth at more length in our brief, the claim is barred on statute of limitations as well as on the inability of Commercial Union to show the elements of the cause of action.

Thank you.

MR. RESTIVO: Your Honor, I think at this stage, based upon the brief filed under seal by Commercial Union, and the tone of those documents, and the fact that these documents in some respect do rely on discovery produced under seal or documents, I would like the Court to consider whether now it might not be an appropriate time to close this hearing since many of the rulings this morning talked about the fact that Travelers is the primary. There may be some privity between Travelers, Commercial Union, INA.

At this stage I would think -- unless some parties object -- it might be best to proceed, since we're going to talk about protected information, in a protected setting.

THE COURT: What's the protected information?

MR. GRIFFITH: I think he's right. I know the Court's don't like this. Can we do this at side bar maybe?

THE COURT: It's really a matter of law. The motion before me is whether as a matter of law it should be granted.

Yes, come to side bar.

(The following discussion took place at side bar:)

MR. RESTIVO: Your Honor, we are not looking for a trial in secret, but based upon the charge, in effect Commercial Union at this stage is stepping into the shoes of the plaintiff's net worth around the country and attacking Pittsburgh Corning and making certain charges concerning how Pittsburgh Corning did business.

Now, while we deny the validity of those charges, we don't want people in the courtroom -- frankly, we don't know who they are -- gathering information for use against Pittsburgh Corning, and indeed Commercial Union and the other carriers, merely because there is a squabble between the insured and its insurance companies.

The documents that Commercial Union makes reference to were given to them by Travelers under the protection and under an idea here that there is some type of privity, the excess carrier is entitled to some information from the primary carrier, and either I would request Mr. Griffith pull his punches and don't repeat what I think are some silly charges, or if he's going to have his head, he ought to be able to have his head without Pittsburgh Corning getting hurt or its carriers getting hurt.

THE COURT: Look, the Complaint was not filed in secret, the Complaint alleges that your client knew about the risks and hazards of asbestos, asbestos was dangerous, manifestation versus the exposure theory. Indeed there is certain information here that may be pulled together, but most of the information is of public record.

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There has to be an overriding reason to close the courtroom. Just because something was filed under seal does not mean that it will remain under seal for all purposes, and I'm telling you now that I will not close the courtroom. What's been filed is here, I'm not going to speak in private. If I have to rule, I'll rule publicly; if I have to write, I'll write publicly.

THE COURT: So, when you come here you should anticipate when you ask for a decision it will be a public decision and that you should be prepared to fully air your case in a public forum.

I have given you the privilege of filing certain things under seal and until such time as is necessary to bring the matters in the open, for the purposes of trial or a ruling, a public ruling, you will have the protection of seal. So you have a chance to withdraw anything you regard as being strong-handed or silly before it becomes a matter open to the public.

I read the documents, I can't tell you what you will say and what you will not say, and I don't know what Mr. Griffith will say. Everything said thus far of the proponents of the motion have been said on the record and there's no reason now to give Mr. Griffith less of a public forum as he will not be given such.

(In open court.)

MR. GRIFFITH: May it please the Court, on behalf of Commercial Union, I would like to respond to the arguments that have been made to date, on the recision motion. I would hope that after making my argument, in the course of making the argument, the Court would not find my argument offensive because it was not meant to be offensive. It was an attempt to set forth a legal proposition on behalf of my client.

THE COURT: I did not find your brief offensive.

MR. GRIFFITH: I would like to --

THE COURT: I would not find, I assure you even ruling prospectively, your argument to be offensive.

MR. GRIFFITH: I have been called offensive on occasion and I hope my argument isn't offensive.

THE COURT: I have not so called you, sir.

MR. GRIFFITH: I think we ought to talk a little about historical perspective. I'm certain no one deliberately stood before the Court today and tried to misstate or take something out of context. I think it's important to understand what we are talking about.

In 1935 Commercial Union did publish an engineering journal that has been the subject of great argument to this Court. It was one of a series of publications that were made throughout the world. They were appearing in various journals, they were the subject of some discussions publicly. I will get to the

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PRIVATE DISCUSSIONS RE ASB? WHEN? WHERE?

BINGO GET THIS MEMO

point about the discussions privately at a later date. But, all of those discussions and all of that knowledge and all of the material that scientists could gather was in the context of a very unique area, it was in the context, sir, of Workmen's Compensation, that is people who worked in the plants where the material was actually made or broken down or pulverized. Nobody had ever seen anywhere in the world a case involving any other potential plaintiff in terms of somebody who used an end product. There was no comprehension publicly or in any of the documents that we have produced or any other carrier produced or any manufacturer produced or anywhere that they had any reason to believe or be even concerned about the risk to a third person out there.

I submit to you, at the very basis of this discussion, in its present posture, there a huge factual jump of faith, that is being imposed on this Court and that is they are asking you to assume, I don't know the degree of your personal scientific knowledge, sir, they are asking you assume that knowledge of a risk in a place where they make the product was the equivalent of a risk to somebody far removed from it, when there was never such a claim, and never has been such a case, and there's never been such an injury until the 1970s.

THIS ATTY'S A LIAR

This becomes important for this reason --

THE COURT: What are you talking about, the manufacturing process versus what?

MR. GRIFFITH: Insulator putting insulation in in a shipyard and there's a material difference in the whole state of knowledge, the whole state of the art as to a man that works in a place where they were making this stuff 24 hours a day and they didn't have ventilation and did not use respirators and did not do anything of that sort as compared to someone out in a shipyard. They didn't understand that they might have been at risk and that's important, because the policies that we are arguing here are not compensation policies. As a matter of fact our policies exclude claims for Workmen's Compensation. These were policies that were written under general liability, products liability, to the third-party users, so we have to draw a very real distinction between an employee in a plant and a third-party user.

Now, for years Johns-Manville, PPC, all of the manufacturers have been going into courts all over this country standing before the court and arguing a state of the art defense based upon the fact that they did not know that this product was a risk to an individual in the capacity of a third-party user and that's why they didn't put labels on their bags and that's why they didn't put other kinds of warnings and they have argued this figures.

The only problem is at about the time this case was filed, we now know there was in fact on the part of many of these manufacturers a deliberate attempt to conceal the fact that they knew that these third-party users were at risk, this has appeared in the so-called Sumner-Simpson letters and now I submit, it appears in the document of -- by Travelers in this case, on the very last day of discovery period permitted by this Court, buried in about 6000 documents, and in that document, which has been attached hereto, there is a very clear and precise statement that appears in a memo from Travelers that a certain physician prior to 1967 discussed with PPC in the acquisition of amosite fibers, and he also claims that he advised them of the asbestos problem.

This was given in a deposition which has not been produced by the defendants as yet, they even make the statement in parentheses, his deposition is not well known.

We can into court in 1981, we came into court knowing that everybody is claiming that they

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did not have knowledge of the risk and hazards and we filed a claim in recision because of the fact that there was this rumor running around what they were saying might not be true, and though get a document in this case indicating that in 1962, in a deposition, a physician claims he told them there was a risk to the third-party users.

We also have a situation where an article appears in a trial magazine documenting a whole pattern of behavior of disclosure.

THE COURT: Wait a minute, the issue here is whether or not there was a fraudulent misrepresentation in the application for excessive -- excess coverage.

MR. GRIFFITH: That'd right.

THE COURT: As I understand it, Pittsburgh Corning was not an employer or a third-party user but was a manufacturer of insulation material.

MR. GRIFFITH: First of all, they never told us but secondly --

THE COURT: Let's assume, well, I don't understand your third-party user argument relationship to this case, because we are talking about manufacturing.

MR. GRIFFITH: No, sir.

THE COURT: And Pittsburgh Corning was the manufacturer of the product.

MR. GRIFFITH: It wrote a comprehensive general liability policy which covers product liability claims by these third-party users and now what is the scenario, I am suggesting and I stand before the Court without having had an opportunity to discover any of this material because your Honor's earlier ruling and okay, but we are at a threshold where a factual issue has now arisen in this case that the application at the time they filed it was fraudulent as part of the industry-wide scheme, not to tell the people about what they knew of a risk, not just to their employees, which is what they have been contending, but of what they actually knew to the people who were going to use the product.

MR. GRIFFITH: I submit to the Court that if discovery bears now what I am suggesting is inherent in these documents and in the other materials that have come out in the last year, those policies are a fraud based upon fraud edicio because they were procured with the full knowledge not that there was a possibility of an accident, but of the certain knowledge that there was going to be so many people sick, so many people died because of a known certainty, a known defect in the product and that's not the basis of coverage of an insurance policy.

THE COURT: There's no obligation on the part of the insured to tell you what you could find out as readily as it could.

MR. GRIFFITH: Yes, the cases have said that, in a case cited by PC's brief, fraud may be committed by the suppression of truth as well as by the suggestion of falsehood. That's a case that they quote on page 27 of their brief and it's very simply stated that if they knew that there was a particular risk to a class of people that had never been disclosed before and had never been disclosed because this industry took it upon themselves to conceal it otherwise go out of business, then they have suppressed the truth.

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THE COURT: What evidence is there in that document that's an industry concealment?

