

Dec 04 2023

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2023-001461
Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AiW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide

Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited is Appellant.

**RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO CONFIRM
AUTOMATIC STAY OR, ALTERNATIVELY, VERIFIED PETITION FOR
SUPERSEDEAS**

Charles W. Branham, III (SC Bar No. 106178)
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
T: 214-722-5990
F: 214-722-5991
tbranham@dobslegal.com

Theile B. McVey (SC Bar No. 16682)
KASSEL MCVEY ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202-1476
T: 803-256-4242
F: 803-256-1952
tmcvey@kassellaw.com
Other email: emoultrie@kassellaw.com

Attorneys for Respondent

INTRODUCTION

Appellant Asbestos Corporation Limited (“ACL”) filed a Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas. Its request is contrary to the plain language of Rule 62(a), SCRCP, and S.C. Code Ann. §14-3-450. ACL’s arguments are also contrary to the Court of Appeals’ September 8, 2023, order in *Childers v. Davis Mechanical*, in which this court recognized that receiverships are exempted from automatic appellate stays by both Rule 62 and S.C. Code § 14-3-450.

On December 1, 2023, this Court denied a substantively identical motion in *Welch v. Advance Auto Parts*.¹ For the same reasons which led this Court to deny the motion in *Welch*, ACL’s motion is without merit, and respondents John and Margaret Tibbs respectfully request it be denied.

BACKGROUND

After holding Appellant ACL in contempt for defying its discovery order, the Richland County Court of Common Pleas struck ACL’s answer.² Subsequently, the trial court instituted a receivership to marshal and protect ACL’s insurance assets.³ ACL challenges these orders in this current appeal.

ACL supplied asbestos to companies and contractors in the United States for decades.⁴ The operative Complaint in this matter alleges Respondent John Tibbs developed lung cancer from exposures to asbestos-containing products and materials manufactured, sold, and/or distributed by

¹ **Ex. 15**, 12/1/23 Order, Appellate Case No. 2023-001096.

² **Ex. 1**, 9/8/23 Order holding ACL in contempt.

³ **Ex. 2**, 9/8/23 Order appointing receiver.

⁴ **Ex. 3**, 1934 ACL brochure, p. 20, (“Asbestos Corporation Limited supplies fibre to all the markets of the World and there is no country engaged in the manufacture of asbestos products to which our fibres have not been shipped.”). All of the exhibits showing ACL’s connections to South Carolina attached to this response were tendered to the trial court, and are part of the record.

ACL and used by or near Mr. Tibbs in South Carolina. Mr. Tibbs, joined by his wife and co-Respondent Margaret Tibbs, filed suit in the Richland County Court of Common Pleas, South Carolina, in April, 2023, seeking recovery for their injuries. In response, ACL challenged the trial court's authority to exercise personal jurisdiction on the basis that it is a Canadian company.⁵

ACL's clients included many major manufacturers of asbestos-containing products within the United States, including National Gypsum⁶; Fibreboard⁷; Eagle-Picher Industries⁸; and HK Porter. Ernest Bratt, HK Porter's former asbestos group manager, testified that HK Porter owned a manufacturing facility in Bennettsville, SC from approximately 1964 through November 1976.⁹ The HK Porter Bennettsville Plant manufactured asbestos-containing products used in thermal insulation, including asbestos cloth, asbestos tape, and asbestos yarn.¹⁰ Mr. Bratt also testified HK Porter purchased chrysotile asbestos used in its products from ACL.¹¹

Despite selling asbestos products directly into the United States, ACL and affiliated Canadian asbestos companies¹² have challenged the jurisdiction of U.S. courts for decades. They

⁵ ACL's current motion attaches an affidavit for Richard Dufour claiming that it never transacted business in South Carolina. Given that 1) ACL refused to respond to discovery on this issue, and 2) it has not appealed the order denying its personal jurisdiction defense, this Court should disregard Mr. Dufour's affidavit.

⁶ See **Ex. 4**, National Gypsum Disc. Resp. at 16-17.

⁷ See **Ex. 5**, Fibreboard Disc. Resp. at 13.

⁸ See **Ex. 6**, *Mitchell v. Asbestos Corp.*, 73 Cal. Rptr. 2d 11 (Ct. App. 1998).

⁹ See **Ex. 7**, Deposition Transcript of Ernest Bratt, *Gray, et al. v. General Dynamics Corp., et al.*, In the USDC of Connecticut, Civil Action No. H-75-327, dated December 6, 1978 ("12/6/78 Bratt Dep. Tr.") at 26, 44-45, 53-54.

¹⁰ See *id.* at 31, 53-54; see also, **Ex. 8**, Deposition Transcript of Ernest Bratt, *Jacque v. Johns-Manville Products Corp., et al.*, In the Superior Court of California, County of Los Angeles, No. C-137-465, dated Feb. 5, 1980 ("2/5/80 Bratt Dep. Tr.") at 22:4-18.

¹¹ See **Ex. 7**, 12/6/78 Bratt Dep. Tr. at 86; **Ex. 8**, 2/5/80 Bratt Dep. Tr. at 114:27-115:3.

¹² The interrelationship between ACL and other Canadian asbestos companies including Atlas Asbestos Co., Atlas Turner Inc., Bell Asbestos, has long been recognized by U.S. courts. See, e.g., *Roberts v. Owens-Corning Fiberglass Corp.*, 101 F.Supp.2d 1067, 1082 (S.D.IN. 1999), recognizing and reciting the interrelationship of various Quebec asbestos companies. See also, *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 643-44 (simultaneous considering motions relating to Atlas Turner, Bell Asbestos, and Asbestos Corporation Ltd., and referencing them collectively as "Canadian Defendants"). Also of note, in another pending South Carolina asbestos case before this court, Atlas Turner filed an appeal relating to the same issues raised in this appeal. See, *Welch v. Advance Auto Parts*, Appellate Case No. 2023-001096. See also, ACL's Appellant's Motion to Confirm Automatic Stay and/or Purported Receiver's Lack of Jurisdiction or, Alternatively, Verified Petition for Supersedeas, which repeatedly references the *Welch* case and parrots Atlas Turner's position taken in that matter (large portions of their briefing are substantively identical). ACL's motion also notes counsel for ACL also represents Atlas Turner in *Welch* (at p. 7, FN 10).

have also refused to participate in discovery, claiming they are excused from such obligations by the Quebec Business Concerns Record Act (“QBCRA”).

Given ACL’s challenge to the court’s jurisdiction, the Tibbs promptly tendered jurisdictional discovery about ACL’s presence in South Carolina and its sale of products into the state. ACL did not respond to any of this discovery. On July 10, 2023, the Hon. Jean Toal entered an order requiring ACL to fully answer discovery and appear for a deposition, noting “[f]ailure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt.”¹³

ACL refused to comply with the trial court’s order, and “made it clear that it does not intend to participate in this matter and that the [trial court’s] orders on discovery will continue to be ignored.”¹⁴ The trial court therefore held ACL in contempt and struck ACL’s answer as a sanction.¹⁵

Via subsequent order, the trial court appointed a receiver over ACL’s insurance assets it.¹⁶ The court reiterated that ACL was in contempt for its failure to comply with its orders and that its answer had been struck as a sanction for that failure.¹⁷ The trial court also explained that receiverships were not just for insolvent entities and could be instituted when a debtor:

is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay or hinder creditors in the collection of debts-then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.¹⁸

¹³ **Ex. 1**, 9/8/23 Contempt Order, p. 12.

¹⁴ *Id.*

¹⁵ **Ex. 1**, 9/8/23 Contempt Order.

¹⁶ **Ex. 2**, 9/8/23 Order on Plaintiffs’ Motion to Appoint a Receiver.

¹⁷ *Id.*, p. 2.

¹⁸ *Id.*, p. 3, citing, *Virginia Carolina Chemical v. Hunter*, 84 S.C. 214 (1909).

Finally, the trial court determined “it is exactly the moral fraud of ACL’s personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and ACL’s continued refusal to participate in this that warrants the appointment of a receiver. Thus, where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.”¹⁹

ACL appealed the orders striking its answer and appointing a receiver. To date, it has sought 60 days of extension to file its initial appeal brief.²⁰ ACL now seeks to have the receiver’s powers stayed during the pendency of the appeal.

ARGUMENT

1. The Appointment of a Receiver Was Not a Sanction

ACL’s motion states its receivership was imposed pursuant to the trial court’s “power to sanction discovery violations under Rule 37, SCRCP.”²¹ This representation is knowingly inaccurate. The plain language of the trial court’s orders makes clear that the sanction imposed by the trial court was the striking of ACL’s answer.²² The trial court’s contempt order does not address the appointment of a receiver.

The trial court’s subsequent order appointing a receiver was not a sanction, but rather was for the purpose of investigating and preserving ACL’s insurance assets in light of the Court’s order striking ACL’s answer. Given that Atlas Turner was already in default,²³ the trial court acted well within its discretion to appoint a receiver to investigate and preserve its assets.

¹⁹ *Id.*

²⁰ Respondents objected to ACL’s request for a second 30 day extension. Its motion remains pending at the time of this brief.

²¹ Appellant’s Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, p. 12. *See also*, Appellant’s Motion, p. 6, FN 7 (referencing receiver order as “an improper discovery sanction.”).

²² **Ex. 1**, 9/8/23 Contempt Order.

²³ In the absence of an answer, the entry of default is merely a ministerial process. *Stark Trust Co., Inc. v. Superior Const. Corp.*, 360 S.C. 503 (Ct. App. 2004).

ACL's motion improperly mischaracterizes the trial court's order appointing a receiver. For this initial reason, ACL's request for a stay is without merit and should be denied.

2. Receivership Orders are Not Subject to Rule 241's Automatic Stay.

A. Rule 62(a) exempts receiverships from the automatic stay

Typically, a notice of appeal automatically stays the relief ordered in the appealed order, judgment, or decree or decision. Rule 205, SCACR. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. However, Rule 62(a), SCRCR provides exceptions to Rule 205's automatic stay.

Automatic Stay; Exceptions--Injunctions, Receivership, and Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal. (emphasis added).

Pursuant to this rule, the receivership over ACL's insurance assets should not be automatically stayed during this appeal.

ACL's motion recognizes receivership actions are exempted from the provisions Rule 205 via Rule 62(a). To avoid this result, ACL seemingly argues that Rule 62(a) only applies to cases where the sole purpose of the action was to appoint a receiver. According to ACL, "the term 'receivership' action refers to a type of action that is different from the instant personal injury lawsuit," and "the instant action is not a 'receivership action.'"²⁴ In support of this argument, it

²⁴ Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, p. 13.

cites *U.S. v. S. Growth Indus., Inc.*, 251 S.C. 404, 406, 162 S.E.2d 849, 850 (1968) and *Lindsay v. Main Ins. Co.*, 281 S.C. 331, 332, 315 S.E.2d 166, 167 (Ct. App. 1984).²⁵

Neither case supports ACL’s argument. In fact, neither case even addresses Atlas Turner’s argument that there is a distinction between a “receivership action” and a lawsuit in which a receiver is appointed. Neither case attempts to define “receivership action,” nor does either case discuss appellate stays or Rule 62’s exceptions to automatic stays.

In fact, the only connection either *S. Growth Indus.* or *Lindsay* have to this matter is that they are two of the eight South Carolina cases containing the phrase, “receivership action.”²⁶ Seven of those eight cases, including *S. Growth Indus.* and *Lindsay*, merely say the words “receivership action” without providing any analysis or discussion of the term.²⁷

Notably, ACL does not cite the eighth case, which *does* contain a nearly page long footnote about the argument ACL is making. In *Porter v. Brown*, 149 S.C. 151, 146 S.E. 810 (1929), Justice Cothran’s concurring opinion, joined by two other justices, recognizes, “[i]t is a well-established rule that in order to authorize the appointment of a receiver it is essential that there be at the time of the appointment a suit pending in which relief other than the mere appointment of a receiver is sought.” 146 S.E. at 813-814. Justice Cothran went on to attach an extended footnote of authorities supporting this position,²⁸ including, among others, the following quotations,

+ “As a general rule a receivership is a purely ancillary remedy and cannot be maintained in a proceeding instituted solely for that purpose.”²⁹

²⁵ *Id.*

²⁶ Respondent conducted a word search for the phrase “receivership action” in Westlaw, searching all South Carolina state court cases.

²⁷ The other five Westlaw results containing the phrase “receivership action” are *Whilden v. Chapman*, 80 S.C. 84, 61 S.E. 249 (1908); *Ex Parte Planters’ Bank. King Hardware Co. v. McGill*, 122 S.C. 241, 115 S.E. 299 (1922); *State Board of Bank Control v. Sease*, 188 S.C. 133, 198 S.E. 602 (1938); *Cohen v. Standard Acc. Ins. Co.*, 194 S.C. 533, 9 S.E.2d 222 (1940); and *Ex Parte Miller*, 192 S.C. 164, 5 S.E.2d 865 (1939).

²⁸ *Porter*, at FN1.

²⁹ *Id.*, citing, 23 R. C. L. par. 5, p. 11

- + “The general rule is that a receiver cannot be appointed except in a pending cause,”³⁰
- + “It is well settled as a general rule that the appointment of a receiver is an ancillary remedy in aid of the primary object of the litigation between the parties.”³¹
- + “The remedy is a provisional or auxiliary one invoked as an adjunct or aid of the principal relief sought by the action and never as the ultimate object of the action.”³²
- + “It is fundamental that there is neither in law nor in equity any such thing as a plain receivership action, i.e., an action in which a receiver is the only desideratum. In short, the appointment of a receiver by a Court of Equity, except in rare cases arising out of lunacy or infancy, is ancillary wholly to some other action having some definite relief in view.”³³
- + “A receiver may only be appointed in a pending case. A suit does not lie for the sole purpose of appointing a receiver, but the Court must have jurisdiction of the suit on some other ground before it can make the appointment.”³⁴
- + “There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver. Such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation so that relief awarded by the judgment, if any, may be effective. The authority conferred upon the Court to make the appointment necessarily presupposes that an action is pending before it, instituted by someone authorized by law to commence it.”³⁵

Porter, the only South Carolina case addressing ACL’s arguments, refutes them. The numerous authorities cited by the *Porter* concurrence establish what constituted the “existing practice” of receiverships as contemplated by S.C. Code Ann. 15-65-10(5). This statute, which

³⁰ *Id.*, citing, 34 Cyc. p. 28.

³¹ *Id.*, citing, 34 Cyc. P. 29.

³² *Id.*, citing, 8 Fletcher, Cyclopedic Corporations, par. 5222.

³³ *Id.*, citing, *Price et al. v. Bankers’ Trust Company* (Mo. Sup. 1915) 178 S.W. 745; *se also*, *Continental Trust Co. v. Brown et. al.* (Tex. Civ. App. 1915) 179 S.W. 939; *District No 21, etc. v. Bourland*, 169 Ark. 796, 277 S.W.546 (1925); *Vila v. Grand Island, etc.*, 68 Neb. 222, 94 N.W. 136, 97 N.W. 613, 63 L.R.A. 791, 110 Am. St. Rep. 400, 4 Ann. Cas. 59 (1903); *Bank of Meadville v. Hardy*, 94 Miss. 687, 48 So. 731 (1909).

³⁴ *Id.* citing, *Baltimore Bargain House v. St. Clair et al.*, 58 W.Va. 565, 52 S.E.660 (1906); *Meyers Bros. v. Harman Bros.*, 78 W.Va. 560, 89 S.E. 146 (1916).

³⁵ *Id.*, citing, *French Bank Case*, 53 Cal. 495.

governs the appointment of a receiver in South Carolina, permits a court to appoint a receiver “[i]n such other cases as are provided by law or may be in accordance with the existing practice . . .” *Porter* demonstrates that the trial court’s receivership order in this case is in accord with the “existing practice” of South Carolina courts.

Contrary to ACL’s claims, South Carolina has never required a completely independent action to appoint a receiver for a case to be considered a “receivership action,” and has always recognized a receivership may arise in relation to a “suit pending in which relief other than the mere appointment of a receiver is sought.” *Porter*, 146 S.E. at 813-814.

ACL provides this Court with no basis to conclude that there is a distinction between a “receivership action” and an “action in which a receiver is appointed” for purposes of Rule 62 analysis. This is because there is no logical basis to create such a distinction. Rule 62 unambiguously applies to any matter in which a South Carolina court appoints a receiver. ACL’s citation to two irrelevant cases, while ignoring a case which explicitly addresses the issue, is without merit.

B. S.C. Code Ann. § 14-3-450 exempts receiverships from the automatic stay

Rule 62(a) is not the only authority which exempts receiverships from being stayed on appeal. South Carolina’s legislature also enacted statutory authority for the same principle. S.C. Code Ann. § 14-3-330(4) sets forth the jurisdictional powers of the appellate courts to determine receivership matters. It states, “[t]he Supreme Court shall have appellate jurisdiction . . . and shall review upon appeal: . . . (4) [a]n interlocutory order or decree in a court of common pleas. . . granting, continuing, modifying, or refusing the appointment of a receiver.”

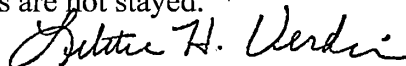
S.C. Code Ann. § 14-3-450 addresses stays during §14-3-330 appeals. Pursuant to this statute, “[i]n case of an appeal under item (4) of Section 14-3-330 the proceedings in other respects

in the court below *shall not be stayed* during the pendency of such appeal unless otherwise ordered by the court below.”³⁶ Thus, both South Carolina statutes and court rules provide that receiverships are not stayed by appeals.

C. This Court recently declined to stay a receivership under similar circumstances.

Further support that Rule 62 and S.C. Code § 14-3-450 apply to this matter is evidenced by this Court’s September 8, 2023, Order in the matter of *Childers v. Davis Mechanical*, appellate case no. 2023-000727. Like this case, in that matter a receiver was appointed as part of an underlying personal injury case.³⁷ Also like this case, the *Childers* appellants requested the receivership be stayed during the pendency of the appeal.³⁸ In denying appellants’ request for stay, this Court entered the following order:³⁹

After consideration of Respondent's "motion to clarify the court's order on appealability," as well as the returns and reply, we clarify that Appellants' appeal of the circuit court's March 31, 2023 order denying their motion to dismiss third-party claims and dissolve the Payne & Keller receivership shall proceed. We further clarify that the March 31, 2023 order is not stayed during pendency of this appeal. *See* Rule 62(a), SCRCP ("Unless ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."); S.C. Code Ann. §14-3-450 (2017) ("In case of an appeal under item (4) of Section 14-3-330 the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below."). Accordingly, the receivership action and the receiver's ability to carry out his duties are not stayed.



FOR THE COURT

³⁶ Emphasis added.

³⁷ **Ex. 9**, 8/27/21 Order appointing receiver over Payne & Keller Company, *Childers v. Davis*, Fifth Circuit, South Carolina case no. 2021-CP-40-03484.

³⁸ **Ex. 10**, Appellants’ Emergency Motion to Clarify and Enforce Rule 205, *Childers v. Davis Mechanical*, South Carolina Court of Appeals case no. 2023-000727.

³⁹ Attached as **Ex. 11**, 9/8/23 Order clarifying receivership order not stayed during appeal, *Childers v. Davis Mechanical*, South Carolina Court of Appeals case no. 2023-000727.

Thus, less than three months ago this Court recognized the stay exceptions of Rule 62(a) SCRPC and S.C. Code Ann. §14-3-450 apply to appeals arising from receivership orders entered in personal injury actions. Respondents John and Margarette Tibbs respectfully requests this Court follow this precedent and deny ACL’s request that the receivership order in this case be stayed.

D. Other South Carolina courts have appointed receiverships for “live” entities

ACL attempts to distinguish itself from *Childers* and other South Carolina receiverships by claiming “most (if not all) involved essentially ‘dead’ companies, for lack of a better expression, where no one fought the appointment of a receivership at that time.”⁴⁰ ACL goes on to claim, “ACL and Atlas were the first to step forward and assert their rights . . . to argue that the circuit court could not take control via a receivership over any part of the company, such as its so-called ‘insurance assets . . .’”⁴¹ ACL continues, “[i]n the other cases, no one with a legitimate interest received notice of the purported receiver’s action.”⁴²

It is unclear what efforts ACL made to review “the other cases,” and ACL provides no citation or support for its claim. But a recent highly publicized South Carolina receivership belies ACL’s representations.

Beach v. Gregory M. Parker, Inc.,⁴³ is a South Carolina civil wrongful death case involving convicted murderer Alex Murdough. In that case, the plaintiffs requested a receiver be appointed to take control of Alex Murdough’s assets, as well as assets held by his son, Buster Murdaugh. Although neither Alex nor Buster are dead, presiding judge Daniel D. Hall appointed co-receivers to preserve their assets.⁴⁴ As set forth in Judge Hall’s order,

⁴⁰ Appellant’s Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, p. 18.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Fourteenth Circuit, South Carolina case no. 2019-CP-25-00111.

⁴⁴ **Ex. 12**, 11/4/21 Order Granting Temporary Injunction and Appointing Co-Receivers and Co-Receivers’ Counsel, *Beach v. Gregory M. Marker, Inc.*, Fourteenth Judicial Circuit, South Carolina case no. 2019-CP-25-00111.

After careful consideration of all information and arguments presented by the parties, this Court finds that Plaintiff's application to appoint the Co-Receivers is meritorious under S.C. Code §15-65-10, the Court's equitable powers, and general principles of fraud and deceit under South Carolina law.⁴⁵

Also finding a temporary injunction was appropriate, Judge Hall recognized such actions were necessary "to prevent irreparable injury, damage or loss to Plaintiff's ability to recover damages from these Defendants."⁴⁶ Among other powers granted to the Murdaugh receivers was the power to "investigate the existence of all insurance coverages potentially available to Alex Murdaugh and Buster Murdaugh in receivership, including as an 'additional insured' under coverage for another person."⁴⁷

Both Alex and Buster Murdaugh are alive, just as ACL is "alive." And just as ACL opposed the appointment of a receiver in this case, so too did Alex and Buster Murdaugh oppose the appointment of a receiver in that case.⁴⁸ Neither fact precluded the trial court from appointing a receiver in *Beach*.

ACL's suggestion that receivers should only be appointed for "dead" entities finds no support in South Carolina law and is in fact contradicted by a recent highly publicized South Carolina receivership. For this additional reason, ACL's motion for stay should be denied.

3. ACL's Request for Supersedeas is Procedurally Improper

Perhaps recognizing that the automatic stay provisions of Rule 205 do not apply to its receivership order, ACL alternatively asks for a supersedeas. This request should be denied because ACL failed to first make this request to the trial court.

⁴⁵ *Id.*, p. 2.

⁴⁶ *Id.*, p. 2.

⁴⁷ *Id.*, p. 6. This authority is nearly identical to the powers vested in ACL's receiver in this case.

⁴⁸ **Ex. 13**, 10/28/21Murdaugh Defendants' Response in Opposition to Plaintiff's Motion for a Preliminary Injunction and Appointments of Co-Receivers and Co-Receivers' Counsel, *Beach v. Gregory M. Parker, Inc.*, South Carolina case no. 2019-CP-25-00111.

Rule 241(d)(1) governs the procedure for obtaining supersedeas in South Carolina. It requires,

Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

ACL's motion attempts to handwave away this "extraordinary" requirement in a footnote to its motion.⁴⁹ This footnote summarily claims "it is impracticable" to first request relief from the trial court, "and/or there is otherwise good cause" for permitting ACL to ignore Rule 241(d)(1). However, this single sentence footnote fails to offer any explanation, let alone an "extraordinary circumstance," justifying why ACL failed to request supersedeas from the trial court before filing the instant motion. ACL did not explain why it could not have requested supersedeas from the trial court in the time before it filed this appeal, or why it could not have done so in the time between such filing and the filing of the instant motion. In short, ACL had ample time to request relief from the trial court before filing the instant motion.

On December 1, 2023, this Court denied a substantively identical motion filed by Appellant Atlas Turner⁵⁰ in the pending *Welch v. Advance Auto Parts* appeal.

Appellant's motion to "confirm" the automatic stay or, alternatively, petition for supersedeas is denied. Appellant failed to petition the circuit court first or to satisfactorily establish that extraordinary circumstances made it impracticable to do so. *See* Rule 214(d)(1), SCACR ("Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court."). Because Appellant did not first petition the circuit court to supersede its order, the petition is denied.⁵¹

⁴⁹ *See*, Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, p. 15, FN 13.

⁵⁰ As noted above, the interrelated relationship between ACL and Atlas Turner has long been recognized. *See*, FN 12, *supra*.

⁵¹ **Ex. 15**, 12/1/23 Order, *Welch v. Advance Auto Parts*, Appellate Case No. 2023-001096.

Just as Atlas Turner did in *Welch*, ACL filed its instant motion in this matter without first making its request to the circuit court. ACL also attempts to justify its failure for the same reason rejected by this Court in *Welch*.⁵² As such, this Court's *Welch* ruling is equally applicable to this case.

ACL's clear goal is delay. To delay discovery against it, delay judgments against it, and delay the receivership appointed over it. It has loudly sounded its contempt for South Carolina courts, refusing to acknowledge their jurisdiction or heed their orders.⁵³ Its current motion is but one more attempt to delay which ignores South Carolina law to the same extent it has so far ignored the authority of South Carolina courts.

South Carolina law is clear and unequivocal. Both Rule 62(a) and S.C. Code Ann. § 14-3-450 exempt receiverships from automatic stays on appeal. Its request for this court to apply the automatic stay is thus without merit. Further, ACL failed to seek supersedeas with the trial court, in direct violation of Rule 241(d)(1). Its request for supersedeas from this Court is thus also without merit.

CONCLUSION

For the foregoing reasons, Plaintiffs John and Margaret Tibbs respectfully request this Court deny Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas.

⁵² ACL claims, "the combination of this alternative request for supersedeas with ACL's primary request for confirmation of the automatic stay (which request, as explained, is not properly addressed to the lower court, but only to this Court), it is impracticable to first pursue supersedeas in the lower court and/or there is otherwise good cause for this Court to consider the within petition for supersedeas in the interest of justice and judicial economy." *See*, ACL's motion, p. 15, FN 13.

⁵³ In the related briefing by Atlas Turner on this exact issue, its counsel, who also represents ACL in this case, went so far as reference an article referring to South Carolina as a "Judicial Hellhole." In a recent Law360 article the author addressed the increase in such attacks on the judiciary, which the author noted have "become increasingly hostile and volatile." **Ex. 14**, Winokur, *Attorneys Have an Ethical Duty to Protect the Judiciary*, 11/21/23. The author went on to note, "Attorneys who publicly excoriate judges throw gasoline on the fire."

Respectfully submitted, December 4, 2023

/s/ Charles W. Branham, III
Charles W. Branham, III (SC Bar No. 106178)
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
T: 214-722-5990
F: 214-722-5991
tbranham@dobslegal.com
achapman@dobslegal.com
khardin@dobslegal.com
tbarnes@dobslegal.com
Other email: rgarner@dobslegal.com

Theile B. McVey (SC Bar No. 16682)
KASSEL MCVEY ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202-1476
T: 803-256-4242
F: 803-256-1952
tmcvey@kassellaw.com
Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFF

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	<i>In Re:</i>
Plaintiff,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
3M COMPANY, et al.	)	
	)	
Defendants.	)	

ORDER HOLDING ATLAS ASBESTOS COMPANY, LTD. IN CONTEMPT

Asbestos Corporation, Ltd. (“ACL”) is a defendant in the above referenced matter. On July 10, 2023, this Court, in open court ordered ACL to fully answer discovery and appear for a deposition so that this matter could be prepared for trial. On July 19, 2023, this Court entered an Order stating: “Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt.”

ACL failed to produce a witness as ordered by the Court. ACL has also refused to identify a witness or a date on which it will produce a witness. Moreover, ACL has failed to fully answer discovery and provide documents ordered to be produced by this Court.

ACL has made it clear that it does not intend to participate in this matter and that this Court’s orders on discovery will continue to be ignored. Plaintiffs moved to have this Court hold ACL in contempt and, as a sanction, to strike ACL’s answer.

LAW AND ANALYSIS

A determination of contempt resides in the sound discretion of the trial judge. *Hook v. South Carolina Dept. of Health and Environmental Control*, 439 S.C. 52 (Ct. App. March 15, 2023). “Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed.” *Id.* The power of a court to punish for contempt “is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.” *Miller v. Miller*, 375 S.C. 443 (Ct. App. 2007).

“The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial.” *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). “Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice,” sanctions must be imposed. *Id.* Without adequate sanctions, discovery procedures would be ineffectual. *Id.* As a result, over leniency must be avoided. *Id.* “If a party fails to obey an order or provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

“In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Id.* at 199, 511 S.E.2d at 719. In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), the South Carolina Court of Appeals stated “[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party.” *Id.* “Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those

who might be tempted to such conduct in the absence of such a deterrent.” *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

Here there is no dispute that ACL has violated this Court’s orders. Moreover, ACL has indicated that it does not intend to comply with those orders in the future. In light of ACL’s position, this Court has no choice but to find ACL in contempt of court. ACL has failed to produce a witness. ACL has refused to participate in meaningful discovery. It has refused to produce documents. Given this intentional and willful refusal to participate in discovery, the Court hereby strikes ACL’s pleadings.

IT IS SO ORDERED.

[JUDGE’S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Sanctions

So Ordered

Jean H. Toal

EXHIBIT 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	<i>In Re:</i>
Plaintiff,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
3M COMPANY, et al.	)	
	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION TO APPOINT A RECEIVER

This order follows the Court's order finding Asbestos Corporation Ltd. ("ACL") in contempt of court and striking ACL's pleadings. Before the Court is Plaintiffs' Motion to Appoint a Receiver over ACL's insurance assets.

BACKGROUND

For the reasons set for below, the Court grants Plaintiffs motion to appoint a receiver over the Insurance Assets¹ of ACL and to allow the Receiver to assume control of the defense of asbestos claims made against Asbestos Corporation, Ltd in the United States. Peter Protopapas is appointed as receiver over those Insurance Assets and the Court expects anyone or any entity having information or materials which are reasonably calculated to lead to the discovery of admissible evidence to cooperate with this Court's Receiver in locating and marshalling those assets. Further, Mr. Protopapas is tasked with tendering current and future claims from Plaintiffs suffering from

¹ This term is defined below.

asbestos disease brought against ACL to which those policies are responsive. Finally, Mr. Protopapas is tasked with the control of the defense of those claims for ACL.

PROCEEDURAL BACKGROUND

On July 19, 2023, this Court ordered ACL to fully answer discovery and to provide a corporate representative for deposition. The Court further held that failure to do so would result ACL being held in contempt. Subsequently, this Court held ACL in contempt and, as a sanction, struck the pleadings of ACL. The Court based its contempt order on ACL's flat refusal to comply with this Court's orders to produce documents, a witness or otherwise participate in discovery.

Now, having struck ACL's answer, ACL is in default.²

LAW AND ANALYSIS

A. Appointment of a Receiver is Appropriate and Warranted

The South Carolina receivership statute provides in relevant part that a receiver may be appointed in cases in accordance with "existing practice." S.C. Code Ann. 15-65-10(5).³

² The process of actually entering default judgment is merely a ministerial process. In the absence of an answer, default is nothing more than that ministerial act. *Stark Truss Co., Inc. v. Superior Const. Corp.* 360 S.C. 503 (Ct. App. 2004)

³ A receiver is also available to carry a judgment into effect, which is the practical result of the coming default following the striking of ACL's answer.

Historically, receivers are appointed by courts sitting in equity in order to ensure a fair result. *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384 (1939). Indeed, “[t]he right to have a receiver appointed is an ancient one” *Pelzer v. Hughes*, 27 S.C. 408 (1887) But where, as here, ACL’s answer has been struck, and thus only a ministerial action being left for ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL’s insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court’s of this state have found appropriate. Specifically, where, as here, a debtor, solvent or otherwise,

is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay or hinder creditors in the collection of debts—then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.

