

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 2 1987

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action
No. 86-0801

In the Matter of:

TURNER & NEWELL PLC

Plaintiffs,

vs.

CANADIAN UNIVERSAL INSURANCE COMPANY
FIRST STATE INSURANCE COMPANY
LEXINGTON INSURANCE COMPANY
NEW ENGLAND REINSURANCE CORPORATION

Defendants

Washington, D.C.

January 8, 1987

The above-entitled matter came on for status hearing
before JEAN F. DWYER, United States Magistrate for the District
of Columbia, on January 8, 1987.

APPEARANCES:

On behalf of the Plaintiff:

PHILLIP HECHT, ESQ.
Clifford & Warnke

STEPHEN PLUM, Esq.
THOMAS I. SHERIDAN, Esq.
Richards O'Neil & Allegaert

PRO-TYPISTS, INC.
PROFESSIONAL WORD PROCESSING & TRANSCRIPTION SERVICE
Area Code 202 - 347-5395



86

1
2 APPEARANCES (Cont'd):

3 On behalf of Defendants Canadian Universal Insurance
4 Company, First State Insurance Company and New
5 New England Reinsurance Corporation:

6 WILLIAM BOWMAN, Esq.
7 L. ANTHONY SUTIN, Esq.
8 Hogan & Hartson

9 On behalf of Defendant Lexington Insurance Company:
10 JAMES P. SCHALLER, Esq.
11 Jackson and Campbell
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

1
2 THE CLERK: Civil Action No. 86-0801, Turner &
3 Newell PLC versus Canadian Universal Insurance Company, et
4 al. For the Plaintiffs, Phillip Hecht, Stephen H. Plum,
5 Thomas I. Sheridan; for the Defendants, William Bowman,
6 Anthony Sutin and James Schaller.

7 THE MAGISTRATE: Counsel, I'm going to ask you,
8 since I know some of you but not all of you, if you will
9 be so kind as to identify yourselves, starting on your
10 right, my left, not only by name, but also by the client
11 whom you are here representing this morning.

12 MR. SUTIN: My name is Anthony Sutin. I'm with
13 Hogan and Hartson, here for First State Insurance Company,
14 Canadian Universal Insurance Company and New England
15 Insurance Company.

16 MR. BOWMAN: My name is William Bowman, also of
17 Hogan and Hartson, and also for Canadian Universal, First
18 State and New England.

19 MR. SCHALLER: James P. Schaller, Your Honor,
20 Jackson and Campbell, for Lexington Insurance Company.

21 MR. HECHT: Phillip Hecht, Your Honor, from
22 Clifford and Warnke, and I represent Turner & Newell, the
23 Plaintiff.

24 MR. SHERIDAN: Good morning, Your Honor. I'm
25 Tom Sheridan from Richards O'Neil and Allegaert in New

1 York.

2 THE MAGISTRATE: And you're also Plaintiff.

3 MR. SHERIDAN: And I represent Turner, yes.

4 MR. PLUM: Stephen Plum, Your Honor. I'm with
5 Richards O'Neil also, representing Turner & Newell.

6 THE MAGISTRATE: Now, counsel, we are here this
7 morning for apparently a number of purposes. First of
8 all, Judge Greene has simply left to my discretion the
9 matter of future timing of discovery and cut-off dates and
10 so on, so we will be coming back to that. That will, of
11 course, to a large extent, influence some of the decisions
12 that we will be arriving at this morning, some of the
13 others which I will be entering this morning.

14 I have reviewed the materials, most of which
15 were received yesterday. I would call to the attention of
16 Plaintiff's counsel that there is a free copy of the local
17 rules available in the Clerk's office. I note that not
18 only is counsel in violation of local rule 207 so far as
19 discovery requests go, but also you are in violation of
20 the local rule which flatly prohibits any written
21 communication with the Court other than by formal motion.

22 A cover letter saying we're enclosing a motion
23 is one thing, gentlemen. A cover letter which goes on for
24 two pages setting forth your view of the merits of any
25 portion of this case is inappropriate. I understand that

1 possibly you didn't realize that and it will certainly in
2 no way prejudice your position before me this morning, but
3 I would bring to your attention that this rule is in
4 existence and ask you please to honor it in the future.

5 Now, among the things that I think we need to
6 deal with promptly, and I think we can probably deal with
7 fairly quickly. I gather that each side owes the other a
8 Rosen Index on the list of documents and materials which
9 you claim are privileged for various reasons, either
10 attorney-client privilege, work product privilege, or
11 possibly sensitive business information. I also infer
12 from the pleadings that you have been, if you will forgive
13 the colloquialism, kind of at a Mexican stand-off over it,
14 each side saying, "Well, we'll do it when you do it."

15 Counsel, it will be done within ten days by both
16 sides. Yes.

17 MR. : Your Honor, I'd like to point
18 out that on behalf of Canadian Universal, First State and
19 New England, we have provided our privilege log to the
20 plaintiffs this morning.

21 THE MAGISTRATE: All right, fine. Glad to know
22 that that log jam has been broken.

23 MR. : We thought we'd take the first
24 step.

25 THE MAGISTRATE: I'm very glad you did, counsel,

1 but that must be dealt with promptly, because there may
2 very well come a time in the weeks to come when I'm going
3 to have to meet with you again on the very issue of what
4 of these materials must be regarded as privileged and what
5 must be disclosed to your opposing counsel.

6 MR. SHERIDAN: I'd like to raise a question
7 regarding the privilege log.

8 THE MAGISTRATE: Certainly, Mr. Sheridan.

9 MR. SHERIDAN: Turner & Newell is a Defendant
10 in, and has been a Defendant in, thousands of persona
11 injury lawsuits and some 80 property damage lawsuits.
12 There is -- the burden that would be involved in listing
13 all of the documents as to which we claim privilege with
14 respect to that literally thousands of cases, I mean, in
15 our office alone there are just stacks and stacks and
16 stacks and stacks and files upon files, not only in the
17 offices of national counsel in New York, but in our
18 client's home offices and in the offices of dozens of
19 national counsel -- well, not dozens, but something on the
20 order of 20 or 30 different national counsel offices --
21 this is an asbestos company, Your Honor. They're involved
22 in --

23 THE MAGISTRATE: I have read the materials,
24 counsel. Is there any way we can narrow the requests
25 which are being made for documents so as to make it

1 feasible. Mr. Bowman?

2 MR. BOWMAN: Perhaps I could suggest this, Your
3 Honor. At a later point this morning I suppose we may get
4 to our claim that many of the documents that -- for which
5 Turner & Newell claims a privilege simply are not
6 privileged vis-a-vis the insurance companies, and if the
7 Court finds itself in a position to rule on that claim,
8 then perhaps that will then lead to the question of
9 whether or not there are a whole lot of documents that
10 must be included on the list, or perhaps fewer than Mr.
11 Sheridan now suggests.

12 THE MAGISTRATE: Well, first of all, it would
13 seem to me that anything which has been filed in an open
14 file in connection with this litigation has lost its
15 privilege. If, indeed, there are documents which are
16 filed under seal by order of any court, we may be in a
17 somewhat different position.

18 MR. : I can simplify that, Your
19 Honor. All of the underlying case files themselves have
20 been produced.

21 THE MAGISTRATE: Is that where some of those
22 60,000 pages came from?

23 MR. : Yeah. In the property damage
24 case. In other words, they looked through all the -- the
25 area of controversy involves our own communications, or

1 our clients' communications, with our local counsel, in
2 effect correspondence back and forth between national
3 counsel and local counsel, memorandum regarding the
4 personal injury cases or the property damage cases, which
5 they've refused to help us defend. And, in effect, they
6 are saying there's a common interest here because you're
7 claiming a duty of defense but -- they're disclaiming the
8 duty of defense. And our position is that there's no
9 joint common interest until they, you know, get on the
10 wagon and acknowledge _____ defense --

11 THE MAGISTRATE: (Inaudible).

12 MR. : -- they want to get something
13 they haven't paid for. So, now -- I think it's an
14 appropriate time to address that issue of privilege now.
15 It was raised, for the first time, in their motion to
16 compel last night. It's a complex issue and a difficult
17 one, and not one that I think ought to be decided, or even
18 the subject, of this conference.

19 It is my understanding that this conference was
20 supposed to be directed towards issues like Mr. Sykes, Mr.
21 Harren, the English witnesses, the lawyers --

22 THE MAGISTRATE: To which no one has bothered to
23 speak to in the pleadings, by the way.

24 MR. : That's not quite correct, Your
25 Honor. Our motion to compel does raise that issue.

1 THE MAGISTRATE: Yes, but no one has bothered to
2 tell me why Harren and Sykes should either be produced or
3 not be produced. As I understood it from our conference
4 call on Monday, that would be something that would be
5 specifically dealt with in any papers to be filed and I --
6 my law clerk and I have both reviewed all the documents
7 which have been filed, and I won' say it isn't in there.
8 I will say that if it is in there, we both overlooked it.

9 MR. : Let me say this. Maybe I can
10 help direct the Court's attention and I can speak to the
11 part of our motion to compel that deals with that, and
12 I'll be happy to speak to that --

13 THE MAGISTRATE: All right. Let's finish this
14 matter of privilege. Privilege is one of the areas of my
15 semi-expertise, Mr. Sheridan. It's a matter in which
16 we've done a number of opinions which have been almost
17 inevitably sustained by the District Judge or by the
18 Circuit. It is always, as you note quite correctly, a
19 very complex matter, and if you feel that there has not
20 been an opportunity adequately to brief it, I'll come back
21 to that in a moment, but it's going to have to be dealt
22 with pretty shortly, because even if I extend discovery --
23 and I am inclined to extend it, though not to the extent
24 that you all are asking for it -- we've got to settle the
25 issue one way or the other.

1 MR. : Your Honor, I can brief it
2 quickly. It's just that the brief we saw on the issue of
3 privilege, we didn't -- we were not told we were getting a
4 motion on privilege --

5 THE MAGISTRATE: Well, this is kind of a laundry
6 list --

7 MR. : -- we got it last night --

8 THE MAGISTRATE: This is kind of a laundry list
9 this morning. I want to deal with things that are right
10 for disposition.