MR. GRIFFITH: In the article that appeared "Trial Magazine" attached as an exhibit, details a whole series of Sumner-Simpson letters, the suppression of research that was done at the Saranac Lake Project in which all of this material was coming out to these people in the early '50s, the risk to third-party users and none of that material was ever published, it was all suppressed.

THE COURT: Suppressed from your client?

MR. GRIFFITH: Yes, suppressed by everybody, the insurers, the public, the employees and the users.

THE COURT: So you are contending that Travelers as a insurance company knew something that Commercial didn't know as an insurance company?

MR. GRIFFITH: I am saying they might be just as much a victim of this concealment as we are. I would like to talk about the issue —

THE COURT: I don't understand that.

Have you filed an affidavit in this case? Well, has anyone at your company filed an affidavit that they didn't know anything about the state of the art from 1937 forward? What the nature of its research was and certifying to its ignorance about research?

MR. GRIFFITH: Well, we have certainly testified to that at all depositions.

If your Honor wants a specific affidavit, I would request leave to file one. I think it's a very important issue.

THE COURT: You may not — well, you have contended that somebody in 1962 knew something that your company didn't know and couldn't find out.

MR. GRIFFITH: That's right. Precisely and it goes into another area. Here we have a situation where by means of concealment you're able to obtain a policy and by means of concealment you now object by exposure of this concealment, it will render null and void the policy and thereby jeopardize the other policies above you, and you then assert that because I can't convince them to insure you, I can't put you back in a position that you have procured by fraud.

THE COURT: Excuse me ignorance as to the science and all of that, but if exposure to insulation, asbestos insulation dust, was known to be a risk, what difference does it make whether it's in the manufacturing process or the use process, so long as there is dust, it's not the manufacturing, it seems to me or the using, it's the dust that causes the injury.

MR. GRIFFITH: What the difference is, when you are making a product, you are dealing with raw asbestos and quantities of it, okay.

When you put it in a cement, which is what they made, it's in a cement product, it's very dilute, it's not 100 percent, so it's not the same condition and was not perceived by people to be the same condition, it was not perceived by them. They claim it was not perceived by all the writers, it was not perceived by anybody according to them until late in the '60s or early '70s. I'm suggesting to you that discovery will prove that may not be true.

THE COURT: You are not suggesting, are you, that common sense would say that dust could only exist in a manufacturing site and not at an insulation site, are you?

MR. GRIFFITH: I am suggesting that was the state of the knowledge of what was disclosed about this product, it's the same problem, your Honor, too, with cigarette smoking, the question is do you know whether or not cigarette smoking of someone in the room is a hazard to you as opposed to smoking it yourself?

We don't know yet, there's some

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THE COURT: What difference does it make, your company was in the business of insuring against asbestos industry risks in 1961 through 1970.

MR. GRIFFITH: Well, there has been a statement made by our underwriter contrary to what they say that they would have written it anyway, but the statement from the underwriter rather clearly was that they do go out and they do look at a plant, if they know it's making asbestos, and they do consider what it's doing or not doing, and for example, she testified--

THE COURT: Why didn't you have such a question on the application form?

MR. GRIFFITH: A question as to what, sir? It says: State in detail all of your applications.

THE COURT: Does the parent or any subsidiary manufacture asbestos?

You asked it as to radioactive materia and explosives.

From those questions I would gather those were matters of particular concern to Commercial Union.

Now, well you can't answer that questio why you didn't ask it, I suppose.

MR. GRIFFITH: I think it may have something to do -- as of 1962 nobody bothered to tell the insurer or the public or anybody else that there was a risk to third-party users under an excess policy and there was an application for an excess policy, not an application for a compensation policy, if it was an application for a compensation policy that might be a totally different thing, there asbestos was perceived as a risk, it was not perceived as a risk when you weren't dealing with raw asbestos in the air, but something already processed into a product, and now on the shelf in the marketplace somewhere and at that point in time, if they claimed they didn't know it was a risk, how are we to be so clairvoyant to include that in a policy for an excess policy, not a comp policy, and that's part of the problem.

You also heard argument about the statute of limitations and manifestation. Yandel --

THE COURT: Do you conceive that Commercial Union knew that exposure to asbestos dust in the insulation business or in the insulation and manufacturing business could be hazardous to persons so exposed?

MR. GRIFFITH: In the insulation, manufacturing or the asbestos manufacturing business, I think they clearly knew there was a risk in the plants where it was being made constantly, that is correct. They did not know nor did anyone else know that somebody out there using a product which contained some percentage of asbestos might have the same risk. I believe that is a part of the reason nobody knew and that may involve an act of concealment on the part of this industry, at least to the point, I think we should be permitted to discover that and determine once and for all whether it's true or not.

THE COURT: Let us suppose that some people in the industry, some researcher didn't disclose all that he knew. In that document that you have cited there, is there any evidence that Pittsburgh Corning had engaged someone to keep information concealed from Commercial Union?

MR. GRIFFITH: Well, sir, I have not been given the document. The deposition that has been referred to in the documents. I think I have an obligation or a right before I answer that and make a representation to the Court to see what this doctor said at his deposition, to at least have the opportunity to review the deposition and to find out from Dr. Grant, their company doctor that participated and I am told in many of these discussions and also conducted his own research, what he knew and what he told senior

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management and what he told them with regard to our various policies, and there were doctors there at that plant who had come over from other companies, come over from the military we believe that had access to very substantial information. Some of these people I think came from Johns-Manville, that had the documents, that were the subject of the Sumner-Simpson letters and suppressed -- and I would like to know how much knowledge he had when he came to work for these people, when they bought the plant in 1962 whether he told them before they applied to us for coverage of $10 million and then they wanted 20, 50 and 100 and claimed at the same time they were just buying coverage and they didn't know they had exposure to risk. They came into our office one day and wanted to go from 20, $30 million excess coverage to $100 million and they wanted to place it in 24 hours and yet they claim they didn't have any idea they may be exposed to these kinds of risks and that's in the discovery that has come out to date and yet, your Honor, I have not gotten into this, I can't present a full record on this, and I can't answer all of the questions you are asking me now because you have told me I can't pursue this and I am here on a recision issue and a very major part of this action I assure you this Complaint was delivered intact, I did not type the

PC suddenly wanted to increase xcess coverage from 30 to 100 mil

first nine counts and I thought maybe I ought to throw in a count for recision and go back to my office and it speaks deliberately in here of knowledge of production, knowledge of risk, knowledge of manufacturer's disclosure of the nondisclosures of the misrepresentations. I concede to this Court the English word "fraud" does not appear in there, but in the language of the cases for recision, they speak of nondisclosure, misrepresentation and concealment and those words are in there, sir.

THE COURT: You are saying prior to 19 --

MR. GRIFFITH: The policy was written in '63.

THE COURT: None of your manufacturers -- none of your excess policies had under it a claim by third-party for asbestos-related exposure?

MR. GRIFFITH: That is correct and there's nothing to rebut that in any case, anywhere in this country, that has come up to date, it's an absolute fact, the first claim that has come up was in the '70s after we were no longer on this risk. Our last policy was written in 1969 and the first case that Mr. Armstrong refers to is the Yandle case and Yandle case he quoted to you was a comp case and all the memos of CU he refers

NO YANDLE WAS NOT A COMP CASE

NC — Legrande & Wenham- All the ... claims c

to about our people being there, all comment upon the fact that the case was handled by the common carrier and that none of the liability carriers were actually defending the cases.

Now, whether that changed or not was of little moment. We had a compensation exclusion in our liability policy and all of those plaintiffs were workers at their Tyler, Texas plant.

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THE COURT: I don't see that that makes any difference. The issue is what did you know. If you didn't know they had any Tyler, Texas asbestos manufacturing plant in 1962, you certainly knew in January of 1974.

MR. GRIFFITH: But again we did not know there was a risk to third-party users of the product because these were all employee claims that people who were working in the plant actually making it again, and we come down to the fact that we had a manifestation policy which we believed in good faith, and we're talking about an equitable doctrine of laches, someone with dirty hands.

I think this company believed it has a manifestation policy, it was no longer in the risk as of 1969, the policies had all ended, we hadn't been involved for years, and now all of a sudden there comes a rash in the late or middle sixties of these claims being made by third parties, and we're over there saying why do we have to file a recision action, we're off the risk, none of these claims manifested during our policy period, we don't have any argument here, we don't have any case or controversy with these people, we're not going to be asked to pay them.

THE COURT: Hasn't Commercial Union previously adopted the exposure theory?

MR. GRIFFITH: There was one case down in Georgia that started to take an appeal based on exposure As soon as the company found out, they withdrew the appeal because it was contrary to corporate practice.

There are some of the cases in some of the other insureds where cases were settled on a pro rata basis following the decision in Borel, but there again you had a court decision that in Borel, or in Texas at least, adopting that practice.

You came up with the first decision in this whole country where they said there was such a thing as an exposure policy in Porter versus INA in which the Court said you wrote a coverage on an exposure basis.

We said we did? That's what this litigation is all about.

THE COURT: By your own documents don't you admit that in 1973 the company had some information that exposure would result in injury?