Virginia Carolina Chemical v. Hunter, 84 S.C. 214 (1909).

Here it is exactly the moral fraud of ACL’s personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and ACL’s continued refusal to participate in this that warrants the appointment of a receiver. Thus, where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.

As Plaintiffs have requested, a receiver appointed here would have the authority to administer “any insurance assets” including “any claims related to the actions or failure to act of ACL’s insurance carriers.” The Receiver would assume control of the defense of asbestos claims made against ACL in the United States. This Court’s view of the scope of a receiver’s authority is not unique. The United States Supreme Court recognized in *Porter v. Sabin*, 149 U.S. 473 (1893) that “[t]he whole property of the corporation [is] within the jurisdiction of the court which

appointed the receiver, **including all its rights of action**, except so far as already lawfully disposed of under orders of that court, [and] remains in its custody, to be administered and distributed by it.” *Id.* at 480 (emphasis added).

That the South Carolina receivership references “property within this state” is not a limitation on the Receiver’s authority in this case. Instead, the statutory reference is consistent with principles of comity, which deter a state court from reaching beyond a state’s borders and asserting jurisdiction over such property located in another jurisdiction. These same principles of comity support a state court’s authority to vest a statutory receiver to assert an insolvent corporation’s rights of action. See *e.g. Hirson v. United Stores Corp.* 263 A.D. 646, 34 N.Y.S.2d 122 (App. Div. 1st Dep. 1942), *aff’d* 43 N.E.2d 712 (N.Y. App. Ct. 1942) (holding that title to choses in action held by a receiver appointed pursuant to Delaware law would be afforded “full faith and credit”). That is the authority given to be given the receiver here.

That authority includes the insurance assets of ACL, including the right to assume control of the defense of asbestos claims made against ACL in the United States and tender claims to applicable insurance policies. Even assuming ACL’s interpretation of §15-65-10 is correct, to the extent they exist, ACL’s Insurance Assets ² would be intended to protect the lives, interests and property within South Carolina. The result is that the insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver.

² For purpose of clarity, this Court defines “Insurance Assets” as any insurance policy, proceeds of insurance policies, claims relating to such insurance policies, including but not limited to, claims relating to any breaches of duty relating to those policies, information relating to those insurance policies including, but not limited to mail, files of counsel, or other information which is reasonably calculated to lead to the discovery of admissible evidence about those insurance policies or any other assets which are related to, touch or are otherwise relevant to such insurance.

S.C. Code Ann §38-61-10 states that

[a]ll contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State.

In interpreting §38-61-10, the South Carolina Supreme Court held that “[i]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located.” *Sangamo Weston v. Nat’l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) (Toal, C.J). The result is that “South Carolina substantive law governs [the insuring assets of ACL]” *Id.* Thus, the appointment of a receiver over those assets is appropriate.

B. Due Process has not and will not be violated

ACL continues to ignore the jurisprudence of this state which directly addresses its due process argument. Just as here, *Sangamo* argued that §38-61-10 was “unconstitutional.” *Id.* at 131. The South Carolina Supreme Court there opined that

insuring property, lives and interests in South Carolina constitutes a significant contact with this state. South Carolina has a substantial interest in who bears the liability for operations conducted in this state which result in injury to South Carolina property and citizens. Although the parties are not residents of this state, both parties availed themselves of the law of South Carolina when they respectively provided or received insurance on interests located in this state.

Id. ACL sold its products throughout the United States well knowing that it would end up in the workplaces of working men and women throughout the nation, including sales, specifically to South Carolina. Therefore, under the statutory scheme of this state and its interpreting precedent, whatever insuring assets of ACL exist and related claims are subject to the substantive law of

South Carolina and nothing about that result is violative of due process.

POWERS OF THE RECEIVER

As set forth above, the powers afforded to the receiver here are all related to the insurance assets of ACL. Therefore, this Court hereby orders that Peter Protopapas be and hereby is appointed Receiver in this case with the power and authority fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, to assume control of the defense of asbestos claims made against ACL in the United States, and take any and all steps necessary to protect the interests of ACL whatever they may be. This order includes the right and obligation to administer any insurance or indemnification assets of ACL as well as any claims related to the actions or failure to act of ACL insurance carriers or other entities, including, but not limited to the officers, directors and/or shareholders of ACL against which the ACL may have claims.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, powers and authority, insofar as they are related to the discovery of and recovery of insurance assets, to: 1) open any mail which is reasonably believed to contain information relating to insurance assets addressed to the defendant and addressed to any business owned by the ACL; redirect the delivery of any such mail addressed to the ACL or any business of the ACL, so that such mail may come directly to the receiver; 2) endorse and cash all checks and negotiable instruments payable to ACL relating to insurance assets; 3) obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL; 4) hire any person necessary to accomplish any right or power under this Order; 5) to assume control of the defense of asbestos claims made against ACL in the United States; and 6) take all action necessary to gain access to

all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of ACL may be situated, and to review and obtain copies of all documents related to insurance assets of ACL.

The Court expects the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL. The Receiver will provide potential insurers or indemnifiers with lists of work sites, contractors, and insurance brokers and agents to facilitate the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of ACL or any entity for whom ACL did work or supplied materials or licensed products or the use thereof as an "additional insured" under coverage written to another entity). The Court expects all insurers or indemnifiers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

This Court notes that under the *Barton* doctrine, suit against the Receiver outside of this Court is expressly prohibited.

CONCLUSION

For the foregoing reasons, the appointment of a receiver for ACL to marshal all of the available insurance assets, including claims related thereto and any other property subject to this receivership of ACL and its subsidiaries, successors, and assigns, is appropriate. Moreover, the Court authorizes Mr. Protopapas to assume the control of the defense of all litigation matters pending in the United States against ACL. Peter Protopapas is hereby appointed the receiver over ACL consistent with this order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Appointment of Receiver

So Ordered

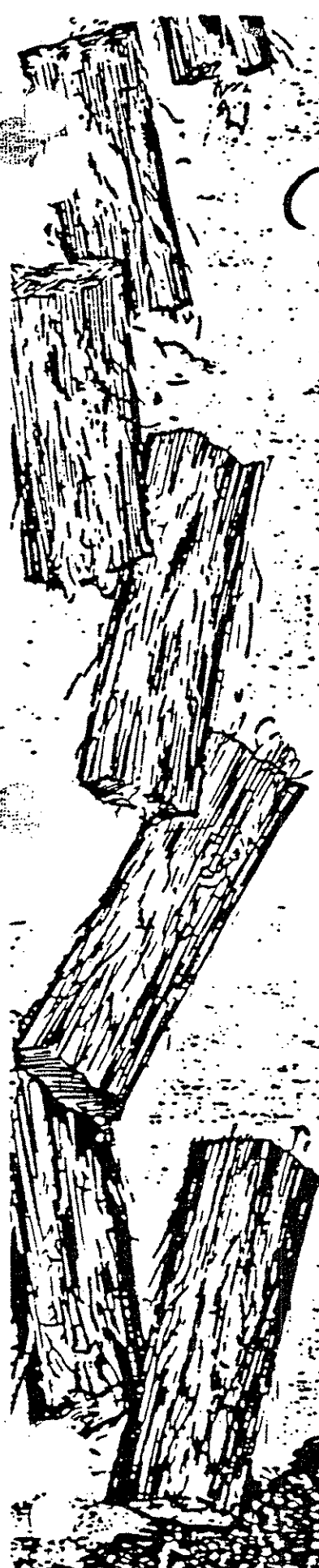
Jean H. Toal

EXHIBIT 3

ACL.9

Oxford

NO. 752 1/3



Miners of

ASBESTOS

Since 1878

**ASBESTOS
CORPORATION
LIMITED**

**THETFORD MINES
QUEBEC
CANADA**

**DEPOSITION
EXHIBIT**

Bockstahler #9

APRIL 1934

A. C.

ASBESTOS

Fibres

Cable Address:

Amescolim
Thetford Mines.

Codes:

ABC Sixth, Acme,
Marconi, Bendleys,
Bentley's Second,
Western Union,
Liebers.

ASBESTOS CORPORATION LIMITED

THETFORD MINES, QUE.
CANADA

Officers:

Robert F. Massie, President

J. G. Ross, Manager

C. W. Colby, Ph. D., Vice-President

J. T. McCallum, Secretary-Treasurer

Kenneth T. Dawes, Vice-President

J. E. Triganne, Sales Manager.

Directors:

Colonel Robert F. Massie, D.S.O.

C. W. Colby, Ph. D.

Kenneth T. Dawes

Geo. R. Cottrelle

Hon. W. G. Mitchell, K. C.

R. O. Sweezey

R. W. Steele

H. P. Thornhill

Alfred H. Paradis

Montreal Office:

727 Canada Cement Building,
Phillips Square

Toronto Office:

465 Bay Street

ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.
Canada

A. C.

ASBESTOS

Fibres

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A. C.

ASBESTOS

Fibres

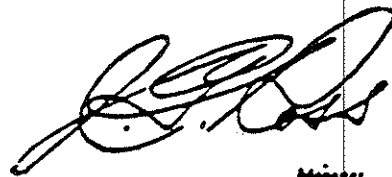
III. INTRODUCTION

This issue of the catalogue and handbook of Asbestos Corporation Limited has been prepared with the double object of acquainting consumers of asbestos with the A. C. Asbestos mines and mills and the A. C. Asbestos Fibres, and of providing a convenient reference book giving useful information bearing on chrysotile asbestos fibres, their properties and their uses. It marks another stage in our programme of bringing to our friends in the asbestos industry the results of recent years of effort in improving asbestos fibres.

In addition to the pages dealing particularly with A. C. grades (which, as now produced, are cleaner and more uniform than ever before — each being adapted for its individual purpose), we have included other material gathered from various sources; there will be found technical data, a description of the standard method of testing asbestos fibres, the Canadian Standard System of marking the various grades, and other information of value to the manufacturer.

Following a detailed description of many A. C. grades will be found an alphabetical list of the principal articles in which asbestos fibre is a constituent, as well as the A. C. grades recommended for each of these uses.

We hope that the information contained herein will be of service to the asbestos trade, and we will be glad to send any copies which may be desired upon receipt of request.



Manager

Asbestos Corporation Limited.

ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.
Canada



A. C.

ASBESTOS

Fibres

IV. CONCERNING ASBESTOS CORPORATION

Asbestos Corporation Limited owns over 30,000 acres of mining lands in the Eastern Townships of the Province of Quebec, Canada. These holdings represent the largest ore supply controlled by any one Canadian asbestos producer. Proven reserves and developed asbestos ore bodies make Asbestos Corporation the most dependable source of continuous supply for the varied series of grades of asbestos fibre. Sufficient ore for years of operation has been made available through extensive exploration, involving over 100,000 feet of diamond drilling. Underground development by modern methods has made available definitely proven bodies of the highest grade ore.

The Corporation's operations cover not one single mine, yielding fibre of a single type, but many different mines, each yielding characteristic fibres, adapted to special purposes or requirements.

Asbestos Corporation Limited was organized in 1926 when properties formerly operated by nine separate companies were brought under one management. Several of these companies were themselves the results of earlier consolidations and mergers. Indeed the Company's lineage boasts of no less than seventy-eight forebears, chief among whom are some of the pioneer asbestos mines of Canada.

The King Mine has been in continuous operation for 56 years. The oldest of the A. C. Black Lake mines was opened about 53 years ago.

Today Asbestos Corporation owns the following properties in the Province of Quebec:

At Thetford Mines:

King Mine;
Beaver Consolidated Mines;
Maple Leaf Mine;
Bennett-Martin Mine.

At Black Lake:

British-Canadian Mines;
Black Lake Asbestos & Chrome Mines.

At Coleraine:

Vimy Ridge Mine;
Edith Mine.

At East Broughton:

Asbestos Mines Ltd;
Fraser Mine.

At Robertsonville:

Pennington Mine;
Federal Mine;
Kitchener Mine.

At Wolfestown:

Belmina Mine.

In former years the separate asbestos deposits on the large area of property now held by Asbestos Corporation Limited were each operated individually and the rock mined from each one was handled in individual mills located on each property, some

ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.

Canada

A. C.

ASBESTOS

Fibres

twenty in number. Today these different mines have been re-grouped and six mills are now conveniently located to handle ore from all the deposits along the forty mile belt. A distinctly characteristic type of fibre is produced at each mill.

- ♦ The total capacity of these six mills as presently equipped is 8900 tons of ore per day, and the average daily capacity production of finished asbestos fibre is 600 tons.



V. GENERAL CHARACTERISTICS OF A. C. FIBRES

King Mine

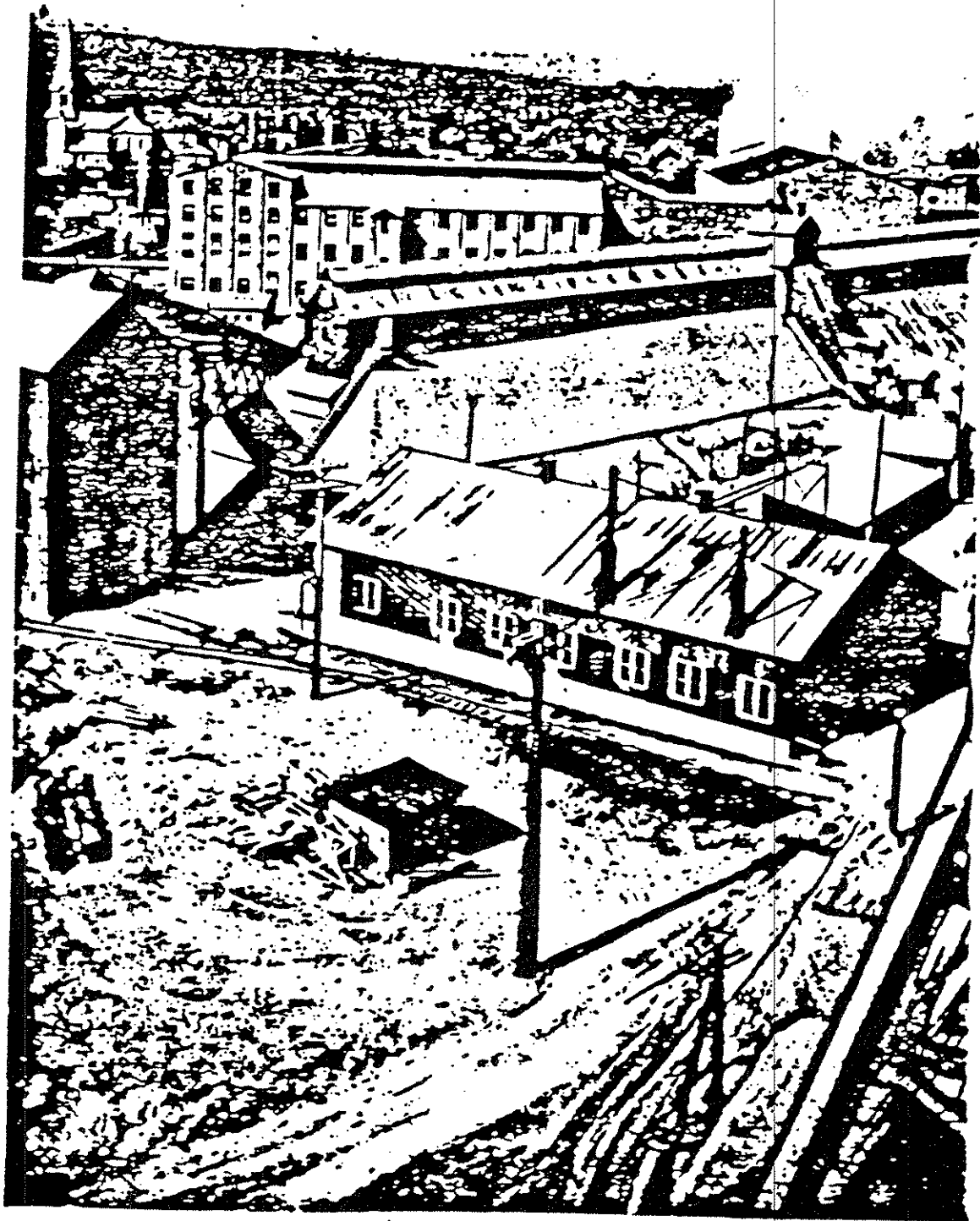
Here are produced asbestos crudes and fibres of every grade and of the highest quality. The fibres are very white in color, soft, pliable, silky, of extremely fine filament, of unsurpassed tensile strength and suitable for every purpose. Asbestos from the King Mine is the world's standard of quality.

The change in mining practice recently inaugurated at the King Mine, involving the cessation of open-cast operations and the adoption of underground mining has resulted in the production of a range of grades which are superior in many respects to anything heretofore produced. The ore is mined by means of a block-caving system, modelled after the method used in the large copper mines of Arizona. (Incidentally, it may be said that this system has never before been employed in any mining field in Canada.) At the time this is written, the underground workings at the King Mine total 6½ miles in length. The fact that all rock is mined hundreds of feet underground means that the resultant fibre is absolutely uncontaminated by contact with overburden, clay, or surface drainage water, all of which tend to give other fibres a darker tint than King fibres. Freedom from wood particles is another real benefit derived from underground mining.

The presence of wood in asbestos fibre is undesirable, and is a source of annoyance to a manufacturer. Its elimination has always presented a serious problem to producers operating open cast workings. Tree stumps and roots, railway ties, wood cribbing, wooden cars, shovel handles, even matches — all of these are possible sources of wood found in asbestos fibre. A. C. fibres from the King Mine are a vast improvement in this respect over anything heretofore produced. Today no wood or wooden equipment is in use at the King Mine. Underground mining has made it possible to eliminate its use entirely and replace it by steel and other materials. All drifts and mine workings are supported where necessary by steel beams, plates, rails and concrete instead of wooden timbering; steel ties are used for all track work; ore chutes are of steel construction; ladders, staging, etc., are of steel. All workmen are supplied with lighters and no matches are allowed to be carried into the mine. Dynamite is removed from its sawdust-filled wooden containers and carried into the mine in waterproof canvas sacks. These and many other precautions are taken to prevent even the smallest piece of wood from getting into the fibre.

ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.
Canada



PLANT AT KING MINE

A. C.

ASBESTOS

Fibres

The flow sheet of the King Mill is so designed that fibres may now be made to the specification of the manufacturer. The work of our Research Engineers, in collaboration with factory staffs at several plants engaged in making different lines of products, brought out the fact that the old line of "run-of-mill" fibres did not give the maximum values to the factory. Different methods of manufacture and different types of machines require different types of fibre. Once the particular requirements of a manufacturer are established, they can be met by one or other of the A. C. fibres.

Beaver Consolidated Mines

A complete line of fine quality Thetford type mill fibres is produced here. These grades are white in color, very silky, of high tensile strength and adaptable for use in all articles in which asbestos is used. Ore for the Beaver Mill is drawn from the Beaver, the Consolidated and the Bennett-Martin quarries.

British-Canadian Mines

Grades from here, in common with those from our other Black Lake mines, are slightly harsher than those from our Thetford properties. They have a somewhat coarser filament and are excellent all-round fibres, especially adaptable to the manufacture of asbestos cement products. Grades like British-Canadian "A" and British-Canadian "Z" have long been popular shingle fibres in the world markets.

Vimy Ridge Mine

From this mine we supply Run-of-Mine and fiberized crudes, spinning fibre, and a harsh type of shingle fibre of a character quite unique among Canadian grades and particularly suited for the manufacture of asbestos-cement products, such as corrugated and flat sheets, shingles, pipes, etc.

Maple Leaf Mine

Fibres from the Maple Leaf Mine are slightly more talcy than those from King or Beaver. They are useful and economical as shingle and paper stocks and especially well adapted for insulation cement and plaster purposes.

Asbestos Mines Limited

These mines are situated at East Broughton and from them are produced the very white, talcy fibres so much in demand for cement pipe and boiler covering and plaster work.



VI. SPECIAL CHARACTERISTICS OF A. C. FIBRES

Crude Fibres

Crude fibres as marketed today are more nearly free from rock particles, lower in iron content and more uniform in grading than ever before. Standards have been raised.

Kings No. 1 Crude and Kings No. 2 Crude are used in making the highest grades of fine yarn. Crudes from the Beaver Mine are of equal quality. Those from the British Canadian Mine at Black Lake and from the Vimy Ridge Mine at Coleraine are suitable for making more bulky yarns for purposes in which this characteristic is more desirable than fineness or smoothness and where a pure white color is not a requisite.

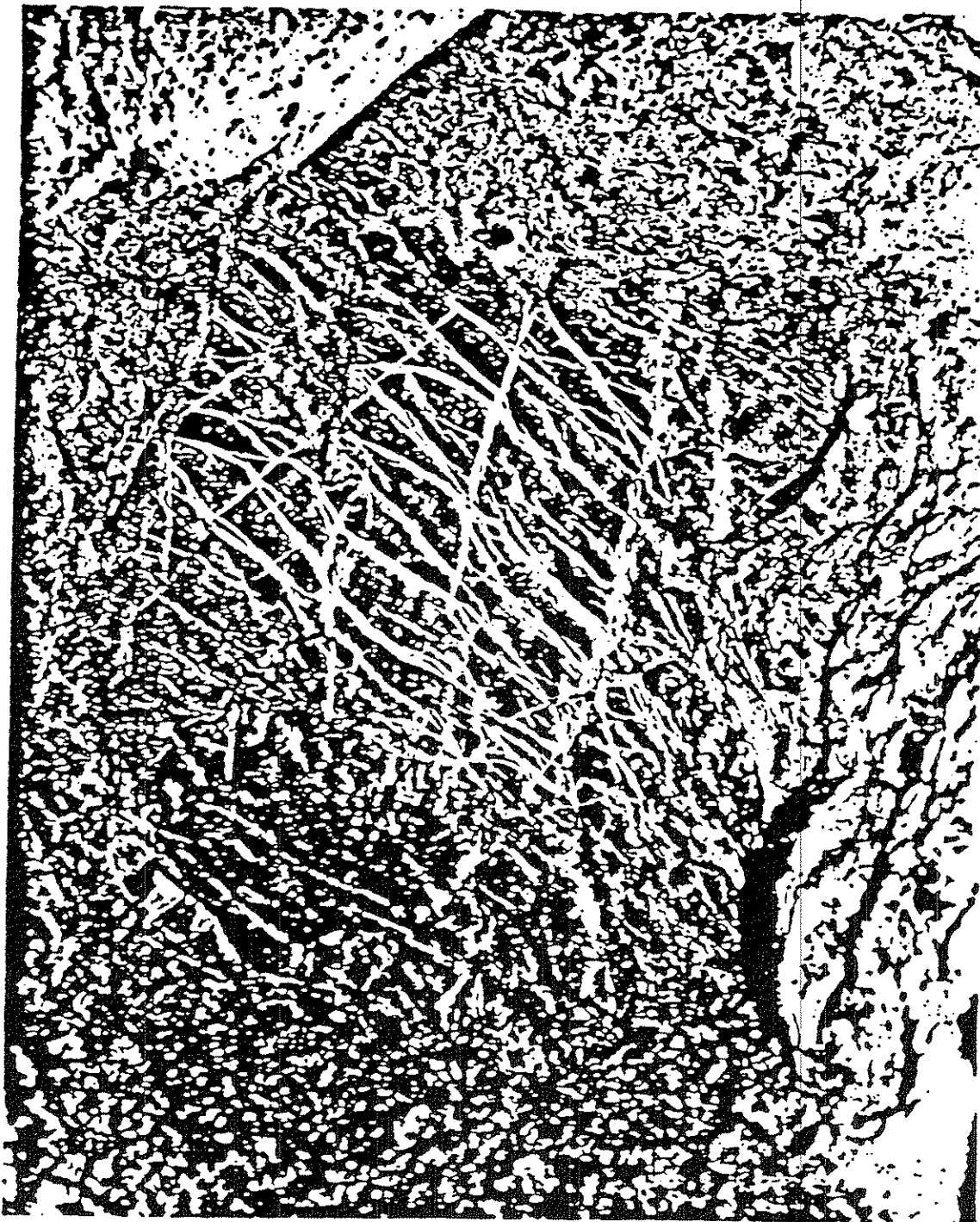


ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.

Canada





View of a ledge at the 500 foot level, King Mine, showing Crude Asbestos veins.

A. C.

ASBESTOS

Fibres

To meet certain specifications in the electrical industry calling for yarns or cloths with a low content of magnetic iron, prepared crude fibres such as Crude No. 15-A, made from specially selected white crudes, have been developed.

Vimy Run-of-Mine Crude is a "run of pit" crude, not divided into the No. 1 or No. 2 grades.

Crudes in fiberized form are also offered; these are the grades known as Fiberized I, Fiberized II, British-Canadian No. 16-A and British-Canadian No. 21. While these are sold on sample only, they are uniform in grading, clean, free from rock particles, and require less opening and consequently show a lower percentage of loss than standard grades of crude.

Spinning Fibres

Two distinct types of spinning fibre are produced at the King Mine. These may be referred to as the "NINE" type and the "THREE" type, the former being a crudy fibre, harsh to the feel, while in the latter the crudy spicules have all been uniformly opened up or "willowed".

A "NINE" type of fibre is suitable for the spinner who prefers to open up his fibre by his own methods prior to carding. It is also intended for the spinner who mixes A. C. fibres with coarser grades. It will withstand the maximum amount of opening which any Canadian mill fibre should undergo. Of course all high quality asbestos fibres may be harmed to some extent if they receive too severe a treatment, but A. C. "NINE" type spinning grades will stand up under a harsh treatment far better than many other qualities.

Our "THREE" type, as already pointed out, is very well opened. It is also noteworthy for its cleanliness and its freedom from dust. It is designed for the spinner who subjects his fibre to only a mild opening process or who gives it no treatment at all prior to carding. The fact that these open type fibres can be put directly into the cards, enables a spinner to save one operation in his factory, which has the double benefit of reducing his cost and of helping to eliminate the presence of dust in his plant.

These spinning grades are marketed under code numbers, in order to fill modern market requirements, and they replace the older grades of Kings 2-B, Beaver Long, Kings "X", and Beaver "X", long the world's standard for spinning fibres.

Details of each grade will be found in the list of A. C. grades on Pages 20 to 26.

Some manufacturers who operate both textile and paper or millboard plants have sometimes utilized the waste and drops from their spinning operations as a raw material for use in the manufacture of millboard and paper. This waste, recovered during the process of opening the run-of-mill type of spinning fibre, consisted of a mixture of small spicules of unopened fibre, bits of rock and rock dust, together with fly. It is now being found advantageous to use A. C. "THREE" type fibres for spinning; purchasing, for millboard and paper, other A. C. fibres specially designed and adapted for making these products.

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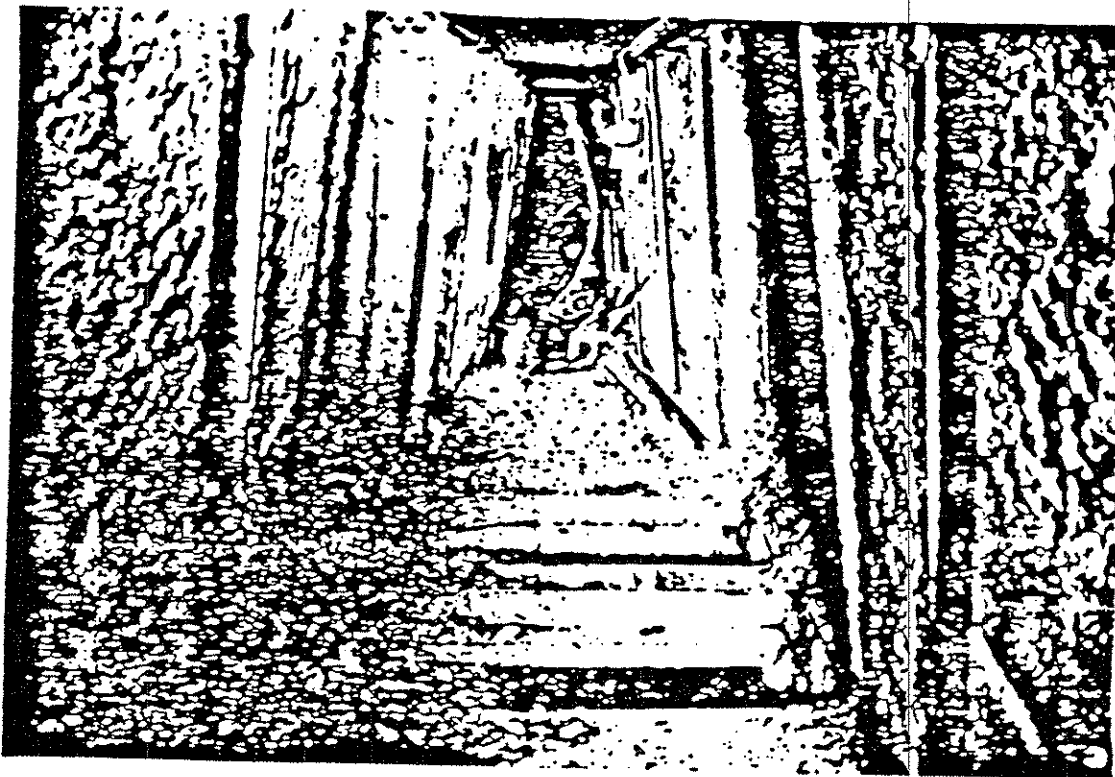
Thetford Mines, Que.

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View of a grizzly drift at the 500 foot level, King Mine, showing steel and concrete reinforcement.

Compressed Sheet Fibres

A variety of fibres is available for use in making compressed sheets, from a high testing, well opened fibre such as Kings No. 353 to a strong, bulky grade of the type of Vimy "G". Kings No. 353 is particularly recommended where extra strength is desired. Similar in character but somewhat shorter in staple, our Kings No. 373 is also an excellent grade for this purpose. Shorter fibres for mixing with the high grades or for use in making lower cost sheets are Kings No. 553, Kings No. 743 or Kings No. 753.

Asbestos-Cement Pipes and Corrugated Sheets

Vimy Shingle Fibre possesses special characteristics which give it unique value for use in the manufacture of asbestos-cement pipes. It is specified for this purpose by manufacturers of the best pipes and corrugated sheets.

Shingle Fibres

A careful study of the requirements of shingle makers has resulted in a drastic change in the types of shingle fibres now being offered. Today A. C. fibres are uniform in length, regular in quality, clean, and evenly milled. One no longer finds in the

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A. C. grades the bunches of long stapled fibre so characteristic of the older types of shingle fibres and which caused "blobs" and weak spots in the finished sheet or shingle. Evenly graded fibre gives a sheet of uniform density and strength.

Shingle fibre from Vimy Ridge Mine is held in very high regard by manufacturers throughout the world, due to its especial characteristics; it is coarser in texture and more bulky than Thetford fibres, but it is very strong.

Excellent shingle grades are also produced at our British-Canadian Mine at Black Lake. British-Canadian "A" and British-Canadian "Z" have been for many years the favourite shingle grades of several important European manufacturers.

At King and Beaver Mines there are produced a range of shingle grades from Kings No. 442, testing not less than 0 - 4 - 9 - 3, down to Beaver "S", a grade shipped in large tonnages, testing not under 0 - $\frac{1}{2}$ - 10 $\frac{1}{2}$ - 5.

In A. C. spinning and shingle fibres the "drops" — that is, material passing through a ten mesh screen, — have been reduced to a minimum. Beyond a certain point material of this nature is undesirable to the spinner or shingle manufacturer, and as a result of the improvement in A. C. grades, he need not now pay freight charges on useless material or have the expense of disposing of that proportion of the fibre which cannot be utilized in his machines.

Magnesia Insulation Fibres

For use in magnesia blocks and magnesia pipe covering Vimy "G" (V3K) gives very good results. It is bulky and contains fibres of great length. Kings No. 353, Kings No. 363 and Kings No. 373 are also recommended for this purpose.

