PLAINTIFF'S EXHIBIT

DOW-1700

Asbestos ruling

Continued

self in suits brought by the Chicago Public Schools and two suburban Chicago school districts, as well as a national class-action suit pending in Philadelphia, Mr. Mielke said.

The insurers have until June 10 to petition for a rehearing, said Robert Kiesler of Kiesler & Berman in Chicago, USF&G's attorney and the lead insurer attorney in the case.

The insurers have not decided whether they will file for a retrial or abide by the ruling and pay Wilkin's legal expenses, he said.

"The Supreme Court ruling is a total affirmation of the appeals court ruling and is the most comprehensive ruling to date on the defense issue," said Mr. Neal, Wilkin's co-counsel.

"The court ruled against the insurers on all issues of their appeal. It is clear that they have a duty to defend," he said.

"The court rejected all of the defenses that insurers have been trying to use. That's why this case is so important," agreed Covington & Burling's Mr. Skinner.

"This is a good decision for building owners because it establishes the property damage issue, and it's also good for asbestos manufacturers and installers because it establishes the duty to defend issue," observed Marilyn Kueper, assistant chief of asbestos litigation for the Illinois attorney general's office, which filed a brief in the case in support of Wilkin.

Tom Freeman of Brobeck, Phleger & Harrison in San Francisco, which represented asbestos manufacturers in the coordinated asbestos litigation in California in 1988 (*BI*, Sept. 12, 1988), believes that insurers' "first line of defense" in asbestos property damage coverage disputes—that asbestos does not constitute property damage—is crumbling.

"Nearly every court to date has ruled that asbestos in buildings constitutes property damage for the purpose of insurance. Now, there is a supportive state supreme court ruling, too," Mr. Freeman explained.

But Mr. Freeman stopped short of saying the Illinois decision will influence courts nationwide presiding over similar cases.

"We all believed the California case was comprehensive enough to resolve everything. But you still have the hard-liners challenging the coverage issue. So, I'm a little skeptical about predicting that the Illinois case will affect anything but Wilkin Insulation."

Mr. Kiesler, USF&G's attorney, said that because this decision was returned by Illinois' highest court, "other courts will look to it for guidance."

But, Mr. Kiesler said the court overlooked key elements in USF&G's case.

"Our whole case centered around whether asbestos fibers released into a building damages property. Asbestos fibers, although harmful to human beings, are not destructive to tangible property.

"If the fibers shorted out a motor, that's property damage. But all we have here is perceived bodily injury. As a matter of law and contract, we feel the court erred in its ruling" Mr. Kiesler said.

David C. McLauchlan, an attorney with Lord, Bissel & Brook in Chicago, which represents Lloyd's of London underwriters in asbestos cases, also called the decision "an important statement on the duty to defend."

But he predicted that the case will have limited impact on other asbestos litigation because it involved an asbestos installer, which he labeled an "aberrational insured," rather than an asbestos manufacturer.

Mr. McLauchlan also said he was "surprised" that "the decision says insurers have a duty to defend but doesn't say which insurers." It would be "unfair" to interpret the opinion to mean all of Wilkin's insurers have a duty to defend if an insurer can show its policy would not have to respond to any court awards in the underlying litigation," he said.

However, Mr. Neal, Wilkin's attorney, said he believes all of the insurers are "jointly and severally on the hook for defense costs."

Mr. McLauchlan also pointed out that the decision does not reach the "critical" issue of whether insurers owe a duty to indemnify policyholders for the costs of removing asbestos from buildings. This "devalues the opinion and its precedent value," Mr. McLauchlan said. "It is not a comprehensive decision."

Jerry S. Sallee of Dinsmore & Shohl in Cincinnati, which represents Liberty Mutual Insurance Co. in asbestos-related cases, agreed.

The high court "only said a carrier has the duty to defend if *potential liability exists*. That's the broadest reading a policyholder can draw from this," Mr. Sallee pointed out.

The case also may have limited influence outside of Illinois because it was not based *on facts* developed in a lengthy trial but rather on a stipulated record, Mr. McLauchlan observed.

Mr. Sallee also questioned the method the court used to make its judgment.

"This decision is set apart from the others, especially the recent U.S. Gypsum case, because no records were used. This was a simple granting of summary judgment. There was *no extensive discovery* nor were there near the number of depositions and documents taken. I don't think the court aired out the underlying cases well enough," Mr. Sallee said.

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The Alchemy Of Asbestos

ASBESTOS IS a mineral far humbler than gold; but the curse it carried was even more baneful, and it continues to be hardly less potent as a stimulus to greed.

Asbestos has been expelled from the market as a public menace for a decade; but it lives posthumously in the damage suits pending for the 33,000 claimant victims who are only the first wave of a total that may grow to 300,000. Diseases traceable to asbestos can, after all, lie latent for 40 years.

These lawsuits have been afflicted by one more plague of the disasters that are a continuing thread in the history of asbestos. Damage suits led the Manville Corp. to file for bankruptcy in 1982; and, as a condition of its release, the Manville Trust was set up to meet all claims settled, pending and to come. The Trust's original assets were $867 million and 80 percent of the stock in the reorganized company.

By 1989, the Manville Trust had spent all its cash, and ways must be found to start payments again. Last week U.S. Judge Jack B. Weinstein arrived at a formula that came as close to his high standards of equity as circumstances permitted, which is to say well below their norm. The sad story Weinstein's opinion had to tell was another reminder that, whenever asbestos is the case, the rapacity of putatively respectable American institutions ends up in the arraignment dock with it.

The Manville Trust's ruin is a chronicle of sack and pillage accomplished with the tolerance of court-approved trustees who kept their eyes open only when *searching out their own comforts. Their office rent* was $1 million a year. They spent $50 million on outside and $25 million on inside counsel, salaried 100 employees, and took out a lavish insurance policy to protect themselves from suits for nonfeasance, a peril that, on their record, can scarcely be dismissed as a phantom.

Meanwhile, word that the trust fund was about to exhaust its reserves was leaked to what Weinstein describes as a "select" group of lawyers.

"The result," the court notes, "was a frenzied offensive by plaintiff's bar to dispose of claims by the hundreds and thousands at a time and collect fees before the Trust went broke."

It had become, in Weinstein's words, "hugely profitable" for lawyers to assemble "huge stables of claims" and earn "hundreds of millions of dollars in fees." That was the boom, and, as usual in asbestos history, distinctly more noticeable to plaintiffs' counsel than to plaintiff. Settlements averaged $42,000 a claim; and, by Weinstein's best estimate, the actual victim got 30 cents out of every dollar paid out in his name. Then came the bust; and the fund was barely a year old when its trustees began talking about a 25-year wait between a settlement and the day of its collection.

There was no remedy but for the courts to intrude some measures of discipline. The Trust will henceforth limit its operating expenses to $6.5 million a month. There will be a 25 percent cap on fees to plaintiffs' lawyers. As to the victims themselves, "exigent health" claimants — i.e., survival dubious beyond six months — are guaranteed 40 percent of their settlement within 20 days. As to those less *exigent*, "*claimants who filed in 1982* will receive 40 percent of their payment in 1991 and . . . the remaining 60 percent in 1996." To have filed in 1988 means to be paid 40 percent in 2007 and 60 percent in 2012.

The over-impatient have the option of taking $2,000 in cash now and forever holding their peace. Settlements will be kept near a $25,000 limit. That was the best Jack Weinstein could do.