MR. GRIFFITH: In the context of the compensation --

THE COURT: Manufacturing.

MR. GRIFFITH: Compensation, yes, no question.

THE COURT: My only question is was it a matter of sticking your head in the sand, or was it a matter of scientific knowledge that asbestos dust is different in Tyler, Texas than it is some other place?

MR. GRIFFITH: I can only tell you, sir, and it is not in the record so you can take it for what it is worth, that Dr. Selikoff has written a speech that appeared some time in the seventies in which he made a statement that the entire medical community would really be taken to task because they weren't smart enough to figure it out.

If we couldn't figure it out, and he is the expert, I don't know what the insurance industry is supposed to be, I guess some super-omniscient giant, but we didn't understand it, sir.

I think there's been a fraud perpetrated on this, and I think we ought to have --

THE COURT: What's the fraud? Are you saying what the doctors are saying now is a matter of common sense, one would infer asbestos dust in a manufacturing setting would cause a problem, that asbestos dust generated in an insulation context would cause a problem?

MR. GRIFFITH: What I really believe is that the industry in the fifties, maybe even earlier,

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undertook research, and when they saw what the results of it would be, the suppressed it, never published the data, never gave it to the doctors who might then have been able to figure this out, never gave it to their insureds who might then have said you guys either put a label on your bags, or we're not writing you anyway, we don't want this risk. We would have had our rights as a contract party preserved.

But when you suppress, you conceal, and you do not disclose something that you yourself know, and you then obtain a policy by suppressing a risk that is so fundamentally --

THE COURT: Is this material that only the manufacturers could know?

MR. GRIFFITH: Others could have know it, the fact is that they did not know it and did not disclose it.

THE COURT: If you have a situation like a life insurance application, and you ask a proposed insured did he have a heart murmur at any time in his life, and there is no way of knowing that except through the voice of the applicant, then I could see it if the person said no, and the insurance company would have no way of knowing that reasonably except by asking. A failure to disclose something that might be material would be a basis for recision.

But you are talking about, I believe, something that is not of that same nature.

MR. GRIFFITH: I disagree.

THE COURT: Why?

MR. GRIFFITH: Very simply, insurance companies could not go out and buy asbestos plants. They don't go out and put 300 people to work in there for 20 years; they don't conduct epidemiological studies every year on what these people are doing. They relied upon their insured to tell them.

THE COURT: Why?

MR. GRIFFITH: I am telling you why.

THE COURT: You are in the insurance business.

MR. GRIFFITH: We're not in the asbestos business.

THE COURT: You're in the insurance business.

MR. GRIFFITH: The first insurance policy for a life insurance application probably did not ask about heart murmurs because they didn't know if that was material to the risk.

When they found out it was material to the risk, you're right, there is a question on every life insurance application saying do you have a heart murmur, and I am saying to you it is the same situation. We didn't have any specific questions on our application for a general liability policy as opposed to a comp policy because when we wrote these policies, they never bothered to tell anybody that that was material for the risk, and I assure you if they had said it is material for the risk because third-party users can get this, then we could be held accountable for not having asked the question. It is the same thing. If you know a heart attack is material to the risk, you ask about heart attacks; if you don't know about heart attacks, I am sure they didn't ask about it when they first wrote the policies.

THE COURT: What basis do you argue Commercial Union could not have known?

MR. GRIFFITH: Because they were never told the information.

THE COURT: Commercial Union is not a giant-come-lately to the insurance business, and they had information going back to 1937 pointing a finger at asbestos.

What is it that Commercial Union could not have discovered using its own resources with respect to asbestos? What research could it not have done? What

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intelligence did it not have?

MR. GRIFFITH: It didn't have the intelligence to perceive there was a problem it should have researched, because nobody had ever suggested that third-party users were at risk. It just doesn't sit around and conjure up things out of the air, there has to be some risk material to an underwriting situation that prompts you to ask the questions, and if you've never had, a claim of this type and no one has ever had an injury and no one has even suggested this is a problem, you don't go out and start thinking about those kinds of questions. I don't do that.

I mean, I have to have something in my own experience, something in my own life situation that suggests things to me. I don't sit there and think about what would be my risk if I undertook to operate a submarine out of the Navy Yard. I have no idea of what operating a submarine involves, no one ever told me what the risks of operating a submarine are. There may be risks that I don't even know about.

THE COURT: Are you saying then if the insured happened to be smarter than the insurer, then that's a basis for recision?

MR. GRIFFITH: Yes, if he has knowledge, superior knowledge that is material to the risk of a policy, and he comes and asks us to underwrite it, I think the cases in our brief clearly state he has an obligation to tell me about that risk so I can bargain in good faith, not like a unilateral mistake in fact, so what risk I am taking, what a fair premium should be, whether I should write a two-year policy or a one-year policy. Those would all be issues that I could then research, evaluate, decide to deal or not to deal, on what terms or on no terms.

THE COURT: What if the insured is more diligent than the insurer? Would your argument be the same?

MR. GRIFFITH: Any time that he has knowledge that is unique to him and material to the risks that he's asking us to undertake, he has a good faith obligation to disclose it. That's what the cases I think clearly state.

THE COURT: It's true that you have not discovered certain information from Pittsburgh Corning with respect to what it might have known about the asbestos risks as of 1961 to 1976, but there's nothing in this record that shows that Commercial Union didn't have the same information, or that it could not have obtained the same information with respect to asbestos.

MR. GRIFFITH: This is their motion, I am not even at the point where I'm putting my case on for the recision. That would be a defense they could argue when I come to the court fully prepared to argue my grounds for the recision, but I didn't move for a recision on the motion for summary judgment, this is their motion saying as a matter of law I cannot prove grounds for recision, and I am saying to you that there are facts in existence that I believe that if I have the opportunity to discover them, I would prove this.

I mean, you can't tie my hands like this and say you're not prepared to prove everything in your case and therefore I am going to grant them a motion for recision when you're the one who has tied my hands. I can't present a full case, you're right, I can't nail down every little aspect at this point and time because everything that I need they've got and you won't let me get it up to this point. Now, I'm getting hysterical, I suppose.

THE COURT: Of course not.

You have everything, though, that belongs to Commercial Union that may be important to you in countering — you brought the complaint, you are seeking recision.

MR. GRIFFITH: That's right.

THE COURT: You are claiming fraud and

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they are claiming that you have not shown certain elements to support your claim for recision, and one of those elements is that you were not only ignorant, but incapable of obtaining information about the risks and hazards of asbestos.

MR. GRIFFITH: I don't know any case that says I was incapable of finding out. The cases have said if I know of the risk, then you are right, it's not material, but I didn't know of the risk and they do, they have an obligation to tell me, and I am suggesting to you that all of the discovery today, all of the claims history, all of the litigation throughout this country has established that nobody -- if you believe everything that they're telling us -- had any idea about exposure to a third party until some time in 1965 when one doctor wrote one article, that was Dr. Selikoff. But our policy was already in effect. That's the first article that everybody says even raised the possibility that this was so, and Mr. Armstrong has quoted Dr. Selikoff's article, so I won't invoke it at this time. I believe it was written in 1964 and published early 1965 after my policy was written, and even then there was great dispute as to whether Selikoff was right or not.

THE COURT: If there was great dispute as to whether or not Selikoff was right in 1965 and 1970, what difference does it make that someone may have had an opinion in 1962 which would have been equally suspect? As was said in the Kean case, it wasn't until the late sixties or the early seventies that the researchers convinced the industry, I suppose, that there was a real connection between prolonged exposure and asbestos.

Now, again, what is it that Commercial Union could not have found out about asbestos?

MR. GRIFFITH: I'm saying that's an improper test. I'm saying to you that if the insured knew something that I didn't know, and they opted to conceal it from me, and then induced me to write a policy in which I think that I'm writing a policy against an unknown contingency, the possibility that somebody using this product might get hurt, they might choke on it, they might burn their fingers on it, whatever, and that's the risk that I'm running, and whereas what I'm really doing is not issuing coverage against that, I'm issuing coverage for something that they know before the policy is even written is going to produce sickness or death or cancer or something like that, and they don't tell me that and they say we can now stay in business, we don't have to tell the public and we don't have to warn our employees, we don't have to put labels on the bags, we don't have to do anything because we are now insulated from liability because we conned these guys from the insurance company who don't know anything like we know about the magnitude of this risk, we're now in business, don't worry about it, and we can go to them and say listen, by the way, we would like to go from $30 million to $100 million, do you think you can place it in 24 hours?

Yet they'll come before the Court and say we didn't know anything about the risk of this, and they don't tell us. They waited until three years after Selikoff's report was published before they even put labels on the bags, and I suspect that there is material and witnesses that they know of in their possession that would say baloney, it was even before '62, and they suppressed it and didn't tell anybody in the whole world about it because to do so would have meant going out of business.

THE COURT: You've come forward with this proposition that asbestos dust is sort of thought to be only asbestos dust in a manufacturing environment, but I don't see what the environment has to do with it, it's how much dust was created.

In 1935 the United States Public Health

Asbestos Litigation Reporter

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Service published a document called, "The Effects of Inhalation of Asbestos Dust Upon the Lungs of Asbestos Workers."