Paper Stocks

Here again the older "run-of-mill" types of fibres have been superseded by newer grades developed after study by our Engineers and experimental work carried out in the plants of manufacturers. A. C. paper fibres have better filtering qualities, work faster in the paper machines and give to the finished paper increased strength and improved appearance, free from spicules and scales. Loss in the stuff box is reduced to a minimum. In some processes the manufacturers using A. C. paper stocks claim to get 100 per cent value from the asbestos.

Short Fibres

The wide range of short fibres made in the Company's six different mills provides a choice in A. C. Fibres for every purpose for which short asbestos fibres are adapted. From the list appearing on Pages 41 and 42 a suitable fibre can be selected to fit any requirement. All grades are clean and uniform.

A certain proportion of clay occurs in fibre produced from rock taken from open pits where stripping of overburden is necessary. This is generally looked upon as being detrimental to most grades of fibre, but in certain very short qualities this clay is actually an asset, as it has a distinct bonding value. In grades of the 7 Group produced at British-Canadian or Asbestos Mines Limited, fibres with a limited amount of residual clay from the surface can be supplied to meet definite specifications when required.

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Moisture

Asbestos fibre is dry when it is packed into bags at the mills. Drying the ore is one of the important processes of preparation. Owing to the hygroscopic nature of asbestos

fibre, however, the moisture content is not constant, and occasionally due to unusual atmospheric or other conditions, a shipment of fibre may have a different moisture content when it arrives at the plant of a manufacturer in comparison with its content when it left the mines.

Experience has shown that in cases where variation in moisture content is a consideration, best results in working the fibre are obtained if it has been kept in storage at the manufacturer's plant for a time sufficient for it to attain the desired condition of dryness required for operating under the most favourable conditions.

It is therefore a good plan for manufacturers to have a few carloads of fibre in stock ahead of requirements.



Sized loading chutes in a haulage drift at the 500 foot level at the King Mine.

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VII. CHEMICAL ANALYSES OF ASBESTOS

Canadian Chrysotile Asbestos is a hydrous magnesium silicate ($H_4Mg_3Si_2O_9$). There is some variation shown in analyses of fibres from mines in different localities, but the variation is generally slight.

Mine	SiO ₂	Al ₂ O ₃	Fe ₂ O ₃	FeO	CO ₂	MgO	H ₂ O+
King Mine							
Thetford	38.70	0.66	3.07	2.05	Nil	41.93	13.53
Black Lake	40.10	0.30	2.30	1.25	"	42.65	13.59
Vimy Ridge	40.30	1.00	1.83	1.14	"	42.32	13.15
East Broughton	38.45	0.14	3.15	0.86	4.45	41.18	11.86

Specific Gravity

Specific gravity of samples taken from the various mines runs as follows:

Vimy Ridge	2.57
Black Lake	2.54
Thetford	2.56
East Broughton	2.59

The hardness of Canadian Chrysotile Asbestos is from 3 to 3.5 Moh's scale.

VIII. COLOR

The change from open pit to underground mining at the King Mine has resulted in a marked improvement in the color of the finished fibre.

In open pit work, no matter how carefully stripping of earth overburden is done, a certain amount of earth and clay is carried into the pit by every rainstorm and mixed with the mill rock. While milling the fibre cleans off much of the clay, it does not remove the yellow color.

Comparison of a King fibre with any other shows that the King material has a white lustre, while many other fibres are deadened by the yellow iron oxide contained in the clay coming from overburden or surface drainage water.

These differences in color shades should not be confused with colors inherent in a fibre. While a Thetford grade when clean should be bright and white with at times a slight greenish tint, the natural color of a British-Canadian fibre from Black Lake is grey, while Vimy fibre has a brownish tint, or in the crude form, a golden color.

Color alone may not be a measure of the value of a fibre, but the presence of clay, indicated by a yellow tint, may be a decided detriment.

Pure Asbestos is chemically inert, but clay on a fibre may have many unforeseen results, particularly in polished boards, or moulded products.

IX. COVERING CAPACITY OF ASBESTOS CEMENT

The relative merits of different brands of asbestos cements have been the subject of much discussion among contractors and supply houses, and dealers in these cements often make fantastic claims for the particular brands they happen to be handling.

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The whole subject of the covering capacity of asbestos cement has recently been exhaustively studied by the National Research Council of Canada, and some of their findings are quoted below.

Bearing on the consistency of asbestos cement pastes, their report says:

- ◆ "When water is added to an asbestos cement, the consistency of the mixture depends on the nature of the fibre . . . Hence the amount of water required to give a workable paste of the correct consistency will vary."

Tests conducted on a wide range of samples of different brands indicated that this variation was rather wide.

"While the same proportion of water, say 80% by weight, could perhaps have been used in all cases, some of the mixtures would have been too wet, others too dry, and the comparison of the cements would have little practical value. In practice the amount of water used depends to some extent on the person using the cement, the contractors usually favouring the use of the least amount of water consistent with workability."

The relation between covering capacity and screen test was studied and the conclusion was reached that though the covering capacity does in a general way increase with the amount of fibre retained on a ten mesh screen, it is by no means directly proportional to the Quebec Standard Screen test. On the other hand, longer fibre seems to cause an increase in shrinkage, which may be because it requires a greater amount of mixing water to give the required consistency.

The wet covering capacity of an asbestos cement depends on the amount of mixing water used. The dry covering capacity, however, is not controlled by the amount of water alone, but depends on other factors, such as shrinkage.

With regard to thermal conductivity, no final conclusions were drawn. The theory is advanced, however, that the thermal conductivity is inversely proportional to the amount of water used in mixing the cement, which means that the heat insulation of the cement would improve with increased amount of mixing water.

Several methods were tried for testing the non-cracking properties of asbestos cements, with all of which no cracking was obtained. This seems to bear out the statement of several very large users of asbestos cements that when cracking does occur, it is not due to the fibre but to faulty workmanship or improper conditions.

Tests on the adhesiveness of asbestos cements when applied to metal surfaces have shown that the condition of the surface is important, especially when quantitative measurements are attempted. The presence of voltaic action affects the adhesion markedly. Roughness of surface does not necessarily increase adhesion, as some high adhesive strengths have been obtained with smooth surfaces.



X. TESTING ASBESTOS FIBRE

One of the important considerations in determining the value of asbestos fibre is its length. A mechanical method for determining the screen test of asbestos fibres has been devised and is now in universal use. This is the Quebec Standard Testing Machine.

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The following description of the machine is taken from "Asbestos Milling and Dressing for the Market" by Eugene Larochelle, published in the Canadian Mining and Metallurgical Bulletin, June 1928:

"The machine consists of a nest of four wooden boxes, measuring 24½ inches by 14½ inches and 3½ inches in depth. The boxes, which are superimposed one above the other, are numbered from the top down, 1, 2, 3 and 4. The bottoms of boxes Nos. 1, 2 and 3 are made of metallic screen of the following specifications: No. 1, ½ inch opening, diameter of wire, 0.105 inch; No. 2, 4 mesh, wire 0.063 inch; No. 3, 10 mesh, wire 0.047 inch. Box No. 4 is a receptacle for the fines which fall through the three other boxes. The nest of four boxes or trays rests on a table attached to an eccentric arm to which an eccentric with a throw of ½ inches gives a movement of 1½ inches travel.

"To make a test, 16 ounces of asbestos is put on the uppermost tray, which is then covered. The machine is run at the rate of 300 r.p.m. and by means of an automatic device, this is kept going for exactly two minutes, giving the nest a horizontal shaking movement. At the end of this time, the asbestos which remains on each tray is weighed. This indicates the grade of the asbestos fibre; the longest fibre naturally stays on the screen with the largest opening, whereas shorter fibre, according to its length, remains on screens 2 and 3 or drops into the pan or lowest tray. The more fibre retained on the first screen and the less fibre falling into the pan, the longer the material, and therefore the greater its value. If, for instance, a customer buys spinning fibre of the specification 4-7-4-1, it means that in a sample of 16 ounces, representing the average of the lot shipped, 4 ounces will remain on the top screen, 7 on the second, and 4 on the third, while one ounce will go through all the screens into the pan. The buyer will naturally pay more for this material than for paper stock testing 0-0-10-6, for which, out of 16 ounces tested, nothing is retained on the first two screens, 10 ounces remain on the third, and 6 ounces go through the latter into the pan. It is evident that the figures of the test represent the proportion in ounces of the different lengths of fibre in a pound of asbestos."

It may be said in passing that a screen test is highly sensitive to any irregularity either of the screen cloth or of the machine itself, and the utmost care must be used in setting up and operating these machines if comparable and consistent results are to be obtained.

The testing machines at the mines are regularly inspected and checked at frequent intervals by an independent Inspector.

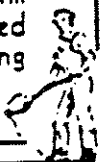


XI. GRADING ASBESTOS FIBRE

For the first time in the history of the asbestos industry a uniform system for the classification of Canadian Chrysotile Asbestos was adopted in 1932 by all producers in Canada. This system of classification divides the output of the mines into nine groups. The first two groups have been appropriately reserved for handcobbled fibre. They form a class by themselves, designated as "Crude Asbestos", consisting of the hand-selected cross-vein material essentially in its native or unfiberized form. The seven remaining



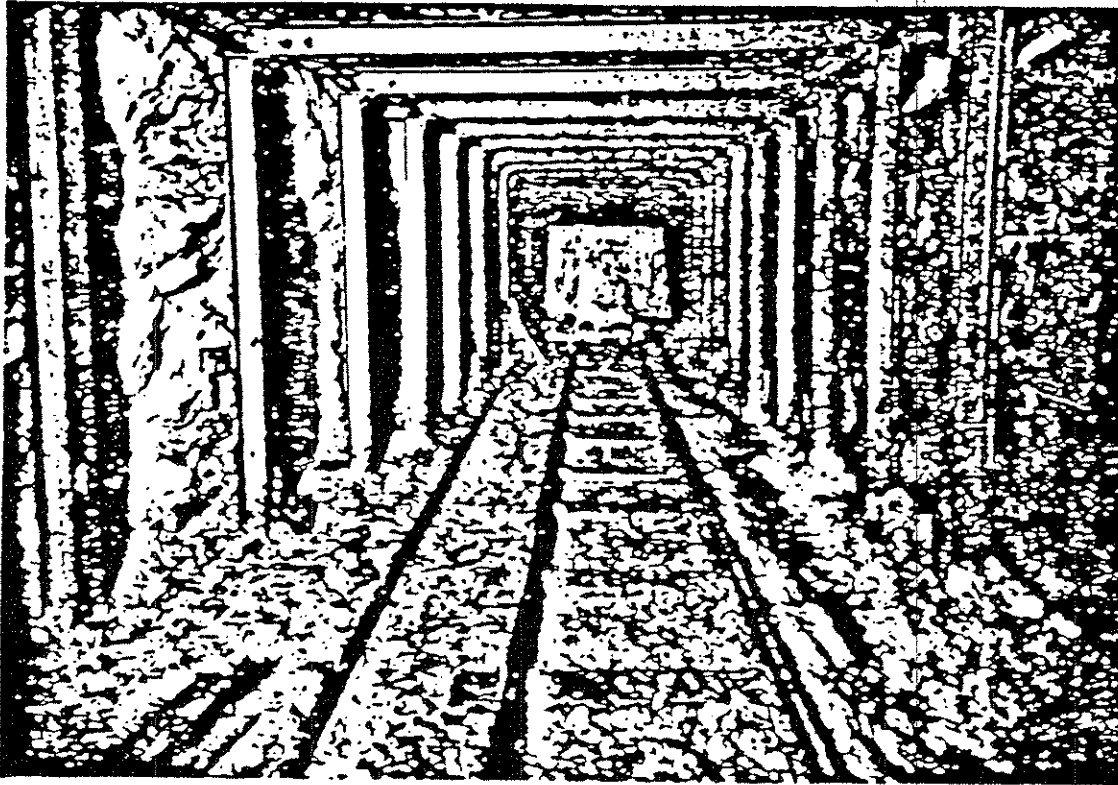
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Haulage drift at the 500 foot level, King Mine, showing steel timbering and concrete lagging.

groups consist of all the grades produced by the mechanical treatment of the ore, and are termed "Milled Asbestos". The classification of these grades is based on screen tests made on the Quebec Standard Testing Machine, described on page 16 of this catalogue.

The shipping test, which is not to fall below a specified minimum, represents the average of tests on representative samples of each car-lot or smaller shipment taken at the time of shipping.

Below are listed the nine groups with their various sub-divisions, together with the Quebec Standard designation and the guaranteed minimum shipping test in each case:

Subdivision of Crude Asbestos		
Group No. 1	Crude No. 1	Consists basically of Crude $\frac{3}{4}$ inch staple and longer.
Group No. 2	Crude No. 2	Consists basically of Crude $\frac{1}{2}$ inch staple up to $\frac{3}{4}$ inch.
	Crude Run-of Mine	Consists of unsorted crudes.
	Crudes, sundry	Consists of Crudes, not otherwise specified.

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Subdivisions of Milled Asbestos

Standard Designation of Grades

Guaranteed Minimum Shipping Test

Group No. 3. Spinning or Textile fibre. Consists of fibre testing 0-8-6-2 and over.

3-D	8.0 - 6.0 - 1.0 - 1.0
3-F	7.0 - 7.0 - 1.5 - 0.5
3-K	4.0 - 7.0 - 4.0 - 1.0
3-M	2.0 - 9.0 - 4.0 - 1.0
3-R	2.0 - 8.0 - 4.0 - 2.0
3-T	1.0 - 9.0 - 4.0 - 2.0
3-W	0.0 - 10.0 - 4.0 - 2.0
3-Z	0.0 - 8.0 - 6.0 - 2.0

Group No. 4. Shingle Fibre. Consists of fibre testing below 0-8-6-2 and including 0.0 - 1.5 - 9.5 - 5.0.

4-D	0.0 - 5.0 - 10.0 - 1.0
4-F	0.0 - 3.0 - 12.0 - 1.0
4-H	0.0 - 5.0 - 8.0 - 3.0
4-K	0.0 - 4.0 - 9.0 - 3.0
4-L	0.0 - 3.0 - 10.0 - 3.0
4-M	0.0 - 4.0 - 8.0 - 4.0
4-R	0.0 - 3.0 - 9.0 - 4.0
4-T	0.0 - 2.0 - 10.0 - 4.0
4-Z	0.0 - 1.5 - 9.5 - 5.0

Group No. 5. Paper Fibre. Consists of fibre testing below 0 - 1.5 - 9.5 - 5.0 to and including 0-0-8-8.

5-D	0.0 - 0.5 - 10.5 - 5.0
5-F	0.0 - 0.0 - 13.0 - 3.0
5-K	0.0 - 0.0 - 12.0 - 4.0
5-M	0.0 - 0.0 - 11.0 - 5.0
5-R	0.0 - 0.0 - 10.0 - 6.0
5-T	0.0 - 0.0 - 9.0 - 7.0
5-Z	0.0 - 0.0 - 8.0 - 8.0

Group No. 6. Waste, Stucco or Plaster. Consists of material testing below 0-0-8-8 and above 0-0-5-11.

6-D	0.0 - 0.0 - 7.0 - 9.0
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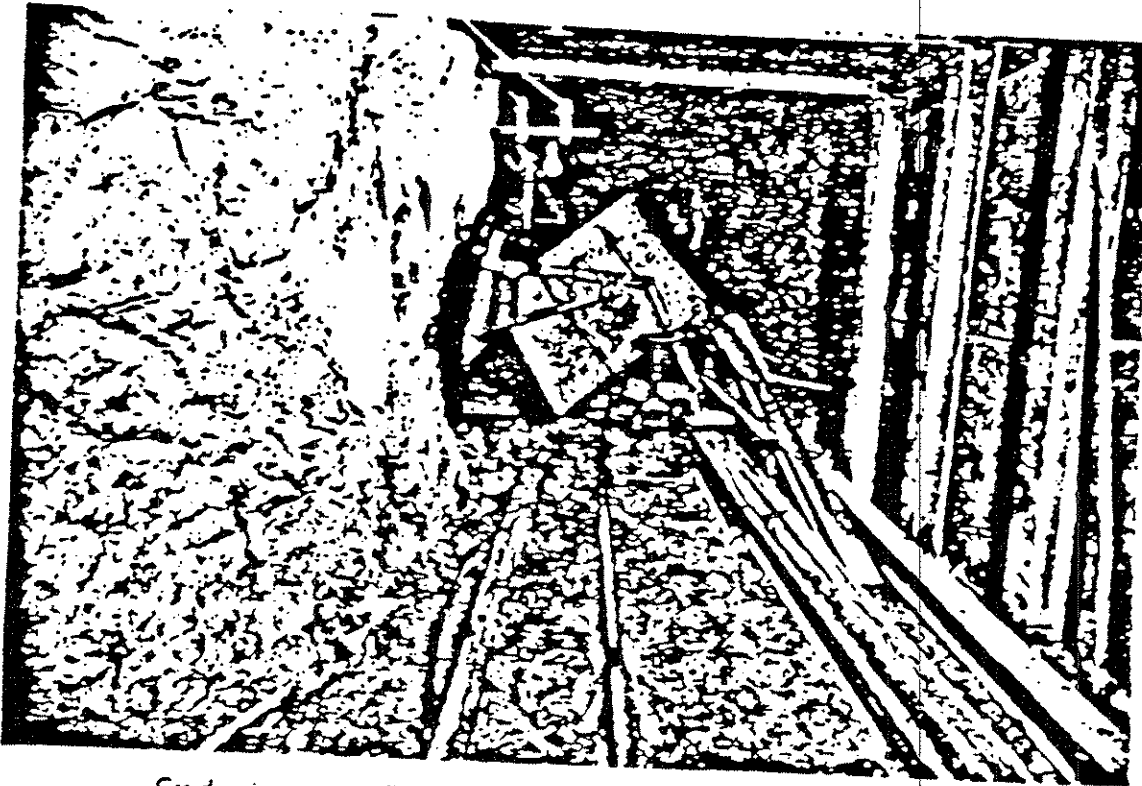
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Car dumping automatically at the shaft loading pocket, 500 foot level, King Mine.

Group No. 7. Refuse or shorts. Consists of material testing 0-0-5-11 and below.

7-D	0.0 - 0.0 - 5.0 - 11.0
7-F	0.0 - 0.0 - 4.0 - 12.0
7-H	0.0 - 0.0 - 3.0 - 13.0
7-K	0.0 - 0.0 - 2.0 - 14.0
7-M	0.0 - 0.0 - 1.0 - 15.0
7-R	0.0 - 0.0 - 0.0 - 16.0
7-T	0.0 - 0.0 - 0.0 - 16.0

The affix "F" designates "Floats" in all subsections of the No. 7 Division of the Classification.

Group No. 8. Sand. Consists of such Asbestos mill product as sand, weighing over 35 lbs. and under 75 lbs. per cubic foot loose measure, and containing a preponderance of rock and to be designated 8-S.

Group No. 9. Gravel and Stone. Consists of such Asbestos Mill products weighing 75 lbs. and over per cubic foot loose measure and to be designated 9-T.

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XII. DISTRIBUTION AND SERVICE

Asbestos Corporation Limited supplies fibre to all the markets of the World and there is no country engaged in the manufacture of asbestos products to which our fibres have not been shipped.

Asbestos Corporation Limited is particularly well equipped to develop special grades for special purposes. The mere fact that it possesses several different mines enables a varied range of grades to be produced, each with distinct characteristics. In addition, particular attention has been given to the development of fibres for special purposes and during the past two years, considerable success has been achieved in providing qualities specially prepared for the particular needs of customers.

The service Asbestos Corporation Limited is equipped to give is strengthened and augmented by the individual attention given to customers by its sales and engineering staffs, who keep in close personal touch with manufacturers' requirements.

Prices are quoted in Canadian funds per ton of 2,000 lbs. f.o.b. cars, mines, and may be obtained on application to the Thetford Mines office.

In addition to its holdings of asbestos bearing lands, Asbestos Corporation Limited also owns extensive deposits of chrome ore and soapstone, and is in a position to supply these two commodities and is prepared to quote prices upon receipt of inquiries.



XIII. A. C. ASBESTOS FIBRES

Kings No. 1 Crude

Basically $\frac{3}{4}$ inch and longer in staple. For many years this has been the standard of the world. It is soft, silky, of fine filament, and possessing unsurpassed tensile strength. It is suitable for the manufacture of all kinds of yarn, and is especially recommended for spinning fine cut, pure asbestos yarn.

No. 14 Crude

A specially prepared Vimy Crude one inch or more in length.

No. 15-A Crude

A selected white crude, $\frac{3}{4}$ inch or longer in staple, low in iron content. Prepared especially for use in yarns for electrical insulation.

Kings No. 2 Crude

Basically $\frac{3}{4}$ inch to $\frac{1}{2}$ inch in length. Similar in character to Kings No. 1 Crude, though shorter in staple. Fine, strong yarns can be spun from this grade and it is also extensively used in mixtures to carry shorter grades of asbestos fibre in order to give the requisite strength to the yarn. It is also used in certain types of high grade asbestos packing.

Vimy Run-of-Mine Crude

Basically over $\frac{3}{4}$ inch in length. This crude has a slightly coarser filament than the King type.

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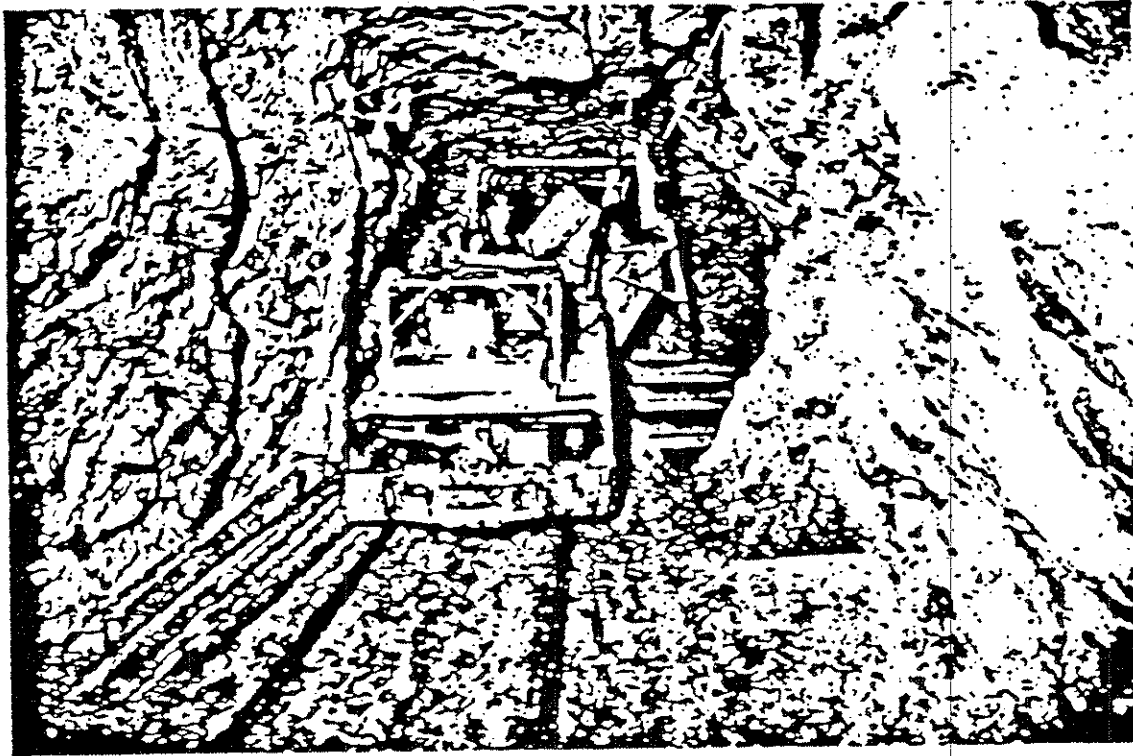
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Electric locomotive and train at the shaft loading pocket, 500 foot level, King Mine.

B. C. No. 16-A

Canadian Standard 3-F. A high quality fiberized grade, product of the British Canadian Mine at Black Lake. Sold on sample but testing not less than 7 - 7 - 1.5 - 0.5. A good spinning fibre.

B. C. No. 21

Canadian Standard 3-Z. A fiberized grade shorter in staple than B. C. 16-A. It is sold on sample only but tests 0-8-6-2 or over. A Black Lake grade, with good spinning qualities.

Fiberized I

Canadian Standard Mark 3-F. A fiberized grade sold on sample but testing not less than 7 - 7 - 1.5 - 0.5. A high grade material of great length of staple, suitable for spinning, and for rubber sheet packing.

Fiberized II

Canadian Standard Mark 3-T. Shorter than the preceding grade, having a minimum test of 1-9-4-2, but also used for spinning and for rubber sheet packing.

Kings No. 339

Canadian Standard Mark 3-K. A spinning fibre of unsurpassed quality, having a minimum shipping test of 4-7-4-1. It is white in color, crudy in character, composed largely of partially opened pencils of fibre; clean, and containing a minimum of dust. Due to its crudy nature, it is especially suitable for use by spinners who are equipped to give their raw material a vigorous opening treatment before putting it into the cards.

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Kings No. 343

Canadian Standard Mark 3-K. This spinning fibre also has a minimum shipping test of 4-7-4-1, but it is much more open in character than Kings No. 339. It is therefore better adapted for use in plants where a very mild opening treatment is given to the fibre before carding. In fact, it is frequently put directly into the cards without any previous opening whatsoever, thus eliminating one operation for the manufacturer. It is very clean, white in color, and practically free of dust. This fibre, together with Kings No. 339, has replaced the old grade known as Kings 2-B.

Kings No. 353

Canadian Standard Mark 3-M, minimum shipping test 2-9-4-1. This grade has replaced the former grade known as Beaver Long. It is an excellent spinning fibre of the open type, but it has been designed for and is particularly well adapted for use in the manufacture of the highest quality of sheet packing.

Kings No. 359

Canadian Standard Mark 3-R. Minimum shipping test 2-8-4-2. This is a medium length spinning fibre of the crudy type, suitable for spinning into all varieties of yarn. It is, in fact, an excellent general purpose fibre, and it may be used to great advantage in a mixture with coarser fibres such as Vimy "G" to give "slickness" to the yarn and to help speed up the process of manufacture. This also applies to the two grades in the 3-K class, as well as the 3-M grade mentioned above. Moreover, yarn made from this grade is finer and less bulky than when a coarse fibre is used alone.

Kings No. 363

Canadian Standard Mark 3-R. Minimum shipping test 2-8-4-2. This spinning fibre is of the open type. Except for this characteristic difference, which makes it especially suitable for use by spinners who employ mild opening methods, all of the remarks made in the preceding paragraph apply with equal force in the case of this particular grade.

Kings No. 369

Canadian Standard Mark 3-T. Minimum shipping test 1-9-4-2. This is a short spinning fibre of the crudy type. Together with Kings No. 373, this grade replaces the older grade known as Beaver X. This grade is very popular where low first cost is an important consideration. It is capable of being spun alone, or it may be mixed to advantage with other spinning grades, from King, Vimy Ridge or British-Canadian Mines.

Kings No. 373

Canadian Standard Mark 3-T. Minimum shipping test 1-9-4-2. A short spinning fibre of the open type. The remarks made in connection with King's No. 369 also apply here. This grade is also suitable for sheet packing.

Maple Leaf "M"

Canadian Standard Mark 3-Z. Minimum shipping test 0-8-6-2. A fibre of good staple, slightly higher in talc content than King's grades, suitable for packing.

Vimy "G" (V-3K)

Canadian Standard Mark 3-K. Minimum shipping test 4-7-4-1. A fibre containing much long staple. Suitable for spinning, Magnesia pipe covering, packing and jointing.

V-3-W

Canadian Standard 3-W. Minimum shipping test 0-10-4-2. Contains a high proportion of fibre on Box 2 of the testing machine; well adapted for use in packing.

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Kings No. 442

Canadian Standard 4-K. Minimum Shipping test 0-4-9-3. A long staple shingle fibre, for making high grade asbestos-cement flat and corrugated sheets, pipes, shingles, etc.

Kings No. 443

Canadian Standard 4-K. Minimum Shipping test 0-4-9-3. A grade similar in test to Kings No. 442, but more open in character. Used in rubber sheet packing and other rubber composition products.

Kings No. 450

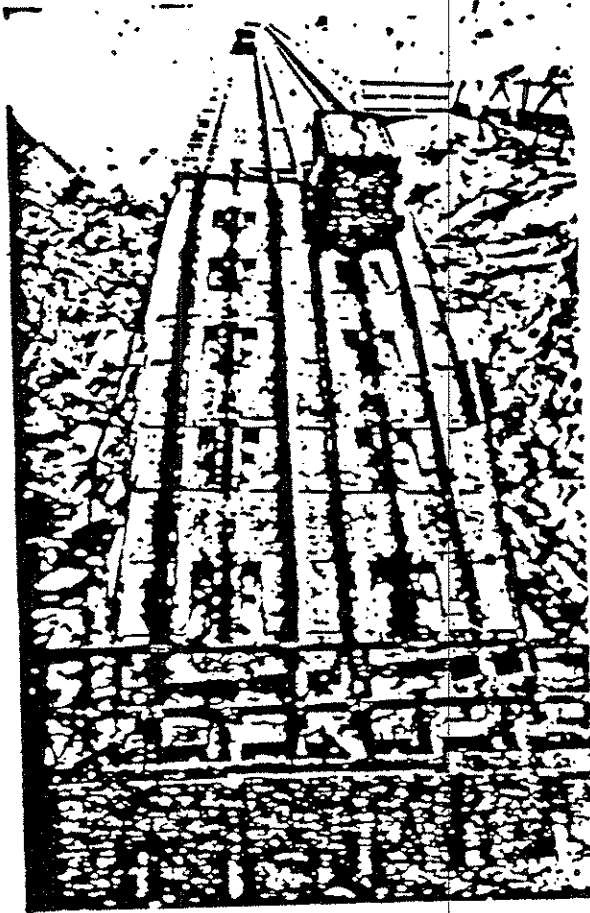
Canadian Standard 4-L. Minimum Shipping test 0-3-10-3. A clean, well opened grade for use in moulded brake lining, packing, etc.

Kings No. 463

Canadian Standard 4-M. Minimum shipping test 0-4-8-4. A well opened fibre of good length suitable for rubber sheet packing, etc.

Vimy Shingle Fibre

Canadian Standard 4-M. Minimum shipping test 0-4-8-4. A high quality crudy shingle fibre of considerable length. This fibre is unsurpassed for use in the manufacture of asbestos-cement pipes, as well as other asbestos-cement goods, such as shingles, flat or corrugated sheets, etc.



Haulage incline from the vertical shaft at the King Mine.

Brit. Can. "A"

Canadian Standard 4-R. Minimum shipping test 0-3-9-4. Shingle fibre of the well known Black Lake type.

Vimy "H"

Canadian Standard 4-T. Minimum shipping test 0-2-10-4. A sharp, crudy shingle fibre, low in dust content and especially designed for the manufacture of asbestos-cement shingles, sheets and pipes.

Kings No. 479

Canadian Standard 4-T. Minimum shipping test 0-2-10-4. A shingle fibre of the Thetford type, but sharp and crudy in character and low in dust content.

Kings Shingle Fibre

Canadian Standard 4-T. Minimum shipping test 0-2-10-4. A well known Thetford type shingle fibre, clean and uniform.

ASBESTOS CORPORATION LIMITED

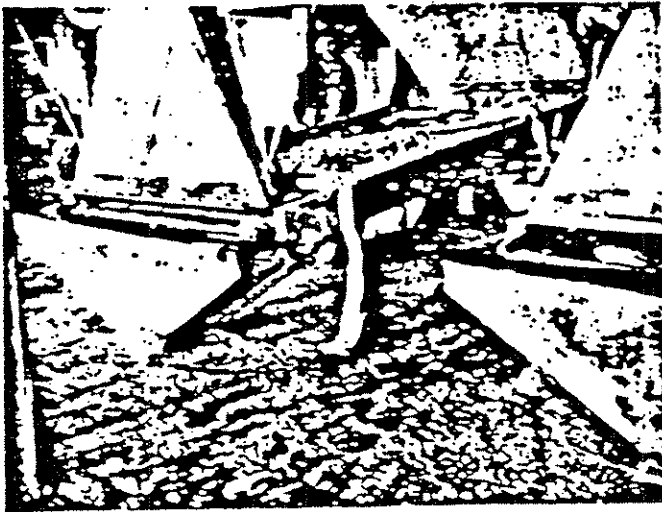
Thetford Mines, Que.