11 MR. : I'll brief it --

12 THE MAGISTRATE: I wanted to set a schedule for
13 getting the other materials that need to be disposed of
14 during the discovery process. We've got to set a schedule
15 and get this moving. As you know, this case was only
16 relatively recently put into my hands, and certainly some
17 of the decisions which I am now empowered to make I
18 wasn't, even as late as 9:30 this morning, so we've got to
19 get this straightened out one way or the other.

20 If you feel, and I suspect you may be right,
21 that privilege is not quite right, fine. The fact that
22 ther has been at least a break in that log jam makes me
23 feel a little bit more comfortable about what's going on,
24 and if, indeed, you have -- well. We'll get back to your
25 deadline on that in just a moment, Mr. Sheridan. Mr.

1 Bowman?

2 MR. BOWMAN: Regardless of the Court's ultimate
3 disposition of whether documents are privileged or not, we
4 would still maintain that we have a right to a log of
5 documents for which they claim the privilege.

6 THE MAGISTRATE: You have a right to a Rosen
7 Index. There's no question about that.

8 MR. BOWMAN: Thank you.

9 THE MAGISTRATE: Because without a Rosen Index,
10 I cannot possibly even think about trying to rule on
11 contested claims of privilege. I suspect that what Mr.
12 Sheridan's trying to tell us, sub silentio, is that he
13 just doesn't have time to fix -- or hasn't taken time to
14 prepare one yet.

15 MR. SHERIDAN: Your Honor, what I'm really
16 driving at is that I would like to do the Rosen Index, not
17 by describing each individual piece of paper, which is --

18 THE MAGISTRATE: You can do it by categories.

19 MR. SHERIDAN: -- I think, a complete waste of
20 everyone's time. But --

21 THE MAGISTRATE: You may do it by categories and
22 if I feel that, in any of those categories the response is
23 inadequate or if counsel, after reviewing them, feels that
24 there are categories which need to be more fully
25 described, I'll address that issue. But let's start off

1 with categories. At least that's a breakthrough.

2 MR. SHERIDAN: Okay.

3 THE MAGISTRATE: Now, I have my own little list
4 which may or may not be in the same order that you would
5 like to take things up. If you feel that something that
6 I'm about to address should be deferred until I address
7 something else, don't hesitate to tell me.

8 In reviewing the materials prepared for me, I
9 notice that in at least one or two of the depositions, Ms.
10 Medaglia would not even let the witness answer what Mr.
11 Sheridan described, and I think probably accurately, as
12 foundation questions in an effort to determine whether or
13 not indeed the substantive answers sought would be, in
14 fact, privileged by order of the Court.

15 I am thinking particularly now as something
16 described, so far as I could determine from the deposition
17 transcript, as quarterly asbestiosis reports. It may be
18 that they are completely privileged, but there is simply
19 not enough data in the transcript so that I could even
20 begin to approach that.

21 I say this as a preface to the following
22 comment, counsel. From now on, when you get into
23 depositions, if you run into that kind of problem where
24 there is a genuine and legitimate conflict among counsel
25 as to whether or not a witness should be instructed not to

1 respond, you are to place a conference call to me,
2 immediately. I have taken conference calls from France,
3 from England, from Texas. Once we even thought we were
4 going to get one from Japan, because I'm handling a fairly
5 big international patent infringement case for Judge
6 Harris.

7 Don't mess around with it; you are not going to
8 have time. You are simply not going to have time. Place
9 a conference call and I will deal with it, provided it's
10 during a normal working day in the United States. I do
11 not guarantee to take a call from England at 2:00 o'clock
12 in the morning. But with that caveat please, we've got to
13 get this case moving. That's the best and, believe it or
14 not, in the long run, probably the cheapest way to deal
15 with it. Even an international conference call can be
16 less expensive than all of the briefing and the time that
17 it takes to file a motion to compel and reconvene a
18 deposition.

19 But I am instructing all counsel so far as
20 foundation questions go, by whom they are prepared, to
21 whom they are submitted, the dates, those are to be
22 permitted so that I will have at least some feel for
23 whether or not they should be further revealed, or whether
24 indeed the claim of privilege is well-founded and must be
25 sustained. And, again, this goes to counsel on both sides.

1 I'm sure that Plaintiff has some stuff that
2 they're objecting to producing, too. Obviously, you have.

3 MR. SCHALLER: Let me accept the responsibility
4 for that --

5 THE MAGISTRATE: Yes, Mr. Schaller.

6 MR. SCHALLER: -- Your Honor. There came a time
7 in, not this case, but in another case, in which I simply
8 said, because I had been told by counsel on the other
9 side, "Well, you opened the door," and I had to say,
10 "Well, I'm closing it," there just came a time when I
11 said, "We're going to object to that. I respect your
12 position, but we're not going to allow any questions on
13 that. We'll give you the foundation information and take
14 it to the Court."

15 I gather that Your Honor does not approve of
16 that method and --

17 THE MAGISTRATE: No. If you'd given the
18 foundation information, that would have been fine, but Ms.
19 Medaglia wouldn't even permit that to be elicited.

20 MR. SCHALLER: That's right, and we will, and
21 should have provided it at that time, but we just didn't
22 want to go any further into it.

23 THE MAGISTRATE: No, I can understand --

24 MR. SCHALLER: It was at my lead, and I accept
25 the responsibility for that and apologize.

1 THE MAGISTRATE: The comment was not intended as
2 being a critical one, gentlemen. I just don't want it to
3 happen again.

4 MR. SCHALLER: Sure.

5 THE MAGISTRATE: And I'm trying to make it clear
6 to you my availability for ruling on it then and there,
7 because once you've got a Court ruling of course you can
8 object to it and will have preserved it, but you'll have
9 something in the record which will have made it very clear
10 that you've objected and the foundation for that, or the
11 ruling by the Court. If you can't live with it, you can
12 always take it to Judge Greene.

13 MR. SCHALLER: Thank you, Your Honor.

14 THE MAGISTRATE: Now, I gather there is an
15 objection to reconvening the depositions of Turtletaub and
16 Shea. Are those the two witnesses that we're having
17 problems about foundation questions on, or are they in
18 another area entirely?

19 MR. BOWMAN: Let me speak first to Shea.

20 THE MAGISTRATE: Certainly, Mr. Bowman.

21 MR. BOWMAN: There's an easy answer to Shea. We
22 did not -- John Shea is from First State and New England
23 Insurance Company, whom I represent, and we did not
24 complete that deposition and we'll continue it. I've
25 suggested a date near the end of this month to continue

1 it, so whatever rulings occur today can be implemented.

2 THE MAGISTRATE: As long as you all are in
3 agreement with that, I won't waste your time on it. Now,
4 what about Turtletraub.

5 MR. SHERIDAN: I'm not entirely in agreement on
6 that.

7 THE MAGISTRATE: What's wrong, Mr. Sheridan?

8 MR. SHERIDAN: I am in agreement that we have
9 not completed it. I'm also in agreement that Mr. Bowman
10 didn't object to the foundation questions, but we do have
11 matters as to which objections were raised -- not
12 foundations types of objections as Medaglia made, but
13 substantive issues relating to documents. And I also have
14 a problem with the timing that Mr. Bowman has suggested
15 for Mr. Shea and those other witnesses.

16 We recognize that's an issue we may be getting
17 to when we talk bout the discovery deadline, but I just
18 don't want you to think that I'm accepting the timing of
19 "sometime later this month." I think those depositions
20 should get started right away.

21 THE MAGISTRATE: Are these -- well, I presume
22 you're going to be in England next week.

23 MR. SCHALLER: Well, no, Your Honor, there are
24 plenty of witnesses working in this case. I don't see any
25 reason why the depositions which we -- after all, the

1 depositions which were noticed first were noticed by us
2 and we had our noses out for Mr. --

3 THE MAGISTRATE: Now, that is a game I will not
4 play or permit counsel to play, Mr. Sheridan. We don't do
5 that in this jurisdiction.

6 MR. SHERIDAN: I'm not suggesting that I have
7 some sort of priority. What I'm suggesting is that my
8 discovery is just as important as theirs.

9 THE MAGISTRATE: No question.

10 MR. SHERIDAN: And I have just as much right to
11 go forward expeditiously with my depositions as theirs, as
12 they do.

13 THE MAGISTRATE: It was my impression from the
14 conference call the other day that the depositions in
15 England, which I gather number at least four or five,
16 could probably be scheduled and gotten over with next week.

17 MR. SHERIDAN: Yes.

18 THE MAGISTRATE: And that's why I said I
19 expected that you would be in England next week.

20 MR. SHERIDAN: Well, the two lawyers who are
21 going to be handling those depositions are already there,
22 and have been since the beginning of this week.

23 THE MAGISTRATE: In other words, what you're
24 proposing is simultaneous depositions.

25 MR. SHERIDAN: Sure.

1 THE MAGISTRATE: That's what I'm trying to find
2 out, Mr. Sheridan.

3 MR. SHERIDAN: Yeah.

4 THE MAGISTRATE: And I'll hear from counsel as
5 to whether or not that's proper and appropriate in just a
6 minute. Mr. Bowman, yes, go ahead.

7 MR. BOWMAN: I have a lot of things to say about
8 the deposition scheduling and I'll be happy to provide the
9 Court on all of my thoughts on it now, or at a later point.

10 THE MAGISTRATE: Go ahead. We might as well
11 settle this now.

12 MR. BOWMAN: All right. Let me begin by way of
13 some background. As the Court is aware, this is an
14 insurance coverage case, and there have been a number of
15 such cases in this Court before. They generally turn out
16 to be large, complicated cases. They take a lot of time.

17 The Court is no doubt familiar with the Keene
18 case that took seven years to resolve. It may be aware of
19 the IBC case now pending that's been pending for other
20 three years. The discovery in this case, real discovery
21 really began in September in this case and we've been
22 proceeding, we believe, apace, first with the documentary
23 discovery, then with the 30(b)(6) deposition, and we
24 provided the names of people that we wished to depose.
25 Originally it was a list of 23; we're trying to narrow

1 that down to see if we can negotiate some smaller number.