MR. GRIFFITH: They were all plant employees, everyone of them.

THE COURT: I don't see why it makes a difference. The issue is not where the dust is, but it's the amount of dust and the amount of exposure.

MR. GRIFFITH: Your Honor, you and I can argue this, and I don't think at this point I'm going to prevail upon you. All I can say to you is you are setting up a standard where we're supposed to know more than the manufacturer of its product; more than any doctor in the world, more than the United States Health Service, more than anything that appeared in the literature simply because we happen to be an insurance company. I don't think the cases will support that proposition.

The cases say if they have knowledge because it's their product, they make it, they have got the experience with it, and they know of a risk, they have to tell us about it. The fact that we didn't go out and hire Mount Sinai Hospital's entire pulmonary medicine department to come up with a theory anyone else had thought of, I think it's a little unfair.

THE COURT: The issue is -- let's assume that Pittsburgh Corning had some information they didn't expose to you. Why should they assume you didn't have the same information? That's what you are asking me to assume here, is that they had the information and you didn't, and that you couldn't get it.

MR. GRIFFITH: That's right, because they were the only ones who had it. They did the research, that industry did the research, they conducted the studies, they suppressed the results of those studies. We didn't even know they had done these studies until 1988 when they finally surfaced for the first time that they had ever done this kind of research. That's when it was discovered. That's when they finally pried all the papers out of J-M.

THE COURT: J-M is?

MR. GRIFFITH: Johns-Manville.

THE COURT: All right.

MR. GRIFFITH: I haven't responded to all the arguments on the dates, but I suggest the last point I made really goes to it, and that is we really did not know the extent of the non-disclosure and the concealment until 1980, and that's when we raised this issue.

The question about the concealment of the plant is another issue that has already been alluded to. They did not tell us that they had a new plant in Texas and it was making asbestos. Our underwriting people have testified clearly, it's in our briefs, that if they had been told that, they would have gone and asked questions like what kind, how much, where is it, what kind of facilities, and Vic Berita's did say that.

THE COURT: That may be. That may go to the amount of premium.

Your argument is really that the doctrine of laches should not apply because they concealed something material from you. I don't see that the plant aspect is a material matter.

All right, I'll hear from Mr. Cramer.

MR. McM. CRAMER: Your Honor, I would like to address one factual point so that we are proceeding on the facts here in our discussion of the applicable law.

On October 1, 1981, I took the deposition of Arthur Lynn, Vice President of Commercial Union, who was a witness designated by Commercial Union pursuant to Rule 30 (b), and at page 6 of his deposition Mr. Lynn testified that he joined Commercial Union in 1963, which gives us a fix on a point in time.

Then at page 41 of his deposition, we refer to a manual of Commercial Union's -- this is not

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an old manual, this is a contemporary manual -- that said, "The asbestos industry has long been recognized as presenting a severe worker's compensation occupational disease hazard," and I asked him if he recognized that fact. He said yes.

I asked how long he had recognized that fact, and he endeavored to answer, and at page 42 I asked him, "Did you recognize it before you came to work for Commercial Union," and he said yes.

And then further down on page 42 I said, "At the time when you had come to recognize the asbestos industry as representing an occupational disease hazard, were there any particular manufacturing or construction operations that you had come to recognize as being a part of the asbestos industry?"

Mr. Lynn said, "Yes. I think what you're getting at is, for example, ship building, insulation work, any operation that will involve the use of asbestos or asbestos fibers. As a matter of fact, I'll even volunteer some information.

"For many years we as a company" -- Tony says "I don't know this" -- "We insured Bath Iron Works in Maine which is the leading ship building manufacturer in the State of Pennsylvania, and for a point in time the Maine Worker's Compensation Act specifically excluded

CU KNEW BATH IRON WK'S EMPLOYEE @ RISK BEFORE 63

occupational diseases, or more especially asbestosis claims.

"The Maine legislature in their infinite wisdom amended the Worker's Compensation Act to include occupational disease, and more specifically asbestosis, at which time we terminated our direct involvement with the account."

But the point is that Mr. Lynn, the underwriter, is testifying that exposure to asbestos was recognized by him as an underwriter before 1963 as presenting a risk in the situation where asbestos was used, not solely in the manufacturing of asbestos products as was suggested by the argument of Mr. Griffith.

THE COURT: What do you say to that?

MR. GRIFFITH: He said that when the amended the Act to include others, that's when they terminated the accounts, which is precisely the situation. The Occupational Disease Act is a Compensation Act, it relates solely to workmen's compensation.

THE COURT: But the issue here is whether in 1963, contrary to your argument, your client associated asbestos-related conditions with the places where it was used, not just where it was manufactured.

MR. GRIFFITH: In the shipyard workers he said specifically.

THE COURT: Shipyard workers, right, shipyards, ships, third-party users. Do you acknowledge that that was said --

MR. GRIFFITH: I have no doubt that Mr. Cramer, if he can show it to me, has read it correctly.

THE COURT: What does that do to your argument?

Mr. Armstrong, did you have anything else to add?

MR. ARMSTRONG: Just a couple of items to kick off, your Honor.

We never heard of this placing of $100 million worth of insurance in 30 minutes. We think it is not in the record.

In fact, your Honor, what is in the record is as follows: PPG bought an umbrella policy from Commercial Union for $2 million in 1959, and when it came up for renewal in 1963, Commercial Union suggested we enlarge it to $10 million. That is in the record here from the depositions of the brokers.

Two: We ask your Honor to assume that for the purposes of this motion, that Pittsburgh Corning had as much knowledge of the risk and hazards in 1962 as anybody else around, except these conspirators that he's talking about that were finally exposed according

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Asbestos Litigation Reporter

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to Mr. Griffith a few years ago.

What he is talking about there is that articles are now being written that Johns-Manville and Raybestos Manhattan had knowledge of risks and hazards of exposure as far back as the fifties, forties, perhaps earlier, which they did not disclose.

The point on this, Pittsburgh Corning could not possibly have been any part of that, because it never went into the asbestos insulation business until 1962, and for purposes of our motion, your Honor, we ask you to assume it had instantaneous knowledge of all the risks and hazards that anybody else around the country knew, that Dr. Selikoff knew. The thing which is so peculiar about Commercial Union's argument is that it argues to your Honor, that it was impossible for it to know in 1962 about exposures because nobody knew about them until 1965 and 1966.

I assume Pittsburgh Corning falls into the "nobody" category because we will ask you to assume we knew as much as anybody knew. If anybody knew any more and it was concealed, it couldn't have been Pittsburgh Corning, it had to be Johns-Manville and Raybestos-Manhattan, back in the '40s, the '50s, because Pittsburgh Corning didn't go into the business until '62, when it bought the business from this company's insured, which it insured the Union Asbestos and Rubber Company and here is this company's umbrella policy, which is dated in 1961. And in 1961 Commercial Union insured that company and set forth in its policy that the business of the company was asbestos manufacturing, et cetera and extended this coverage for an annual premium of $4000. That company's what we call UNARCO, the acronym and now the official name of that company, and it renewed that policy again in 1964, 1967, again setting forth that business which it was insuring and it renewed it again in '67 to '70, this time it dropped its annual premium down to $3000 to insure one of the principle asbestos manufacturers in the United States prior to its selling its business to Pittsburgh Corning.

Your Honor, you have been told many startling things, and I will tick off the next one.

The policies at issue in your lawsuit of Commercial Union do indeed contain excess Worker's Compensation coverage.

CU also wrote excess WC writs for coverage at Pitts

The statement attached, and I asked the question whether your Honor had seen what I call the -- I forget what I called it --

THE COURT: Hysterical.

MR. ARMSTRONG: Hysterical statement. It was only filed yesterday, but it attached the document that comes from Travelers, no author, but it comes from Travelers, in which Travelers is stating a Mr. Gaze -- incidentally, he was an engineering doctor from one of the English suppliers that sold the material to Pittsburgh Corning -- he said he had discussed the asbestos problem with PC in '62, but goes on to say Mr. Buckley of PC didn't recall such a conversation right within the document, but it doesn't matter, assume that he did for the purposes of this motion, that has absolutely nothing to do with Commercial Union's knowledge.

DR GAZE discussed it at Pittsburgh w/ PC in 62

In the application PPG attached exactly what they asked for, they didn't ask for facilities of affiliated companies.

Now, I suspect they do and their testimony about primary coverage indicated that they actually went out and looked at places and got a list but how counsel can stand before your Honor, tell your Honor that they relied upon knowledge about asbestos in excess policies, we can't understand it because we refer in the briefs directly to the testimony of their underwriters, which state that in excess policies they don't even look into it, they look at the underlying company, the gross sales and their competitive prices.

Your Honor, I don't know how you can be told the Tandle case was a Workmen's Compensation case. It wasn't, their memoranda in this smaller supplemental thing discusses -- it tells each other they have got to follow it closely, describes exactly what it is, this long memorandum of the meeting in Pittsburgh and there's the sign-in sheet of the meeting

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in Pittsburgh, they discuss exactly what it was, there's the complaint that was sent to them in January of '76, and I'll tell you exactly what it was, Pittsburgh -- PPG wouldn't possibly be sued in a compensation suit. There are many suppliers, there was one employer, Pittsburgh Corning because in Texas, upon a death in gross negligence, an employee can recover against his employer. Everybody else is a third-party being sued there.