Canada

A. C.

ASBESTOS

Fibres



A shaking screen in operation cleaning asbestos fibre in one of the A. C. mills.

Brit. Can. "Z"

Canadian Standard 4-T.
Minimum shipping test 0-2-10-4.
For many years one of the most popular of the A. C. shingle grades; a fibre of the Black Lake type intended particularly for use in shingles, sheets, etc.

Maple Leaf Shingle

Canadian Standard 4-T.
Minimum shipping test 0-2-10-4.
A good shingle fibre, slightly more talcy than other Thetford or Black Lake grades.

Maple Leaf "Z"

Canadian Standard 4-Z.
Minimum shipping test 0-1½-9½-5.
Similar in character to Maple Leaf Shingle Fibre, but slightly lower in test.

Beaver "S"

Canadian Standard 5-D. Minimum shipping test 0-½-10½-5. A short staple shingle fibre, popular for use in the manufacture of low cost asbestos-cement products.

Kings "XX" Special

Canadian Standard 5-M. Minimum shipping test 0-0-11-5. A clean, open fibre especially prepared for use in moulded brake lining and asbestos gaskets.

Kings "XX" 11-5

Canadian Standard 5-M. - Minimum shipping test 0-0-11-5. A strong fibre of good staple for use in millboard or paper.

Kings No. 559

Canadian Standard 5-R. Minimum shipping test 0-0-10-6. A crudy type of fibre for use in a mixture with longer fibres for asbestos-cement products.

Kings "XX" -

Canadian Standard 5-R. Minimum shipping test 0-0-10-6. A popular grade for use in asbestos millboard and asbestos paper.

Beaver "XX"

Canadian Standard 5-R. Minimum shipping test 0-0-10-6. Similar in general character to the grade mentioned immediately above.

Maple Leaf "XX"

Canadian Standard 5-R. Minimum shipping test 0-0-10-6. A good quality of paper and millboard stock, slightly talcy.

Kings "E"

Canadian Standard 6-D. Minimum shipping test 0-0-7-9. A medium length fibre capable of being manufactured into asbestos paper.

ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.

Canada

A. C. ASBESTOS

Fibres

Beaver "E"

Canadian Standard 6-D.
Minimum shipping test 0-0-7-9.
Similar to the above.

Kings "C"

* Canadian Standard 7-D.
Minimum shipping test 0-0-5-11.
A clean fibre for use as a paper
filler or as a filler in roofing
compounds, etc.

Beaver "C"

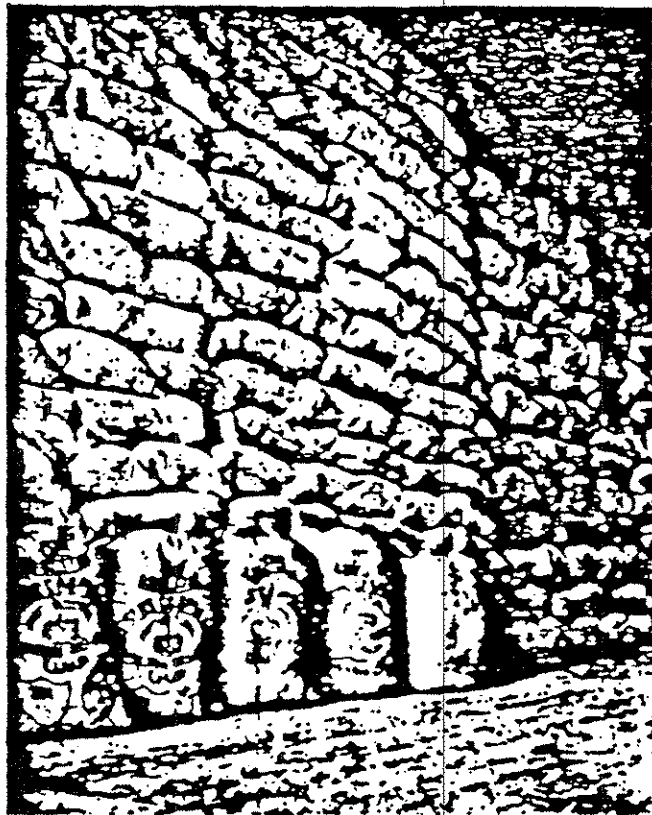
Canadian Standard 7-D.
Minimum shipping test 0-0-5-11.
Similar to the above.

Maple Leaf "C"

Canadian Standard 7-D.
Minimum shipping test 0-0-5-11.
Similar to the above but slightly
more talcy.

Kings No. 723

Canadian Standard 7-F.
Minimum shipping test 0-0-4-12.
A clean uniform grade of fibre for
use as a filler in various products.



Asbestos Fibre bagged for shipment in the storehouse at the King Mine.

A. M. No. 313

Canadian Standard 7-H. Minimum shipping test 0-0-3-13. A white, talcy
fibre suitable for use in insulation, particularly when combined with gypsum.

K-7-H

Canadian Standard 7-H. Minimum shipping test 0-0-3-13. A fibre of
intermediate length especially prepared for manufacturers of composition flooring.

Kings "D"

Canadian Standard 7-K. Minimum shipping test 0-0-2-14. A clean uniform
fibre for use either as a filler for caulking compounds and plastic paints, or as a covering
cement. Widely used in cold moulded products.

K-7-M

Canadian Standard 7-M. Minimum shipping test 0-0-1-15. A clean, uniformly
graded short fibre, very popular as a covering cement.

Maple Leaf "XXXX"

Canadian Standard 7-M. Minimum shipping test 0-0-1-15. A good grade of
covering cement.

ASBESTOS CORPORATION LIMITED

Thetford Mines, Que.

Canada



ASBESTOS

Fibres

Brit. Can. "CF"

Canadian Standard 7-M. Minimum shipping test 0-0-1-15. A popular grade of short asbestos containing a small percentage of residual clay. In demand for cold moulded products and for use in making nailing concrete, as well as for ordinary covering cement purposes.

Kings No. 763

Canadian Standard 7-R. Minimum shipping test 0-0-0-16. A short grade for use as asbestos covering cement where low cost is a pre-requisite.

Kings No. 5

Canadian Standard 7-R. Minimum shipping test 0-0-0-16. A short grade, weighing slightly more per cubic foot than Kings No. 763.

Kings No. 52

Canadian Standard 7-R. Minimum shipping test 0-0-0-16. A grade generally similar to the previous one but slightly heavier.

A. M. No. 7

Minimum shipping test 0-0-0-16. A white fibre of a talcy nature. An excellent grade for boiler and pipe covering cement.

A. M. No. 7-T

Minimum shipping test 0-0-0-16. A white talcy fibre, short in staple and an excellent grade for boiler and pipe covering cement.

A. M. No. 5

Minimum shipping test 0-0-0-16. A white, talcy fibre similar in character to the above but somewhat heavier per cubic foot.

V-27

Canadian Standard Mark 7-R. Minimum shipping test 0-0-0-16. A short fibre produced at the Vimy Ridge Mine.

Kings Special Floats

Canadian Standard 7-R-F. Not sold on screen test. A carefully prepared grade of Floats, uniform and free of grit. Particularly adapted for use in fibre filled lubricating grease.

Kings Floats

Canadian Standard 7-R-F. Not sold on screen test. Air-floated asbestos, clean and uniform. Suitable for use in cold moulded insulation, composition flooring, etc.

Kings No. 793

Canadian Standard 7-T-F. Not sold on test. A short material, especially prepared for use in composition flooring.

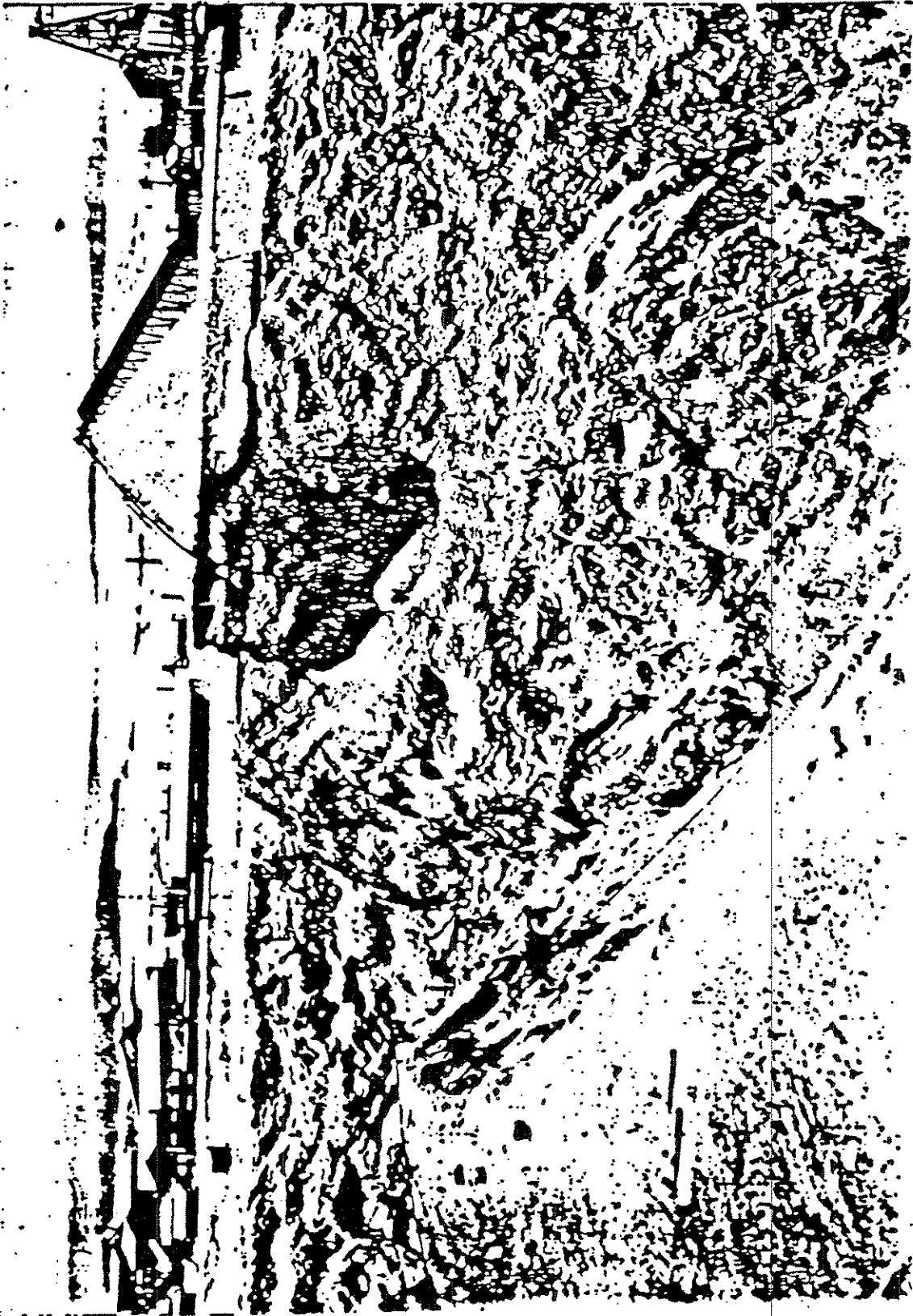
K. P.

Canadian Standard 8-S. Not sold on screen test. A material weighing about 45 lbs. per cubic foot. Suitable for use in composition flooring.

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Thetford Mines, Que.

Canada



View of west face of King Pit, showing the sand fill in the opening caused by surface subsidence over Slope Block No. 1.

A. C.

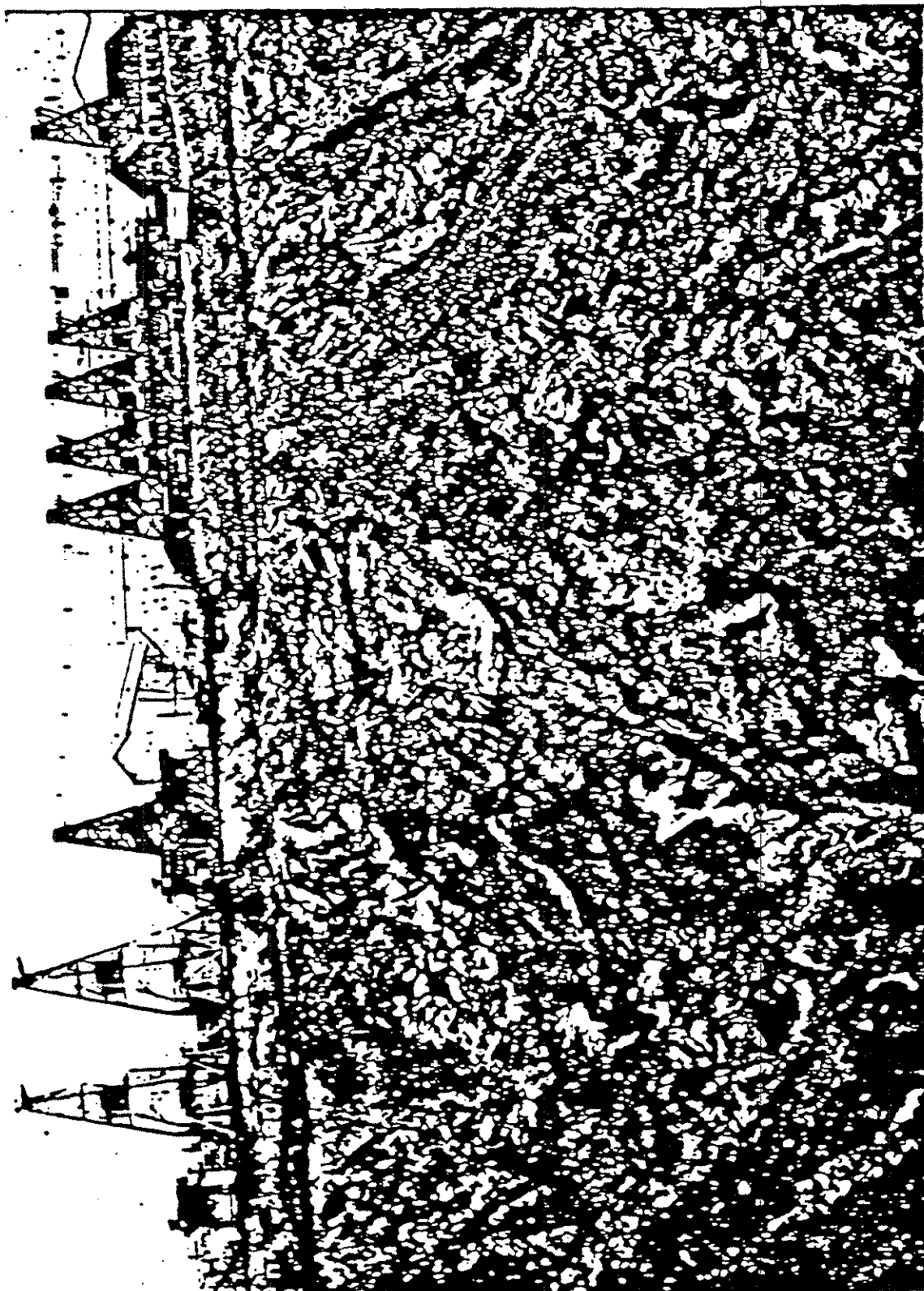
ASBESTOS

Fibres

XIV. ALPHABETICAL LIST OF USES AND A. C. FIBRES RECOMMENDED

Purpose	Suitable A. C. Fibres	Canadian Standard
*Air Cell Pipe Covering: —	See all grades listed opposite "Paper, Asbestos."	
Asbestos Yarn: —	Kings No. 1 Crude Kings No. 2 Crude Crude No. 14 Kings No. 339 Kings No. 343 Kings No. 353 Kings No. 359 Kings No. 363 Kings No. 369 Kings No. 373 Fiberized I Fiberized II B.C. No. 16-A B.C. No. 21 Vimy "G" (V-3K)	— — — 3-K 3-K 3-M 3-R 3-R 3-T 3-T 3-F 3-T 3-F 3-Z 3-K
Asphalt Roofing Paint: —	See all fibres listed opposite "Paint, asphalt roofing."	
Belting (Conveyor): —	See all fibres listed opposite "Asbestos Yarn".	
Blocks (Concrete): —	Kings "D" K-7M Kings No. 763 Kings No. 5 British Canadian "CF" Maple Leaf XXXX A.M. No. 7 A.M. No. 5 V-27	7-K 7-M 7-R 7-R 7-M 7-M 7-R
Boiler Covering (Asbestos Cement): —	Kings "C" Maple Leaf "C" Kings No. 723 K-7H A.M. No. 313 Kings "D"	7-D 7-D 7-F 7-H 7-H 7-K

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Canada



View of the upper west face of the King Pitt, showing cableways and head tower.

A. C.

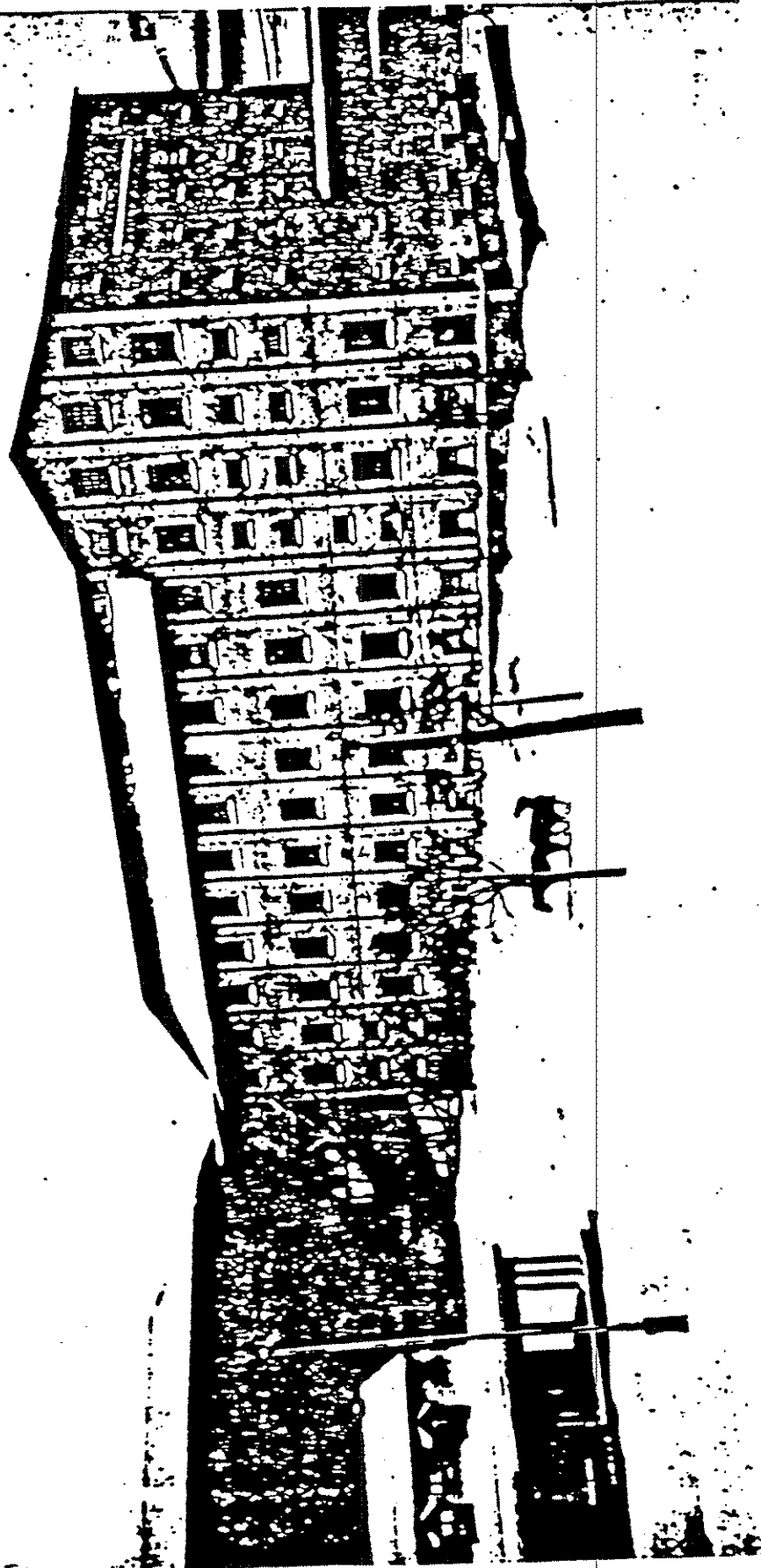


Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Boiler Covering (Asbestos Cement):— (Continued)	British Canadian CF Maple Leaf XXXX K-7M British Canadian CF Kings No. 763 Kings No. 5 Kings No. 52 A.M. No. 7 A.M. No. 5 A.M. No. 7-T	7-M 7-M 7-M 7-M 7-R 7-R 7-R
Boiler Mattress Covers: —	See all grades listed opposite "Asbestos Yarn".	
Boiler Mattress Fillers: —	See all grades listed opposite "Mattress Fillers, Boiler".	
Braid Packing (Pleited & Braided Asbestos Yarn): —	See all grades listed opposite "Asbestos Yarn".	
Brake Blocks (Moulded Type): —	Kings No. 363 Kings No. 373 Kings No. 450 British Canadian "A" British Canadian "Z" Kings Shingle Fibre Maple Leaf Shingle Beaver "S" Kings "XX" Special	3-R 3-T 4-L 4-R 4-T 4-T 4-T 5-D 5-M
Brake Blocks (Woven Type): —	See all grades listed opposite "Asbestos Yarn".	
Brake Lining (Flexible Moulded): —	See all grades listed opposite "Brake Blocks, Moulded Type".	
Brake Lining (Hard Moulded): --	See all grades listed opposite "Brake Blocks, Moulded Type".	
Brake Lining (Woven Type): —	See all grades listed opposite "Asbestos Yarn".	

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Thetford Mines, Que.
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THE KING MILL.

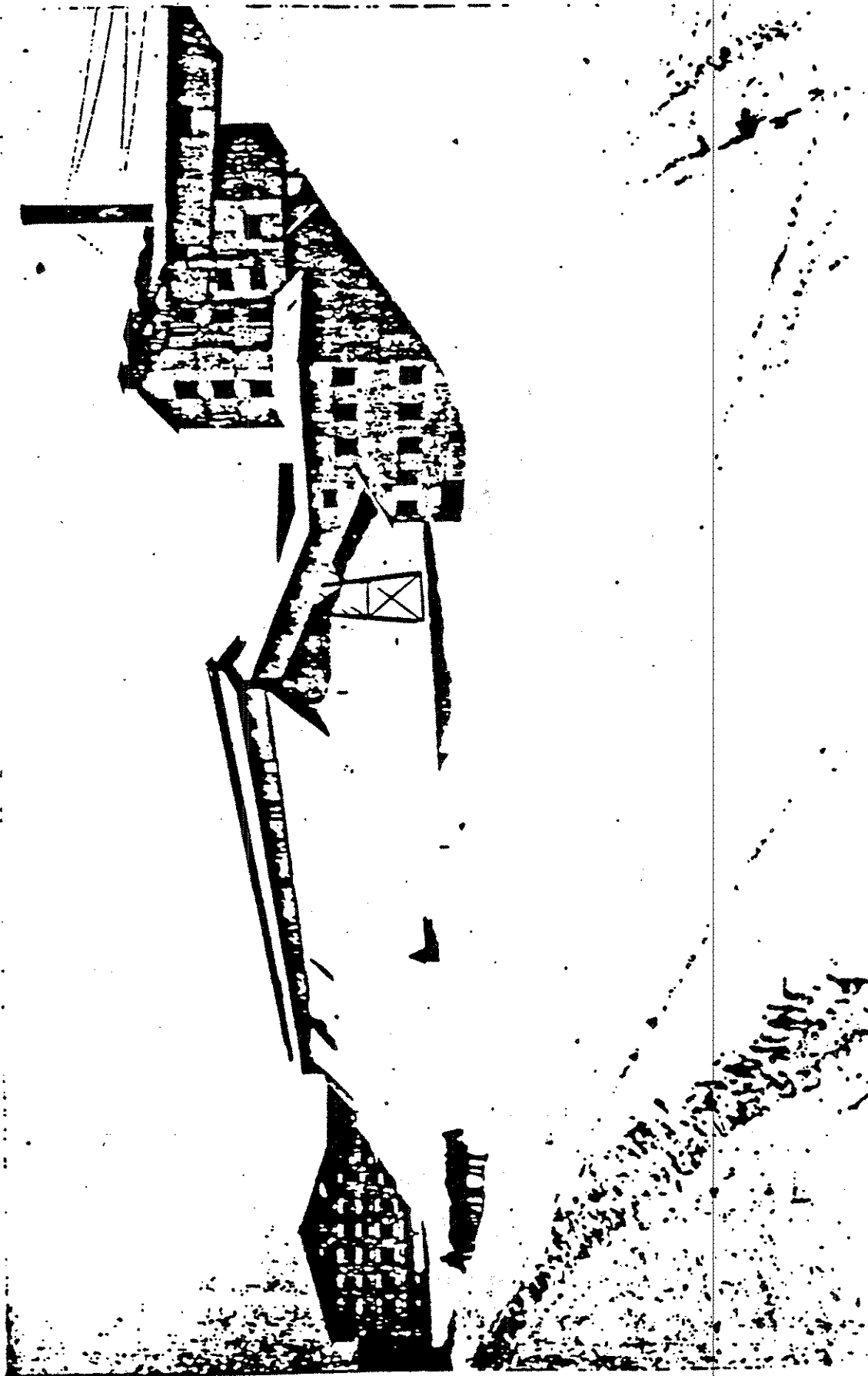
A. C.

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Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Caulking Compound: —	Kings "C" Maple Leaf "C" Beaver "C" Kings No. 723 K-7H A. M. No. 313 Kings "D" Maple Leaf XXXX K-7M British Canadian CF A. M. No. 7	7-D 7-D 7-D 7-F 7-H 7-H 7-K 7-M 7-M 7-M
Cement (Asbestos Boiler and Pipe Covering cement): —	See all grades listed opposite "Boiler Covering".	
Cement (Asbestos-Cement Shingles, sheets, etc.): —	Vimy Shingle Fibre Kings No. 442 Kings No. 460 B. C. "A." Vimy "H" Kings Shingle Kings No. 479 British Canadian "Z" Maple Leaf Shingle Beaver "S"	4-M 4-K 4-M 4-R 4-T 4-T 4-T 4-T 4-T 5-D
Cement (Plastic Roofing Cement): —	See all grades listed opposite "Caulking Compound".	
Cloth (Filtering): —	See all grades listed opposite "Asbestos Yarn".	
Clothing (Fireproof): —	See all grades listed opposite "Asbestos Yarn".	
Clutch Facings (Flexible moulded type): —	See all grades listed opposite "Breke Blocks, moulded type".	

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Thetford Mines, Que.
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View of plant at the Beaver Mine, showing the dryer plant, dry rock storage bin, with the mill in the background.

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Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Clutch Facings (Hard Moulded Type): —	See all grades listed opposite "Brake Blocks, moulded type".	
Clutch Facings (Woven type): —	See all grades listed opposite "Asbestos Yarn".	
Cold Moulded Products: —	See all grades listed opposite "Moulded Products, cold".	
Composition Flooring: —	See all grades listed opposite "Flooring Composition".	
Compressed Sheet Packing: —	Kings No. 2 Crude British Canadian No. 16-A British Canadian No. 21 Fiberized I Fiberized II Kings No. 343 Vimy "G" (V-3K) Kings No. 353 Kings No. 363 Kings No. 373 Maple Leaf "M" V-3W Kings No. 443 Kings No. 450 Kings No. 463 British Canadian "A" Kings Shingle British Canadian "Z"	— 3-F 3-Z 3-F 3-T 3-K 3-K 3-M 3-R 3-T 3-W 3-W 4-K 4-L 4-M 4-R 4-T 4-T
Concrete Flooring: —	Kings "D" Maple Leaf XXXX K-7M British Canadian CF Kings No. 763 Kings No. 5	7-K 7-M 7-M 7-M 7-R 7-R
Curtains, Fireproof: —	See all grades listed opposite "Asbestos Yarn".	

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View of the south face of the Beaver Pit.

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Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Electrical Insulation:	Kings No. 1 Crude Kings No. 2 Crude Vimy No. 15-A Crude	
Filters: —	Kings No. 1 Crude Kings No. 2 Crude	
Flooring Composition: —	A. M. No. 313 K-7H Kings "D" Maple Leaf XXXX K-7M British Canadian CF Kings No. 763 Kings No. 5 K. P. Kings Special Floats Kings Floats Kings No. 793 A. M. No. 7 A. M. No. 5	7-H 7-H 7-K 7-M 7-M 7-M 7-R 7-R 8-S 7-RF 7-RF 7-TF
Gaskets (Asbestos Paper): —	Kings No. 450 Kings XX Special Kings XX Beaver XX Maple Leaf XX Kings "E" Kings "C" Maple Leaf "C" Beaver "C"	4-L 5-M 5-R 5-R 5-R 6-D 7-D 7-D 7-D
Gaskets (Asbestos paper Metal-Clad): —	See all grades listed opposite "Gaskets, Asbestos paper".	
Gaskets (Asbestos Textile): —	See all grades listed opposite "Asbestos Yarn".	
Gaskets (Rubber Sheet): —	See all grades listed opposite "Compressed Sheet Packing".	
Grease (Fibre Filled): —	Kings Special Floats	7-RF

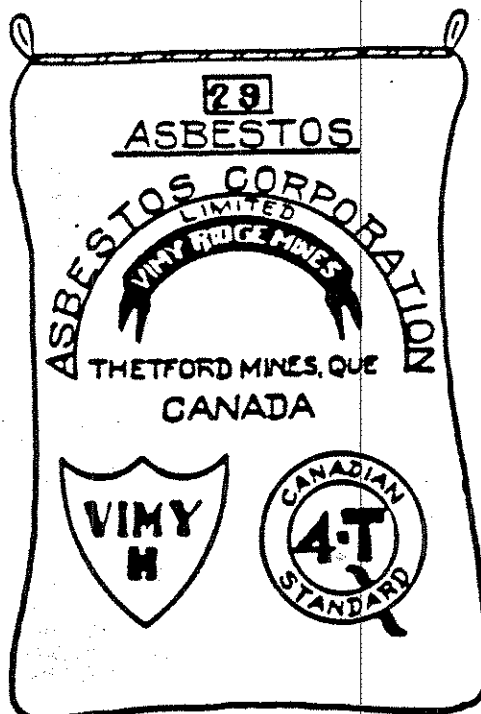
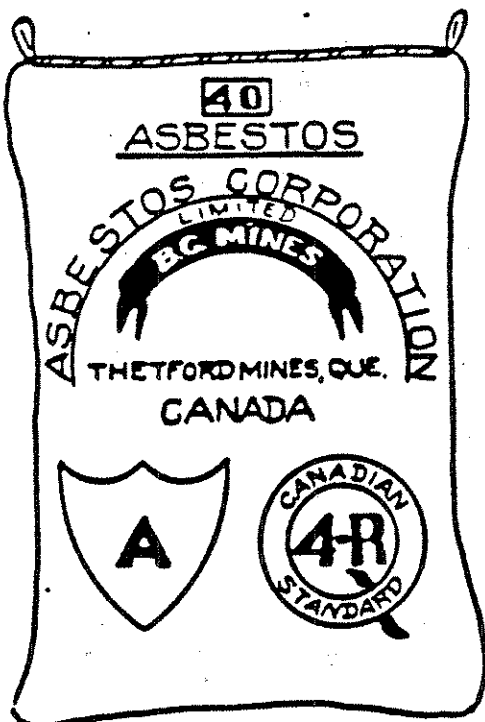
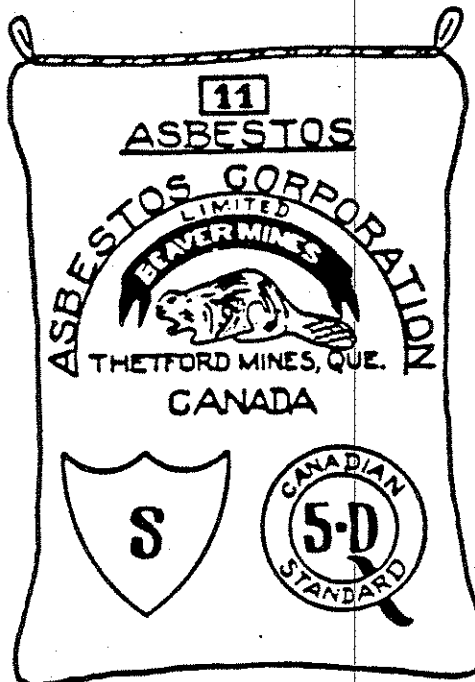
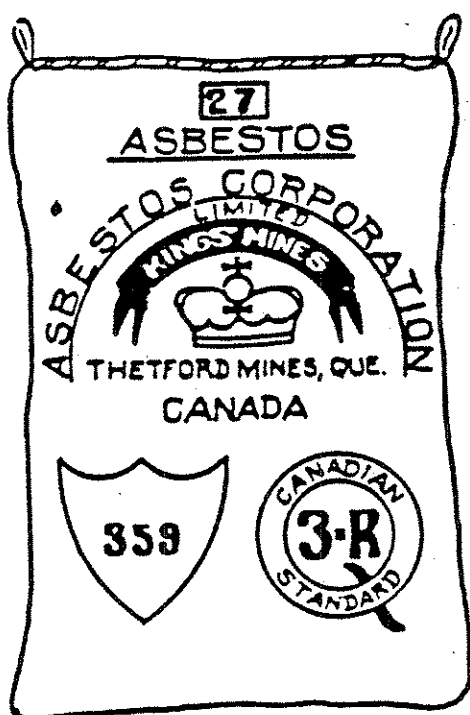
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Thetford Mines, Que.
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A. C.