2 As to the depositions of the people in England,
3 we have to divide them into two categories. First, there
4 are former employees of Turner & Newell and in order to
5 obtain the testimony of former employees of Turner &
6 Newell without a very complicated procedure, as the Court
7 may be aware for non-party witnesses in other countries,
8 we have attempted to negotiate with Turner & Newell. They
9 have agreed, at least under some circumstances, they would
10 produce a witness named Tom Kemberton in England for us to
11 depose. In fact, at one point they noticed his deposition.

12 As to the present employees, we have negotiated
13 as well. While we believe that they would have an
14 obligation to produce those present employees in
15 Washington, because they brought the case here, under some
16 scenarios of our negotiation we have agreed that, since
17 they're there, we have no real reason to want to disrupt
18 Turner & Newell's ongoing operations, that it would make
19 more sense for a few lawyers from here to go over there
20 than a whole lot of employees from there to come over here.

21 Having said that, we are very concerned about
22 the timing of all those depositions. We obviously would
23 like to take one trip. We obviously would like to be in a
24 position so that we would not have to repeat any of the
25 depositions or go back to follow up, and therefore we

1 would like to get as much information and documents and
2 everything else as we can before we go over.

3 This raises my concern about doing those
4 depositions next week. Frankly, we don't believe that we
5 have all the information that we would want or need in
6 order to make that a logical and efficient procedure.
7 Turner & Newell has -- and they have every right to -- but
8 they've stuck very hard to this January 15th discovery
9 cut-off.

10 My suggestion to the Court is that there is
11 nothing magic about that cut-off in the least, and that
12 where parties have been proceeding with discovery -- as we
13 have. This is not a case where we've been delaying.
14 We've taken depositions. We've done -- there's been a lot
15 of documentary discovery on both sides. We've had
16 disputes; we've tried to resolve those disputes.

17 THE MAGISTRATE: You deny being a grasshopper,
18 in other words.

19 MR. BOWMAN: I beg your pardon?

20 THE MAGISTRATE: You deny being a grasshopper.

21 MR. BOWMAN: Oh, we certainly deny that,
22 although we --

23 MR. : He can't sing at all, Your
24 Honor.

25 THE MAGISTRATE: Okay.

1 MR. BOWMAN: We enjoyed, and were amused, by the
2 reference in the papers. But we think that the record would
3 indicate that, in fact, we have proceeded -- keeping in mind
4 the fact that all law firms and all lawyers are busy, that
5 it's difficult to work out everyone's schedule at one time
6 and, as is always the case, and as Magistrate Burnett has
7 noticed many times in IPC, there has to be a due regard,
8 both for the lawyers' convenience and the fact that all
9 lawyers have other cases.

10 But, be that as it may, I can tell you that, at
11 Hogan and Hartson, the people working on this case have been
12 devoting an awful lot of time to this case. The major
13 problem that we face now, in terms of the depositions of Mr.
14 Pemberton in England, is that Mr. Pemberton had the role of
15 -- I don't know his exact title, but the role he fulfilled
16 was essentially that of a risk manager for Turner & Newell.
17 And what he did was he attempted to find coverage on the
18 American market for Turner & Newell.

19 In order to do that, he worked through an
20 insurance broker, Fred S. James, which is located in New
21 York.

22 THE MAGISTRATE: Mr. Schaller, you're a good
23 writer. I just got --

24 MR. SCHALLER: Good.

25 MS. MEDAGLIA: Excuse me for being late, Your

1 Honor.

2 THE MAGISTRATE: Certainly, Ms. Medaglia.

3 MR. BOWMAN: We attempted to find out as much as
4 we could. We got documents from Turner & Newell indicating
5 who it was at Fred S. James, and what types of documents
6 Fred S. James might have, what types of documents Turner &
7 Newell might have. We learned that the account executive
8 there was a man named Arthur Derrick. We checked with Fred
9 S. James; he was no longer there. Nobody at Fred S. James
10 could tell me where to find him. Then we learned that Mr.
11 Sheridan knew, and then we found out ourselves by other
12 means he's now in Pennsylvania.

13 At that point, we decided well, what we'd better
14 do is notice a deposition of Fred S. James and subpoena the
15 relevant records, which we did. I spoke last night with an
16 attorney representing Fred S. James, a woman named Lynn
17 Sussman I believe -- Fishman. Fishman, from Shane Gould.
18 She told me that they had received the subpoena, although
19 they did not receive it as early as we thought it had been
20 served.

21 She told me that the quantity of the documents
22 that would be potentially responsive would be extremely
23 large. That it was six or seven file cabinets -- not file
24 drawers, but file cabinets. That they had not yet reviewed
25 those documents to see which were responsive or which may be

1 privileged. She said that her personal schedule was busy
2 and that she had a trial next week. She was speaking to the
3 partner to see if other people could be freed up to help
4 with it, but her estimate was that these documents would not
5 be available for our review and, since Turner & Newell
6 apparently has also been looking for these documents for
7 their presumably simultaneous review until approximately
8 January 23rd.

9 That being the case, and it being the case that we
10 believe that all parties should review those documents
11 before Mr. Pemberton is deposed, otherwise it is inevitable
12 that we're going to see stuff in there that would make us
13 think, "Gee, we really ought to ask him about this and this
14 and this document," we would suggest putting off those
15 depositions until some time in February and just as soon as
16 we have had an opportunity to review the Fred S. James
17 documents, we will be in a position.

18 The second major concern I have about the England
19 depositions is the issue of what do we do about Mr. Sykes
20 and Mr. Harren, and we would like, if we have the
21 opportunity to depose them, obviously to depose them during
22 that very same trip, unless Turner & Newell would be willing
23 to produce them at some later point in the United States.
24 But assuming that they were to be deposed in England, we
25 would like a determination, and perhaps we'll get it today,

1 or soon after this hearing, as to whether or not we have the
2 right to depose them, because they have potentially relevant
3 information regarding this case.

4 THE MAGISTRATE: Are they the witnesses that you
5 would expect to speak to the issue of the reserves and --

6 MR. BOWMAN: Reinsurance? No, Your Honor.

7 THE MAGISTRATE: Yes. They are --

8 MR. BOWMAN: The reserve and reinsurance issue is
9 an issue that has been raised by the Plaintiff. The
10 Plaintiff would like the Defendant insurance companies to
11 produce information relating to reserves, reinsurance and
12 other insureds.

13 THE MAGISTRATE: Yes. I understood that it was
14 the Plaintiff's position --

15 MR. BOWMAN: Okay.

16 THE MAGISTRATE: -- that this would be relevant,
17 or would lead to relevant material. I'm just trying to get
18 sorted out why the objection to deposing Harren and Sykes.

19 MR. BOWMAN: Okay, let me --

20 THE MAGISTRATE: Since, as I say, it was --

21 MR. BOWMAN: Let me give you my view on that, and
22 then Mr. Sheridan can give you his view.

23 THE MAGISTRATE: And then I'll hear from --

24 MR. BOWMAN: Our view is this, that what we have
25 here is a case where Turner & Newell wants coverage, that

1 is, they want the defense and indemnity 80 underlying
2 building claims, claims where school districts or
3 governments claim that asbestos in their buildings is
4 causing a health hazard and therefore should be replaced or
5 encapsulated or something like that.

6 In light of that fact, we believe that we have the
7 right to find out just as much as we can about those
8 underlying cases. Now, it's true that we've received the
9 pleadings that have been filed in open court in those cases,
10 but we believe there's a lot more information that is
11 available relevant to those underlying cases and, more
12 important, relevant to the question of whether there is
13 coverage, in other words, whether the facts alleged or
14 proven in those cases constitute what is defined as property
15 damage within our policies, and there is a very specific
16 definition of property damage, and if so, whether that
17 property damage occurred during our policy periods.

18 Our clients provided insurance for only three
19 years: 1980 to 1983. Other carriers who are not, at least
20 yet, part of this case, provided coverage before and after.
21 And so we need the underlying information to find out
22 whether it's property damage, in other words, whether there
23 is an allegation or proof of actual physical destruction of
24 property or loss of use of that property -- that's how
25 property damage is defined -- and, if so, whether it's in

1 our policy period.

2 Now, all those underlying claims information,
3 including, I would submit, letters back and forth between
4 the lawyers in the underlying case to Turner & Newell, we
5 think is going to contain relevant information about those
6 issues. In other words, the letter may say, "Well, in this
7 case, we've established that the asbestos was incorporated
8 into the building on such and such date, we've established
9 that they haven't really done anything to the building yet
10 but they would like to do something to it so that, in our
11 view, there would not be a loss of use as that is defined in
12 the policy."

13 There are two other issues that we're interested
14 in. In each of these policies, coverage is extended only to
15 the extent that the damages sustained was not expected or
16 intended by the insured. And so the issue, in our minds, is
17 whether or not Turner & Newell reasonably could have
18 expected the alleged damages that have been caused and
19 alleged in these building claims.

20 Now, what that means is this. We want to look at,
21 number one, what was the state of Turner & Newell's medical
22 knowledge? Did they know at the time they incorporated the
23 asbestos into the buildings that asbestos presented at least
24 a potential health hazard?

25 Number two, what did they know about the products

1 that were incorporated? We're told that the major product
2 involved in these building claims is a product called
3 sprayed limpet asbestos, something that is actually sprayed
4 on to walls and girders and floors and ceilings, as a
5 fire-proofing and as an insulation. We'd like to know what
6 they knew about that product at the time that it was sprayed
7 and at later times. Did they know that it would break up
8 and become into dust, or freeable is, I think, the term they
9 use, that it would flake off, that in fact it might present
10 a health hazard? If so, and we don't know the answer to
11 that, but if so, then it might be that those damages could
12 have been reasonably expected by Turner & Newell and,
13 therefore, our coverage, which was provided much later,
14 would not apply.

15 This issue presents an issue that, we believe, is
16 quite similar to a case that I'm familiar with, and I know
17 this Court is familiar with because awhile ago I stood up
18 and made the same argument with respect to the Schmid case,
19 that there was a manufacturer, an IUD, and we said that if
20 Schmid knew of the dangers and still marketed the IUD, then
21 perhaps -- and again we're only talking about discovery, so
22 we're only talking about potential relevance -- then perhaps
23 that would show that Schmid reasonably expected that the
24 injury might occur.