I just don't know how it can be represented..

THE COURT: Was the employee an employee in a manufacturing plant or --

MR. GRIFFITH: Yes, of Pittsburgh Corning's Tyler plant.

MR. ARMSTRONG: We think PPG who bought this insurance was entitled to assume that anything the excess umbrella insurance company wanted to know, it would ask, and I can assure you, anything that they are asked for, they gave.

MR. GRIFFITH: If your Honor will look at the documents that are attached, you will see that all the correspondence from Commercial Union does refer to the fact that the cases being defendant by the compensation carrier, there is an indication that the Hartford is not defending it, the liability carrier, but the Travelers is not the defending it, who is the liability carrier, but that the comp carrier was defending it.

THE COURT: That doesn't change the nature of the action.

MR. GRIFFITH: They were employees of Pittsburgh Corning that brought the lawsuit, they were all employees in the plant.

THE COURT: Still it does not change the nature of the action, which is that exposure to asbestos dust can cause asbestosis.

MR. GRIFFITH: The question that Mr. Cramer read from, the deposition, do you recognize the asbestos industry as presenting a severe Workmen's Compensation occupational disease hazard?

Answer: Yes.

How long have you recognized that fact?

I wouldn't pinpoint it in time. I wouldn't try to give you, in other words, seven years as against six years, ten years as against nine.

This is a deposition that was taken in 1981, okay, it would be impossible to truly identify in terms of length this knowledge has been generally recognized again as a compensation risk hazard.

Okay, he was then -- well, he went on to say --

THE COURT: Well, the compensation case hazard were not just manufacturing plants as was read by Mr. Cramer, but in other environments.

MR. GRIFFITH: It says at the time when you come to risk, the asbestos industry as representing an occupational disease hazard, were there any particular manufacturing you came to recognize?

He says: I think that's what we are now getting into, ship building.

But the deposition is not clear. He says now in 1981, we know about this, but he said that's what he knew in 1963 when he came with the company. I think that's different.

THE COURT: I'll read it.

What about this, sir, Mr. Armstrong says that, hey -- he didn't say hey.

He said Commercial Union already knew everything about Tyler, Texas plant was the primary carrier.

MR. GRIFFITH: We were not the primary

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carrier.

THE COURT: Or the excess carrier, you had already insured the risk as to that particular plant and with respect to that particular plant, as I understand it, Pittsburgh Corning didn't do anything new to the plant, they didn't make a different product, they didn't sell to different people, they simply took over the same operation that you had already insured. What is it that you didn't know which would affect whether or not you would assume the risk?

MR. GRIFFITH: We didn't know they had it, for one thing, when we quoted them a premium policy price on the terms --

THE COURT: Okay.

MR. GRIFFITH: There may be other business reasons why we carried UNARCO and UNARCO's plant and they might not have been the same countervailing reasons that we would have picked up them and they might have felt UNARCO knew how to run the plant and they didn't, and I don't know.

THE COURT: Your argument is not that the plant was improperly run. It is that they were selling to people that used asbestos, I don't think you can plead ignorance that asbestos manufacturers have to sell to people that use asbestos, otherwise there wouldn't be a need for them to be in business.

Secondly, Mr. Armstrong pointed out that Pittsburgh Corning didn't get into the business of asbestos manufacturing until 1962. Yet, you have put in the category of conspirators.

MR. GRIFFITH: That's right, because a lot of the people that ran their plant were the people that were from UNARCO, that had been there and knew about these problems. Lots of employees they picked up came over from Johns-Manville and had also been aware of these things.

MR. ARMSTRONG: That's absolutely inaccurate.

THE COURT: Is that in the record?

MR. GRIFFITH: No, I didn't have a chance to take their deposition.

MR. ARMSTRONG: It's false.

MR. GRIFFITH: It's not false. There were certain people from Johns-Manville, you know who they were.

MR. ARMSTRONG: I have been litigating this case for years, that's a false statement.

THE COURT: Now you have -- if you have information, submit an affidavit.

MR. GRIFFITH: I can't submit an affidavit -- I will submit an affidavit on what I have been told as to where their employees were from and what they knew. I can't get that because you will not let me.

THE COURT: No, it's not a matter of what they knew, you have simply said that you know for a fact that --

MR. GRIFFITH: Our information at this point in time is that some of their employees were from UNARCO, some of these employees were from Johns-Manville.

MR. ARMSTRONG: It's true, some of the employees were from their insured when they insured this plant.

THE COURT: I understand that. There's no --

MR. ARMSTRONG: Not J-M.

MR. GRIFFITH: There were employees there who had been in the business and who knew about the risk and they became their employees and if, therefore those people of risks and didn't disclose them, they are bound by them. They were there employees at the time the applied for the policy and they are charged with knowledge of their own employees as to a risk factor of their own industry.

THE COURT: All right, I have to adjourn briefly but I'll be back.

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adjourn briefly but I'll be back.

You are to wait here until 5:00.

Can I have the deposition please.

MR. McCRAMER: Yes, your Honor. This is it and I'll hand it up.

MR. GRIFFITH: If you will read that, we have attached Exhibit B, another deposition of the same underwriting group.

THE COURT: I have a telephone conference that I have to attend.

(Recess.)

THE COURT: Mr. Griffith, what do you mean by a third-party user?

MR. GRIFFITH: A third-party user would be somebody who was not involved in the manufacture of the product but who would be entitled to bring an action under products liability.

THE COURT: Like an employee of a shipyard?

MR. GRIFFITH: Not necessarily.

THE COURT: But it could be.

MR. GRIFFITH: Some of the shipyards had their own asbestos products that were supplied by the government, and they used the --

THE COURT: Or an employee of an insulator?

MR. GRIFFITH: He could or could not be, depending upon whether they made their own products or bought somebody else's.

THE COURT: Someone who didn't make his own product.

MR. GRIFFITH: Could be, sir.

THE COURT: So what you are saying is that employees of non-manufacturers who are entitled under the products liability laws who bring suits against the manufacturers of the asbestos are third-party users?

MR. GRIFFITH: Those are the claims that did not arise until the seventies, and again that's a factual issue.

The point I would like to say at this point is, I think we spent two hours arguing over what are really factual disputes and issues.

THE COURT: I am also concerned in a motion for summary judgment whether or not there's any material fact.

As I read the deposition of Lynn, it is that the claims department through her, at least since 1963, when she came there, knew about the association between asbestos and asbestosis in any industry that used asbestos, or where there was exposure to asbestos fibers, not only in the manufacturing end, but also in the ship building industry and insulation work industry.

MR. GRIFFITH: That's not how I read it, sir. All those answers were in the context of workmen's compensation cases.

THE COURT: But it doesn't make any difference. I am not interested in whether it's workmen's compensation or not, the issue is whether or not there was a reason to believe that one could in the non-plant environment contract the condition by exposure. Whether or not the insurance companies believed that workmen's compensation laws would be the exclusive remedy of the employee is not at issue. I mean, as a matter of law,

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Arthur Lynn
Depo

the law may have expanded such as to permit, as in Maine, employees to be covered for occupational diseases as asbestosis, under the compensation law.

MR. GRIFFITH: But the problem is, everybody else who has been deposed on this issue has said that was not the state of the knowledge, and I think that is a factual issue. One of the same people in the same department said he was totally unaware of it until the seventies.

THE COURT: He may have been unaware of it.

MR. GRIFFITH: He's also an underwriter. Vicky Serita's indicated she was not aware of it.

THE COURT: But Arthur Lynn says she was as a casualty underwriter for Commercial users. It says, "He had the knowledge, which was general in the industry, prior to his coming to Commercial Union, that there was a connection between asbestos and an occupational disease hazard and exposure to asbestos fibers."

Page 41 says, did he recognize this asbestos industry as presenting a severe workmen's compensation and occupational disease hazard.

The answer was Yes.

"Q. How long have you recognized that fact?

"A. I couldn't pinpoint it in time. I wouldn't want to try to give you a -- in other words, seven years against six years, ten years as against nine. It would be impossible to truly identify in terms of time," et cetera, "when I became aware."

Page 42:

"Q. Did you recognize it before you came to work for Commercial Union?

"A. Yes.

"Q. Was that a result of your experience with the insurance companies for whom you had worked before Commercial Union?

"A. I think it was perhaps more along the lines of trade journals, articles that were published, prognostications of what was to come, things of that nature. I can't recall any specific claim.

"Q. At the time when you had come to recognize the asbestos industry as representing an occupational disease hazard, were there any particular manufacturing or construction operations that you had come to recognize as being a part of the asbestos industry?

"A. Yes. I think what you are getting at is for example shipbuilding, insulation work, any operation that involved the use of asbestos or asbestos fibers."