ASBESTOS

Fibres



Representative designs of fibre bags from four of Asbestos Corporation's mines.

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Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
High Pressure Insulation: —	Vimy "G" (V-3K) Kings No. 353 Kings No. 363 Kings No. 373 Maple Leaf "M" V-3W	3-K 3-M 3-R 3-T 3-W 3-W
Hot Moulded Products: —	See all grades listed opposite "Moulded Products, Synthetic Resin".	
Jointing: —	See all grades listed opposite "Compressed Sheet Packing".	
Listings (Asbestos Packing): —	See all grades listed opposite "Asbestos Yarn".	
Low Pressure Insulation: —	See all grades listed opposite "Boiler Covering".	
Lumber (Asbestos): —	See all grades listed opposite "Cement, Asbestos-Cement, shingles, sheets, etc."	
Magnesia Pipe Covering: —	See all grades listed opposite "High Pressure Insulation".	
Mattress Covers, Boiler: —	See all grades listed opposite "Asbestos Yarn".	
Mattress Fillers, Boiler: —	Vimy "G" (V-3K) V-3W	3-K 3-W
Millboard, Asbestos: —	Kings XX 11-5 Kings XX Beaver XX Maple Leaf XX Kings "E" Beaver "E" Kings "C" Beaver "C" Maple Leaf "C"	5-M 5-R 5-R 5-R 6-D 6-D 7-D 7-D 7-D

ASBESTOS CORPORATION LIMITED
Thetford Mines, Que.
Canada

A. C.

ASBESTOS

Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Moulded Products, cold: —	Kings XX Special Kings XX Beaver XX Maple Leaf XX Kings "E" Kings "C" Beaver "C" Kings "D" K-7M British Canadian CF V-27 Kings Floats	5-M 5-R 5-R 5-R 6-D 7-D 7-D 7-K 7-M 7-M 7-R 7-RF
Moulded Products (Synthetic Resin): —	Kings Special Floats	7-RF
Nailing Concrete: —	See all grades listed opposite "Concrete Flooring".	
Packing, Asbestos Compressed Sheet: —	See all grades listed opposite "Compressed Sheet Packing".	
Packing (Rubber Impregnated Asbestos Cloth): —	See all grades listed opposite "Compressed Sheet Packing".	
Paint (Asphalt Roofing): —	Kings "C" Maple Leaf "C" Kings No. 723 K-7H A. M. No. 313 Kings "D" Maple Leaf XXXX K-7M Kings No. 5 Kings No. 763 Kings No. 773	7-D 7-D 7-F 7-H 7-H 7-K 7-M 7-M 7-R 7-R 7-T
Paint, Plastic Wall: —	See all grades listed opposite "Paint, Asphalt Roofing".	



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A. C.

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Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Paper, Asbestos: —	Kings XX 11-5 Kings XX Special Kings XX Maple Leaf XX Beaver XX Kings "E" Beaver "E" Kings "C" Maple Leaf "C" Beaver "C"	5-M 5-M 5-R 5-R 5-R 6-D 6-D 7-D 7-D 7-D
Pipe Covering (High Pressure Insulation, 85% Magnesia): —	See all grades listed opposite "High Pressure Insulation".	
Pipe Covering (Low Pressure Insulation, Boiler Cement): —	See all Grades listed opposite "Boiler Covering".	
Pipes, Asbestos-Cement: —	See all grades listed opposite "Cement, Asbestos-Cement shingles, sheets, etc."	
Plaster, Asbestos Fibre: —	See all grades listed opposite "Paint, Asphalt Roofing".	
Roll Board, Asbestos: —	See all grades listed opposite "Paper, Asbestos".	
Roofing Paint: —	See all grades listed opposite "Paint, Asphalt Roofing".	
Rovings, Asbestos: —	See all grades listed opposite "Asbestos Yarn".	
Sheathing, Asbestos-Cement Flat or Corrugated: —	See all grades listed opposite "Cement, Asbestos-Cement Shingles, sheets, etc."	
Sheets, Asbestos-Cement Flat and Corrugated: —	See all grades listed opposite "Cement, Asbestos-Cement Shingles, sheets, etc."	

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Canada

A. C.



Fibres

Purpose	Suitable A. C. Fibres	Canadian Standard
Shingles, Asbestos Cement: —	See all grades listed opposite "Cement, Asbestos-Cement Shingles, sheets, etc."	
Stucco (Asbestos): —	See all grades listed opposite "Paint, Asphalt Roofing".	
Tape (Asbestos): —	See all grades listed opposite "Asbestos Yarn".	
Tile (Asbestos-cement): —	See all grades listed opposite "Cement, Asbestos-Cement Shingles, sheets, etc."	
Tile (Asphalt Floor): —	A. M. No. 313 K-7H Kings "D" K-7M British Canadian CF Kings No. 5 Kings No. 763 K. P. Kings No. 793 Kings Special Floats Kings Floats A. M. No. 7 A. M. No. 5	7-H 7-H 7-D 7-M 7-M 7-R 7-R 8-S 7-TF 7-RF 7-RF
Wire Wiping: —	Specially prepared grades available on application.	
Yarn, Asbestos: —	See all grades listed opposite "Asbestos Yarn".	

ASBESTOS CORPORATION LIMITED
Thetford Mines, Que.
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A. C.

ASBESTOS

Fibres

XV. CLASSIFIED LIST OF A. C. FIBRES.

Quebec Standard	Grade	Our Code No.	Minimum Shipping Test	Minimum Carload (Tons)	Freight Classification
—	Kings No. 1 Crude	—	—	20	Asbestos Crude
—	Kings No. 2 Crude	—	—	20	" "
—	Vimy No. 14 Crude	—	—	20	" "
—	Vimy No. 15-A Crude	—	—	20	" "
—	Vimy Run-of-Mine Crude	—	—	20	" "
3-F	B. C. No. 16-A	—	—	20	Asbestos Fibre
3-Z	B. C. No. 21	—	—	20	" "
3-F	Fiberized I	—	—	20	" "
3-T	Fiberized II	—	—	20	" "
3-K	Kings No. 339	339	4 - 7 - 4 - 1	20	" "
3-K	Kings No. 343	343	4 - 7 - 4 - 1	20	" "
3-K	Vimy "G" (V-3K)	—	4 - 7 - 4 - 1	20	" "
3-M	Kings No. 353	353	2 - 9 - 4 - 1	20	" "
3-R	Kings No. 359	359	2 - 8 - 4 - 2	20	" "
3-R	Kings No. 363	363	2 - 8 - 4 - 2	20	" "
3-T	Kings No. 369	369	1 - 9 - 4 - 2	20	" "
3-T	Kings No. 373	373	1 - 9 - 4 - 2	20	" "
3-W	V-3W	—	0 - 10 - 4 - 2	20	" "
3-Z	K-3Z	—	0 - 8 - 6 - 2	20	" "
3-Z	Maple Leaf "M"	—	0 - 8 - 6 - 2	20	" "
4-K	Kings No. 442	442	0 - 4 - 9 - 3	20	" "
4-K	Kings No. 443	443	0 - 4 - 9 - 3	20	" "
4-L	Kings No. 450	453	0 - 3 - 10 - 3	20	" "
4-M	Vimy Shingle Fibre	—	0 - 4 - 8 - 4	20	" "
4-M	Kings No. 463	463	0 - 4 - 8 - 4	20	" "
4-R	B. C. "A"	—	0 - 3 - 9 - 4	20	" "
4-T	Vimy "H"	—	0 - 2 - 10 - 4	20	" "
4-T	Kings No. 479	479	0 - 2 - 10 - 4	20	" "
4-T	Kings Shingle Fibre	480	0 - 2 - 10 - 4	20	" "
4-T	Brit. Can. "Z"	—	0 - 2 - 10 - 4	20	" "
4-T	Maple Leaf Shingle	—	0 - 2 - 10 - 4	20	" "
4-Z	Maple Leaf "Z"	—	0 - 1 1/2 - 9 1/2 - 5	20	" "
5-D	Beaver "S"	520	0 - 1/2 - 10 1/2 - 5	20	" "
5-M	Kings "XX" Special	553	0 - 0 - 11 - 5	20	" "
5-M	Kings "XX" 11-5	552	0 - 0 - 11 - 5	20	" "

ASBESTOS CORPORATION LIMITED

Therford Mines, Que.

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A. C.

ASBESTOS

Fibres

CLASSIFIED LIST OF A. C. FIBRES

(Continued)

Quebec Standard	Grade	Our Code No.	Minimum Shipping Test	Minimum Carload (Tons)	Freight Classification
5-R	Kings No. 559	559	0 - 0 - 10 - 6	20	Asbestos Fibre
5-R	Kings "XX"	562	0 - 0 - 10 - 6	20	" "
5-R	Beaver "XX"	—	0 - 0 - 10 - 6	20	" "
5-R	Maple Leaf "XX"	—	0 - 0 - 10 - 6	20	" "
6-D	Kings "E"	652	0 - 0 - 7 - 9	* 30	Asbestos Waste
6-D	Beaver "E"	—	0 - 0 - 7 - 9	30	" "
7-D	Kings "C"	713	0 - 0 - 5 - 11	30	Asbestos Shorts
7-D	Beaver "C"	—	0 - 0 - 5 - 11	30	" "
7-D	Maple Leaf "C"	—	0 - 0 - 5 - 11	30	" "
7-F	Kings No. 723	723	0 - 0 - 4 - 12	30	" "
7-H	A. M. No. 313	—	0 - 0 - 3 - 13	30	" "
7-H	K-7H	733	0 - 0 - 3 - 13	30	" "
7-K	Kings "D"	743	0 - 0 - 2 - 14	30	" "
7-M	K-7M	753	0 - 0 - 1 - 15	30	" "
7-M	Maple Leaf XXXX	—	0 - 0 - 1 - 15	30	" "
7-M	Brit. Can. CF	—	0 - 0 - 1 - 15	30	" "
7-R	Kings No. 763	763	0 - 0 - 0 - 16	30	" "
	A. M. No. 7	—	0 - 0 - 0 - 16	30	" "
	A. M. No. 7-T	—	0 - 0 - 0 - 16	30	" "
	A. M. No. 5	—	0 - 0 - 0 - 16	30	" "
7-R	Kings No. 5	764	0 - 0 - 0 - 16	30	" "
7-R	Kings No. 52	765	0 - 0 - 0 - 16	30	" "
7-T	Kings No. 773	773	0 - 0 - 0 - 16	30	" "
7-R	V-27	—	0 - 0 - 0 - 16	30	" "
7-RF	Kings Special Floats	—	—	30	" "
7-RF	Kings Floats	—	—	30	" "
7-TF	Kings No. 793	793	—	30	" "
8-S	K. P.	845	—	30	" "

* Grades in 6-D Classification can be shipped under the Freight Classification of Asbestos Waste to points where such a classification is in effect, minimum carload quantities being 30 tons; otherwise 6-D grades must be shipped as Asbestos Fibre, minimum carload quantities of 20 tons.

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Thetford Mines, Que.
Canada

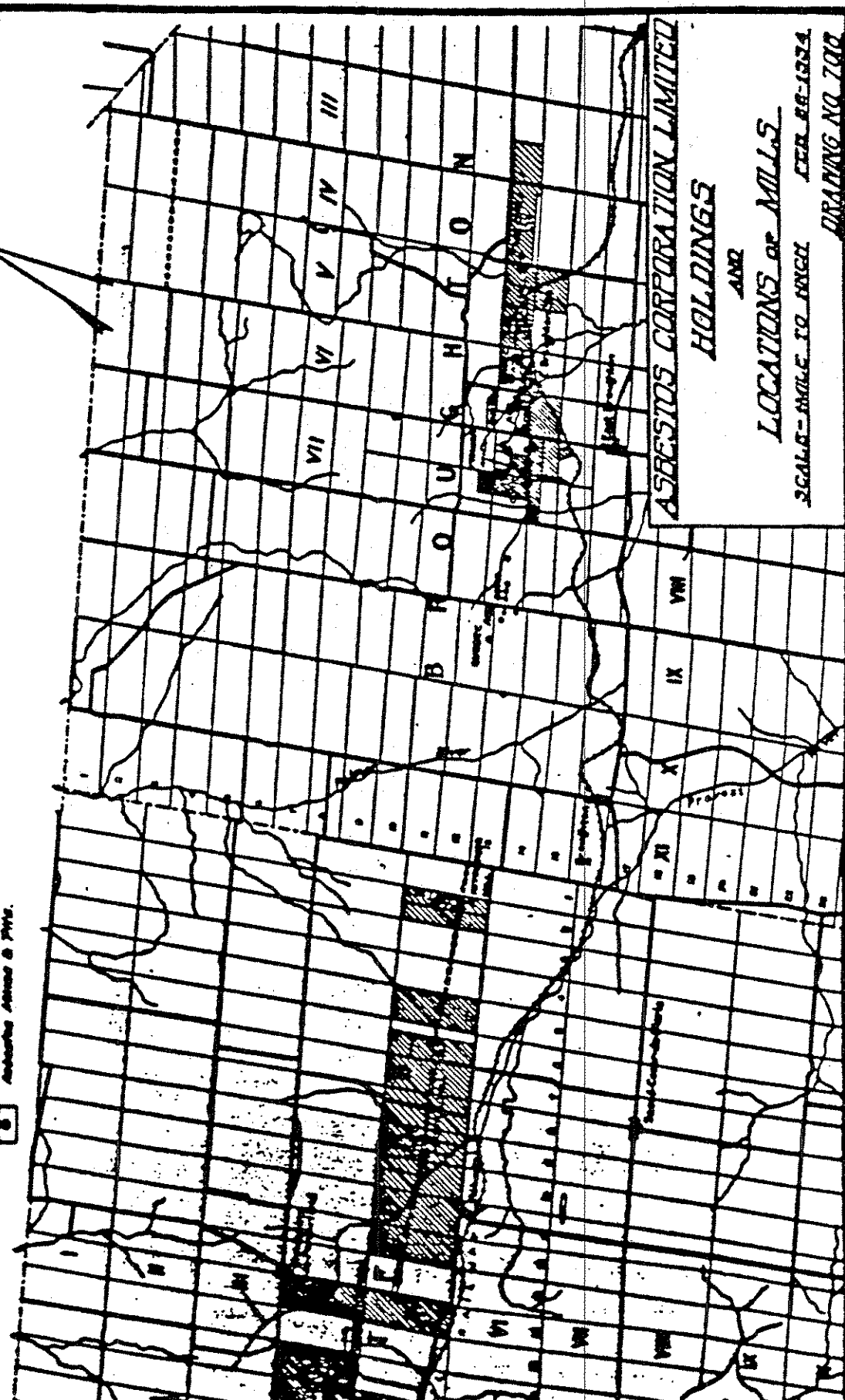


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ARIZONA-ASBESTOS CORPORATION LIMITED HOLDINGS SHOWN HATCHED.

-  Asbestos Mills.
-  Asbestos Areas & Pits.



ARIZONA-ASBESTOS CORPORATION LIMITED
HOLDINGS
AND
LOCATIONS OF MILLS.
SCALE - MILE TO INCH. FEB. 28-1934
DRAWING NO. 700



EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

IN RE: ASBESTOS CASES :
: (Shipworker/Insulator Cases) :
:

RESPONSES OF DEFENDANT NATIONAL GYPSUM COMPANY
TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

National Gypsum Company ("National Gypsum") responds to
Plaintiffs' First Set of Interrogatories as follows:

GENERAL OBJECTIONS

Defendant National Gypsum objects to any interrogatory or instruction that purports to impose upon Defendant any obligation not expressly set forth in the Federal Rules of Civil Procedure. In particular, National Gypsum objects to the definitions of "you", "your" and "defendant" on the ground that, as the terms are defined, the interrogatories are vague, overbroad and unduly burdensome.

National Gypsum objects to these interrogatories to the extent that they seek privileged or work product information developed in anticipation of litigation or in preparation for trial.

Defendant National Gypsum objects generally to these interrogatories to the extent they purport to require National Gypsum to provide information with respect to all of its subsidiaries, affiliated companies, and predecessors, which are not parties in this case, on the grounds that, as so defined, the

interrogatories are overbroad and unduly burdensome, seek information not relevant to the subject matter of this action and not reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs allege exposure to asbestos-containing products while employed as insulators and shipyard workers. Accordingly, National Gypsum answers these interrogatories with respect to asbestos fiber, which had many uses, asbestos-containing products of the type used to insulate pipes, boilers and similar installations, and asbestos-containing products approved for use on ships. With respect to each interrogatory, Defendant objects to answering to the extent that the interrogatory seeks information regarding additional products on the grounds that such interrogatory is overbroad and seeks information not relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence, and, thus, the interrogatory is unduly burdensome.

INTRODUCTORY STATEMENT

Mr. Robert E. Oberkircher, an Assistant Controller of Gold Bond Building Products Division of National Gypsum Company, Charlotte, North Carolina, has reviewed the answers to these interrogatories and has attested on behalf of National Gypsum to the accuracy of the answers for the purpose of satisfying the verification requirement. Mr. Oberkircher has been employed by National Gypsum from 1955 to the present. These answers are based upon an ongoing review of National Gypsum's documents and information obtained from ongoing discussions with various

National Gypsum personnel over a period of years. The information contained herein has been assembled by authorized employees and counsel for National Gypsum. It is not possible to reconstruct each step taken to gather this information or to state that all documents that might possibly pertain to the matters at issue, which may have occurred many years ago, have been located or examined in connection with these answers. It is not possible to identify by name each person who could be said to have participated in the preparation of answers or to identify all documents that may have provided information. National Gypsum reserves the right to amend these answers on the basis of any further information that is obtained.

RESPONSES

1. Identify the registered name of the answering defendant as well as all prior names or predecessor entities by which the defendant has existed.

(a) For each give the current address and the state of incorporation and whether or not it is an active corporation.

RESPONSE: See Attachment 1.

2. Set forth the full and correct name, the principal place of business and the state and date of incorporation of the answering defendant.

RESPONSE: See Attachment 1.

3. Identify all divisions, subsidiaries or affiliated companies to the answering defendant.

RESPONSE: See General Objections and Attachment 1.

4. For each entity or division listed in response to #3, state whether or not it ever has or presently engages in any

phase of mining, manufacturing, sale, supply, distribution, or design of asbestos or asbestos-containing products.

RESPONSE: See General Objections and Attachments 1 and 2.

5. With respect to each division, subsidiary or company listed in #4, identify the nature and extent of its function during the period of time it was in existence.

RESPONSE: See response to Interrogatory No. 4.

6. Has this answering defendant been sued under its correct name? If not, please state the correct legal name of the defendant and provide the information requested in #1 above concerning the defendant as correctly named.

RESPONSE: The correct name of this defendant is National Gypsum Company.

7. Please state whether or not you have ever held a certificate of authority to do business in this state and the address for your registered agent for service in this state.

RESPONSE: National Gypsum is qualified and authorized to do business in South Carolina. Its registered agent in that state is CT Corporation System, 409 East North Street, Greenville, South Carolina 29602.

8. Have you ever mined asbestos?

RESPONSE: See Attachment 2.

9. If the answer to the previous interrogatory is "yes", please state the dates in which you were involved in mining asbestos, and the locations of your mines.

RESPONSE: See Attachment 2.

10. Have you ever sold raw asbestos fiber to any of the co-defendants? If so, in what years and in what quantities did you make such sales.

phase of ~~RESPONSE~~: National Gypsum objects to this
design of asbestos or asbestos-containing product
interrogatory as overbroad, unduly burdensome and irrelevant.

RESPONSE: See General Objections and Attachments
Without waiving these objections, National Gypsum will make its
sales records available for inspection and copying in accordance

with Attachment 3.

11. As to any product containing asbestos in any form
or quantity, has this defendant ever:

- (a) Designed such a product;
- (b) Manufactured such a product;
- (c) Processed such a product;
- (d) Sold such a product;
- (e) Distributed such a product;
- (f) Relabeled such a product manufactured or
designed by another; and
- (g) Held a patent for such a product.

RESPONSE: Yes.

12. If the answer to the preceding interrogatory or
any subpart thereof was in the affirmative, please state the
following information about each product:

- (a) The manufacturer of the product;
- (b) The designer of the product;
- (c) The supplier of the raw asbestos fiber
used in the product;
- (d) The dates of its manufacture or sale by the
answering defendant;
- (e) The percentage of asbestos content of the
product; and
- (f) The type of asbestos used in the manufacture
of the product.

RESPONSE: See General Objections and Attachments A-F
("Product-Attachments") and the burden of proof is on the plaintiff.

Without waiving these objections, National Gypsum will answer:
13. In what year did the answering defendant first begin selling or distributing asbestos-containing products? Please be specific for each asbestos-containing product manufactured, sold or distributed by you.

RESPONSE: See General Objections and Product Attachments.

14. In what year did the answering defendant last sell, distribute or manufacture an asbestos-containing product? Please be specific for each asbestos-containing product.

RESPONSE: See General Objections and Product Attachments.

15. For each asbestos-containing product manufactured and/or distributed by you, state:

- (a) The brand name of the product and the inclusive years of its manufacture and/or distribution;
- (b) The asbestos content by weight of each product for each year;
- (c) The type of asbestos fiber used in each product;
- (d) The application for which such product was advertised or sold;
- (e) The temperature ranges for the products used; and
- (f) Whether the product was cement, a pipe covering, a cloth or other type of thermal insulation product.

RESPONSE: See General Objections and Product Attachments.

16. Describe each product as to its color and physical characteristics and appearances.

RESPONSE: See General Objections and Product Attachments.

17. As to each product, state how such product was packaged or supplied.

RESPONSE: See General Objections and Product

Attachments.

18. Does the answering defendant claim that any patent would cover any product listed in response to the interrogatories above? If so, give the number of each patent, the date same was issued and the number of each patent application that is pending.

RESPONSE: See General Objections and Product

Attachments.

19. For each asbestos-containing product manufactured or designed by you, please state the specific batching requirements for that product.

RESPONSE: See General Objections and Product

Attachments. To the extent that this interrogatory requests additional information, National Gypsum objects to it as overbroad, unduly burdensome and not relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence.

20. State the time period each particular batching requirement was followed and any changes that were made.

RESPONSE: See response to Interrogatory No. 19.

21. For each asbestos-containing product that you manufactured, please set forth the supplier of the raw asbestos fiber used for that product.

RESPONSE: See General Objections, Product Attachments and Attachment 6.

RESPONSE: See General Objections and Interrogatory 22. As to each product mentioned above, identify the following:

- (a) Any pertinent trademark that was applicable to the product during any time of its sale;
- (b) The label on the packaging of that particular product for each year of its manufacture;
- (c) All sales brochures, specification sheets, performance data or other promotional material, as well as any and all installation materials, data or brochures which would have accompanied or been distributed in connection with the installation, application or use of each of the products listed above; and
- (d) The advertised use of the product. (As to this interrogatory, you may provide a copy of the document in lieu of describing same.)

RESPONSE: See Product Attachments and Attachment 3.

23. For each document listed or described above, please indicate the name or the names of the individuals having custody of said documents or copies thereof, and where they are located.

RESPONSE: See Attachment 3.

24. Please describe in detail the method for disbursement and sale of each asbestos-containing product manufactured, designed or distributed by the answering defendant.

RESPONSE: See General Objections. National Gypsum also objects to this interrogatory as vague, ambiguous and overbroad. Without waiving these objections, National Gypsum states that the products described in the Product Attachment generally were sold by National Gypsum's industrial sales division. In addition, TUCO Products Corporation, New York, New York, was a distributor of asbestos-faced mineral wool board and

(a) Identify each such written material or document; and mentioned above. Identify the following:

(b) Who presently has possession of each such document and where is it located.

RESPONSE: See response to Interrogatory No. 30.

32. Have you conducted any tests concerning the health consequences of the use of your product between 1960 and 1975 or the date that the asbestos content was removed from the product, whichever is the later.

RESPONSE: See General Objections and response to Interrogatory No. 33.

33. If so, please state:

- (a) What tests were done;
- (b) Who was responsible for conducting the tests;
- (c) What the results of the tests were; and
- (d) Identify any documents concerning the tests.

RESPONSE: See General Objections, response to Interrogatory No. 28 and Attachment 4. The products described in Attachments B-F were discontinued prior to 1960, and National Gypsum had no reason to conduct any tests concerning health consequences of use of those products.

34. When did the asbestos-containing products manufactured by you first contain any warning or caution concerning the health consequences of the use of the product or the breathing of asbestos dust?

RESPONSE: See General Objections, Product Attachments and Attachment 22.

35. For each such product, please state:

- (a) The wording of each warning or caution;

- (b) The description of each such printed warning or caution;
- (c) The method used to distribute the warning to persons who were likely to use the products;
- (d) The date each such warning was issued;
- (e) The name, address and job classification of each person who presently has possession of the above-described warning or caution;
- (f) Identify the warning or caution by date and content;
- (g) State whether any industrial psychologist or human factors engineers were consulted prior to utilizing such warnings or cautions; and
- (h) Identify any special instructions provided with each product regarding its use or safety procedures to be employed by persons handling such product.

RESPONSE: National Gypsum objects to part (h) as overbroad, unduly burdensome and irrelevant. Without waiving this objection, see response to Interrogatory No. 34.

36. For any warning ever provided on an asbestos-containing product manufactured or distributed by you, please state:

- (a) When the warning first appeared;
- (b) What was the precise wording of the warning when it first appeared;
- (c) Was the warning ever altered, amended or changed in any manner and, if so, how and when; and
- (d) Where was the warning located on the product or packaging.

RESPONSE: See response to Interrogatory 34.

37. When did you first become aware that warnings were placed on products distributed by other defendants?

RESPONSE: National Gypsum believes that it became aware in the late 1960's at trade association meetings that warnings were used by some other companies on certain asbestos-containing insulation products. However, National Gypsum did not manufacture asbestos-containing insulation products at that time. National Gypsum also became aware that some other companies were placing warnings on asbestos fiber in about 1968 or 1969; National Gypsum began to use the same warning on asbestos fiber at that time. In general, National Gypsum placed warnings on its products at about the same time that it became aware that warnings were placed on similar products by others.

38. State the manner in which each of your products was shipped and the type of container it was shipped in to the retailers.

RESPONSE: See General Objections and Product Attachments. To the extent that this interrogatory requests additional information, National Gypsum objects to it as vague, overbroad and irrelevant.

39. When, if ever, did you specifically inform the purchaser or user of your products that contained asbestos that the use of that product or exposure to asbestos dust could cause cancer, asbestosis or other serious disease? Please identify the document containing this information by date and location.

RESPONSE: See General Objections. National Gypsum also objects to this interrogatory as misleading and argumentative. Without waiving these objections, see Product Attachments and Response to Interrogatory No. 28.

of testimony before the Occupational Safety and Health Administration, the National Institute of Occupational Safety and Health, any U.S. Congressional committee or sub-committee or governmental hearing or investigative proceeding on the subjects of biological effects on human life from exposure to asbestos and the setting, modification, feasibility and acceptance of allegedly safe or proper levels of such exposure to asbestos and asbestos products.

RESPONSE: See Attachment 18.

80. For all testimony set forth above, please identify:

- (a) The dates and descriptions of the proceeding;
- (b) The relationship between the person who testified or responded and you;
- (c) All studies, test results or other scientific or medical documents relied upon by said person as a basis for any recommendation made or testimony given;
- (d) Whether at any time prior to or following such testimony you possessed knowledge of documents suggesting that existing or proposed threshold limit values were not safe or proper or that lower threshold limit values were necessary in order to prevent disease; as to this response, please identify the origin of the knowledge and all documents relating thereto; and
- (e) Whether at any time prior to or following such testimony you were aware that the proper method for determination of safe levels of asbestos dust was to test concentrations of fibers in the air rather than the total number of particles. If your answer is in the affirmative, identify the origin of said knowledge and all documents relating thereto.

RESPONSE: See Attachment 18. National Gypsum does not have sufficient information to enable it to respond to part (c). National Gypsum objects to parts (d) and (e) as vague and ambiguous, overbroad, argumentative and unduly burdensome.

81. What do you understand "threshold value limit" to mean?

RESPONSE: See Attachment 19.

of testimony before the Occupational Safety and Health
Administration: 82. What do you understand "dose-response" effect and
relationship" to mean? Occupational committee or sub-committee or
governmental hearing or investigative proceeding on the subject
of bio: RESPONSE: See Attachment 20: exposure to asbestos and
the asbestos-related diseases.

83. What is being measured when you take the
measurement of threshold limit value as you define it?

RESPONSE: See Attachment 19.

84. Did you advertise any of your asbestos-containing
products for use on ships or navy vessels?

RESPONSE: Not to the best of National Gypsum's
knowledge.

85. If the response to Interrogatory No. 84 was yes;
please state:

- (a) The name of the product;
- (b) In what years you advertised the product; and
- (c) The intended purpose of the product.

RESPONSE: Not applicable.

86. Did you design any asbestos-containing products
for use on ships or navy vessels? If so, please state:

- (a) The name of the products;
- (b) The year of their design;
- (c) The manufacturer; and
- (d) The intended use.

RESPONSE: See Product Attachments.

87. Did you sell any asbestos-containing materials to
the:

- (a) United States Government;
- (b) General Services Agency;
- (c) United States Navy;
- (d) Any naval shipyard;
- (e) Any shipyard;

RESPONSE: National Gypsum objects to this
interrogatory as vague, ambiguous, overbroad, unduly burdensome

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and irrelevant. Without waiving these objections, National Gypsum states that information responsive to this interrogatory may be included in its sales records, which are available for inspection in accordance with Attachment 3.