25 We think this case is quite similar to that and,

1 as the Court may recall, it ruled that that discovery, with
2 some limitations, was available and it was permissible for
3 us to seek it. There, as you may recall, the Court stopped
4 the discovery. They said, "Okay. Your policy ended in
5 1975, so anything that happened after 1975 isn't going to be
6 relevant." Here, our policies ended in 1983, so a similar
7 restriction, we believe, as the Court imposed in Schmid,
8 would be appropriate. Thank you.

9 MR. SCHALLER: Your Honor, I wonder if I might be
10 heard briefly --

11 THE MAGISTRATE: Certainly, Mr. Schaller.

12 MR. SCHALLER: -- on the same side of the issue.
13 Since Mr. Bowman has already ably argued today and has
14 argued to you on previous occasions some of the matters that
15 he discussed, I won't add to them. Let me say, however,
16 that I agree with him with respect, particularly, to his
17 observation that there is no magic to this discovery cut-off
18 of January 15th. Not only do I agree with that, I feel that
19 in order to prepare this case properly, there's black magic
20 to that discovery cut-off date, if we try to adhere to it.

21 Your Honor, I think, has seen very clearly just
22 with respect to the very limited issue of the privilege
23 list, that these are difficult and complex issues. We
24 certainly have no objection to working with counsel for
25 Turner & Newell, but these are not the kind of things that

1 can be worked out under the kind of Damaclean pressure that
2 is applied if you've got to take 30 depositions her and in
3 Britain between now and the 15th of January.

4 It seems to me that if nothing else is clear by
5 now it's that, because of the complexity of these issues,
6 and because of the inter-related nature of the various kinds
7 of discovery we have to take, it's necessary to prioritize
8 and to order that discovery, and you have to do that in a
9 rational fashion. You can't do it by saying we're going to
10 take this deposition day to day and then we'll go to the
11 next one and we'll take all these depositions in Britain
12 and, meanwhile, in Boston we'll take the others and we'll
13 take some down here on double or triple track.

14 It can't be done, and it seems to me that Mr.
15 Bowman has made the case with respect to what we need by way
16 of prerequisite discovery before we take those London
17 depositions at all. I think Your Honor would agree with us
18 that it makes sense to take all of them on one trip rather
19 than be going back and forth across the Atlantic and, of
20 course, the whole business of Harren and Sykes is yet
21 another complication, for which Your Honor may want just
22 argument today, you may want briefing, what have you.

23 But I would suggest to Your Honor that your
24 anticipation that we will be in England this coming week,
25 while I'd love to get to the Harrod's sale, I don't think

1 we'll do much for this case, and I would ask that Your Honor
2 would reconsider that in the light of what Mr. Bowman said,
3 and in the light of my comments.

4 THE MAGISTRATE: Mr. Sheridan?

5 MR. SHERIDAN: I have a lot to say, Your Honor.

6 THE MAGISTRATE: And I'm not cutting other counsel
7 off, please, gentlemen, don't misunderstand me.

8 MR. SHERIDAN: The first observation I'd like to
9 make, Your Honor, is that nobody ever said that the January
10 15th date was magic, but that date was established by Judge
11 Greene in all seriousness in a court order when everybody
12 had ample opportunity to make all the arguments that they're
13 making now, and actually did make most of the arguments that
14 they're really making now, about how much they had to do and
15 how difficult it would be to do it, and they've basically
16 just ignored that court order.

17 They did the bare minimum that they thought they
18 could do to get by to make it look like they had done a
19 little bit of discovery so they could come in and get a
20 further extension of the discovery deadline, and the best
21 example of that I can think of is what Mr. Bowman has just
22 been talking about with Fred S. James.

23 The Fred S. James name is right on the face of
24 their policies. They have known --

25 MR. SHERIDAN: And you told me the other day, Mr.

1 Sheridan, that you had tried unsuccessfully for months --

2 MR. SHERIDAN: That's right.

3 THE MAGISTRATE: -- to get this material from the
4 James company.

5 MR. SHERIDAN: Well, not for months, but for
6 weeks. I've been trying to get it, informally. I've called
7 them up. I've said, "I'd like to take a look at the files.
8 I would like to do it in the most inexpensive way possible.
9 I'd like to look at them." But they didn't do that. They
10 served Fred S. James with a subpoena Tuesday, after the
11 conference with you. Fred S. James wasn't served until the
12 6th of January.

13 They had noticed Mr. Pemberton's deposition for
14 January 14th. They knew that they weren't going to have
15 Fred S. James documents in order to take his deposition,
16 there's no way they were going to have eight or ten file
17 drawers -- I mean --

18 THE MAGISTRATE: File cabinets.

19 MR. SHERIDAN: Excuse me. File cabinets of
20 documents on that kind of timetable. And one of the very
21 first things they should have done was to notice Fred S.
22 James's deposition. They could have done that last summer.
23 The most obvious thing in the case to do would be to go to
24 the broker and say, "Let's take a look at the files." They
25 should have done that in July, in August. They certainly

1 should have done it in September when Judge Greene set the
2 discovery cut off, or in October or November. They didn't.
3 They waited until the discovery deadline was within hailing
4 distance and then they didn't even serve the deposition
5 subpoena until January 6th.

6 For them to say that the Pemberton deposition
7 shouldn't go forward because they don't have the James --
8 for them to use that as an excuse -- the message in that is
9 that we will be rewarded for our delay and that the
10 Plaintiffs will be penalized for having done what they
11 thought they needed to do within the deadline that the Court
12 established.

13 It's just not fair for them to be using Fred S.
14 James as a justification for putting off especially Mr.
15 Pemberton's deposition who they themselves have acknowledged
16 is probably the most important deposition in the case. We
17 have been telling them for weeks that he could be available
18 on the 8th and 9th of January. We encouraged them to take
19 it at that time. We told them on several occasions that it
20 could be done then. They didn't -- they didn't take us up
21 on the offer, they didn't take us up on the offer. Finally
22 we said, "Well, he's going to be available then. We'll take
23 it." So we noticed his deposition to begin on the 8th and
24 continue on the 9th, we expected, of this week.

25 And after the lawyers had left on Sunday to come

1 down so they could -- to go to England so they could take
2 the deposition, on Monday we got a call that there was an
3 emergency application, the discovery deadline is expiring
4 and they don't want to have to go to England -- they make
5 England sound like it was a trip to the moon. England is
6 pretty close by air. There's no particular reason why a
7 second trip to England would be the worst thing in the world.

8 There are four witnesses over there whose
9 depositions they, themselves, have noticed for next week who
10 are all available next week: Monday, Tuesday, Wednesday,
11 Thursday, right up to the 15th which is the discovery
12 deadline. They have four witnesses who are ready to go.
13 There are four lawyers over there who are prepared to go
14 forward, and basically their only excuse for not wanting to
15 go is that they haven't seen the Fred S. James documents.

16 And what are the Fred S. James documents? They
17 are the documents that Fred S. James basically has already
18 sent to them. All the applications and drafts of policies
19 and memoranda back and forth, all the stuff that we gave to
20 Fred S. James which we've produced to them, and all the
21 stuff that Fred S. James gave to them, which they have in
22 their own file. Basically it's already out on the table. I
23 will concede there may be some things in the Fred S. James
24 files which people haven't seen yet. I doubt if it's very
25 significant. It's pretty speculative whether it's even

1 there or not, and it's no justification considering the
2 delay that's been involved in even starting the process of
3 going after James documents for postponing what are clearly
4 important -- or an important deposition of Mr. Pemberton,
5 who's available now.

6 The other issue they talked about is Mr. Sykes and
7 Harren. If Mr. Bowman wants Sykes and Harren because they
8 have something to say about -- on the definition of property
9 damage or the timing of the occurrence, I think that's
10 absurd. These people are business people who don't know
11 anything about the definition of property damage under
12 insurance policies. They have nothing to do with these
13 insurance policies. Their names aren't mentioned in any of
14 the insurance documents.

15 In Mr. Bowman's papers he makes what seems to me
16 the only colorable argument, which is they may have some
17 knowledge about health risks associated with asbestos, and
18 they make the argument that, well, the policies may be
19 invalid because you didn't tell us about the health risks,
20 especially about limpet. These men didn't work for the
21 company that made limpet. They worked for a completely
22 different subsidiary.

23 Limpet is not what -- the sprayed limpet asbestos
24 that -- Mr. Bowman's right; that's basically the heart of
25 this case. It's a sprayed asbestos product. That sprayed

1 product was banned by the EPA in the United States in 1973.
2 It's been illegal to sell asbestos spray products since that
3 time. There hasn't been any asbestos-containing limpet sold
4 by Turner & Newell, or anybody else that I'm aware of, since
5 the EPA banned it.

6 These policies were taken out six or seven years
7 -- in '79. The policy periods are '80, '81, '82. The
8 product was long gone at that point, and the health risks
9 were well-known. If he wants to ask them, "Did you know
10 about the health risks about asbestos?" the answer is, "Of
11 course. Everybody knew about the health risks of
12 asbestos." Not only did everybody know, they knew.

13 In our annual reports, which we gave them when we
14 took out the policies, right there in the report it reported
15 that we were subject to asbestos personal injury claims all
16 over the United States amounting to -- we didn't know what
17 the exact number was, because some of the complaints don't
18 even tell you what the ad damnum is, but in those cases
19 where an amount was stated, they added up to \$2.8 million
20 worth of claims. Right in our own annual report.

21 This company, these companies, wrote what is
22 essentially asbestos insurance for an asbestos company
23 knowing that that asbestos company had asbestos cases
24 against it at a time when everybody knew that there were
25 health hazards associated with asbestos. Indeed, the big

1 product involved had been banned since 1973.

2 They knew everything they needed to know or wanted
3 to know about health risks associated with asbestos, which
4 raises the question, why do they want to ask Mr. Sykes and
5 Mr. Harren did they know something about the health risks
6 associated with asbestos? And the answer of that is a far
7 more sinister one than Mr. Bowman would have this Court
8 believe.

9 What Mr. Bowman and his clients would like to do
10 is to increase Turner & Newell's exposure in underlying
11 personal injury and property damage cases. It doesn't take
12 a lot of figuring out to know that if you start taking
13 depositions of witnesses of asbestos companies and asking
14 them questions about health hazards associated with asbestos
15 that it can't possibly do the asbestos company any good. If
16 they say something that's helpful, everybody disregards it.
17 And if you get them to say something that isn't helpful,
18 everybody's going to seize on it.