"And Lynn volunteered information as to the fact that Commercial Union had insured the Bath Iron Works of Maine knowing that the compensation law in that state excluded occupational diseases for asbestos claims, but when there was an amendment to the Act, with whatever knowledge the company had regarding asbestos diseases, it withdrew coverage, it cancelled the policy."

MR. GRIFFITH: None of that is dated in terms of time as I recall it.

THE COURT: Well, not that.

MR. GRIFFITH: The other thing is, when they became aware of the risk, they withdrew coverage in a compensation situation. When they were being asked to assume a risk of coverage for an asbestos-related industry, even in the compensation context they withdrew the coverage. That goes to my argument and that's why they had an obligation to tell us they were making asbestos in Tyler, Texas, what they were making, how they were making it, what concentrations there were so that we would have had the same opportunity.

THE COURT: You knew everything, or you had an opportunity to learn everything you would have wanted to know about the Tyler, Texas plant beginning

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in January 1974.

MR. GRIFFITH: How is that, sir?

THE COURT: Because if you didn't know that there was a Tyler, Texas asbestos manufacturing plant prior to that time, the record is replete with reasons why you did know all of that in January 1974.

MR. GRIFFITH: We no longer had any policies.

THE COURT: Maybe, maybe. But you also knew according to Lynn in 1974 of an association between asbestos in operations other than manufacturing --

MR. GRIFFITH: I've stated that to the Court. By 1974 or so we were aware there were then claims being asserted, but we were not aware of any basis for any courts or any health hazards that would account for any such claims in third-party users by the time these policies were written.

THE COURT: Lynn says you knew in 1973.

MR. GRIFFITH: In a workmen's compensation context of manufacture in the asbestos industry.

THE COURT: No, Lynn says you knew with respect to the insulation industry and with respect to shipbuilding, insulation workers, not manufacturing workers only.

MR. GRIFFITH: I understand your Honor seen it in that context, but I'm suggesting to you it's not accurate for the simple reason nobody claims to have known anything of that.

THE COURT: In the deposition you showed me it says Yes, you knew there's an association between asbestosis and insulation workers, non-plant workers, non-manufacturing workers in the seventies, but you believed that workmen's compensation was the exclusive remedy for any such claims and that you just didn't think about the possibility that there could be products liability claims by the employees against the manufacturers.

Now, that does not mean -- that latter does not mean that there was no knowledge of the possibility of asbestos-related claims arising out of exposure in the insulation worker environment as opposed to or in addition to the plant worker environment.

MR. GRIFFITH: I disagree. The history of the whole situation is clear, that no one foresaw any injuries to the non-manufacturing people, and there were no people who had ever asserted any claims. How could we be asked to assume knowledge of claims when none had ever been asserted, nor was there any indication of that. There's no suggestion by any of the professionals that such reduced exposure outside of the plant where they make it is going to cause this type of illness or give rise to this type of liability.

THE COURT: Well, let's at your case this way: Let's assume that you knew in January of 1974 not only that there was a Texas Tyler asbestos plant, but also that there were third-party user claims possible within the non-plant worker community, yet you didn't bring a recision action until seven and a half years later.

MR. GRIFFITH: Because the client believed in good faith it's policies were written on a manifestation basis, none of those claims had been manifest during the policy period, they believed there was no reason for them to be concerned about it because none of those claims could possibly come within the coverage that had been written in the past, and that all the cases had interpreted manifestation up to that point, and none of the cases had ever even suggested there was liability for an exposure on a policy that you hadn't been on risk on for over 15 years, and furthermore --

THE COURT: But by the same token you didn't act, and obviously Pittsburgh Corning relied --

MR. GRIFFITH: March of 1981 was the first time there was a claim made against us for these policies. Within two months of that date we filed an

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action seeking recision in the policies.

Just as there was no case in controversy against the other defendants out there, in this very courtroom it's been discussed this morning no one has made a claim against them yet, so there is no case or controversy. I don't have to have them as parties here on the record. No one ever made any claim against us on any of these claims until March of 1981, and we filed this action within two months thereafter.

THE COURT: The issue is what did you know and when did you know it.

As I understand the undisputed facts, you knew everything that was necessary -- you knew everything about the asbestos operation of PPC that you needed to know, including how they made their application in 1974. The issue then becomes whether or not under all of the circumstances you should be entitled to rescind the policies in 1981.

MR. GRIFFITH: It seems to me, sir, when you are not making any claim against a carrier, you haven't put them on notice until 1976 or '77 when they first started sending complaints in, and you enter into agreements with underlying carriers without ever telling them, everybody acts as if there is no indication of any involvement of your policies, and no one is making any claims against your policy, why does the insurer have to go file an action in recision?

But in March of 1981 they then call up and invite us to go to a meeting in Pittsburgh and say, "Oh, by the way, Travelers is about to exhaust and are you going to take over the cases? We now want you to go back and cover it on policies you wrote 15 or 20 years ago," and at that point they say no, then go into court and file an action. I don't think that's dilatory or subject to a claim of laches.

THE COURT: You're not suggesting, are you, that anyone knew how this Court would rule, for example, on the issue of manifestation versus exposure, or how any Court would rule on manifestation versus exposure?

MR. GRIFFITH: No, but I do know what was in the minds of the underwriters, that when they wrote a policy and they charged a premium and they expected to be on a risk for one year, and one year only, and the risk came, and no disease manifested, that there was no claim for bodily injury within the policy, that they had no further liability on them, because that's how policies have been interpreted for 50 years.

THE COURT: The issue here is against which party should be held, your assumption about what the law would be in the future with respect to manifestation versus exposure. Should you bear the risk of that virtue of what you knew in 1974, or should either party bear the risk in terms of fraud? I don't see how you can charge to Pittsburgh Corning, even assuming that it knew there could be a relationship between asbestos and exposure --

MR. GRIFFITH: That's not my argument. I'm not suggesting they knew there could have been a possibility of a relationship, I'm saying that they knew as true as they were standing there that there were going to be deaths, there were going to be diseases, as a reality, not as a possibility for a contingency, and that's the part that they concealed, which is directly material to the risk, and they're still concealing it.

How could I be guilty of laches proceeding on that argument when they won't even admit in any of the cases today when they knew in 1962 as a certainty of the risk, as a certainty that diseases would come, as a certainty that people would be injured? That's what they didn't disclose, and still don't disclose.

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But I believe that information is there

THE COURT: Lynn says in 1963, it appears, that you also knew. As I read this deposition, it appears that -- it appears to be that Commercial Union believed that the exclusive remedy for the employee of the insulation company or the shipbuilding company would be under Workmen's Compensation, the Federal Tort Claims Act, or whatever, and just didn't believe that there could be a third-party action against the manufacturer.

MR. GRIFFITH: See, you are interpreting a deposition of one witness, contrary to what other witnesses for the same company have said, which raises in my opinion a factual dispute. We're doing it in a situation where the standard for review on a motion for summary judgment as I perceive it that all inferences or doubts, if you will, have to be resolved in my favor at this point in time.

We're arguing over what somebody knew or didn't know, how much they knew, did they know about the risk of it in smaller dosages to shipyard workers; did they know about it when they wrote the policies.

THE COURT: The issue here is -- well, whatever knowledge Lynn had, who was an underwriter, is charged to Commercial Union. You can't get around that.

That somebody else in the company may have had a different opinion does not change the implication of knowledge of Lynn through the company. I don't see any dispute except you had some knowledge in the company by an underwriter as opposed to a lot of knowledge, or uniform opinion within the company. At least there was knowledge within the company of a relationship. You had argued that the company had no knowledge of any relationship going to third-party users. This deposition really shoots you down in that respect.

MR. GRIFFITH: I'm not going to argue with the Court's interpretation, but I don't think that's what the man was saying. I think the man was saying in a plant situation, in a shipyard situation where they were making asbestos, they were using asbestos, that it presented a hazard under the compensation laws.

THE COURT: He says, "Any operation that involved the use of asbestos or asbestos fibers."

MR. GRIFFITH: Asbestos and asbestos fibers, it doesn't say in a product mixed up in a cement, using it the way that they were making it. He's talking about asbestos and asbestos fibers. I don't know whether he means there's a raw entity, they were just using raw asbestos, or he's talking about after it's been manufactured into a product such as pipe joint cement, which is the only product PPC made.

I know that the Government supplied huge quantities of raw asbestos to shipyards directly. I also know in some instances the Government supplied asbestos to some manufacturers to be made into another product. Whether all shipyards bought finished product, or whether they mixed their own, or whether they took raw asbestos and mixed it in cement, I really can't represent that, that's a factual thing I would have to look into, sir, and I don't know the context in which Mr. Lynn was referring to asbestos as opposed to asbestos-containing product.

THE COURT: Is there anything else?

MR. GRIFFITH: I have nothing further.

MR. ARMSTRONG: A couple of very brief points, your Honor.

It is said that Commercial Union did not have knowledge of third-party installer cases.

Your Honor, you'll note that Mr. Griffith has not replied to my statements to your Honor about Commercial Union providing excess insurance to Johns-Manville.

CU'S Excess ins To JM

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We think the record will show that they have insured Johns-Manville since 1940. In fact, we think they are trying to litigate matters before your Honor relative to the Johns-Manville coverage.