88. Did you ever conduct any dust studies in any of your asbestos product manufacturing facilities? If so, please state:

- (a) The date of each such study;
- (b) The person conducting the study;
- (c) The result or conclusion; and
- (d) Who presently has possession of the report or study.

RESPONSE: See Attachment 21.

Respectfully submitted,

ROBERT H. HOOD & ASSOCIATES

By: Laurie P. Hood
for Robert H. Hood
172 Meeting Street
Charleston, South Carolina 29401

Attorney for Defendant
National Gypsum Company

January 23, 1987
Charleston, S.C.

HOYLE, MORRIS & KERR
1424 Chestnut Street
Philadelphia, Pennsylvania 19102

OF COUNSEL

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service on this 23 day of January 1987
CHARLESTON, SC

Donna L. Huff

ATTACHMENT 1 TO ANSWERS TO INTERROGATORIES
and irrelevant Without waiving these objections, National

Gypsum states that information requested by this interrogatory:
The full corporate name and current principal place of
business of National Gypsum Company is:

National Gypsum Company
4500 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

National Gypsum Company was incorporated under the laws
of the state of Delaware under its present name on August 29,
1925. Its corporate headquarters were located in Buffalo, New
York. In 1976, corporate headquarters were transferred to
Dallas, Texas.

National Gypsum Company is a corporation. It had no
prior name or predecessor corporation. It has never been
incorporated in any state except Delaware. Over the course of
its history, National Gypsum has acquired the assets or stock of
various companies.

National Gypsum Company's Gold Bond Building Products
Division was created in 1966. The Gold Bond Building Products
Division designs, manufactures, sells, and distributes a wide
variety of building products for use in the construction in-
dustry. At one time, the Gold Bond Building Products Division
manufactured, sold, or distributed asbestos-containing products,
although it no longer does so.

ATTACHMENT 1 TO ANSWERS TO INTERROGATORIES

The full corporate name and current name of National Gypsum Company, Ltd.

ATTACHMENT 2 TO ANSWERS TO INTERROGATORIES

National Gypsum Company has never mined or milled asbestos. National Asbestos Mines, Ltd., a wholly owned subsidiary of National Gypsum (Canada) Ltd., which is a wholly owned subsidiary of National Gypsum Company, was created in 1955, and began mining and milling chrysotile asbestos fiber in Thetford Mines, Quebec, Canada in about July, 1958. It ceased operations in September, 1973, and was formally dissolved in February, 1982. From September, 1973 until October 1974, National Gypsum Company obtained asbestos fiber from Asbestos Corporation, Limited for resale.

ATTACHMENT 6 TO ANSWERS TO INTERROGATORIES

National Gypsum does not have sufficient information to identify all entities from whom it may have purchased asbestos fiber. From the records and other information that are available, National Gypsum Company believes that it obtained asbestos fiber from the following companies:

Asbestos Corporation, Ltd.
Thetford Mines
Quebec, Canada

Ruberoid Company
Address Unknown

Canadian Johns-Manville
Company
Quebec, Canada

Flintkote Company
Address Unknown

Bell Asbestos Mines, Ltd.
Thetford Mines
Quebec, Canada

North American Asbestos
Corporation
Chicago, Illinois

Union Carbide Corporation
Tonawanda, New York

Southern Asbestos Co.
Charlotte, North
Carolina

Calaveras Asbestos, Ltd.
California

Special Materials, Inc.
Milwaukee, Wisconsin

Johnson Mines
Address Unknown

Nicolet Mines
Address Unknown

Lake Asbestos of Quebec,
Inc.
New York, New York

Casa Sano
Address Unknown

National Asbestos Mines,
Ltd.
Thetford Mines
Quebec, Canada

Philip Carey Company
Address Unknown

National Gypsum Company does not know whether the addresses shown above are currently correct.

ATTACHMENT TO ANSWERS TO INTERROGATORIES

National Gypsum first became aware that warnings were placed on asbestos fiber in about 1969 or 1970. At that time, National Gypsum may have received bags of asbestos with the following caution:

CAUTION

This bag contains chrysotile asbestos fibers. Persons exposed to this material should use adequate protective devices as inhalation of this material over long periods of time may be harmful.

After 1972, bags of fiber may have had the following caution label, as required by OSHA:

CAUTION

CONTAINS ASBESTOS FIBERS
AVOID BREATHING DUST
BREATHING ASBESTOS DUST MAY CAUSE
SERIOUS BODILY HARM

ATTACHMENT 19 TO ANSWERS TO INTERROGATORIES
ATTACHMENT TO ANSWERS TO INTERROGATORIES

As the American Conference of Governmental Industrial Hygienists (ACGIH) has defined the term, National Gypsum understands "threshold limit value" to refer to the recommended maximum concentration of airborne asbestos fibers greater than 5 microns in length. National Gypsum also understands "threshold limit" to mean the dose below which disease would not occur.

National Gypsum was not a member of the ACGIH and did not participate in experiments, studies, or tests to determine what the threshold limit value for asbestos should be. National Gypsum believes that the ACGIH established a threshold limit value (maximum allowable concentration) for exposure to asbestos dust of 5 million particles per cubic foot (mppcf) in 1946. National Gypsum is unable to determine how or when one or more of its employees first became aware of the ACGIH threshold limit value, but believes it was aware of such a value at least by 1971.

National Gypsum believes that it became aware in approximately 1974 that the ACGIH threshold limit value for exposure to asbestos was to 5 fibers greater than 5 microns in length per cubic centimeter, and that it became aware in approximately 1980 that the ACGIH threshold limit value for exposure to chrysotile asbestos had been changed to 2 fibers greater than 5 microns in length per cubic centimeter.

National Gypsum believes that it never advised customers, distributors, contractors, or government agencies of ACGIH threshold limit values. National Gypsum does not know whether trade associations disseminated such information for exposure to asbestos dust.

National Gypsum was also aware of and complied with OSHA regulations concerning airborne asbestos fiber that were promulgated beginning in 1971.

NATIONAL GYPSUM
more distribution
threshold limit value
ATTACHMENT 20 TO ANSWERS TO INTERROGATORIES

National Gypsum objects to interrogatories requesting a definition of the term "dose response relationship" on the ground that they seek a medical or scientific opinion. Without waiving this objection, National Gypsum states that it understands "dose response relationship" to refer to the correspondence between exposure (i.e., "dose") and the biological outcome of interest (i.e., "response"). For example, the risk of asbestos-related disease decreases in correspondence to a decrease in asbestos dose.

ATTACHMENT 22 TO ANSWERS TO INTERROGATORIES

Warning labels were first placed on bags of asbestos fibers in 1969 or 1970, as follows:

CAUTION

This bag contains chrysotile asbestos fibers.

Persons exposed to this material should use adequate protective devices as inhalation of this material over long periods of time may be harmful.

In 1972, the warning label was changed to read as follows, and was included on other National Gypsum products:

CAUTION

CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
BREATHING ASBESTOS DUST MAY CAUSE
SERIOUS BODILY HARM

The specific language of these warnings was developed by the Quebec Asbestos Mining Association and OSHA, and National Gypsum does not know whether industrial psychologists or human factors engineers were consulted. Additional information concerning warnings is provided in the Product Attachments, if applicable.

ATTACHMENT A TO ANSWERS TO INTERROGATORIES

National Gypsum Company sold chrysotile asbestos fiber from July, 1958 until October, 1974. Until September, 1973, this asbestos fiber was obtained from National Asbestos Mines, Ltd., a wholly-owned subsidiary of National Gypsum (Canada) Ltd., a wholly-owned subsidiary of National Gypsum Company. National Asbestos Mines, Ltd., was located in Thetford Mines, Quebec. In September, 1973, all of its assets were sold and it ceased operations. From September, 1973 until October, 1974, National Gypsum Company obtained asbestos fiber from Asbestos Corporation, Ltd. for resale. Chrysotile asbestos generally is light gray in color, although the color may have varied.

Asbestos fiber had numerous uses, as determined by the user based on the type and grade of the fiber and the user's particular needs. National Gypsum did not provide its customers with direction or manuals regarding the use of asbestos fiber, except for the warning described below.

Gold Bond asbestos fiber was packaged in various types and sizes of jute, paper or polyethelene bags. At one time, the bags were tan with orange diagonal stripes and bore the name "Gold Bond" printed in large black letters with the word "Asbestos" in a black band below the words "Gold Bond." Above the word "Asbestos" the fiber grade appeared in black letters. The asbestos was identified as "A Product of Canada" and the source was shown as "National Asbestos Mines Limited."

Beginning in approximately 1969 or 1970, the bags bore the following warning label:

CAUTION

This bag contains chrysotile asbestos fibers. Persons exposed to this material should use adequate protective devices as inhalation of this material over long periods of time may be harmful.

Some time in 1972, the caution label was changed to read as follows:

CAUTION

CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
BREATHING ASBESTOS DUST MAY CAUSE
SERIOUS BODILY HARM

Sales brochures were prepared regarding asbestos fiber, and advertisements for the product were prepared for Asbestos Magazine, Modern Plastics and Chemical Materials Catalog.

ATTACHMENT B TO ANSWERS TO INTERROGATORIES

A National Gypsum brochure for Gold Bond Gimco Rock Wool Industrial Insulation, prepared about 1943, offers 35 lb. asbestos roofing jackets for sale in connection with certain styles of felted rock wool pipe covering. Prior to 1941, this product was offered for sale by General Insulating and Manufacturing Company (Gimco), Alexandria, Indiana. National Gypsum does not know the source of this product, its composition or color, its asbestos content or type, how it was packaged, or whether it was patented. National Gypsum is not aware of any records regarding the design of this product. National Gypsum is not aware of any instructions for use or that a warning was placed on this product and was not aware of any possibility of injury from the use of asbestos roofing jackets that would have required any such warning. Sales literature would have been prepared by the marketing department and certain material may have been approved by the research department. The rock wool pipe coverings with which this product was used are believed to have been discontinued during World War II.

ATTACHMENT C TO ANSWERS TO INTERROGATORIES

Gold Bond rock wool insulating cement, sometimes sold as Gold Bond No. 340 Insulating Cement, was intended for use as a scratch or finish coat over Gold Bond Flexfelt mineral wool blankets and pipe coverings or as a monolithic primary insulating coat on irregular surfaces such as valves or fittings.

Rock wool insulating cement was manufactured by National Gypsum at its Alexandria, Indiana plant from 1941 until 1957. It was also sold from National Gypsum's Dover, New Jersey, plant from 1941 until 1943. Prior to March, 1941, General Insulating and Manufacturing Company (Gimco) manufactured rock wool insulating cement at the Alexandria Plant. During World War II, National Gypsum revised the formula for this product in order to satisfy United States Navy specifications. A revised formulation was approved for use by the Bureau of Ships in 1943. Further revision to improve the work value was required, however, and a second revised formulation, designated internally as 340-N, was approved by the Bureau of Ships in 1944, and the prior approval was cancelled. The 340-N formulation was discontinued by 1946. Rock wool insulating cement was withdrawn from the market in 1957 because of poor market acceptance and because rock wool manufactured by new techniques was not suitable for use in cement.

This product was composed of rock wool, bentonite, clay, asbestos, sodium nitrite, sodium perborate or sodium silicate, and a wetting agent. After 1943, the asbestos content was approximately 10% by weight of product. The asbestos content before 1943 has not been established but available records indicate that the amount may have been less than 10% by weight. The 340-N formulation, which contained trisodium phosphate as well as sodium nitrite, was made under a non-exclusive patent license (U.S. Patent No. 2,237,745) granted by Eagle Picher Company.

At certain times, the asbestos used in this product was obtained from Southern Asbestos Company, Charlotte, North Carolina, and the fibers were approximately 3/8" to 3/4" in length, Grade 2. National Gypsum has no basis to believe that warnings accompanied the asbestos fiber supplied by Southern Asbestos Company.

Rock wool insulating cement was sold in a dry form in 50-lb. bags. At one time National Gypsum products were typically packaged in tan paper bags with the words "Gold Bond" in black and, below that, the name of the product in white on a black band. The bag had three cream-colored stripes at the top and two at the bottom. For a brief period during World War II burlap bags may have been used. After about November 21, 1955, rock wool insulating cement may have been packaged in 50-lb. bags, 24" by 44", of 3 ply natural kraft paper with an orange and

black Gold Bond design. The insulating cement was mixed with water in a suitable container and applied with a trowel or hands. Instructions for use of the product were printed in a brochure entitled "Gold Bond (340 Monolithic) Insulating Cement." No reference to warnings to users is contained in the instructions; National Gypsum was not aware of any possibility of injury from the use of No. 340 rock wool insulating cement that would have required any such warning. After application, rock wool insulating cement had a grey cement-like appearance.

Rock wool insulating cement was described in Gold Bond annual handbooks. Brochures were available from National Gypsum in Buffalo, New York, and in 1949 advertisements were placed in Petroleum Processing, Power and in Chemical Industries. In addition, advertisements for rock wool insulating cement appeared in Sweet's File - Architectural until 1954.

Also ATTACHMENT D TO ANSWERS TO INTERROGATORIES

Gold Bond Asbestos-Faced Mineral Wool Board was intended for use as marine insulation. It was manufactured by National Gypsum at its Alexandria, Indiana, plant in 1944 and 1945, and was designed to satisfy specifications of the Bureau of Ships of the United State Navy.

The product consisted of a rigid block of compressed rock wool which was faced with asbestos paper, scrim side to the wool, in accordance with Bureau of Ships specifications. The paper facing, the only part of the product containing asbestos, was Grade No. 112 asbestos paper supplied by Keasbey & Mattison Company. The chemical composition of this paper and the type of asbestos used are not known. It is believed that Keasbey and Mattison did not accompany this asbestos paper with any warnings or directions. When applied, the facing did not extend over the edge of the mineral wool at any point. It was bonded to the block with Cascanite adhesive. The product was fabricated to the thickness, width, and length specified in the order; standard dimensions appear to have been 24" by 36", and 1", 1 1/2" or 2" in thickness.

The finished product was packaged in cartons stamped to show the type, size, quantity of contents and the time and place of manufacture. No warnings or instructions for use are mentioned in the specifications; National Gypsum was not aware

of any possibility of injury from the use of asbestos-faced mineral wool board that would have required any such warning.

The product is believed to have been withdrawn from production because of poor market acceptance.

No design changes material to this action are known to have been made with respect to this product.

National Gypsum also sold asbestos stripping tape, which conformed to Bureau of Ships specifications, for use with asbestos-faced mineral wool board or alone. This product was purchased for resale from Keasbey & Mattison Company and is believed to have been made of reinforced asbestos paper. It was furnished in rolls containing 33 lineal yards. The chemical composition of this tape and the type of asbestos used are not known. National Gypsum is not aware of warnings or directions for use that may have accompanied this tape, and was not aware of any possibility of injury from the use of asbestos stripping tape that would have required any such warnings.

National Gypsum is not aware of any patents or sales material regarding these products.

ATTACHMENT E TO ANSWERS TO INTERROGATORIES

From 1943 until 1953, National Gypsum sold asbestos-cement board manufactured by Keasbey & Mattison Company, Ambler, Pennsylvania, and St. Louis, Missouri, as "Gold Bond A-C Board" and as "Gold Bond Asbestos Cement Board". Other varieties of this product were "K&M X-4 Marine Board," "K&M C-4 Marine Board," and "Gold Bond Flexbestos." Various types of board were available in 4' x 8' sheets in 1/8", 3/16", 1/4" and 3/8" thicknesses. It was used as a fireproof, waterproof, and weatherproof sheet for interior linings and exterior surfaces of structures and could be applied with nails or screws. The product was shipped in stacks. National Gypsum also sold accessories, such as battens, manufactured by Keasbey & Mattison.

The composition of Gold Bond A-C Board is unknown, except that it contained portland cement and asbestos fiber. National Gypsum is not aware of any patents relating to this product. National Gypsum is not aware of any warnings that accompanied this product; further, it was not aware of any possibility of injury from the use of Gold Bond A-C Board that would have required any such warning.

This product was sold primarily to the construction industry. Although the product was approved for federal public housing and federal government structures and required for many government jobs, National Gypsum has discovered no records of sales to any governmental agency. In about 1943 the United

States Coast Guard accepted Gold Bond A-C Board manufactured by Keasbey & Mattison as incombustible material for merchant vessels. Coast Guard approval was renewed in 1947 and in 1952,* but National Gypsum believes that only one type of this board may have been sold for marine use. National Gypsum is not aware of any sale of that variety after 1945.

National Gypsum discontinued the sale of Gold Bond A-C Board in 1953 when it obtained facilities to manufacture a similar product.

* From 1957 through 1977, Keasbey & Mattison's A-C Board continued to be listed as an approved product of National Gypsum's by the U.S. Coast Guard even though National Gypsum no longer sold this product.

ATTACHMENT F TO ANSWERS TO INTERROGATORIES

From approximately 1944 until 1946, National Gypsum Company manufactured and marketed Gold Bond Natcor and Natcor Sheathing. The product was discontinued after World War II.

Natcor was intended for use as bulkheading and partitions in ships. It consisted of a gypsum-board core faced front and back with Keasbey & Mattison asbestos cement board.

Natcor Sheathing was intended for use in lining, sheathing and ceiling application in ships. It consisted of a gypsum-board core faced on one side with Keasbey & Mattison asbestos cement board and on the other side with aluminum foil.

The only asbestos in these products was contained in the asbestos cement panels manufactured by Keasbey & Mattison Co., and National Gypsum has no information on the type, percentage or source of asbestos in these products.

Natcor and Natcor Sheathing were supplied in eight-foot lengths of varying widths and thicknesses. Both products could also be specially ordered in other sizes. The products were shipped in stacks protected by gypsum-board and bracing.

In 1944, the U.S. Coast Guard and the Maritime Commission approved the 3/4" and 7/8" thicknesses of Natcor for use as Class B bulkhead panels. In 1944, these agencies also approved Natcor Sheathing in certain thicknesses as "acceptable" as incombustible material for use as ceiling or lining material on ships. In 1945, these agencies gave the same approval to 3/8"

thick Natcor panels. Neither product is believed to have been patented.

National Gypsum has no indication that Keasbey & Mat-
tison supplied any warnings to National Gypsum in connection
with sales of its asbestos cement board, and National Gypsum's
specifications make no reference to warnings. National Gypsum
was not aware of any possibility of injury from the use of
Natcor or Natcor Sheathing that would have required any such
warning. National Gypsum is not aware of having published any
sales material regarding this product.

STATE OF NORTH CAROLINA :

COUNTY OF MECKLENBURG

Robert E. Oberkircher
Robert E. Oberkircher
Assistant Controller
Gold Bond Building Products Division
National Gypsum Company

Sworn to and subscribed
before me this 16 day
of (April) 1987.

Notary Public

My Commission Expires:

My Commission Expires July 12, 1989

EXHIBIT 5

FIBREBOARD

ORIG TH FIBREBOARD FILE

CC: CERRY

① NOTE PABCO USED ONLY After early 1960's - 1971.
(EXHIBIT A)

② NOTE Cement PRODUCT
(EXHIBIT B)
CC: B & F FIBREBOARD
DISC.

JAMES BORTHWICK, ESQ.
BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI
5 CROWN CENTER
2480 PERSHING ROAD
KANSAS CITY, MISSOURI 64108

Attorneys for
Fibreboard Corporation

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BLATT & FALES

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OLIVER JOSIAS, ET AL,

Plaintiffs,

vs.

KEENE CORPORATION, ET AL,

Defendants.

No. 84-416 C(2)

FIBREBOARD CORPORATIONS
RESPONSE TO PLAINTIFF'S
INTERROGATORIES

FIBREBOARD CORPORATION by and through its counsel of
record hereby responds in writing under oath to plaintiff's first
set of interrogatories.

PRELIMINARY STATEMENT

Each of the interrogatories responded to here refers to
defendant Fibreboard Corporation as "you." Fibreboard has an
extensive history as, among other things, a paper products and
building materials company. Only a small portion of Fibreboard's
business or corporate history relates to the subject matter of
this litigation, alleged exposure to asbestos-containing insula-
tion products. Although Fibreboard provides a complete list of

1 all products manufactured by Fibreboard that contained asbestos
2 in Exhibit A, Fibreboard's responses here are limited to those
3 pertaining to asbestos-containing insulation products on the
4 grounds that these are the only products relevant to this
5 litigation. Moreover, unless otherwise expressly stated in these
6 responses or properly called for by a specific interrogatory, the
7 responses to these interrogatories are given with the
8 understanding that the terms "Fibreboard," "defendant," "you,"
9 "your company," "your business" and "predecessors" refer to the
10 entity which operated under the following four names: Fibreboard
11 Corporation, Pabco Products, Inc., Fibreboard Paper Products
12 Corporation and the Paraffine Companies, Inc.

13 In the many decades of Fibreboard's operations multiple
14 changes have transpired in its corporate structure and product
15 lines. In the span of its existence Fibreboard has expanded,
16 diversified, added new product lines and deleted others, operated
17 a variety of plants in several states, acquired or sold companies
18 and merged with, reorganized with and disposed of others.
19 Throughout this time various companies affiliated with Fibreboard
20 have manufactured hundreds of different products, ranging from
21 milk cartons to floor wax. Manufacture of building products was
22 only one of Fibreboard's many commercial ventures. Moreover,
23 plants which at one point may have manufactured asbestos-
24 containing products have been, in the normal course, closed or
25 sold to other distinct entities. As in any business transaction,
26 records pertaining to the business were transferred as part of
27 the sale. Other records were discarded decades ago in the
28 ordinary course of business when their expected usefulness had

1 ended. Consequently, much of the information requested in these
2 interrogatories if it ever was in the possession or control of
3 Fibreboard is no longer as it currently is organized.

4 Manufacture of asbestos-containing thermal insulation or
5 of other asbestos-containing products was never a substantial
6 portion of Fibreboard's business. Over the many years since
7 asbestos-containing products first were produced by Fibreboard
8 all plants in which asbestos-containing products were manufac-
9 tured have been closed and virtually all of the witnesses who had
10 personal knowledge of events related to this litigation are
11 deceased, are no longer in Fibreboard's employ, are retired and
12 not in a position to respond to interrogatories, are otherwise
13 unavailable or may have no reliable current recollection of these
14 ancient necessary facts.

15 Despite these limitations after reasonable search and
16 inquiry Fibreboard has made good faith responses to these inter-
17 rogatories based on what information is available and in keeping
18 with the discovery nature of these boilerplate interrogatories.
19 However, these same limitations on Fibreboard's information have
20 required that each of the responses that follow be based only on
21 information and belief of the person verifying these responses.
22 The statements contained in these responses, therefore, are not
23 and cannot be deemed admissible evidence under the Federal Rules
24 of Evidence as non-hearsay facts asserted by a party with first-
25 hand knowledge. Fibreboard continues to investigate issues
26 relevant to this lawsuit and reserves the right to introduce
27 additional evidence at trial which is produced in the course of
28 its further investigation or review of information.

1 Fibreboard's general objections apply to each and every
2 interrogatory notwithstanding the inclusion of or reference to
3 other objections.

4 GENERAL OBJECTIONS

5 Fibreboard objects generally to this entire set of
6 interrogatories on the following grounds:

7 (1) These interrogatories seek information from and
8 identification of each and every person with knowledge of a
9 particular fact, event or subject matter and as such are overly
10 broad, unduly burdensome, oppressive and harassing. The inter-
11 rogatories are complex and vague and have overlapping subject
12 matters. Thousands of persons may have knowledge of some of the
13 subjects inquired into. In other cases the subjects are too ill-
14 defined to allow specification of persons with knowledge. Many
15 of the persons who may have had knowledge of the particular
16 facts, events or subject matters inquired into in these inter-
17 rogatories are now deceased or cannot be located. Others, though
18 locatable, are not currently in the employ or under the control
19 of Fibreboard and cannot be compelled to assist in the prepara-
20 tion of answers to these interrogatories. Moreover, due to the
21 extensive time, in some instances open-ended, covered by these
22 interrogatories, the persons who may have had knowledge of the
23 particular fact or event may not be unable to recall or recon-
24 struct either the extent of their knowledge, the source of such
25 knowledge or the time at which such knowledge was acquired.

26 (2) These boilerplate interrogatories are overly broad,
27 unreasonably burdensome, oppressive and harassing in that they
28 request information which is not within the personal knowledge or

1 possession or control of Fibreboard, its employees or agents, or
2 which can only be ascertained or derived through a page-by-page
3 review of the existing voluminous documents. There is no
4 compilation, abstract or summary relating to many of these inter-
5 rogatories of most records in Fibreboard's possession, and the
6 burden of deriving or ascertaining the responses to most
7 interrogatories is substantially the same for the party
8 propounding these interrogatories as for Fibreboard.

9 (3) Nearly every interrogatory in this set designates
10 extensive periods of time or requests information without any
11 limitation or specification of particular periods of time, and
12 consequently the entire set is overly broad, unduly burdensome,
13 oppressive and harassing. As a result of the failure to specify
14 relevant time periods, many of the interrogatories fail to dis-
15 tinguish relevant from irrelevant matter. Many of the interroga-
16 tories call for Fibreboard to provide responses concerning events
17 and records spanning a period of more than eight decades. Such
18 information is not of sufficient relevance or materiality to this
19 litigation to justify for discovery purposes here the great
20 expense and burden that would be involved in its collection by
21 Fibreboard for the benefit of plaintiffs if in fact such
22 information exists.

23 (4) The entire set of interrogatories are form inter-
24 rogatories filled with boilerplate and propounded indiscrimi-
25 nately to every defendant without any attempt to tailor them to
26 any individual defendant based on plaintiffs' knowledge of that
27 defendant, and as such are overbroad, unduly burdensome, oppres-
28 sive, harassing and annoying. Moreover, the failure to limit

1 these interrogatories to information related to Fibreboard's
2 alleged liability in these cases renders the interrogatories, as
3 a whole, irrelevant to the subject matter of these actions and
4 not reasonably calculated to lead to the discovery of admissible
5 evidence.

6 (5) Many of these interrogatories call for Fibreboard
7 to characterize the state of knowledge or awareness of a corpora-
8 tion or groups of corporations at any given time with regard to a
9 particular fact, event or subject matter. No corporation is
10 capable of knowledge or awareness except through its managerial
11 employees whose knowledge is attributable to the corporation by
12 operation of law. Fibreboard can only respond to such interroga-
13 tories, if at all, by stating on information and belief the
14 degree of knowledge of a particular fact, event or subject matter
15 as held by a named person at a specific time. Such response is
16 not intended nor should it be deemed to constitute acknowledgment
17 that such knowledge is attributable to any corporation.

18 (6) Many of these interrogatories are repetitive,
19 redundant or overlapping as to subject matter and are unduly
20 burdensome, oppressive, annoying or harassing. The repeated
21 requests for substantially identical information serve no useful
22 purpose and cause Fibreboard unnecessary burden and expense.

23 (7) Repeatedly throughout this set, plaintiffs' inter-
24 rogatories require reference to previous interrogatories or
25 responses, rendering them misleading, confusing, oppressive,
26 harassing and annoying.

27 (8) Most of the interrogatories in the set are vague,
28 ambiguous, compound and complex, and unintelligible or incompre-

1 hensible. When read as a whole such interrogatories are not
2 susceptible to any meaningful response.

3 (9) Fibreboard construes these interrogatories not to
4 call for information protected by the attorney-client privilege,
5 work product doctrine or any other privilege. Since Rule 26(b)
6 of the Federal Rules of Civil Procedure only requires discovery
7 regarding any matter not privileged Fibreboard is not required by
8 that rule to specify privileged material where to do so would
9 reveal its attorneys' work product. Fibreboard objects to any
10 request for a specification of privileged materials absent a
11 proper showing of necessity under Rule 26(b)(3).

12 (10) Fibreboard objects to the use of the term "Co-
13 defendant" in each of plaintiff's interrogatories on the grounds
14 that the term is vague, ambiguous, subject to change and
15 therefore confusing and misleading.

16 FIBREBOARD'S RESPONSES TO PLAINTIFF'S INTERROGATORIES

17 INTERROGATORY NO. 1:

18 Identify the registered name of the answering Defendant,
19 as well as all prior names or predecessor entities by which the
20 Defendant existed.

21 (a) For each give the current address and the state of
22 incorporation, and whether or not it is an active corporation.

23 (b) Set forth the full and correct name, the principle
24 (sic) place of business, and the state and date of incorporation
25 of the answering Defendant.

26 (c) Identify all divisions, subsidiaries or affiliated
27 companies to the answering Defendant.

1 (d) For each entity or division listed in response to
2 (c) above, state whether or not it ever has or presently engages
3 in any phase of mining, manufacturing, sale, supply,
4 distribution, or design of asbestos or asbestos-containing
5 products.

6 (e) With respect to each division, subsidiary or com-
7 pany listed in #4, identify the nature and extent of its function
8 during the period of time it was in existence.

9 (f) Has this answering Defendant been sued under its
10 correct name? If not, please state the correct legal name of the
11 Defendant and provide the information requested in Interroga-
12 tory 1, above concerning the Defendant as correctly named.

13 (g) Please state whether or not you have ever held a
14 certificate of authority to do business in this state and the
15 address for your registered agent for service in this state.

16 RESPONSE TO INTERROGATORY NO. 1:

17 Fibreboard objects to this interrogatory as overbroad
18 and irrelevant to the extent that it requests information about
19 "divisions," which had no legal existence, and about subsidiaries
20 or affiliates which had no connection whatsoever with asbestos.

21 Without waiving any of its objections, Fibreboard
22 responds as follows:

23 Fibreboard Corporation is a Delaware corporation with
24 its principal place of business located at, 111 S.W. Fifth
25 Avenue, Portland, Oregon 97204. See Preliminary Statement.

26 Fibreboard has previously operated under the following
27 names: The Paraffine Companies, Inc., Pabco Products, Inc., and
28 Fibreboard Paper Products Corporation.

1 Plant Rubber & Asbestos Works, which manufactured, sold
2 and installed insulation, was acquired by stock purchase in
3 1928. The stock was held until that entity was dissolved in
4 1947. A wholly-owned subsidiary of Fibreboard, Pabco Insulation
5 Corporation, was in the business of installing insulation from
6 1959-1961.

7 Fibreboard has no records or information indicating it
8 ever engaged in the business of mining, milling or selling raw
9 asbestos. Fibreboard ceased manufacturing asbestos-containing
10 products in 1971, when it introduced the first commercially
11 acceptable asbestos-free calcium silicate insulation in the
12 United States.

13 Fibreboard has no certificate of authority to do
14 business in this state, and no registered agent for service.

15 INTERROGATORY NO. 2:

16 Have you ever mined asbestos?

17 (a) If the answer to this Interrogatory is "yes,"
18 please state the dates in which you were involved in mining of
19 asbestos, and the locations of your mines.

20 (b) Have you ever sold raw asbestos fiber to any of the
21 Co-defendants? If so; in what years and in what quantities did
22 you make such sales.

23 RESPONSE TO INTERROGATORY NO. 2:

24 Fibreboard has not identified any records or information
25 indicating that it ever mined asbestos.

26 INTERROGATORY NO. 3:

27 In what year did the answering Defendant first begin
28 selling or distributing asbestos-containing products? Please be

1 specific for each asbestos-containing product manufactured, sold
2 or distributed by you.

3 (a) In what year did the answering Defendant last sell,
4 distribute or manufacture an asbestos-containing product? Please
5 be specific for each asbestos-containing product.

6 RESPONSE TO INTERROGATORY NO. 3:

7 See Exhibit A.

8 INTERROGATORY NO. 4:

9 For each asbestos-containing product manufactured and/or
10 distributed by you, state:

11 (a) The brand name of the product and the inclusive
12 years of its manufacture and/or distribution;

13 (b) The asbestos content by weight of each product for
14 each year;

15 (c) The type of asbestos fiber used in each product;

16 (d) The application for which such product was
17 advertised or sold;

18 (e) The temperature ranges for the products used;

19 (f) Whether the product was a cement, a pipe covering,
20 a cloth or other type of thermal insulation product;

21 (g) Describe each product as to its color and physical
22 characteristics and appearances;

23 (h) As to each product, state how such product was
24 packaged or supplied.