19 In fact, if these insurance companies were
20 honoring their defense obligations, as they should under
21 these policies, the last thing in the world they would want
22 to have happen is for anybody on behalf of T&N to have to
23 give depositions on health hazards. If the issue is, did
24 they know about the health hazards associated with limpet,
25 the answer is, of course they did. It's a product that had

1 been banned by the EPA.

2 So what they're really trying to do is they're
3 trying to up the ante. They're trying to make -- they're
4 trying to increase T&N's exposure in underlying cases in
5 order to use that as a strategic lever against Turner &
6 Newell with respect to coverage. Back off on the insurance
7 coverage cases or we're going to air all the dirty laundry.
8 We don't know what's out there, but we're just going to
9 start deposing witnesses and we'll keep asking them all
10 questions about knowledge of health risks and once it's out
11 on the record all those plaintiffs are going to get ahold of
12 it and Turner & Newell is going to have to worry about
13 what's coming out on the record.

14 This is not a good faith request on the part of
15 the insurers. They are trying to hurt us with this, and it
16 is completely meaningless in terms of any of the issues in
17 this case. The issue of validity of this policy is a
18 complete red herring. They have defended under this
19 policy. They have defended personal injury cases under
20 these policies.

21 The last question asked of Mr. Warren, of Turner &
22 Newell Industries at his deposition, was had they been
23 defending Flexatalic, which is one of the other insureds
24 under this policy, for personal injury cases, and the answer
25 is yes, they have. They have -- the reservation of rights

1 letters, at least the ones that came, not from the lawyers
2 but from the business people, don't say your policies are
3 invalid because you didn't tell us about health risks.
4 There is no way that the business people would contend that,
5 because they knew that they were getting -- they were
6 insuring asbestos health risks.

7 That's a bogus issue. It's completely - they have
8 acknowledged the validity of these policies. They have
9 defended personal injury cases under these policies, and
10 they knew perfectly well that they were insuring an asbestos
11 company without an exclusion for asbestos. Most other
12 companies to the time were refusing to write policies like
13 this. We went to Canadian Universal because they were one
14 of the few companies which, by 1980, was writing any
15 asbestos coverage at all. That was -- they were like
16 experts in writing insurance for asbestos companies.

17 You couldn't just go to Fred S. James -- Fred S.
18 James didn't just go to Canadian Universal. They had to go
19 to Lovelace and Company down in Atlanta, which was like a
20 wholesaler and a specialist in placing difficult risks.
21 This was not something where they just went out and got a
22 policy.

23 So the Sykes and Harren -- I want to call it a red
24 harren, but it's -- it's a --

25 THE MAGISTRATE: That would be too much, Mr.

1 Sheridan.

2 MR. SHERIDAN: It would be a little bit too much
3 after the ant and the grasshopper, but I did, and I
4 apologize. It's just a complete waste of everybody's time
5 and all they're trying to do is use it as a bludgeon.

6 THE MAGISTRATE: Am I to infer from what you're
7 saying that you are willing to stipulate that at the time
8 the applications were made and the policies were written
9 that your clients were familiar with the asbestiosis problem?

10 MR. SHERIDAN: Asbestos was a known health hazard.

11 THE MAGISTRATE: And that was known to your
12 clients at that time?

13 MR. SHERIDAN: Yes.

14 THE MAGISTRATE: Anything else? Not necessarily
15 to Sykes and Harren, but to the relevant people at the
16 company.

17 MR. SHERIDAN: That's right.

18 MR. BOWMAN: Your Honor, I'm compelled to leap to
19 my feet with respect to one thing that Mr. Sheridan has said
20 today, anmd it's something that's brand new to me and
21 frankly I'm shocked because I never heard it before from him
22 informally, I've never seen it in any papers that have been
23 filed, and it's the suggestion that somehow the insurers are
24 out to get Turner & Newell.

25 THE MAGISTRATE: Oh.

1 MR. BOWMAN: In my view, that's an outrageous
2 suggestion. It's completely false.

3 THE MAGISTRATE: Mr. Bowman, don't worry about a
4 courtroom hyperbole. I'm an old trial lawyer.

5 MR. BOWMAN: Let me say this, though, as to that.
6 With respect to information that we are seeking that may
7 tend to show that Turner & Newell reasonably might have
8 expected the alleged damage that has occurred, there is a
9 protective order in this case. We have abided by that
10 protective order faithfully. We intend to abide by that
11 protective order.

12 The last thing that we want to do is somehow
13 increase Turner & Newell's exposure. The last thing that we
14 would do would be to somehow make that information available
15 to plaintiffs' lawyers in underlying cases. All we want to
16 do is to see whether or not we have a policy obligation to
17 begin with. And the fact that the -- while the injury
18 claims may have been defended under these same policies is
19 entirely irrelevant, because here we're talking about a
20 completely separate animal: property damage cases. A
21 completely different definition. Completely different
22 exclusions that may or may not apply.

23 That's what we're looking into, and I see no legal
24 suggestion that we're somehow estopped from denying coverage
25 in this case because, in our view, these claims, at least

1 the information we've received so far, do not demonstrate
2 that there is property damage as defined in the policies,
3 either alleged, which may trigger a duty to defend, or
4 proven, which may trigger a duty to indemnify.

5 THE MAGISTRATE: Well, it seems to me you are
6 talking about apples and oranges here, Mr. Bowman. On the
7 one hand, your original representation was that you wanted
8 to establish, as you attempted to in the Schmid case,
9 knowledge on the part of the people seeking insurance, that
10 conceivably might operate to invalidate the policies written
11 by your clients. I understand from Mr. Sheridan that they
12 are willing to stipulate that they possessed that knowledge
13 at the relevant times.

14 MR. BOWMAN: I don't think they're willing to
15 stipulate to what we would seek to prove if the evidence
16 is --

17 THE MAGISTRATE: All right, what would you seek to
18 prove?

19 MR. BOWMAN: What we would seek to prove is that
20 at the time this was installed and at the time the policies
21 were written, Turner & Newell was aware that --

22 THE MAGISTRATE: Now you are talking about two
23 entirely different things.

24 MR. BOWMAN: No, no, no.

25 THE MAGISTRATE: Installation, if this has

1 correctly been represented to me, installation ceased by
2 order of the EPA in 1973.

3 MR. BOWMAN: Let me say this, then, Your Honor, we
4 have to get to an underlying premise of Turner & Newell's
5 case, and that is that, even though all of this activity
6 ceased by 1973, insurers who issued policies in 1980 and
7 1983 are somehow responsible for any alleged damage that
8 occurred as a result of the incorporation in the late '50s
9 and during the '60s. And if Turner & Newell is willing to
10 drop what we think is an absurd suggestion that somehow the
11 later people are responsible for that damage, then we'd be
12 willing to -- you know, that would be the end of the case as
13 far as we're concerned, but that's not what's happening here.

14 Turner & Newell says, "You, Mr. Insurer in 1980,
15 '81 and '82 are responsible for these damages." So, as long
16 as that's the case, the fact that --

17 THE MAGISTRATE: All right. Now, how do you
18 expect to get anything from either Sykes or Harran that's
19 going to support that position? I have a commitment from
20 Mr. Sheridan that they will stipulate that as of the time of
21 the original applications in '79, and I presume going on
22 through '83, Turner & Newell were aware of the underlying
23 hazards of asbestos and, as he quite understandably says,
24 although I didn't ask him to include it in the stipulation,
25 I guess everybody in the community was.

1 MR. BOWMAN: Well, now, let me --

2 THE MAGISTRATE: Now you're hopping back to '73,
3 and that's something entirely different.

4 MR. BOWMAN: Let me get back to my original
5 point. We got offtrack because I mentioned installation as
6 well as at the time of the policies. Let me focus just at
7 the time of the policies.

8 I strongly doubt that Mr. Sheridan is going to
9 stipulate that, as of 1979 or 1980, Turner & Newell was
10 aware that it had in buildings around this country an
11 asbestos product that was going to flake, chip, peel, become
12 dusty and get into the air and cause injury to people in the
13 buildings, or potentially cause injury to people in the
14 buildings, and require that that asbestos be removed or
15 encapsulated.

16 Now, if they're willing to concede that, then I
17 think that we would accept that because that would prove
18 that they reasonably expected the alleged injuries to have
19 occurred, and that's -- that's what we're trying to improve.

20 MR. SHERIDAN: They've changed what they said they
21 were going to try to prove.

22 THE MAGISTRATE: Yes.

23 MR. SHERIDAN: In their papers, they said they
24 wanted Messrs. Harren and Sykes because of asbestos health
25 risks. And they know something about asbestos health risks

1 and, you know, Dr. Selikoff's report, which is sort of a
2 landmark in the field, in '64, I believe it was, and as I
3 say, the ban was in '73.

4 What he's now asking us to do is to stipulate that
5 in 1979 we knew that the building cases were going to be filed
6 against us in 1982. A word of background about what
7 everybody knew about building cases.

8 The statute, the asbestos -- I can't remember the
9 full name of it. Something like the Asbestos Control in
10 Schools Act which the United States Government promulgated.
11 It promulgated it in 1980. That statute directed the
12 Attorney General to do a study of asbestos in schools, which
13 was finally published in 1981. His report came out -- I
14 think it was late 1981, and said, you know, there is a
15 problem here and there are various legal theories that
16 people ought to pursue, but it's not the job of the
17 Government to clean up the schools, it's really the job of
18 the individual schools to pursue whatever remedies they have
19 in the courts against the manufacturers, et cetera.

20 So the first asbestos-related property damage case
21 was in 1982 and basically I would say that before the
22 Attorney General's report, I don't know if anybody who
23 really expected property damage cases to come down the
24 pike. Certainly Turner & Newell didn't expect property
25 damage cases. They would not concede, even today, that the

1 asbestos in buildings, that people are trying to rip out and
2 remove, is a health hazard.

3 What we're prepared to stipulate to is that there
4 is a known health hazard from asbestos, but we're not
5 prepared to stipulate that there's a hazard in buildings
6 that simply contain asbestos. Now, that's what Mr. Bowman
7 is asking for. Even today, I don't think that's the case
8 and a good debate, a good vigorous debate, among the experts
9 about whether not indeed there is such a health hazard, or
10 whether the health hazard is of such a degree that it merits
11 doing anything about it.