In any event, they filed an amicus brief with the District of Columbia Circuit Court which I think we would like to send to your Honor if your Honor would receive it at this late date.

THE COURT: In what year?

MR. ARMSTRONG: During the submission of the Keene case to the circuit, your Honor. I think it was last year, and they have a bar chart in which they show how many years they insured these various companies, including J-M.

Now, J-M was a defendant in Borel and I'm sorry I don't have Borel with me, but Borel was an insulator worker who worked out in the construction field. I think it was a Fifth Circuit case, Borel vs. Fibreboard, if I could take a look at --

THE COURT: What year is Borel?

MR. ARMSTRONG: It's before January of '74, your Honor. I think the Fifth Circuit opinion was '73, but I think that the underlying case was found in the district court a number of years before that. I think looking at Borel vs. Fibreboard in F.2d will tell us that, but they insured a named defendant in Borel. They could not have known about the case that went through the Fifth Circuit.

THE COURT: They admit that they had a connection, they made a connection between asbestos and third-party users in 1974.

MR. ARMSTRONG: Fine, so that at least by that time the statute of limitations or laches argument would apply in terms of third-party claims arising out of Borel, then Yandle and so forth.

THE COURT: Their argument, of course, as has been made is that they had no reason to believe that there was a need to rescind since there had been no claim against the excess policy and there wasn't any reason to believe that there would be a standard of exposure as opposed to manifestation made, and there had been no manifestation claim made during the policy.

MR. ARMSTRONG: They speak of the claim being made and a lack of notice.

Here in the supplemental appendix, your Honor, the brown one, a letter, January 29, 1974, it's about seven or eight pages in. It's right after the second portion of the Texas complaint. It's a letter from Parker and Company to Mr. John Ripka, Employers Commercial Union Companies. Does your Honor have that letter?

THE COURT: Yes.

MR. ARMSTRONG: "Since your company provided umbrella excess coverage during the period to date under the above-captioned policy, I would appreciate your establishing a file and taking whatever steps are necessary to protect the interests of PPG Industries, Inc."

It would not be suggested that they did not get notice of their coverage involvement in 1981 when that letter is dated 1974, January.

And finally, your Honor, it's suggested to this Court that by 1974 when they realized that in Yandle there could be exposure to Commercial Union in asbestos cases, the suggestion to your Honor is they wouldn't write it again.

Your Honor, I'm holding in my hand a copy of a Commercial Union insurance policy attached to Pittsburgh Corning's request to admit pending to Commercial Union, and Commercial Union has failed to respond so far. It's the subject of one of the motions before your Honor.

This insurance policy, which they will admit when directed by your Honor to respond, is issued by the Commercial Union Insurance Company on October 1,

Jan 74
letter Parker
co (PC) to CU
advising CU to
establish a file

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1974, to cover a three-year period until October 1977 to the Standard Asbestos Manufacturing and Insulating Company and Standard Insulations, and therein the provide liability coverage under products, which means third-party claims to that company for a three-year period. So it is just not true that once they learned about Yandle that they would not have sold this coverage. There's an example of selling it ten months later.

MR. GRIFFITH: That's not part and parcel of the record in this case. My clients have not yet responded to that. I think it's inappropriate after three or four hours of argument to bring up a document, the veracity of which has not been identified, nor has it been substantiated yet, nor is it part of the record of this case.

THE COURT: I've heard some things from you, too, that are not of record, but, you know, are you going to reply soon to that?

MR. GRIFFITH: Your Honor, we haven't responded to that because your Honor entered an order staying any discovery on this recision, and that was part and parcel of what was submitted. So we have not responded on that because of the discovery then that was adopted by the Court.

We have had a motion pending to reconsider that and allow discovery on this issue. That has not been ruled upon by the Court.

MR. ARMSTRONG: My colleagues have just informed me that this policy was produced by Commercial Union as part of the Schriger deposition, so it turns out that it is a part of the record.

THE COURT: All right.

MR. GRIFFITH: If we produced the policy, we produced the policy, but I don't know the dates of it. Are the dates on there?

MR. ARMSTRONG: Yes. Let me hand it to you so that you can be sure that it's your client's document.

MR. GRIFFITH: It's a policy dated October 1, 1974. I don't know whether the policy was rescinded or not after. I do know that in 1975 no coverage was written for any asbestos. Whether that coverage was rescinded or what, I don't know, sir.

THE COURT: Don't you have a burden of addressing that?

MR. GRIFFITH: Pardon me?

THE COURT: In view of the record, don't you have a burden of rebutting it? The inference that can be drawn from that is that your company, with the knowledge it had, would have insured a manufacturer against products liability claims.

MR. GRIFFITH: I don't know that I have a burden of rebutting that because I don't know -- I haven't had a chance to go through here to see whether asbestos was ridered out or not. I have not seen this policy.

MR. ARMSTRONG: Now that this has been called to my attention, I can see that if this policy had been rescinded early in 1974, maybe he would have bought another policy from Commercial Union.

THE COURT: Maybe they would have rescinded your policy too.

MR. ARMSTRONG: One doesn't know.

MR. GRIFFITH: I can't stand here and read this whole document, it's 28 pages, and I don't know to what extent -- I'll have to check this. I'll produce any document that may relate to what was subsequently done with regard to asbestos under this policy.

THE COURT: You know, there's a lot of correspondence pertaining to the Yandle litigation where Commercial Union expressed its concern about whether or not its coverage would be reached.

MR. GRIFFITH: There's also a letter is there from Frank Cas indicating there was no

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coverage because manifestation was the interpretation of the company as to its coverage, indicating what he believed to be the fact that none of these policies would be appropriate.

There's a great deal of correspondence as to the whole thing going on in 1974 and 1975.

THE COURT: The mere fact your company took the posture of that manifestation would be the appropriate legal standard does not mean that ends the query or the risk that you have accepted by reason of the policy language. The issue is only that your client recognized, it seems by virtue of the evidence of record, that it was possible, assuming that its version of the law is not accepted, could be reached, its policy could be reached if there was no manifestation theory accepted by a court.

MR. ARMSTRONG: The record shows, it was testified last week under that policy that I just showed the Court that Mr. Griffith is holding for Standard Asbestos, the Commercial Union took the position that exposure applied under that policy with Standard Asbestos during the '70s, so it depended upon when you wrote your policy. That's in the record of last week's deposition.

MR. GRIFFITH: They said they had a pro rata distribution in certain cases they entered into. I don't believe they took an exposure interpretation of the policy.

THE COURT: Did your company rescind any policies after 1975?

MR. GRIFFITH: This brief and the tables referred to recount there are at least 16 declaratory actions my company has filed seeking to either rescind or have its policies interpreted, and that along with this bar that he keeps talking about of coverage written is a complete chronology or glossary, if you will, of the fact they have moved to file a declaratory judgment action.

THE COURT: They have now?

MR. GRIFFITH: No, they did.

THE COURT: Since what date?

MR. GRIFFITH: Since the date the claims were made under the policies. I think some of them were filed back in '77, '78; I think some of them were filed within the last several years, '80, '81. I know there were a lot filed before this one.

MR. ARMSTRONG: I might point out to your Honor —

THE COURT: Just a minute.

You're saying there wouldn't have been any notice or obligation for Commercial Union in '74 to have instituted an action to rescind because while there was discussion about whether or not it's policy would be reached by virtue of the Yandle case, there had not actually been an acknowledged claim?

MR. GRIFFITH: That's correct.

And also, in addition to that, the situation was such that there had been no specific claim made at that time against any of the policies, and none were made against this policy until 1981, March of '81 when they called and said we're now making a demand that you take over and defend these cases and pay indemnity. That took place in March of 1981.

THE COURT: In 1974 Commercial Union was an excess carrier on the Yandle case.

MR. GRIFFITH: We were one of them.

THE COURT: You were one of them.

MR. GRIFFITH: They sent notice to everybody. There had been a whole legion of people at various times who were the excess carrier for this particular company, but they sent notice. They never made a claim we pay dollars, they never asked us to defend a case, they simply sent notice of a potential claim that never turned out to be an actual claim. We never paid any money, and we weren't asked to pay any

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BAILEY LETTER

CU Insurance

money.

Thank you, sir.

THE COURT: Mr. Cramer?

MR. McN. CRAMER: Your Honor, in connection with the issue that we've just been discussing, I wanted to reemphasize that at page 61 of our reply brief we dealt with the issue of when an action for recision would be brought, and the authority cited there indicate that that action is available as soon as a party learns information which gives him reason to believe that a false representation has been made to him, and it does not require any claim on the policy to activate the right to recision. I think that comports with common sense, because otherwise it leaves the insurer in a position to gamble on a sure thing, sit back and keep the premium if no claim is ever made, or seek to rescind the policy if a claim is made. The law I think is more sensible, it says that he's got to act when he has information or give up his right to act at that point when the statute of limitations has run. I think that's the only point I would like to emphasize at this time.

Thank you.

THE COURT: Thank you. I'll take this matter under advisement.