25 RESPONSE TO INTERROGATORY NO. 4:

26 Fibreboard objects to this interrogatory to the extent
27 that it calls for information pertaining to Fibreboard's non-
28 insulation asbestos-containing products on the grounds that it

1 calls for information that is not relevant to the subject matter
2 of this litigation and not reasonably calculated to lead to the
3 discovery of admissible evidence.

4 Without waiving any of its objections, Fibreboard
5 responds as follows:

6 See Exhibit A which provides general information
7 pertaining to all of Fibreboard's asbestos-containing products.
8 In this interrogatory and all succeeding interrogatories,
9 Fibreboard's detailed responses are limited to its asbestos-
10 containing insulation products, the only products that are
11 relevant to the issues in this litigation.

12 Fibreboard's thermal insulation products were intended
13 to conserve energy by reducing heat loss and protect workers from
14 injury by contact with heated surfaces.

15 Insulation blocks were 36" long, 6" or 12" wide and from
16 1" to 3" thick. Pipe covering sections were 36" long, from 1" to
17 3" thick, and curved to fit around various pipe sizes.
18 Insulating cements were powdered.

19 Solid sections were packaged in corrugated paperboard
20 boxes; insulating cements in bags.

21 INTERROGATORY NO. 5:

22 Does the answering Defendant claim that any patent would
23 cover any product listed in response to the Interrogatories
24 above? If so, give the number of each patent, the date same was
25 issued and the number of each patent application that is pending.

26 RESPONSE TO INTERROGATORY NO. 5:

27 Fibreboard does not make any such claim at this time.
28 However, in the past, Fibreboard owned certain patents relating

1 to manufacture of insulation products. Fibreboard has no pending
2 applications relating in any way to asbestos.

3 Documents pertinent to Fibreboard patents are located at
4 the office of Robert A. Beck, Esq. 22 Battery Street Suite 404
5 San Francisco, California and to the extent they are not
6 privileged or otherwise protected from disclosure, they will be
7 made available for inspection and copying at a mutually
8 convenient time.

9 INTERROGATORY NO. 6:

10 For each asbestos-containing product manufactured or
11 designed by you, please state the specific batching requirements
12 for that product.

13 (a) State the time period each particular batching
14 requirement was followed and any changes that were made.

15 RESPONSE TO INTERROGATORY NO. 6:

16 Fibreboard objects to this interrogatory on the grounds
17 it is overly broad, unduly burdensome, oppressive, irrelevant and
18 not reasonably calculated to lead to the discovery of admissible
19 evidence.

20 Without waiving any of its objections, Fibreboard
21 responds as follows:

22 Fibreboard had many different batching requirements for
23 each of its products which varied over time. Generally speaking,
24 the batch requirements involved mixing raw ingredients, including
25 asbestos into a water slurry which was then heated to form solid
26 segments.

27 Pertinent documents are located at the office of
28 Robert A. Beck, Esq., 22 Battery Street, Suite 404, San

1 Francisco, California and to the extent they are not privileged
2 or otherwise protected from disclosure, they will be made
3 available for inspection and copying at a mutually convenient
4 time.

5 INTERROGATORY NO. 7:

6 For each asbestos-containing product that you manu-
7 factured, please set forth the supplier of the raw asbestos fiber
8 used for that product.

9 RESPONSE TO INTERROGATORY NO. 7:

10 Fibreboard purchased raw chrysotile asbestos fibers from
11 Asbestos Corporation Ltd., Cassiar Asbestos, Johnson's Asbestos,
12 Lake Asbestos of Quebec, Ruberoid, Nicolet, Inc., and Johns-
13 Manville Corporation at times between approximately 1940 and the
14 early 1960s.

15 Fibreboard purchased amosite asbestos from Cape Asbestos
16 Ltd. from the late 1940s until the early 1950's. Fibreboard also
17 purchased amosite asbestos mined by Egnep Ltd. and possibly
18 others in South Africa from and through North American Asbestos
19 Corporation from the early 1950s until approximately 1970.

20 INTERROGATORY NO. 8:

21 As to each product mentioned above, identify the
22 following:

23 (a) Any pertinent trademark that was applicable to the
24 product during any time of its sale;

25 (b) The label on the packaging of that particular
26 product for each year of its manufacture;

27 (c) All sales literature (including brochures, adver-
28 tisements and pamphlets), specification sheets, performance data

1 or other promotional material, as well as any and all installa-
2 tional materials, data or brochures which would have accompanied
3 or been distributed in connection with the installation, appli-
4 cation or use of each of the products listed above, manufactured
5 or sold by you beginning in 1925 and coming forward to the
6 present.

7 (d) The advertised use of the product (as to this
8 Interrogatory you may provide a copy of the document in lieu of
9 describing the same).

10 (e) For each document listed or described above, please
11 indicate the name or the names of the individuals having custody
12 of said documents or copies thereof, and where they are located.

13 RESPONSE TO INTERROGATORY NO. 8:

14 Fibreboard objects to this interrogatory on the grounds
15 that it is overbroad, burdensome and harassing calling for
16 information spanning over half a century.

17 Without waiving any of its objections, Fibreboard
18 responds as follows:

19 See Exhibit A.

20 For trade and brand names, See Exhibit A. From about
21 1948-1960, a rooster symbol was used. Most solid product
22 containers were marked "Precision Molded" with the "P" in the
23 form of a micrometer. The Corporate name and address also were
24 on containers.

25 Fibreboard delivered to its customers a brochure
26 published by the National Insulation Manufacturer's Association
27 entitled "Recommended Health Safety Practices for Handling and
28 Applying Thermal Insulation Products Containing Asbestos."

1 The advertised purpose of these products was thermal
2 insulation. Fibreboard had product brochures which described the
3 nature and specifications of its insulation products. Very few
4 of these brochures exist today. Those that have been retained
5 are available at the office of Robert A. Beck, Esq. 22 Battery
6 Street, Suite 404, San Francisco, California, and along with
7 other pertinent documents and copies of the NIMA brochure, to the
8 extent they are not privileged or otherwise protected from
9 disclosure, they will be made available for inspection and
10 copying at a mutually convenient time.

11 INTERROGATORY NO. 9:

12 Please describe in detail the method for disbursement
13 and sale of each asbestos-containing product manufactured,
14 designed or distributed by the answering Defendant.

15 RESPONSE TO INTERROGATORY NO. 9:

16 Fibreboard objects to this interrogatory on the grounds
17 that the term "method for disbursement or sale" is vague,
18 ambiguous and undefined and not susceptible of intelligible
19 response.

20 Without waiving any of its objections, Fibreboard
21 responds, to the extent it understands this interrogatory, as
22 follows:

23 Fibreboard products were sold F.O.B. its manufacturing
24 plants in California, and were "disbursed" by rail or truck.

25 INTERROGATORY NO. 10:

26 Have any of the products listed in the answer to Inter-
27 rogatories 3 and 4 above been altered in chemical composition or
28 asbestos type or content since their first being marketed; and if

1 your answer is in the affirmative, state:

2 (a) The trade name of each such product;

3 (b) The date such product was altered;

4 (c) The nature of the alteration;

5 (d) The reason for the alteration;

6 (e) What person has knowledge concerning the
7 alterations.

8 RESPONSE TO INTERROGATORY NO. 10:

9 Fibreboard objects to this interrogatory to the extent
10 that it calls for information not pertaining to the asbestos
11 content of Fibreboard's asbestos-containing products on the
12 ground that it calls for information that is not relevant to the
13 subject matter of this litigation and not reasonably calculated
14 to lead to the discovery of admissible evidence.

15 Without waiving any of its objections, Fibreboard
16 responds as follows:

17 There have been minor, day-to-day chemical alterations
18 of probably all of Fibreboard's asbestos-containing insulation
19 products as the products were refined. For changes in type of
20 asbestos used, see Exhibit A.

21 The significant alteration was a research program to
22 reduce and eventually eliminate asbestos usage conducted from
23 1967-1971. Asbestos content was gradually reduced, and in
24 September 1971, all use of asbestos ceased.

25 There were several reasons for the elimination of all
26 asbestos from Fibreboard's insulation products. By 1967 when
27 this research program was initiated, some members of Fibreboard's
28 management had learned of government studies in progress

1 regarding health effects of asbestos and had received conflicting
2 reports concerning the circumstances under which asbestos might
3 pose a hazard, and the seriousness of the risk. There was also
4 information indicating the government might restrict use of
5 asbestos. Also, Fibreboard had long been interested in
6 developing a substitute because of the high cost of asbestos and
7 the control of this material by large asbestos companies. The
8 comparative strength of these reasons changed over time as
9 Fibreboard's employees learned more about health consequences of
10 asbestos.

11 Ed Torbohn is the person who is most familiar with the
12 asbestos-elimination project at the present time.

13 INTERROGATORY NO. 11:

14 Prior to 1960, did you conduct any tests concerning the
15 health consequences of the use of your asbestos-containing
16 product?

17 (a) Do any written memoranda, specifications, recom-
18 mendations or other written materials of any kind or character
19 related to the testing of said products exist, and if so, please
20 state:

21 (b) Identify each such written material or document;

22 (c) Who presently has possession of each such document
23 and where it is located.

24 (d) Have you conducted any tests concerning the health
25 consequences of the use of your product between 1960 and 1975, or
26 the date that the asbestos content was removed from the product,
27 whichever is the later.

- (e) If tests were done, specify the tests;
- (f) Who was responsible for conducting the tests;
- (g) What the tests (sic) of the tests were;
- (h) Identify any documents concerning the tests.

RESPONSE TO INTERROGATORY NO. 11:

Fibreboard objects to this Interrogatory on the grounds that the term "health consequences" is ambiguous and unintelligible as it does not distinguish between different medical problems that might be associated with asbestos exposure, including minor respiratory irritation, potentially disabling pneumoniosis, termed asbestosis, and certain malignancies. By framing its question in terms of "health consequences" this interrogatory ignores the separate and distinct features of each of several medical conditions and the different levels of severity of each.

Without waiving any of its objections, Fibreboard responds as follows:

Fibreboard has not identified any records or information indicating that such tests were ever conducted.

INTERROGATORY NO. 12:

When did the asbestos-containing products manufactured by you first contain any warning or caution concerning the health consequences of the use of the product or the breathing of asbestos dust?

(a) For each such products, please state:

- (1) The wording of each warning or caution;
- (2) Its description of each such printed warning or caution; and its location on the product or packaging;

1 (3) The method used to distribute the warning to
2 persons who were likely to use the products;

3 (4) The date each such warning was issued;

4 (5) The name, address and job classification of
5 each person who presently has possession of the above-described
6 warning or caution;

7 (6) Identify the warning or caution by date and
8 content;

9 (7) State whether any industrial psychologist or
10 human factors engineers were consulted prior to utilizing such
11 warnings, or cautions;

12 (8) Identify any special instructions provided
13 with each product regarding its use or safety procedures to be
14 employed by persons handling such product;

15 (9) Was the warning ever altered, amended or
16 changed in any manner, and if so, how and when?

17 RESPONSE TO INTERROGATORY NO. 12:

18 Fibreboard objects to this interrogatory on the grounds
19 that the term "special instructions" is vague, ambiguous and
20 undefined and thus not susceptible to intelligible response.

21 Without waiving any of its objections, Fibreboard
22 responds as follows:

23 From 1966-67 until Fibreboard ceased manufacturing its
24 asbestos-containing insulation products Fibreboard affixed a
25 written label warning against the inhalation of insulation dust
26 upon containers of insulation manufactured by Fibreboard.

27 The text of the labels was as follows:
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If adequate ventilation control is not possible wear respirator approved by U.S. Bureau of Mines.

Fibreboard has no records indicating it consulted with any industrial psychologist or human factors engineers.

INTERROGATORY NO. 13:

RESPONSE TO INTERROGATORY NO. 13:

Without waiving any of its objections, Fibreboard responds as follows:

On or about the date Fibreboard began using its cautionary label. See Response to Interrogatory No. 12.

1 INTERROGATORY NO. 14:

2 State the manner in which each of your products was
3 shipped and the type of container it was shipped in to the
4 retailers.

5 RESPONSE TO INTERROGATORY NO. 14:

6 fibreboard objects to this interrogatory on the grounds
7 that it is overbroad, burdensome and oppressive.

8 Without waiving any of its objections, Fibreboard
9 responds as follows:

10 Fibreboard's insulation products were shipped by rail or
11 truck. For types of containers, see Response to Interrogatory
12 No. 4.

13 INTERROGATORY NO. 15:

14 When if ever, did you specifically inform the purchaser
15 or user of your products that they contained asbestos and that
16 the use of that product or exposure to asbestos dust could cause
17 cancer, asbestosis or other serious diseases? Please identify
18 the document containing this information by date and location.

19 RESPONSE TO INTERROGATORY NO. 15:

20 Fibreboard objects to this interrogatory on the grounds
21 that the term "other serious diseases" is vague and ambiguous.

22 Without waiving any of its objections, Fibreboard
23 responds as follows:

24 See Response to Interrogatory No. 12.

25 INTERROGATORY NO. 16:

26 Identify any and all labeling or relabeling agreements
27 in existence since 1925 between you and any other person
28 including Co-defendants.

1 (a) Did you sell any of your products containing
2 asbestos fibers or any raw fiber to any of the companies named as
3 Co-defendants in this lawsuit, and if your answer is in the
4 affirmative, state:

5 (1) The name, address and job classification of
6 each individual who currently has possession of such knowledge,
7 either by documents or records;

8 (2) Please list the names of each Co-defendant to
9 whom your products have been sold;

10 (3) Please state the dates of each such sale and
11 the amount and kind of materials sold.

12 RESPONSE TO INTERROGATORY NO. 16:

13 Fibreboard objects to this interrogatory on the grounds
14 that it is overbroad, burdensome and harassing.

15 Fibreboard objects to this interrogatory to the extent
16 that it calls for relabeling agreements that did not pertain to
17 Fibreboard's asbestos-containing insulation products on the
18 grounds that such information is not relevant to the subject
19 matter of this litigation and not reasonably calculated to lead
20 to the discovery of admissible evidence.

21 Without waiving any of its objections, Fibreboard
22 responds as follows:

23 See Exhibit A.

24 Fibreboard had written rebranding agreements for
25 asbestos-containing insulation products with Owens-Corning
26 Fiberglas and Armstrong Contracting & Supply. In addition, there
27 was an oral rebrand agreement between Fibreboard and PPG
28 Industries.

*

1 Fibreboard sold its insulation products to distributors
2 and distributor contractors who in turn sold there products to
3 others.

4 Fibreboard presently possesses documents which appear to
5 summarize shipments and delivery destinations of Fibreboard
6 manufactured products, including asbestos containing insulation
7 products, to certain business entities during the years 1957
8 through 1964 and during the years 1967 through 1971. Shipments
9 and delivery destinations for the year 1966 can be derived from
10 the 1967 summaries. For year 1965, only customer and quantity of
11 asbestos-containing products shipped are available. For 1972,
12 shipment and delivery destinations of insulation products are
13 available, some small percentage of which may concern asbestos-
14 containing insulation products, but which percentage, if any, is
15 not determinable from these records.

16 Pertinent documents are located at the office of
17 Robert A. Beck, Esq. 22 Battery Street Suite 404, San Francisco,
18 California and to the extent they are not privileged or otherwise
19 protected from disclosure, they will be made available at a
20 mutually convenient time.

21 INTERROGATORY NO. 17:

22 State whether your company manufactured asbestos-
23 containing insulation products for a Co-defendant, and placed the
24 Co-defendant's labels, logos or insignia on said products and
25 list each such Co-defendant.

26 RESPONSE TO INTERROGATORY NO. 17:

27 Fibreboard manufactured insulation products for Owens-
28 Corning Fiberglas, under a rebrand agreement, for OCF's

1 requirements in the thirteen western states.

2 See Exhibit A.

3 INTERROGATORY NO. 18:

4 If you have discontinued manufacturing and/or selling
5 asbestos products, please state the reasons therefore.

6 RESPONSE TO INTERROGATORY NO. 18:

7 Fibreboard ceased manufacturing Air Cell because it sold
8 that portion of its operations. Fibreboard stopped producing
9 Prasco and 85% Magnesia because of changing market conditions for
10 the products. Fibreboard still manufactures asbestos free Super
11 Caltemp. Fibreboard eliminated asbestos in Super Caltemp for the
12 following reasons:

13 By 1967 when Fibreboard's asbestos free research program
14 was initiated some members of Fibreboard's management had learned
15 of government studies in progress regarding health effects of
16 asbestos and had received conflicting reports concerning the
17 circumstances under which asbestos might pose a hazard and the
18 seriousness of the risk. There also was information that there
19 might soon develop a demand for an asbestos-free product or that
20 regulations might restrict the use of asbestos. Finally,
21 Fibreboard long had been interested in developing a substitute
22 for asbestos because of the high cost and control over the
23 mineral exercised by the large asbestos companies. The
24 comparative strength of these reasons changed over time after
25 1967 as more was learned by these Fibreboard managers concerning
26 the health consequences of exposure to asbestos.

27 INTERROGATORY NO. 19:

28 Did you receive any reports or communications from your

1 workmen's compensation insurance carrier or products liability
2 insurance carrier with regard to the hazards incident to the use
3 of asbestos-containing insulation products? If so, please state
4 who has possession of such reports, the location of such reports
5 and the substance of the contents of such reports, listing for
6 each such report the respective insurance company, its address,
7 the agents signing such correspondence and the date of such
8 notice or report.

9 (a) Have any of the Co-defendants named in this litigation
10 ever furnished you with any information as to the state of
11 the medical knowledge regarding the connection between asbestos
12 dust exposure and the contracting of pulmonary diseases,
13 including asbestosis and cancer, and if your answer is in the
14 affirmative, please identify:

15 (1) What information you were furnished;

16 (2) Who furnished that information;

17 (3) When that information was furnished.

18 (b) Have you at any time since 1930 interchanged
19 results of research tests, medical studies or experiments regard-
20 ing the state of the medical knowledge regarding the connection
21 between asbestos exposure and the contracting of pulmonary dis-
22 eases including lung cancer and asbestosis with any other person,
23 including any Co-defendants in this action, and if your answer is
24 in the affirmative, please state:

25 (1) When this interchange took place;

26 (2) Who participated in these interchanges;

27 (3) Summarize the content of these interchanges or
28 studies.

1 (c) Please state if you or anyone on your behalf ever
2 conducted, sponsored or contributed financially to any studies or
3 research to determine if the inhalation of asbestos fibers may be
4 harmful, and if your answer is in the affirmative, please state:

5 (1) By whom the research was conducted, giving
6 complete names and addresses;

7 (2) The dates that each such research project or
8 test was conducted;

9 (3) The complete results of each test or study;

10 (4) Identify all documents that refer, reflect or
11 relate to the test or study;

12 (5) Supply copies of the reports of the research
13 department pertaining to the use by the corporation of asbestos
14 in their manufacture of insulation products.

15 (d) Did anyone ever make any recommendation and/or sug-
16 gestions to you pertaining to the risks, and hazards associated
17 with the manufacturing or use of insulation products containing
18 asbestos, and if so, state:

19 (1) Where such recommendations or suggestions were
20 made;

21 (2) Who made such recommendations or suggestions;

22 (3) To whom were these recommendations or sugges-
23 tions made;

24 (4) The substance of the recommendations or sug-
25 gestions;

26 (5) What actions did you take as the result of
27 those recommendations and suggestions?

28 (e) Do you agree that there is a causal connection

1 between the asbestos dust exposure and:

2 (1) Asbestosis?

3 (2) Lung cancer?

4 (3) Mesothelioma?

5 (4) Other cancers?

6 (f) If your answer to (e) above is yes as to any or all
7 subparts, please identify the following as to each disease
8 process listed below:

9 (1) When and how you first learned of such connec-
10 tion;

11 (2) If the knowledge was obtained by the
12 attendance at any conference, lecture, convention, symposium or
13 meeting, identify such event and provide the name of the person
14 attending or the documents obtained from that meeting;

15 (3) If knowledge was obtained from a medical or
16 scientific study or any other published works, identify the same;

17 (4) If the knowledge was otherwise obtained,
18 identify the manner of receipt of the document or communication.

19 RESPONSE TO INTERROGATORY NO. 19:

20 Fibreboard objects to this interrogatory on the grounds
21 that it is compound, complex and prolix calling simultaneously
22 for information on a wide variety of topics rather than discreet
23 subjects.

24 Fibreboard objects to this interrogatory to the extent
25 that it calls for information after the date Fibreboard ceased
26 manufacturing asbestos-containing products on the grounds that
27 such information is not relevant to the subject matter of this
28

1 litigation and is not reasonably calculated to lead to the
2 discovery of admissible evidence.

3 Fibreboard objects to this interrogatory as calling for
4 Fibreboard to characterize the state of knowledge or awareness of
5 a corporation at any given time with regard to any particular
6 fact, event or subject matter. No corporation is capable of
7 knowledge or awareness except through managerial employees whose
8 knowledge is attributable to the corporation by operation of
9 law. This interrogatory improperly calls for a legal opinion and
10 conclusion as to what constitutes knowledge by a corporation of a
11 stated fact or condition. This interrogatory also improperly
12 calls for speculation both as to the state of mind of
13 Fibreboard's employees and their status as legal representatives
14 of Fibreboard Corporation. Consequently, Fibreboard can only
15 respond to such interrogatory, if at all, by stating on
16 information and belief the degree of knowledge of a particular
17 fact, event or subject matter as held by a named person at a
18 specific time. Such response is not intended nor should it be
19 deemed to constitute acknowledgment that such knowledge is
20 attributable to any corporation.

21 Fibreboard objects to this interrogatory on the grounds
22 it is overly broad, unduly burdensome and oppressive.
23 Furthermore, it is unlimited in time and would require review and
24 compilation of information received over a period of fifty years.
25 Much of this time period is irrelevant to this litigation, as
26 Fibreboard ceased manufacturing asbestos-containing insulation in
27 1971.

28

1 Fibreboard further objects to this interrogatory as
2 requiring an expert medical opinion from Fibreboard and on the
3 grounds that Fibreboard's current knowledge of various medical
4 conditions is not relevant to this litigation.

5 Fibreboard objects to this interrogatory on the grounds
6 that the term "interchanged" is vague and ambiguous.

7 Without waiving any of its objections, Fibreboard
8 responds as follows:

9 Fibreboard has not identified any records or information
10 indicating that Fibreboard received any reports or communications
11 from a workmen's compensation insurance carrier or products
12 liability insurance carrier with regard to the "hazards incident
13 to" the use of asbestos-containing insulation products during the
14 time when Fibreboard manufactured asbestos containing insulation
15 products.

16 Fibreboard has not identified any records or information
17 indicating that information concerning the state of medical
18 knowledge at that time was furnished to Fibreboard by co-
19 defendants during the time when Fibreboard manufactured asbestos
20 containing insulation products.

21 Fibreboard has not identified any records or information
22 indicating that Fibreboard "interchanged research tests, medical
23 studies or experiments regarding the state of the medical
24 knowledge regarding the connection between asbestos exposure and
25 the contracting of pulmonary diseases including lung cancer and
26 asbestosis" with Co-defendants or other persons during the time
27 when Fibreboard manufactured asbestos containing insulation
28 products. Fibreboard states, however, that in the late 1960's

1 some Fibreboard employees received some information through the
2 New Yorker magazine and by attending a conference in New York
3 where Dr. Irving Selikoff and others lectured.

4 Fibreboard has not identified any records or information
5 indicating that it, or anyone on its behalf, ever conducted,
6 sponsored or contributed financially to studies or research "to
7 determine if the inhalation of asbestos fibers may be harmful."

8 See Response to Interrogatory No. 18.

9 With respect to "recommendations and/or suggestions . .
10 . pertaining to the risks and hazards associated with the
11 manufacturing and use of insulation products containing asbestos"
12 Fibreboard states that at least since the 1940's, Fibreboard
13 employees understood that exposure to any inorganic nuisance
14 dust, including asbestos dust, could produce respiratory and
15 other (for example, eye) irritation. As a result, Fibreboard
16 took reasonable steps to suppress all dust, including asbestos
17 dust, in all its work places and expected that applicators and
18 other handlers of its products, including its insulation
19 products, would take similar steps.

20 In the period 1966-1968, certain Fibreboard employees
21 received contradictory information that under certain
22 circumstances exposure to certain asbestos-containing insulation
23 products could increase the likelihood that an insulation worker
24 might contract certain life threatening diseases. As a result,
25 and as Fibreboard learned more of the circumstances and severity
26 of these risks, Fibreboard concentrated its research on the de-
27 velopment of an asbestos substitute, which culminated in 1971
28

1 when Fibreboard marketed the first asbestos-free calcium silicate
2 insulation produced in the United States.

3 The information regarding the various risks came to
4 different Fibreboard employees from a variety of sources
5 including a 1968 seminar presented by Dr. Irving Selikoff in New
6 York, an article in an October 1968 New Yorker magazine, and a
7 publication received from the National Insulation Manufacturers
8 Association in approximately 1967 entitled "Recommended Health
9 Safety Practices for Handling and Applying Thermal Insulation
10 Products Containing Asbestos."

11 The contradictory and incomplete information about as-
12 bestosis that came to some Fibreboard employees before this 1966-
13 71 period did not give Fibreboard knowledge that medical problems
14 uniquely related to asbestos resulted from use of any of
15 Fibreboard's products under normal circumstances of exposure to
16 them as it was then understood.

17 Fibreboard states that it is aware that under certain
18 circumstances exposure to raw asbestos dust can cause asbestosis
19 especially in individuals who smoke. Fibreboard employee
20 insurance files indicate that in approximately 1957, certain
21 employees allegedly subject to exposure to asbestos in various
22 environments claimed they developed asbestosis. Such information
23 did not inform employees of Fibreboard's insurance department
24 that the use of any of Fibreboard's insulation products, which
25 contained a small percentage of asbestos, was associated with
26 asbestosis.

27 Fibreboard states that in approximately 1968 some
28 Fibreboard employees learned of a lung disease called

1 mesothelioma from a lecture in New York, described above.

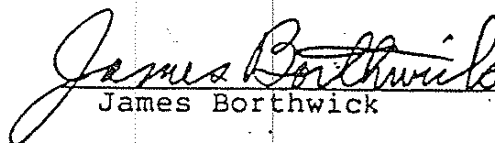
2 Fibreboard is not certain when any of its employees
3 first learned of any relationship between lung cancer and
4 exposure to asbestos dust.

5 Fibreboard has not identified any information indicating
6 that Fibreboard has knowledge of a "causal relationship" between
7 exposure to asbestos dust and other cancers. Fibreboard believes
8 that medical experts disagree whether there is any such
9 relationship.

10 Pertinent documents are located at the office of
11 Robert A. Beck, Esq. 22 Battery Street Suite 404 San Francisco,
12 California and to the extent they are not privileged or otherwise
13 protected from disclosure, they will be made available for
14 inspection and copying at a mutually convenient time.

15 Dated: April 7, 1986

16 JAMES BORTHWICK
17 BLACKWELL, SANDERS, MATHENY, WEARY &
18 LOMBARDI

19 
20 James Borthwick

21 Attorneys for Fibreboard Corporation
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1 EXHIBIT A
2 INSULATION PRODUCTS

3 Prior to 1948, insulation products were manufactured and
4 sold by a wholly-owned subsidiary under the trade name "PLANT."
5 Since 1948 products were manufactured by this Defendant and sold
6 under the trade name "PABCO."

7 Products manufactured prior to the late 1940s contained
8 chrysotile asbestos. Thereafter, until the early 1960s, mixtures
9 of chrysotile and amosite were used. From the early 1960s until
10 September, 1971, asbestos was amosite. No asbestos in any
11 product manufactured after September, 1971.

12 PRASCO was manufactured at Redwood City, CA, Aircell at
13 San Francisco, CA, 85% Magnesia at Redwood City and Emeryville,
14 CA; all other products at Emeryville, CA.

15 BRAND NAMES:

16 1. PRASCO: 85% diatomaceous earth and binders, 15%
17 asbestos. Manufactured from about 1928 to 1957. Blocks, Pipe
18 Covering and Insulating Cement. Temperature range: There were
19 two types of PRASCO - 15c, up to 1500°F and 19c, up to 1900°F.
20 Color: yellow or red.

21 2. 85% MAGNESIA: 85% or more basic magnesium
22 carbonate, 15% or less asbestos. Manufactured from about 1928-
23 1966. Blocks, Pipe Covering and Insulating Cement. Temperature
24 range: to about 550°F. Color: white.

25 3. CALTEMP: (called Caltherm during first year of
26 manufacture). 88% calcium silicate, 12% asbestos. Manufactured
27 from about 1952 to 1968. Blocks, Pipe Covering and Insulating
28 Cement. Temperature range: to about 1200°F. Color: 1952 to
mid-1960s, pink. Thereafter, white or gray.

4. SUPERCALTEMP: Primarily calcium silicate.
Asbestos content reduced over time of manufacture from about 12%
at start to 3-1/2% in 1971; all asbestos removed from product in
September, 1971. Manufactured from mid-1960s to date. Blocks
and Pipe Covering. Temperature range: to about 1350°F.
Color: white or gray.

5. FI: Insulating Cement. About 95% calcium silicate
and binders, 5% asbestos. Manufactured from 1963-1966. Tempera-
ture range: to about 1200°F. Color: the same as Caltemp manu-
factured at the time.

6. No. 127: Insulating Cement. Composition same as
FI, but asbestos gradually reduced until September, 1971, when
all use of asbestos ceased. Manufactured from 1966 to about
1975. Temperature range: to about 1200°F. Color: white or
gray.

1 7. AIR CELL: Little information remains. Made from
2 asbestos paper and sodium silicate. Asbestos percentage not
3 known. Manufactured for an unknown period prior to 1948.
4 Temperature range: believed to have been up to about 350°F.
5 Color: believed to have been grayish.

6 REBRANDS:

7 1. KAYLO: Blocks and Pipe Covering. Composition,
8 temperature range and color were the same as Caltemp or
9 Supercaltemp at the time. Manufactured from 1960 to 1972, under
10 a written Rebrand Agreement for Owens-Corning Fiberglas, which
11 specified the product was to meet OCF specifications and be
12 packaged in OCF containers. No asbestos was used in Kaylo manu-
13 factured after 1971. Agreement stated that quantities were to
14 meet OCF's requirements in the 13 western states.

15 2. LK INSULATION: Blocks and Pipe Covering. Composi-
16 tion, temperature range and color were the same as Caltemp or
17 Supercaltemp manufactured at the time. Manufactured from 1964-
18 1972 under a written Rebrand Agreement for Armstrong Contracting
19 & Supply which specified the product was to meet Armstrong's
20 specifications and be packaged in their containers. No asbestos
21 was used in LK Insulation after 1971.

22 3. PYROCAL: Blocks and Pipe Covering. Composition,
23 temperature range and color were the same as Supercaltemp manu-
24 factured at the time. Manufactured from about 1968-1971 under an
25 oral Rebrand Agreement for PPG Industries. Packaged in PPG con-
26 tainers.

OTHER PRODUCTS

At times in the past, certain other products containing asbestos were manufactured and/or sold by this Defendant or its predecessors. Due to the passage of time and sales of facilities, little information on these products remains. However, the following is known:

1. FLOOR TILE: Linoleum, floor coverings and floor tile were manufactured from the 1920s until the 1960s. Of these products, only one contained asbestos. Name: PABCO FLORON - manufactured at Emeryville, CA, from about 1952-1954. About 15% asbestos.

