

Bloomington, Ind. Owens Corning is represented by Glen E. Amundsen and Michael Resis of O'Hagan, Smith & Amundsen in Chicago. A.P. Green is represented by Michael Drumke of Segal, McCambridge, Singer & Mahoney in Chicago. Springmann is represented by Cathy A. Stephens-Molchin in Mapleton, Ill. ■

Pa. Judge Finds 'Unwarranted,' 'Deceptive' Discovery Practices

PHILADELPHIA — An insurer's *pro hac* vice counsel was removed from General Refractories Co.'s (GRC) bad faith action April 20 by a Philadelphia judge who also ordered the carrier to pay GRC and the City of Philadelphia for time and costs due to its conduct during discovery (General Refractories Co., et al. v. Fireman's Fund Insurance Co., No. 1499, Pa. Common Pleas, Phila. Co.).

(Memorandum Opinion available. Document #03-000516-106. 13 pages.)

GRC, a defendant in thousands of asbestos exposure bodily injury suits, filed this action against Fireman's Fund Insurance Co. for breach of contract, breach of fiduciary duty and bad faith.

GRC moved for sanctions against Fireman's Fund, asserting that the insurer's central representative (Mr. West) lied under oath at a deposition in stating that certain documents did not exist. GRC maintained that Fireman's Fund *pro hac* vice counsel knew the testimony was perjurious, did not correct the testimony and actively concealed the documents. The existence of the notes was acknowledged after Fireman's Fund counsel used the hidden documents during a subsequent deposition of GRC's principal representative.

"Initially presented along with a hundred other motions on other cases in Discovery Court, this Court heard oral argument over a four day period, reviewed voluminous filings, memoranda, appendices and exhibits and has determined that the defendant's conduct in concealing the West computer records and

numerous other highly significant documents was intentional, inexcusable, and warrant severe sanctions," the court held.

'Stonewalling, Deception'

Reviewing the case's discovery history, Judge Mark I. Bernstein found "a clear pattern of delay, stonewalling, deception, obfuscation and pretense. Defendant intentionally withheld critical documents, ignored Court orders, permitted false testimony at depositions and misrepresented facts to opposing counsel and the Court. The defendant, through its employees, its house counsel, and its engaged litigation counsel participated in an intentional campaign to hide critical facts and documents. At every stage of discovery, reasonable and relevant requests have been met by incomplete responses, unreasonable objections, unfounded claims of privilege and intentionally incomplete 'privilege' logs. Whenever plaintiff sought Court intervention additional documents were 'found', 'voluntarily produced' and the privilege log expanded. Finally, defendant found hundreds of additional documents and submitted a box of documents entitled 'J. Richard West, Attorney File Submitted Under Seal For Review In-Camera With Privilege Log Pursuant To Court Order Dated December 23, 1999.' It is conspicuously odd in character."

The court determined that no privileged attorney-client relationship existed and rejected work product privilege arguments.

"Concerned with protecting its own funds, to the detriment of its insured, in a conscious effort to avoid this very claim of bad faith, defendant attempted to use counsel to construct a 'privilege' wall against discovery of the true nature of their decision making. This was no client attorney relationship. Mr. West is an employee of the defendant acting not as counsel but as an adjuster with a law degree. There is no privileged relationship."

The insurer's conduct constituted waiver of all right to assert attorney-client or work product privileges as to Mr. West, according to Judge Bernstein, who added that numerous probative documents, on which no good faith claim of privilege can be asserted, are still hidden in West's files and are discoverable.

While denying the requested sanction of judgment for GRC, the court ordered removal of the insurer's pro hac vice counsel, ordered that Fireman's Fund pay GRC \$126,897.81 for time and costs expended and the same amount to the City of Philadelphia for "unwarranted, obstreperous and deceptive conduct in discovery."

GRC is represented by John N. Ellison and Timothy P. Law of Anderson Kill & Olick of Philadelphia. ■

Proration By Months Increases Insurer's Reimbursement Of Settlement

MILWAUKEE — A federal judge has amended a prior ruling to prorate liability by months on the risk, increasing the amount an insurer is to be reimbursed for payment of an underlying settlement agreement (Sybron Transi-tion Corp., et al. v. Security Insurance Company of Hartford, No. 92-C-779, E.D. Wis.; See 3/21/97, Page 16).

Decision and Order available. Document #03-000516-105. 34 pages.)

Sybron and Kerr Manufacturing Corp. seek a declaration that Security Insurance Company of Hartford is liable for all or most of a \$1.3 million settlement made to the survivors of Dr. Alan Press, who died from mesothelioma caused by his exposure in dental school to asbestos manufactured by Kerr.

The Press action was settled in 1992 for \$1.3 million, with Security Insurance Co., Hartford Fire Insurance Co. and Sybron contributing to the settlement. Security and Hartford paid \$500,000; Sybron paid \$300,000. When Hartford was dismissed from the action pursuant to prior court rulings, Sybron paid Hartford back its \$500,000 contribution.

In an August 1999 ruling, the court found the injury occurred over 10 of 19 years at issue and prorated the \$1.3 million settlement amount over all 10 triggered years. Dividing

the \$1.3 million by 10 years, the court found three Security policies triggered for a total of \$390,000. Because Security has paid \$500,000 toward the settlement, it was entitled to judgment on its counterclaim seeking refund of any overpayment in the amount of \$110,000. Judgment was entered in favor of the insureds for \$390,000 on their claim; in favor of Security for \$110,000 on its counterclaim for reimbursement of the \$500,000 it paid toward the Press settlement while reserving its right to contest liability; and in favor of plaintiffs on Security's counterclaim for reimbursement of defense costs. The parties moved to alter or amend the judgment.

Security's Motion

Security maintained that the court erred by treating partial years of injury or coverage the same as full years when prorating the settlement amount. U.S. Judge Lynn Adelman agreed with Security that her final decision treats Security as if it had insured Sybron for the full year in 1971 and lets Sybron off the hook for another insurer's period.

The judge held, upon reconsideration, that Security is to be allocated only 1/12 of the portion of the \$1.3 million Press settlement allocated to 1971.

Another review of pertinent case law indicates that while the authorities discuss allocation or proration on a yearly basis, they do not specifically address or hold that part-year allocation is improper, the judge said. "Several cases refer to 'time on the risk' rather than or in addition to 'years on the risk,'" the judge said, noting that nothing mandates allocation by year as opposed to months or days. Except for the months in which Press first noticed symptoms and died, months are the unit of time the parties presented in their stipulations at trial.

"As a result, my decision of August 13 is amended to hold for proration of liability evenly across trigger periods of September 1969 through May 1973 (45 months) and January 1984 until April 1988 (51 months), for a total of 96 months. Security was on the risk for 17 months. Dividing \$1,300,000 by 96 months equals \$13,541.67 per month. Security's share, therefore, is \$230,208.39. The