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BAILEY LETTER

CU Insurance

Commercial Union Insurance Companies
Executive Offices: One Beacon Street
Boston, Massachusetts 02108

July 6, 1982

Mr. Michael Mealey, Editor
Asbestos Litigation Reporter
c/o Andrews Publication
P.O. Box 200
Edgemont, PA 19028

Dear Mr. Mealey:

Recent proceedings in the Pittsburgh Corning coverage litigation with Commercial Union referred to in the most recent issue of the Asbestos Litigation Reporter clearly require some clarification and explanation.

Recently, Federal District Court Judge James Giles allowed certain motions for additional discovery. One of those motions related to allegations made by Commercial Union that Pittsburgh Corning's primary carriers had entered into "block settlements". We have defined this practice to mean the settlement of a large number of claims for a lump-sum payment, e.g., 200 claims for $2,000 each. By its very nature, a block settlement implies that the defendant is exchanging the opportunity to get rid of a large number of claims for a "cheap price" from engaging in discovery in every one of them. The practice is somewhat analagous to what the industry traditionally calls "nuisance value settlements." After all, no one would seriously contend that several hundred people had all been "injured" to precisely the same degree and with the same economic consequences and value. However appropriate the practice may have seemed to some claim executives many years ago, as well as to the executives of the asbestos companies, it should have become apparent at some point — probably no later than 1977 or 1978 — that by virtue of the growth in litigation and claim volume continuation of the practice would ultimately result in the exhaustion of the asbestos companies' aggregate insurance limits.

For the past several years, Commercial Union has warned that this practice may some day haunt the insurance industry when the insured discovers that his policy limits have been exhausted by a practice whereby one of the principal purposes was "savings" in the area of defense costs. Since the obligation to provide the insured with a proper defense has already been the subject matter of several notable cases concerning the issue of "bad faith," it did not seem to require the substantial "leap of logic" required in other recent decisions to predict that the courts would construe any policy language or insurance industry practice, which, even from the benefit of 20/20 hindsight, ultimately inures to the detriment of the insured in the amount of coverage available to pay asbestos related claims. The "bad faith" cases have also made it abundantly clear that a primary carrier owes the same duties to an excess carrier as it does to the insured.

Asbestos Litigation Reporter
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The issue has been discussed over the past few years at several seminars and by various employees of Commercial Union at a host of defense lawyers and industry gatherings around the country. In the supplemental Interrogatory which we were asked to answer, we understood that the moving party was seeking the names of those persons with whom we had "discussed the subject of block settlements". We did not understand that the interrogatory required us to state the names of individuals who had explicitly criticized a particular primary carrier for engaging in improper claim handling and settlement practices.

Accordingly, we listed the names of those with whom we have been closely associated in professional circles and in industry organizations, and with whom we have had the greatest number of conversations concerning all of the aspects of the asbestos litigation including, from time to time, the subject of the use of "block settlements" as a means of disposing of large blocks of claims. It is well known that Commercial Union has initiated such discussions and requested others' opinions and comments. As indicated at the conclusion of the Answer we filed with the Court, it is also clear that we cannot state with any certainty that those whose names were furnished to the Court were persons with whom the subject of block settlements was discussed explicitly, if ever.

In view of our counsel's broad interpretation of the question, we considered that it was necessary to provide a comprehensive list of those who may or may not have been engaged in such discussions. Clearly, the subject has been discussed in a variety of forums. See, e.g., D.R.I.'s "FOR THE DEFENSE", Vol. 23, No. 6, p. 24.

In a hearing before Judge Giles on Thursday, June 24, 1982, it became apparent that opposing counsel interpreted the Interrogatory very narrowly. They called for the specific names of persons who had allegedly criticized a particular primary carrier's claim handling as improper. Clearly, the Answer filed by Commercial Union was not responsive to what opposing counsel was requesting. In fact, the Answer furnished is precisely the opposite! Although many of the persons named by Commercial Union represent several carriers besides Commercial Union, and several do not even represent Commercial Union, they are all persons with whom we have enjoyed a most cordial professional relationship in the past discussing issues relating to the insurance industry and to the asbestos litigation.

It is obvious that these differing interpretations of what was called for must now be clarified lest anyone conclude that Commercial Union had listed persons who had criticized the claim practices of a specific primary carrier. That simply was not the purpose or import of the Answer which was filed.

We hasten to add that we are having a great deal of difficulty understanding the relevance of "naming names" when the facts with regard to what is in the claim files will speak for themselves. We submit that answering questions about "Who told you that?" is of no relevance to the issue of whether or not the files themselves indicate that the allegations in the Complaint are true. On that question, only time will tell. An amended Answer will be filed shortly.

I hope the foregoing assists in explaining how your name was included in Commercial Union's Answer.

Very truly yours,

FROUD

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIFTH DIVISION
June 25, 1982

(2)

Nos. 81-0052, 81-0053, 81-0054 Consol.

BEATRICE FROUD, Individually and as Special Administrator of the Estate of James Froud, Plaintiff-Appellant, vs. THE CELOTEX CORPORATION, et al., Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
RITA WILLIAMSON, Individually and as Administrator of the Estate of WYATT WILLIAMSON, Plaintiff-Appellant, vs. THE CELOTEX CORPORATION, et al., Defendants-Appellees.	
SHIRLEY FRIDAY, Individually and as Special Administrator of the Estate of JOHN FRIDAY, Plaintiff-Appellant, vs. THE CELOTEX CORPORATION, et al., Defendants-Appellees.	HONORABLE PAUL F. ELWARD, PRESIDING.

JUSTICE LORENZ delivered the opinion of the court:

These three consolidated appeals present the question of whether punitive damages can be recovered under the Survival Act (Ill. Rev. Stat. 1979, ch. 110 1/2, par. 27-6) in a common law cause of action.

James Froud and John Friday were asbestos workers who allegedly contracted peritoneal mesothelioma from prolonged exposure to asbestos products which were manufactured and sold by the defendants. Wyatt Williamson was an asbestos worker who allegedly contracted bronchogenic carcinoma from prolonged exposure to the same asbestos products. After Froud and Friday filed actions against the defendants, they died,

of their estates. Williamson died before filing an action, and his administrator brought an action on behalf of his estate.

In each of ...

to kill people rather than to merely injure them. 61 Ill 2d at 38, (J. Goldenhersh dissenting).

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of their estates. Williamson died before filing an action, and his administrator brought an action on behalf of his estate.

In each of these actions, count one accuses the defendants of negligence, count two is based on strict liability in tort, and count three seeks recovery of punitive damages. The defendants moved to dismiss count three of each action on the grounds that these common law actions for punitive damages abated at the death of the injured parties. These motions were granted, and the trial court found that there was no just reason for delaying appeal of its dismissal orders. (Sup. Ct. R. 304(a), Ill. Rev. Stat. 1979, ch. 110A, par. 304(a).) In deference to the trial court, we note that the court stated that it is illogical and unjust to permit defendants to escape liability for punitive damages merely because they are lucky enough to injure people who die before trial. However, the trial court reluctantly concluded that it was obligated to dismiss the actions for punitive damages.

We reverse.

The common law rule is that actions for "personal torts" abate at the death of the injured person. (Prosser, Torts § 126, at 898 (4th ed. 1971).) This common law rule is the source of the old adage that it was cheaper to kill people rather than to merely injure them. To counter the injustice caused by this rule, the Survival Act keeps various causes of action from abating at the death of the injured party, including "actions to recover damages for an injury to the person (except slander and libel)" (Ill. Rev. Stat. 1979, ch. 110 1/2, par. 27-6). But, despite the fact that the statute does not distinguish between punitive and compensatory damages for injury to the person, Illinois case law has, for more than 100 years, interpreted the Act as providing that actions for punitive damages abate at the death of the injured person. (Mattyasovszky v. West Towns Bus Co. (1975), 61 Ill.2d 31, 33, 330 N.E.2d 509.) Thus, as far as liability for punitive damages is concerned, it continued to be cheaper

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to kill people rather than to merely, [illegible]
(J. Goldenhersh dissenting).

Relying on National Bank of Bloomington v. Norfolk and Western Ry. Co. (1978), 73 Ill.2d 160, 383 N.E.2d 919), the administrators in the present cases argue that the supreme court no longer construes the Survival Act as providing for the abatement of actions for punitive damages. In National Bank, the supreme court held that a statutory cause of action for punitive damages under section 73 of the Public Utilities Act (Ill. Rev. Stat. 1969, ch. 111 2/3, par. 77) did not abate at the death of the injured person, even though section 73 does not contain any reference to the question of survivability.* The court explained that it reached this result because the goal of promoting public safety through the use of punitive damages would be perverted if a wrongdoer could escape liability for outrageous misconduct merely because the injured person died before trial. 73 Ill.2d at 174.

As interpreted by the supreme court in National Bank, "The Survival Act itself neither authorizes nor prohibits punitive damages." (73 Ill. 2d at 174.) The court further explained that, "Punitive damages for injuries prior to death should be unaffected by the subsequent death of the injured person, for punitive recovery addresses only the nature

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* Section 73 provides:

"In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages award damages for the sake of example and by the way of punishment." Ill Rev. Stat. 1969, ch. 111 2/3, par. 77.