12 But the cases didn't even arrive until 1982 and
13 these policies were taken out in -- and that's when the
14 exclusions all came in. After 1982, the building cases came
15 in and all the insurance companies started putting asbestos
16 personal injury and property damage exclusions in their
17 policies.

18 So basically, they knew and we knew, back in '79
19 and '80 and '81, that there was a health hazard from
20 asbestos. Nobody knew exactly what the extent of it would
21 be, what the personal injury cases would be or what other
22 kind of cases there might have been, but they knowingly
23 undertook a known asbestos risk. They wrote policies for an
24 asbestos company.

25 Right in their annual report they say, you know,

1 Turner & Newell Asbestos Company. We're trying to reduce
2 our dependence on asbestos products and we've gotten it down
3 to something like 55 percent are nonasbestos products. But
4 they know that -- they knew that Turner & Newell had been in
5 the asbestos business for its entire corporate history. For
6 them to suggest that they didn't know enough about asbestos
7 to be able to properly analyze the potential risk, and
8 that's all it was in '79 and '80 and '81, that maybe
9 Plaintiffs' lawyers would maybe start bringing property
10 damage cases in 1982, you know, to imply that Messrs. Sykes
11 and Harren have something relevant to say on that issue is
12 exceedingly farfetched, exceedingly farfetched.

13 MR. SCHALLER: Your Honor?

14 THE MAGISTRATE: Yes, Mr. Schaller.

15 MR. SCHALLER: Your Honor, I can't leap to my feet
16 -- I'm too old anymore -- but I would like to be heard
17 briefly on that particular point. It seems to me that Mr.
18 Sheridan has made the dichotomy very clear. This is, after
19 all, a property damage case, a building case, and it bakes
20 no loaves, as far as we're concerned, for Mr. Sheridan to
21 stipulate that they will agree that everybody knew there was
22 a health hazard from asbestos as of the time these policies
23 were written. Of course. Everybody knew that if you worked
24 with asbestos, if you fabricated it, if you installed it,
25 you were at risk.

1 But what most people didn't know, including these
2 insurance companies, is that somewhere down the line people
3 were going to claim that they were at risk because there was
4 asbestos installed in buildings in great, huge amounts, and
5 that people could claim to be affected by that. The only
6 people who really knew very much about that were the people
7 in the asbestos industry, and that's why this investigation
8 began to be undertaken in 1981, very late in the day.

9 But that investigation was undertaken because some
10 people did know about it, and the people who knew about it
11 were the people such as Mr. Sykes and Mr. Harren, and that's
12 why we seek to depose them. This is a building case.

13 I know Your Honor is used to trial lawyer's
14 hyperbole, but notwithstanding that, it seems to me that the
15 argument that what we're doing is bludgeoning Turner &
16 Newell by saying, "If you don't back off these insurance
17 coverage cases, we're going to hang out all the dirty
18 laundry," gives new meaning to the old expression about
19 cutting off your nose to spite your face. After all, if we
20 lose this case, we're going to be paying those underlying
21 cases, and it seems to me it makes no sense whatsoever to
22 say, "We're going to blow those out of proportion, up your,
23 increase your, exposure so you back off." That doesn't make
24 any sense at all.

25 And moreover, this particular problem has been

1 confronted by insurance carriers in every toxic tort case,
2 every delayed manifestation case that has ever been
3 brought. It's easily handled by precisely the device that
4 Mr. Bowman suggested, and that is the protective order
5 that's in place here.

6 Finally, we are not suggesting that London is
7 Mars. We're all modern day lawyers and we do travel long
8 distances. But, Your Honor, it ain't Rockville either, and
9 I'm still not very used to going to London very often. It
10 is a long trip, and it seems to me --

11 THE MAGISTRATE: I remember my last one, Mr.
12 Schaller.

13 MR. SCHALLER: Well, my last one was two years ago
14 and that was also my first one, so I'm not quite such an
15 international traveller as to say that we can just dash over
16 there all the time.

17 THE MAGISTRATE: All right. Counsel, first of
18 all, I --

19 MR. SHERIDAN: Your Honor, may I add one more
20 thing?

21 THE MAGISTRATE: Very briefly, please, Mr.
22 Sheridan.

23 MR. SHERIDAN: It will be very brief but I just
24 want to say on this general subject that, you know, what's
25 sauce for the goose ought to be sauce for the gander. If

1 they are going to seriously contend that -- they're going to
2 press this issue of invalidity, we knew about the hazards of
3 asbestos relating to -- and the prospect for property
4 damage, they should have to disclose that too, and we should
5 have full and complete disclosure of all of the insurance
6 company's files relating to their knowledge of the hazards
7 of asbestos and their knowledge of the likelihood of
8 property damage cases --

9 THE MAGISTRATE: You haven't already sought it?

10 MR. SHERIDAN: Pardon me?

11 THE MAGISTRATE: You haven't already asked for it?

12 MR. SHERIDAN: I have and they've refused to tell
13 me anything about property -- or personal injury cases.
14 They don't want to tell me anything about other insureds.
15 They've cut me off. My motion to compel is on that subject.

16 THE MAGISTRATE: Your motion to compel will be
17 denied out of hand because of your failure to comply with
18 Rule 207. It will be denied without prejudice to your
19 renewing any appropriate parts of it. But I cannot deal
20 with it the way it's drawn. It does not comply with the
21 local rules. If I had seen it a little earlier, which
22 unfortunately I did not, I would have denied it before the
23 Defendants went through the exercise of responding to it.

24 MR. SHERIDAN: I'm not sure I follow what Your
25 Honor --

1 THE MAGISTRATE: Rule 207 is very specific and
2 very explicit in its requirements. It says that if you have
3 asked a question and the response which you receive is, in
4 your view, for any reason, inappropriate: too vague,
5 claiming privilege that doesn't exist, whatever the reason,
6 you are to A, repeat the question; B, repeat the response;
7 and C, make your argument. Then you go on to the next
8 question that you have some problems with, and you do the
9 whole thing all over again.

10 Read 207. That's why I say there's a free copy of
11 the rules available in the Clerk's Office.

12 MR. SHERIDAN: I'm talking now, Your Honor, about
13 document demands?

14 THE MAGISTRATE: That also applies to document
15 demands.

16 MR. SHERIDAN: We have asked for this information
17 in countless ways on countless --

18 THE MAGISTRATE: Counsel, you're going to comply
19 with Rule 207 or you're going to stand on the denial. I'm
20 telling you now. I cannot deal with discovery of this
21 magnitude when the demanding documents do not conform with
22 the local rules. That rule was drawn for one very specific
23 purpose, and that is to enable the presiding judicial
24 officer to rule on each question appropriately and in order
25 and with some understanding of the issues which are raised

1 by the question and by the objection.

2 Your motion to compel does not permit me to do
3 that, and accordingly it will be denied out of hand, but it
4 will be denied, as I say, without prejudice, for leave to
5 renew it in the appropriate form.

6 MR. SHERIDAN: With all due respect, Your Honor, I
7 have a suspicion that you may be referring to their motion
8 to compel.

9 THE MAGISTRATE: I don't think so, sir.

10 MR. SHERIDAN: Okay. I'll just --

11 THE MAGISTRATE: This starts out, "Plaintiff
12 Turner & Newell" and goes from there.

13 MR. SHERIDAN: I stand corrected, Your Honor, I
14 thought we had attached all of the transcripts and the --

15 (BEGIN TAPE DL4-87)

16 THE MAGISTRATE: That is not the answer, sir. You
17 did attach transcripts. That was how I got the information
18 about what I regard as the inappropriate objections which
19 did not permit you to lay the foundation for certain
20 privilege objections. I have reviewed all that material,
21 but your motion in no way complies with the requirements of
22 Rule 207.

23 MR. SHERIDAN: I guess I'd have to say that I
24 wouldn't think that theirs does either.

25 MR. : Your Honor, if I might, I'd like

1 to say that we will attempt to comply with Rule 207. I'd
2 like to get a ruling from you as to the timing for that.

3 THE MAGISTRATE: Ten days. Ten days. Actually,
4 ten days would be Sunday, so you have eleven days.

5 In that connection, counsel, I am prepared at this
6 time to extend discovery until the close of business March
7 2nd. That gives you approximately 45, 46 days in addition
8 to the present week or so which you have left.

9 I would prefer that you go ahead with those
10 depositions in England, get them behind you, except for the
11 two witnesses whom we've been discussing this morning.
12 This, counsel for Defendants, is without prejudice to a
13 further showing as to the need for Harren and Sykes. It may
14 be by the time you are back from England you will have
15 gotten enough information elsewhere, or you will have worked
16 out a stipulation that will obviate the need for deposing
17 those two witnesses. Yes, Mr. Bowman?

18 MR. BOWMAN: Your Honor, could I raise one other
19 issue again --

20 THE MAGISTRATE: Certainly.

21 MR. BOWMAN: -- related to the timing of the trip
22 to England. We agree with Mr. Sheridan that Mr. Pemberton
23 is a very important witness, and, for that reason, would
24 prefer to depose him after we have had the opportunity to
25 speak to other witnesses. In other words, somewhat near the

1 close of the discovery period.

2 THE MAGISTRATE: The order I would say, I would
3 solicit the cooperation of counsel in working out. If you
4 would prefer to depose Mr. Pemberton towards the end of the
5 week, I would seek cooperation of Plaintiff's counsel in
6 trying to schedule that.

7 MR. BOWMAN: Not the end of next week, Your Honor,
8 but near -- sometime in February, as I indicated, once we
9 have --

10 THE MAGISTRATE: Oh you are willing to go back to
11 England. Okay.

12 MR. BOWMAN: I'm sorry?

13 THE MAGISTRATE: You are willing to go back to
14 England.

15 MR. BOWMAN: We are willing to go to England, as I
16 think I indicated, except that we would prefer not to do it
17 next week but to do it sometime in February.

18 THE MAGISTRATE: Well, is Pemberton the only
19 witness you propose to depose?

20 MR. BOWMAN: No, no. Let me make one additional
21 observation and this is part of our motion to compel that we
22 haven't gotten to today. We have been informed by Turner &
23 Newell that five witnesses, not Mr. Pemberton, but five
24 other witnesses, have already been deposed and have given
25 information potentially relevant to the coverage issues in

1 this case, we believe.

2 We have asked for copies of those transcripts. We
3 believe that those transcripts are within the purview of
4 document requests that we have already given. In fact, one
5 of our document requests related specifically to the issue
6 of transcripts.

7 THE MAGISTRATE: Isn't one of them under a
8 protective order in another court?

9 MR. : Mr. Atkinson's is under
10 protective order of this Court.

11 MR. BOWMAN: And what we would suggest is -- they
12 have -- we would suggest that any transcript that we get
13 obviously would be subject to the protective order in this
14 court, and I'm not certain what the protective order
15 regarding Mr. Atkinson's transcript is, but I'm certain
16 that --

17 THE MAGISTRATE: I think I can probably extend it.

18 MR. BOWMAN: I think that's right. As long as
19 these transcripts are subject to our protective order, no
20 use will be made of them, except in connection with this
21 case, and therefore no harm will befall Turner & Newell with
22 respect to the underlying cases as a result of it.

23 However, some of those -- getting back to the
24 original point, some of those transcripts are transcripts of
25 people who are former employees of Turner & Newell, some of

1 whom also live in England at this time. What we suggested
2 at the 30(b)(6) deposition last November was that we would
3 like to depose as few people as possible because we'd like
4 to streamline discovery. Therefore, why don't you let us
5 review those transcripts. If they answer our questions,
6 that's great. We won't have to depose those people. If
7 they don't, then at least it will narrow areas of discovery
8 and at least we will know who it is we believe we need to
9 depose.

10 So in addition to the witnesses that we've already
11 discussed, there may be, after we review the transcripts,
12 other witnesses that we believe it's necessary to depose.
13 Again, as former employees, those depositions would almost
14 certainly be in England and we would like to do it, if
15 possible, in one trip. For that reason, I just wanted to
16 make clear that our strong desire is not to take those
17 depositions in England next week.

18 THE MAGISTRATE: Mr. Sheridan?

19 MR. SHERIDAN: Your Honor, I think -- there's no
20 reason not to have these depositions in England next week.
21 Next week was the date -- was the week they themselves
22 selected. They noticed all these depositions for next
23 week. There's plenty of time for Mr. Schaller to get over
24 to England and to recover from his jet lag and to commence
25 the deposition on Monday morning, which is now four days

1 away. Whether that deposition took place in Washington,
2 D.C. or over in England is not really going to make any
3 difference.

4 On the other hand, we have two lawyers who have
5 been over there all week, trying to take a deposition, have
6 admittedly important witness who they really should have
7 noticed the deposition for earlier but who we finally, in
8 order to make sure that his deposition would get taken
9 before the discovery deadline, finally noticed ourselves.
10 We didn't think we'd have to notice our own deposition, but
11 we did, and we took his deposition in order that we could do
12 it within the timeframe set by the Court.

13 There are other witnesses over there, they can be
14 available next week, and there really isn't any reason -- I
15 mean, it would be very nice in discovery if you could always
16 do everything last, you know, you'd always have all the
17 documents you need for each individual witness, but it just
18 doesn't work that way, and essentially that's what Mr.
19 Bowman wants to do. He wants to get all the Fred S. James
20 and all the other witnesses and then he wants to take Mr.
21 Pemberton last.

22 Well, he sort of put himself in this bind by
23 waiting until the very end of discovery and really not doing
24 any of the foundation stuff first, like getting the Fred S.
25 James documents. And now he's sort of using the lack of his

1 own going forward with discovery as an excuse to -- I mean,
2 why should our lawyers have to go off and make a second trip
3 to England? We've already made the trip to England. We've
4 already gone through the discombobulation of going over and
5 getting ready. So now we're supposed to come back so we can
6 do it at a more convenient time somewhere. I don't think
7 that's fair.

8 I think they should be ready to go forward with
9 these witnesses. We are ready to go forward with these
10 witnesses. They've had ample notice that -- noted that the
11 depositions would go forward, at least some time reasonably
12 soon, and next time's the time to do it.

13 THE MAGISTRATE: Let me ask you this. Are any of
14 the witnesses in England -- let me try that one again. Have
15 you copies of depositions of any of the witnesses in England
16 taken in connection with any other cases, that you know of?

17 MR. SHERIDAN: Yes.

18 THE MAGISTRATE: Can you make those available
19 fairly promptly?

20 MR. SHERIDAN: Just not sure, Your Honor. It's
21 complicated by several factors. First of all, they asked us
22 in their document request for depositions of anybody who's
23 given a deposition in a property damage case. We said we
24 would make those available, and we will. There's only one,
25 and it's Sandy Marshall, and that will -- we'll make that

1 available.

2 All the other people that they're talking about
3 are people who gave testimony in personal injury cases.
4 They've spent a lot of time in this case trying to say,
5 "personal injury cases have nothing to do with this. Don't
6 ask us questions about what we've done with respect to
7 personal injury asbestos problems." They've tried to
8 suggest that that is a completely unrelated, property damage
9 is different from personal injury, and when we say that, we
10 say, "Look, these people all gave depositions with respect
11 to matters in personal injury cases," suddenly the tables
12 are turned, and somehow it's relevant. It is not relevant.

13 Issues of the duty of defense are determined on
14 the basis of comparing the policies with the allegations of
15 the complaint, and if the allegations of the complaint are
16 covered --

17 THE MAGISTRATE: All right, counsel.

18 MR. SHERIDAN: -- then there's a duty of defense.

19 THE MAGISTRATE: Your answer could have been yes,
20 one. I honestly do not, at my advanced age in life need a
21 lecture on how you decide an insurance policy case.

22 MR. SHERIDAN: I'm sorry.

23 THE MAGISTRATE: I do have one housekeeping matter
24 that I wish to take up with counsel. I understand that --

25 MR. : Your Honor, may I be heard just a

1 little bit further on this whole matter of next week in
2 England? Mr. Sheridan has said it makes absolutely no
3 difference whether those depositions are taken here or taken
4 there, but it makes a lot of difference to me. We had ten
5 days notice of this deposition and I've got things on my
6 calendar that I'm going to be very discombobulated trying to
7 get out of, or reassign, or what have you.

8 These were put on there for this week, according
9 to Mr. Sheridan on his own motion, because of the discovery
10 deadline of January 15th. We're no longer laboring under
11 that discovery deadline and it seems to me there's no
12 pressing necessity to go forward with those depositions
13 there.

14 Now, Mr. Sheridan says, "We've been telling you
15 for weeks that we want to take that deposition on the 8th."
16 Well, the answer to that is we've been telling him for weeks
17 that it was not convenient for us to take it on the 8th, and
18 because we wanted some preliminary discovery before we took
19 it at all. The fact that he then went ahead and sent two
20 lawyers over to London, it seems to me, should not prejudice
21 us.

22 Obviously we've got to comport with Your Honor's
23 order, but it seems to me that the entire justification for
24 setting up this week -- now, this isn't a day or two, that I
25 can ask Liz to cover one day and somebody else to cover

1 another day. This is a week we're going to be over there
2 across the water, so it means that the things that I've had
3 on my calendar for a month or a month-and-a-half, I've got
4 to take off, and I think that that is unfair, and I think
5 that that does discombobulate people, and I don't think that
6 it's necessary, given what Your Honor has done today in
7 terms of the discovery cut-off date.

8 THE MAGISTRATE: All right, counsel. You will
9 depose the witnesses in England to conclude no later than
10 February 15th. I will not have this kind of argument again
11 on the 27th of February, which is exactly what I see coming
12 up if we go that way.

13 If the lawyers went to England for the purpose of
14 preparing the witnesses for the depositions, I am sure that
15 preparation is still valid. I would prefer that you go next
16 week. I recognize the problems that that may present for
17 both sides. I would hear you on the propriety of assessing
18 the expenses of the attorneys against the Defendants. If
19 you feel that strongly against it, Mr. Sheridan, you may
20 file a motion in that connection. I'm not sure I'll grant
21 it, but I would certainly hear you if you cared to file such
22 a motion.

23 I notice that some time ago Plaintiffs apparently
24 prepared a stipulation having to do with the disclosure or
25 confidentiality of certain documents which Defendant had not

1 yet signed. What seems to be the problem with that, Mr.
2 Bowman?

3 MR. BOWMAN: Your Honor, let me speak to that very
4 briefly. I don't think there's any problem at all.

5 THE MAGISTRATE: Why hasn't it been signed, then?

6 MR. BOWMAN: Your Honor, as I best recall it --
7 and this came up some months ago -- there is a remaining
8 discussion. The Defendants had indicated to the Plaintiff
9 that we did not believe that we should be responsible for
10 paying paralegal costs, and there is an indication in the
11 stipulation that we would be so responsible. That's my best
12 recollection of where things stood when last we spoke.

13 We are willing to abide by all other terms of that
14 stipulation; indeed, we believe that we have abided by all
15 other terms. As I informed Mr. Sheridan, the Defendants
16 agree that they're responsible for copying costs for the
17 documents. There is one remaining item in that stipulation,
18 however, and that relates to a breakdown of defense costs
19 that Turner & Newell was supposed to provide us that, as far
20 as I know, we haven't seen yet.

21 MR. SHERIDAN: Your Honor, I'm eager to comply
22 with that stipulation. I signed it a long time ago.
23 Everybody negotiated for many hours over its terms,
24 including the provisions which basically said that when each
25 side would go and examine documents of the other that the

1 party making production would have available some assistant,
2 a paralegal or a file clerk, someone who would help, go down
3 to the basement, pick up the files, bring them back, answer
4 questions. Everybody agreed that it would be okay to --
5 that each side would pay for those costs. It was in the
6 stipulation, and when everybody agreed to it, I signed it
7 and I sent it off to them back in October, and I haven't
8 seen it since. And frankly I have been holding back on
9 giving them things in here, like the breakdown, because I
10 don't know whether they're going to abide by it. I mean,
11 they just flatly refuse to sign it. I have it right here
12 with me today. I'd like to get it signed, and if it gets
13 signed, we'll comply with it.

14 MR. BOWMAN: If we eliminate the provision
15 concerning paralegal costs, which we don't think is
16 appropriate, we'll sign it today. We'll sign it right
17 here --

18 THE MAGISTRATE: Strike that, and if necessary,
19 the Court will rule on the issue.

20 MR. SHERIDAN: Your Honor, may I just be heard on
21 one issue?

22 THE MAGISTRATE: Surely.

23 MR. SHERIDAN: They've already allowed us to run
24 up all these charges --

25 THE MAGISTRATE: I understand that.

1 MR. SHERIDAN: -- paid for them, and now they're
2 saying, "Well, we didn't really realize what we had agreed
3 to."

4 THE MAGISTRATE: No, that's why I say the Court
5 will rule on it.

6 MR. SHERIDAN: Okay.

7 THE MAGISTRATE: If I have to.

8 MR. BOWMAN: Your Honor, we incur paralegal costs
9 in connection with document production as well. It's a cost
10 of litigation. We don't understand why we should pay for
11 their paralegals anymore than we'd ask them to pay for ours.

12 MR. SHERIDAN: Because you agreed.

13 MR. BOWMAN: We didn't agree. That's my point.
14 That was the sticking point.

15 MR. SHERIDAN: (Inaudible).

16 THE MAGISTRATE: Gentlemen, enough of this, you're
17 another. I really don't need to hear it. And that's
18 exactly what you're getting into. You sound -- well, never
19 mind.

20 In any event, strike that, if that's the only way
21 you can get it signed, and then file a motion to compel
22 payment of costs.

23 MR. SHERIDAN: That's exactly what we'll do.

24 THE MAGISTRATE: It does seem to me that paralegal
25 costs incurred in connection with production and assistance

1 in copying documents may very well be valid. That is not a
2 pre-ruling; it is just the Court's off-the-cuff view which I
3 might very well be talked out of. I've been talked into
4 changing my mind before, Mr. Bowman, as you have yourself
5 done from time to time.

6 One issue that we have not addressed and that I
7 guess we're going to have to at some point, but I'm not
8 prepared to do it today, is the matter of the information so
9 far as reserves and reinsurance goes. I understand that I
10 was -- in fact, I have reviewed the opinions which have been
11 provided to me. I do not find anything that is particularly
12 convincing in those opinions.

13 From my rather brief -- and, of course, you can
14 understand it had to be brief; I didn't get this material
15 until mid-afternoon yesterday -- from my necessarily brief
16 view of it, I question whether there is any convincing case
17 law out there, whether there is anything that says A, you're
18 absolutely entitled to information on reserves and
19 reinsurance or B, you're not. If anybody can find me a case
20 that says one way or the other, fine.

21 But no, I do not find the memorandum of opinions.
22 They are not binding on this court and I am not, at the
23 moment, convinced one way or the other. My off-the-cuff
24 feeling again is that I -- well, let me put it this way. If
25 anybody wants to file a supplementary memorandum, while I

1 understand that material which is produced through discovery
2 need not itself be relevant, there must be some showing of
3 some likelihood of its ultimately producing relevant
4 material. It's got to be one or the other. I do not see it
5 this time, why reserves and reinsurance would meet those
6 criteria.

7 If somebody can convince me on that, that's fine,
8 but that is my big reservation right now. The fact that
9 somebody sets aside a reserve when they write a policy, it
10 would seem to me, is only good business practice. I don't
11 see why it's going to be any indication that they're
12 anticipating all this liability.

13 MR. : Would you like me to address that?

14 THE MAGISTRATE: Not now.

15 MR. : Okay.

16 THE MAGISTRATE: If anyone -- I'm not going to
17 require you to, but if anyone cares to file a supplementary
18 memorandum briefly --

19 MR. : I actually don't think it's
20 necessary to file a _____ memoranda. I'd just like to
21 encourage Your Honor to read the Aubrey Young --

22 THE MAGISTRATE: I did.

23 MR. : -- decision, if you didn't. That
24 hadn't been something (Inaudible).

25 THE MAGISTRATE: Now, as soon as I can get ahold

1 of the Rosen Indices I will see what we can do about the
2 privilege problems. I would encourage you all to work out
3 this matter of money. I really don't need to be troubled
4 with paralegal fees, though I will certainly deal with it if
5 I have to, and there will be a couple of formal orders
6 issuing in connection with our hearing today, counsel, which
7 will make it clear in the record that discovery has been
8 extended. The denial without prejudice of the motion to
9 compel, the requirement that the British depositions must be
10 concluded before the 15th of February, and I'm sure my law
11 clerk has another laundry list for me as well. Mr. Bowman?

12 MR. BOWMAN: Will there be a ruling on the
13 question of whether we get deposition transcripts?

14 THE MAGISTRATE: To the extent that they're
15 available, yes, they should be produced.

16 MR. SHERIDAN: Your Honor, excuse me, but that's
17 -- I mean, what he has asked for is -- there's a mountain of
18 things out there, and I don't think it's appropriate to deal
19 with it in a kind of blanket fashion.

20 THE MAGISTRATE: Produce the Marshall one.

21 MR. SHERIDAN: Certainly I will produce the
22 Marshall one.

23 THE MAGISTRATE: And the Atkinson one. Who signed
24 the protective order on the Atkinson one?

25 MR. BOWMAN: Was it Judge Flannery?

1 MR. SHERIDAN: I think it was Judge Flannery.

2 THE MAGISTRATE: It's the IPC case?

3 MR. : No, no.

4 MR. : (Inaudible).

5 THE MAGISTRATE: Somebody get the information on
6 the case and the cite number, please, or the docket number
7 and give my law clerk, Mr. O'Reilly, a call so that I may
8 take a look at the file and make sure that any order that I
9 enter will track with the requirements of Judge Flannery's
10 order.

11 MR. SHERIDAN: If I may, Your Honor --

12 THE MAGISTRATE: Yes.

13 MR. SHERIDAN: The reason why materials in that
14 other case were made subject to a protective order was
15 because the Defendants in that case, other insurance
16 carriers, wanted it. Turner & Newell didn't ask for it. We
17 said we would agree to it. They had wanted it. They have
18 an interest in the confidentiality of materials that were
19 produced in discovery. Indeed, Mr. Bowman has just made a
20 motion to inplead them as third party defendants in this
21 action. They're going to have something to say about
22 lifting protective orders in their case.

23 One of the arguments we've heard here today --

24 THE MAGISTRATE: Now, you misunderstood me,
25 counsel. I did not say I was going to lift the order. I

1 simply said that I would enter an identical order permitting
2 counsel to take a look at it in this case. But before I do
3 that, I will examine the jacket in which Judge Flannery
4 entered the order and see if, in any way, I'm infringing on
5 the rights of any nonparty or any potential third party in
6 the case.

7 MR. SHERIDAN: I'd just like to alert Your Honor --

8 THE MAGISTRATE: Don't misquote me, please,
9 because I never said I was going to lift that order.

10 MR. SHERIDAN: Excuse me. I didn't -- I misspoke
11 if I implied that. I just wanted to alert Your Honor to the
12 fact that there are third parties who they've tried to bring
13 into this case who are affected by it and indeed were the
14 people who wanted it --

15 THE MAGISTRATE: We are, of course, waiting for
16 several rulings from Judge Greene. He may grant your motion
17 to transfer and we'll all be out of the case.

18 MR. BOWMAN: Keep our fingers crossed. Could I
19 raise just one other deposition? That's Mr. Sykes, because
20 that may have an impact on -- you know, well review the
21 Sykes deposition transcript and maybe we can inform the
22 Court that we no longer need his testimony.

23 THE MAGISTRATE: Would you make that available?
24 It will be of assistance --

25 MR. SHERIDAN: I'm reluctant to agree with it

1 right now, because my client is over in England waiting to
2 hear on the issue of whether Mr. Sykes is even relevant or
3 not.

4 THE MAGISTRATE: Let me put it this way. If I
5 don't hear from counsel on a conference call by next
6 Tuesday, I am going to assume that you will provide it. If,
7 after talking -- and this will give you time to confer with
8 the people in England and see what the situation is --

9 MR. SHERIDAN: I'll give Mr. Bowman an answer
10 today on the Sykes --

11 THE MAGISTRATE: All right. If I don't hear from
12 you, I'll assume it's going to be provided. If you, after
13 reviewing the situation, have some serious objections to it,
14 then I guess we'll just have to do another conference call.
15 I won't drag you back down here again physically, at least
16 not yet.

17 Good afternoon, gentlemen.

18 MR. : Thank you, Your Honor.

19 (Whereupon, proceedings were concluded.)
20
21
22
23
24
25

1 UNITED STATES OF AMERICA)

)

Civil Action No. 86-0801

2 DISTRICT OF COLUMBIA)

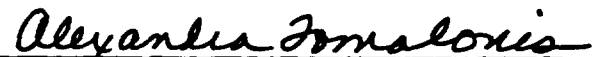
)

3 I, PAUL R. CUTLER, do hereby certify that the
4 foregoing proceedings were recorded by me from an original
5 recording in the offices of the United States Magistrate
6 for the District of Columbia and that said proceedings
7 were transcribed under my direction to typewritten form.

8 
9 PAUL R. CUTLER

10 - - -

11 I do hereby certify that the foregoing transcript
12 was typed by me and that said transcript is a true record
13 of the recorded proceedings to the best of my ability.

14
15 
16 ALEXANDRA TOMALONIS

17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 8 1987

Clerk, U.S. District Court
District of Columbia

TURNER & NEWALL PLC,
Plaintiff,

v.

Civil Action No. 86-0801

CANADIAN UNIVERSAL INSURANCE
COMPANY, ET AL.,

Defendants.

FILED

JAN 15 1987

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

During the discussions with counsel having to do with discovery matters there was mention of a deposition (the Atkinson deposition) which is presently under seal by Order of the Honorable Thomas Flannery, Judge in connection with Turner & Newall vs. American Mutual, Civil Action No. 82-1339. An examination of Volume II of the Court's File reveals that upon application Judge Flannery permitted the inspection of certain materials by parties apparently not directly involved in that litigation. Such an application with a ruling by Judge Flannery appears is a more orderly procedure and, therefore, it is by the Court this 8th day of January, 1987,

ORDERED that if the parties feel a genuine need to inspect materials under Judge Flannery's protective order, application should be made to him.


JEAN F. DWYER
United States Magistrate