2. ASBESTOS CEMENT PRODUCTS: Roofing, siding and board made from Portland Cement and about 15%-20% asbestos were manufactured at Redwood City, CA from 1948-1963. Sold under the names: PABCO COLOROK, PABCO STORMLAP, PABCO PABFLEX and PABCO STONITE. Facility closed in 1963. From about 1964-1968, small amounts of similar products were purchased from Johns-Manville and resold.

3. PAINT PRODUCTS: A wide variety of paints were manufactured from the 1920s until 1968. Of these paints, only two specialty products contained asbestos. These were: A roof coating called PABCO ALUMI-SHIELD and a floor coating called PABCO GRIP-DEK were manufactured at Emeryville, CA from about 1940-1968. Compositions were paint vehicles, pigments and about 5%-10% asbestos. This Defendant's paint operations were sold in 1968. The sale involved transfer to the purchaser of manufacturing facilities, personnel and records.

4. ASPHALT SATURATED FELTS AND ROLL ROOFING: Asphalt saturated or coated felts and roll roofing were manufactured at Emeryville, CA from 1920-1961, at Wilmington, CA from 1955-1968, at Portland, OR from about 1949-1968 and at Martinez, CA from 1961-1968. The majority of these products comprised an organic base sheet treated with asphalt. However, a small percentage were made using an asbestos base sheet. Sold as PABCO FELT or PABCO ROLL ROOFING. Defendant's roofing operations were sold in 1968. The sale involved transfer of manufacturing facilities, personnel and records.

5. CAULKING COMPOUNDS AND COATINGS: Fiber reinforced caulking compounds, plastic cements and roof coatings containing about 5%-10% asbestos were manufactured at Emeryville, CA from prior to 1940 until 1968. Manufacture was at the paint facilities but sale was generally by the roofing department. Manufacture ceased by this Defendant when paint operations were sold in 1968. Sold generally under the name PABCO. A specific caulking and coating compound was called PABCO HYDROSEAL.

1 6. GYPSUM PRODUCTS: This Defendant manufactured
2 Gypsum board, lath, plaster, wallboard taping compounds and
3 finishing compounds, at South Gate, CA, from at least the 1940s
4 to 1967, at Florence, CO from at least the 1950s to 1967, at Las
5 Vegas, NV from 1965-1967 and at Newark, CA from 1956-1970.
6 A fire retardant Gypsum board called PABCO FLAMECURB, made from
7 about 1951-1960 contained a small percentage of asbestos. For
8 a few months in 1954, all Gypsum board and lath manufactured at
9 South Gate, CA contained 0.2%-0.3% asbestos. Insofar as is
10 known, no other board or lath contained asbestos. Some taping
11 and finishing compounds contained about 5%-10% asbestos from
12 about 1951 to 1960. After about 1960, taping and finishing com-
13 pounds were not manufactured. However, small amounts were pur-
14 chased (source not known) until about 1970 and resold under the
15 Pabco label. May have contained some asbestos. From about 1956-
16 1959, a specialty plaster called PABCO CONCRETE BOND PLASTER was
17 made in small quantities. Gypsum products were sold under the
18 name PABCO. All Gypsum operations were sold in the period 1967-
19 1970. Manufacturing facilities, personnel and records were
20 transferred to the purchasers with these sales.

21 7. INSULATING TAPE: In the 1940s and prior thereto,
22 small quantities of insulating tape were manufactured at
23 Emeryville, CA. This product may have contained some asbestos.
24 No further information has been located. Sold under the name
25 PABCO.

26 8. GASKETS AND PACKINGS: For an unknown period of
27 time prior to 1948, a subsidiary, Plant Rubber & Asbestos Works,
28 manufactured gaskets, packings and a product called ASBESTOFELT
in San Francisco, CA. Some of these products contained asbestos;
percentage is not known. Also, for an unknown period prior to
1948, this subsidiary sold, but did not manufacture, some or all
of the following: Asbestos-cement roofing, siding and lumber,
refractories, asbestos textiles, paper, millboard and acoustical
materials, some of which contained asbestos in percentages not
known. The name PLANT was used on the foregoing products. No
further information has been located.

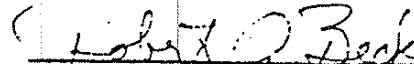
VERIFICATION

I, ROBERT A. BECK, declare as follows:

I am employed by Fibreboard Corporation, defendant in these proceedings and am authorized to verify these responses on behalf of Fibreboard Corporation. I have reviewed the responses to interrogatories propounded on behalf of the plaintiffs, and I am informed and believe that these responses are true and correct to the best of my knowledge at this time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29 day of March, 1986, at San Francisco, California.



Robert A. Beck

James Borthwick
James Borthwick

Blackwell Sanders Matheny Weary &
Lombardi
Five Crown Center
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

Robert D. Andrekanic
Daniel & Mehan
314 N. Broadway, Suite 950
St. Louis, Missouri 63102
(314) 421-6141

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

to: Copy of the foregoing mailed this 8 day of April 1986

Blatt & Fales
Walter L. Floyd, Plaintiffs
Joseph Leritz, Nicolet

James Borthwick
James Borthwick

EXHIBIT 6



KeyCite Red Flag - Severe Negative Treatment

Reversed by [Hamilton v. Asbestos Corp., Ltd.](#), Cal., May 15, 2000

73 Cal.Rptr.2d 11

Review Granted

Previously published at: 62 Cal.App.4th 200

(Cal.Const. art. 6, s 12; Cal. Rules of

Court, Rules 8.500, 8.1105 and 8.1110,

8.1115, 8.1120 and 8.1125)

Court of Appeal, First District, Division 2, California.

Arthur MITCHELL, Plaintiff and Respondent,

v.

ASBESTOS CORPORATION,

LTD., Defendant and Appellant.

No. A076593.

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March 17, 1998.

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Review Granted June 17, 1998.

Synopsis

Tack welder who allegedly contracted asbestosis as result of exposure to asbestos while working with insulating cement manufactured by American company brought strict liability and negligence action against multiple defendants, including Canadian asbestos supplier. Some two years later, plaintiff brought second action against supplier, who was never served in connection with first action. After cases were consolidated, the Superior Court, City and County of San Francisco, John E. Munter, J., entered judgment on jury verdict awarding plaintiff damages. Supplier appealed. The Court of Appeal, Lambden, J., held that: (1) one year statute of limitations on all of plaintiff's asbestos injury claims commenced when plaintiff filed first action; (2) plaintiff was not entitled to split his cause of action to bring second suit for later-stage, asbestos-related cancer mesothelioma, which he did not allege in first action; (3) San Francisco Superior Court General Order No. 27 did not entitle plaintiff to split his claims; (4) supplier did not waive its statute of limitations defense; (5) supplier was not estopped from raising that defense; and (6) record showed that consolidation was for purposes of trial only, rather than for all purposes.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

*13 Parker & Bonis, LLP [James C. Parker](#), San Francisco, Stevens, Drummond & Gifford, [Gary T. Drummond](#), Walnut Creek, for Defendant and Appellant.

Brayton Harley Curtis, [Philip A. Harley](#), Novato, [James L. Oberman](#), Hercules, for Plaintiff and Respondent.

Opinion

[LAMB DEN](#), Associate Justice.

This asbestos action by Arthur Mitchell went to jury trial against one defendant, Asbestos Corporation, Ltd. (ACL), a Quebec mining company which supplied asbestos fibers to various manufacturers. Mitchell's trial theory was that ACL supplied Eagle-Picher Industries, Inc. (EPI), a Midwestern company which manufactured an insulating cement called Eagle 66 or Super 66. Mitchell contracted [asbestosis](#) and [mesothelioma](#). He claimed asbestos exposure, partly from EPI cement, while working for three to six months in 1942 or 1943 as a tack welder at Moore Dry Dock in Oakland. He relied in particular on deposition testimony from Robert Bockstahler, a one-time EPI employee, who testified, based on copies of EPI records, that ACL had been EPI's exclusive supplier of asbestos fibers during the relevant time period.

The case went to the jury on theories of strict liability and negligence. By special verdict, the jury found: asbestos bore a defect in design or failure to warn when it left ACL's possession; this caused Mitchell's injury *14 and was reasonably foreseeable; ACL also negligently caused injury; Mitchell first suffered appreciable harm before January 4, 1986 (the effective date of Proposition 51); and ACL was a substantial factor in causing the exposure and was 10 percent liable. The jury made separate noneconomic damage awards for [asbestosis](#) and [mesothelioma](#).

Judgment was for the principal sum of \$835,119, and ACL appeals.

ACL seeks reversal on several grounds, most of them raised in its unsuccessful posttrial motions for judgment notwithstanding the verdict and new trial. It argues: (1) merely supplying raw asbestos for use in manufacturing by others cannot support strict liability; (2) the statute of limitations bars recovery; (3) the evidence is insufficient to support causation between Mitchell's injuries and any asbestos ACL supplied; (4) the Bockstahler deposition was

erroneously admitted; and (5) Proposition 51 should have been applied to reduce noneconomic damages to ACL's 10-percent proportional fault. Post-briefing authority would seem to resolve the last point in ACL's favor (*Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 66 Cal.Rptr.2d 438, 941 P.2d 71), but we find that and other issues moot. Error in applying the statute of limitations compels a complete reversal.

DISCUSSION

The statute of limitations problem has several component parts, which we address separately. Their common factual and procedural predicate is as follows.

Mitchell filed several asbestos-related lawsuits, two of them San Francisco Superior Court actions naming ACL as a defendant. The verdict and judgment here are after these two actions were ordered consolidated on Mitchell's motion. The first action No. 955576(Mitchell), filed in October 1993, alleged Mitchell suffered injuries which included "breathing difficulties, *asbestosis*, and/or other lung damage," suffered increased risk and fear of developing various *cancers*, and had been diagnosed on or about 1979 with "*asbestosis* and asbestos-related *pleural disease*." ACL was never served in that action.

The second action *Mitchell v. Asbestos Corp., Ltd.*(Super Ct. S.F. County, No. 975884)(Mitchell), filed in February 1996, added allegations Mitchell suffered from "lung and/or other *cancer*, *mesothelioma*," and had been diagnosed the month before with *mesothelioma*. ACL was served in this action in February and answered on April 11, raising an affirmative defense of the statute of limitations found in *section 340.2 of the Code of Civil Procedure* (all unspecified further section references are to that code). Citing his terminal illness, Mitchell moved on April 12 for an order consolidating the actions and granting trial preference. His motion was granted on April 30, without objection from ACL, and trial was set for July 8, discovery to remain open. Several defendants were served with the motion, but settlements obviously followed, for trial began on July 31 against ACL as the sole remaining defendant.

ACL raised the issue of the statute of limitations near the close of evidence and raised it again in its posttrial motions. Relying on *Darden v. General Motors Corp.* (1995) 40 Cal.App.4th 349, 47 Cal.Rptr.2d 580 (*Darden*), it maintained *Mitchell*

II was time-barred because *Mitchell I* had started the one-year statute (§ 340.2) running. Tardy cognizance of this issue, ACL explained in its posttrial motions, was from not having realized, until a chance remark by the court in chambers, that this was a consolidated case. Only afterwards did ACL discover it had been named in *Mitchell I*. It was stipulated at the motion made during trial that Mitchell's answers to standard interrogatories had revealed the prior lawsuit and listed the defendants involved but had *not* listed ACL.

The court denied the posttrial motions, reasoning aloud: (1) the first action was without dispute timely filed; (2) Mitchell had promptly filed and served ACL with the second action after learning he had *mesothelioma*; (3) the matters had been consolidated "for all purposes" and an early trial date set; (4) trial then proceeded with ACL "the only remaining defendant" and the court clerk announcing on the first day the case was being tried as a consolidated action; and (5) *15 ACL made no claim during Mitchell's presentation of evidence that "either *asbestosis* or *mesothelioma* was outside the proper scope of the issues." The court concluded: (6) ACL had "made a general appearance" in both cases; (7) all evidence had been properly admitted for both cases; (8) the matter was distinguish-able from *Darden*; and (9) the judgment was "not defective" based on the statute. When ACL's counsel asked to clarify for the record that "the consolidation was not for all purposes, but rather just for trial," the court said the record would "speak for itself" and read aloud the consolidation order, which merely stated in part " ... Action Nos. 955576 and 975884 are consolidated as Action No. 955576." In denying the motion when first raised, at trial, the court had said it found Mitchell was misled by lack of earlier objection "either under the doctrine of waiver [,] estoppel or la[c]hes any or all of them...."

I. Statute of limitations (*Darden*)

Section 340.2 provides in part: "(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following: [¶] (1) Within one year after the date the plaintiff first suffered disability. [¶] (2) Within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure. [¶] (b) 'Disability' as used in subdivision (a) means the loss of time from work as a result of such exposure which precludes the performance of the employee's regular occupation."

This special statute, enacted in recognition of the long period of time which may elapse before serious asbestos-related disease develops, allows a plaintiff who knows of his or her asbestos-related illness to nevertheless delay bringing an action until disability from work occurs (*Darden, supra*, 40 Cal.App.4th 349, 354, 47 Cal.Rptr.2d 580) or, in the case of a plaintiff who has retired before the onset of what would have been a disability, for an indefinite period of time (*ibid.*; *Duty v. Abex Corp.* (1989) 214 Cal.App.3d 742, 749–751, 263 Cal.Rptr. 13).

Darden decided, on facts remarkably like those here, that this unusual freedom to delay bringing an action nevertheless does not mean a plaintiff, once having elected to bring suit, can bring successive actions without violating the one-year limitation period. The plaintiff in *Darden* brought a 1987 action based on asbestos exposure, naming but never serving defendant General Motors Corporation (GM). After reaching settlements with some defendants, he dismissed the action without prejudice as to others, including GM. Then in 1991, he filed a virtually identical complaint against GM and others. (*Darden, supra*, 40 Cal.App.4th at p. 351, 47 Cal.Rptr.2d 580.)

Division Four of this court held the second action time-barred under the one-year statute: “Although plaintiff claimed the statute never began to run against him because he did not suffer a disability within the meaning of section 340.2, unquestionably with the commencement of [his first action] he was on record that he knew and believed his cause of action had accrued for asbestos-related illness....” (*Darden, supra*, 40 Cal.App.4th at p. 352, 47 Cal.Rptr.2d 580.) “Holding fast under these circumstances to the literal definition of ‘disability’ would endorse a rule that encourages plaintiffs who have already elected to litigate their asbestos-related personal injury claim to avoid the normal consequences of civil procedure with a second, otherwise untimely, lawsuit. These consequences include the bar of the statute of limitations as well as mandatory dismissal for failure to serve (§ 583.210 et seq.) or prosecute (§ 583.310 et seq.). Such a result would subvert the general policy informing statutes of limitations and, on the other hand, would fail to serve the specific remedial policy which spurred the passage of section 340.2.” (*Id.* at p. 355, 47 Cal.Rptr.2d 580.)

This “loophole for multiple suits against the same defendant beyond the one-year bar” would defeat the purposes of promoting repose and preventing stale claims and be “out

of synch” with the general scheme for commencing actions. (*Darden, supra*, 40 Cal.App.4th at p. 356, 47 Cal.Rptr.2d 580.) “Section 340.2 postpones accrual of the cause of action for injury from exposure to asbestos. *16 Section 312 tells us an action cannot be started until it accrues. By filing [the first action] in 1987 plaintiff voluntarily commenced an action within the meaning of section 350 and therewith admitted that his cause of action had accrued. Plaintiff in effect invoked the bar of section 340.2 and cannot later revoke it: if his cause of action accrued in 1987, it does not ‘unaccrue’ in 1991 just because he attempted to deny accrual under the technical shelter of the very same statute.” (*Ibid.*) The court found no legislative intent in section 340.2 “to allow multiple suits beyond the one-year limit.” (*Ibid.*)

Accordingly, *Darden* held, “[W]hen an individual has already announced and pursued an asbestos-related personal injury claim with a prior lawsuit, and indeed in that suit has named but not served the very defendant then pursued at a much later date, that person does not escape the limitation of section 340.2. Rather, the statute starts to run upon filing the first lawsuit.” (*Darden, supra*, 40 Cal.App.4th at p. 356, 47 Cal.Rptr.2d 580.)

Our case is not meaningfully distinguishable. Mitchell filed his first action against ACL in October 1993, claiming asbestos-related injury and naming but not serving ACL. This started the one-year statute running. He filed his second action over two years later, in February 1996, making the second action time-barred.

Mitchell acknowledges the similarity but argues *Darden* is wrongly decided. He criticizes its discussion equating commencement of actions with accrual of actions, noting that accrual of an action may, as in section 340.2 and other situations (notably where a plaintiff with an accrued cause of action is under a disability), long precede the running of the time for commencing the action. While our division has recently endorsed *Darden* as essentially correct (*Barr v. ACandS, Inc.* (1997) 57 Cal.App.4th 1038, 1049–1053, 67 Cal.Rptr.2d 494 (*Barr*), review den. Dec. 23, 1997), we briefly address Mitchell's arguments.

Darden 's use of the terms “accrued” and “accrual” is inaccurate. “[A]s a general proposition it is settled that a plaintiff's cause of action accrues for purposes of the statute of limitations upon the occurrence of the last element essential to the cause of action; that is when the plaintiff is first entitled to sue. [Citations.]” (*Buttram v. Owens–*

Corning Fiberglas Corp., *supra*, 16 Cal.4th 520, 531, fn. 4, 66 Cal.Rptr.2d 438, 941 P.2d 71.) Section 340.2, in using the trigger of “disability,” does not equate “accrual” with commencement of the limitations period; a plaintiff may have an “accrued” cause of action for asbestos-related injury but, until “disability” occurs, enjoys a period where the one-year time has not yet started to run. Thus *Darden* does err when it reasons that commencing an action admits the action has “accrued” (*Darden*, *supra*, 40 Cal.App.4th 349, 356, 47 Cal.Rptr.2d 580; *Barr*, *supra*, 57 Cal.App.4th 1038, 1049 & fn. 4, 67 Cal.Rptr.2d 494). However, this does not undermine its rationale. *Darden*’s point is simply this: by commencing an action, the plaintiff admits there is a known asbestos-caused injury (§ 340.2, subd. (a)), and when he or she elects to file suit, eschewing the statutory option of waiting longer, he or she has made the choice and cannot sue again after one year passes. Nothing in the legislation shows an intent to allow multiple actions. (*Barr*, *supra*, 57 Cal.App.4th 1038, 1050, 67 Cal.Rptr.2d 494.)

We hold that the second action, *Mitchell II*, is time-barred (§ 340.2) under *Darden*.

II. Separate cause of action for mesothelioma injury

Mitchell’s first complaint alleged “breathing difficulties, asbestosis, and/or other lung damage,” an increased risk and fear of developing various cancers, and a 1979 diagnosis of “asbestosis and asbestos-related pleural disease.” His second complaint alleged for the first time “lung and/or other cancer, mesothelioma” and a February 1996 diagnosis of mesothelioma. Encouraged by a Court of Appeal decision which cannot be cited due to a grant and retransfer by the Supreme Court (*Richmond v. A.P. Green Industries, Inc.* (Cal.App.) review granted Oct. 1, 1997 (S062813) cause trans. to Ct.App. with directions, Dec. 23, 1997), Mitchell asks us to distinguish *Darden* and to recognize, as *17 some other jurisdictions have, a separate cause of action and new running of the statute for late-developed cancer injury like mesothelioma. We decline to do so.

California follows the primary right theory, which generally prevents a plaintiff from “splitting” his or her cause of action. (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 24, pp. 85–87.) A single action cannot be divided and made the basis of several suits (*id.*, § 35, pp. 95–96) except where exceptional circumstances might justify a departure from the rule to avoid harsh results (*id.*, § 36, pp. 96–

97). This applies as well to damages. “A single tort can be the foundation for but one claim for damages. [Citations.]” (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 638–639, 134 P.2d 242; *Landeros v. Flood* (1976) 17 Cal.3d 399, 413, 131 Cal.Rptr. 69, 551 P.2d 389.) “Accordingly, if the statute of limitations bars an action based upon harm immediately caused by defendant’s wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing would normally amount to splitting a cause of action. [Citation.]” (*Miller v. Lakeside Village Condominium Assn.* (1991) 1 Cal.App.4th 1611, 1622, 2 Cal.Rptr.2d 796.)

California case law has turned, for possible exceptions, to language in the Restatement Second of Judgments identifying circumstances where, for example, a first judgment is “plainly inconsistent with the fair and equitable implementation of a statutory ... scheme ... ” (Rest.2d Judgments, § 26(1)(d)) or “[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason ... ” (*id.*, § 26(1)(f)). (*Martinez–Ferrer v. Richardson–Merrell, Inc.* (1980) 105 Cal.App.3d 316, 327, 164 Cal.Rptr. 591 [as formerly proposed in tentative draft form].)

Harsh results can arise under California law when an ordinary statute of limitations is used for a plaintiff who suffers a progressive occupational disease. (*Martinez–Ferrer v. Richardson–Merrell, Inc.*, *supra*, 105 Cal.App.3d 316, 326–327, 164 Cal.Rptr. 591 [allowing a split cause of action for latent disease from toxics exposure]; see generally *Miranda v. Shell Oil Co.* (1993) 17 Cal.App.4th 1651, 1659, 26 Cal.Rptr.2d 655.) Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect his or her injury was caused by someone’s wrongdoing. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110, 245 Cal.Rptr. 658, 751 P.2d 923.) The discovery rule itself was judicially engrafted onto the law to help ameliorate harshness in cases of progressive occupational disease. (*Blakey v. Superior Court* (1984) 153 Cal.App.3d 101, 104–105, 200 Cal.Rptr. 52; *Velasquez v. Fibreboard Paper Products Corp.* (1979) 97 Cal.App.3d 881, 887–888, 159 Cal.Rptr. 113.) Nevertheless, harshness may persist with asbestos-related disease, for there may be early discovery of some harm yet a latency period of 15 to 35 years for the most serious diseases to develop. This might force a plaintiff to bring suit far in advance of his or her most significant injury (*Blakey v. Superior Court*, *supra*, 153 Cal.App.3d at p. 105, 200 Cal.Rptr. 52; *Puckett v. Johns–Manville Corp.* (1985) 169

Cal.App.3d 1010, 1017, 215 Cal.Rptr. 726) and when more serious future harm is speculative.

Alleviating harshness in the application of ordinary statutes of limitations to asbestos-related claims is what has driven several jurisdictions outside our own to allow a plaintiff to split a cause of action and bring separate suit for a later-stage, asbestos-related cancer like mesothelioma. (E.g., *Marinari v. Asbestos Corp., Ltd.* (1992) 417 Pa.Super. 440, 612 A.2d 1021, 1022, 1027–1028; *Potts v. Celotex Corp.* (Tenn.1990) 796 S.W.2d 678, 680–685; *Fusaro v. Porter–Hayden Co.* (1989) 145 Misc.2d 911, 548 N.Y.S.2d 856, 858–860; *Sheppard v. A.C. & S. Co.* (Del.Super.1985) 498 A.2d 1126, 1129–1134; *Eagle–Picher Industries, Inc. v. Cox* (Fla.App.1985) 481 So.2d 517, 519–524; *Devlin v. Johns–Manville Corp.* (1985) 202 N.J.Super. 556, 495 A.2d 495, 500–503; *Jackson v. Johns–Manville Sales Corp.* (5th Cir.1984) 727 F.2d 506, 516–522; *Pierce v. Johns–Manville Sales Corp.* (1983) 296 Md. 656, 464 A.2d 1020, 1025–1028; *Wilson v. Johns–Manville Sales Corp.* (D.C.Cir.1982) 684 F.2d 111, 115–121; cf. *18 *Ayers v. Jackson Tp.* (1987) 106 N.J. 557, 525 A.2d 287, 300 [toxics exposure generally].)

In California, however, we do not have an ordinary statute of limitations. Potential harshness has been all but eliminated through the enactment of section 340.2, by which the Legislature has not only codified the discovery rule but allowed plaintiffs to escape all time constraints until they reach the point of disability. (*Blakey v. Superior Court, supra*, 153 Cal.App.3d 101, 107, 200 Cal.Rptr. 52.) By then, of course, a plaintiff has experienced severe loss, and the action is no longer anticipatory nor the damages speculative. Further, if as often happens, injury does not reach a disabling degree until after a plaintiff has retired, the statute never commences to run (*Duty v. Abex Corp., supra*, 214 Cal.App.3d 742, 749–751, 263 Cal.Rptr. 13); the plaintiff may delay bringing suit indefinitely. The author of the bill creating section 340.2 expressly identified a legislative purpose “to relieve victims of asbestos-related diseases from a potentially harsh application of [a] statute of limitations which was designed not for disease claims but for victims of traumatic injury.’....” (*Blakey v. Superior Court, supra*, 153 Cal.App.3d 101, 105, 200 Cal.Rptr. 52.)

Under the extraordinarily accommodating provisions of section 340.2, there are simply no exceptional circumstances to justify a departure from the rule against splitting a cause of action. We decline to announce one.

III. General Order No. 27

Mitchell invokes San Francisco Superior Court General Order No. 27, which he argues extended a “promise” that he could split his cause of action and file again should he develop cancer. Because no published opinion has directly questioned the order since its issuance in 1985, he urges that we should abrogate the order—i.e., bar a second action under the rationale of *Darden*—only prospectively. We briefly examined a similar argument in *Barr* but found the general order inapplicable, and the issue thus moot, since the plaintiff had actually alleged cancer-related injury in his first action. (*Barr, supra*, 57 Cal.App.4th 1038, 1058–1059, 67 Cal.Rptr.2d 494.) Here Mitchell did not allege cancer-related injuries in his first action, but his claim fails for different reasons.

It is first helpful to examine the effect of the order, for it raises considerable doubt whether many plaintiffs would have relied on its asserted cause-splitting component. The order itself actually does not address splitting a cause of action. Rather, it addresses the circumstances under which an asbestos plaintiff in a pre-cancer action may introduce evidence of, and recover damages for, emotional distress and medical monitoring costs caused by an increased risk of contracting cancer. The order issued on April 10, 1985, and was largely supplanted by Supreme Court authority eight years later. The December 1993 opinion in *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795 (*Potter*), addressed the same issues in the broader context of toxics exposure cases generally. In a case like Mitchell's, where his first action was filed two months before *Potter* and when plaintiffs' counsel in this specialized area of the bar must have known of the imminence of the high court decision in *Potter*, one can question how much reliance was placed on the general order. Nothing in our record, incidentally, expressly shows such reliance.

Further eroding the prospect of actual reliance is that Mitchell invokes not the general order itself, but part of the order's rationale as expressed in a simultaneously issued memorandum opinion. One provision of the order was that a pre-cancer plaintiff could not recover for increased risk of developing cancer, and the memorandum opinion gave three supporting reasons. First, the prospect of developing cancer was speculative and, even if found to be a reasonable certainty, apt to result in compromise jury awards. Second, given the enormity of the asbestos litigation problem,

recovery could seriously diminish defendants' continued ability to respond in damages. Third, and only in this one aspect pertinent to Mitchell's argument, if plaintiffs are currently precluded from such recovery, then "elementary fairness requires the assurance that upon contracting the disease [they] will not be legally barred from pursuing a remedy if and when cancer develops...." For this proposition, the *19 memorandum opinion cited two of the out-of-state cases we have already examined and found inapplicable to section 340.2, a special statute enacted to rectify hardships arising from usual statutes of limitation (part II, *ante*).

But assuming a plaintiff might have actually relied on the general order's split-cause-of-action rationale in filing an action in the San Francisco Superior Court, the next question is whether that reliance was justified. A statute controls over any inconsistent local rule (Gov.Code, § 68070, subd. (a); *Butterfield v. Butterfield* (1934) 1 Cal.2d 227, 228, 34 P.2d 145; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 28, 210 Cal.Rptr. 762, 694 P.2d 1134) or policy (*Los Angeles County Dept. of Children etc. Services v. Superior Court* (1996) 51 Cal.App.4th 1257, 1267, 59 Cal.Rptr.2d 613; *Wisniewski v. Clary* (1975) 46 Cal.App.3d 499, 504–505, 120 Cal.Rptr. 176), and a local general order is but a manifestation of a local rule or policy for this purpose (Cal. Rules of Court, rule 981(b)(2)). Thus to the extent that the split-cause-of-action rationale underlying General Order No. 27 was inconsistent with section 340.2, section 340.2 controlled.

The Supreme Court in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 67 Cal.Rptr.2d 16, 941 P.2d 1203 (*Rutherford*), recently examined an analogous conflict. A Solano County Superior Court general order, also issued for asbestos litigation, had prescribed an instruction shifting to defendants the burden of proving, once harm from asbestos exposure was shown, that the defendant's particular product did *not* cause the plaintiff's injuries. (*Id.* at p. 965, 67 Cal.Rptr.2d 16, 941 P.2d 1203.) The court began: "[R]egardless of their source of authority, 'trial judges have no authority to issue courtroom local rules which conflict with any statute' or are 'inconsistent with law.' [Citations.]" (*Id.* at p. 967, 67 Cal.Rptr.2d 16, 941 P.2d 1203.) Thus if the burden-shifting instruction conflicted with any statewide statute, rule of law or Judicial Council rule, it was an inappropriate exercise of rulemaking powers and an invalid exercise of the court's inherent judicial powers. (*Id.* at pp. 967–968, 67 Cal.Rptr.2d 16, 941 P.2d 1203.) The Supreme Court thus "question[ed] the propriety" of the general order having embodied the burden-shifting device but stopped short

of deciding. It held instead that "the theoretical predicate for a burden shift on causation" was "lacking." (*Id.* at p. 968, 67 Cal.Rptr.2d 16, 941 P.2d 1203.) Shifting the burden had constituted "a fundamental departure" from tort causation principles and could "only be justified on a showing of necessity[.]" which the order lacked. (*Id.* at p. 969, 67 Cal.Rptr.2d 16, 941 P.2d 1203.) Interestingly, *Potter* said nothing about potential reliance on the general order preventing retrospective application of the holding invalidating the order.

To capsule what we have already observed in part II (*ante*), the rule against splitting a cause of action is fundamental to California tort law, has been departed from only in exceptional circumstances demanding the avoidance of peculiarly harsh results, and cannot be abrogated in the operation of section 340.2, a special statute expressly designed to alleviate harshness in asbestos actions. Section 340.2 had been in effect over five years before General Order No. 27 was issued. (Stats.1979, ch. 513, § 1, pp. 1689–1690; *Barr, supra*, 57 Cal.App.4th 1038, 1047, 67 Cal.Rptr.2d 494.) Given the greatly accommodating statute of limitations section 340.2 provided, the order had no policy predicate for departing from the fundamental rule against splitting a cause of action. The general order could not in these circumstances engender reasonable reliance.

Nor was the *Darden* reaffirmation of the no-splitting rule, in the section 340.2 context, an unforeseeable event justifying prospective-only application. We have held elsewhere that *Darden* is entitled to the usual rule of full retrospective effect. (*Barr, supra*, 57 Cal.App.4th 1038, 1052–1053, 67 Cal.Rptr.2d 494.) We add here that the case law did not point to abandonment of the no-splitting rule, either in 1985 when the general order was issued, or in 1995 when *Darden* was decided. One case did hold in 1980 that injury from long-term ingestion of an anticholesterol drug created a special hardship allowing one plaintiff to bring a second action, beyond the governing one-year statute. *20 The case also spoke of "a trend away from an unthinking enforcement of the rules" and, more metaphorically, of a rising "wind" blowing "away from a blind adherence to rigid concepts of what constitutes a cause of action...." (*Martinez-Ferrer v. Richardson-Merrell, Inc., supra*, 105 Cal.App.3d 316, 326–327, 164 Cal.Rptr. 591.) This portent, however, never came to pass and by 1987 was sternly criticized as dictum inconsistent with binding Supreme Court precedent. (*DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1024–1025, 242 Cal.Rptr. 368.) That criticism then mounted in a case which found no

exception for an allergy/asthma sufferer who had experienced long-term exposure to molds. (*Miller v. Lakeside Village Condominium Assn.*, *supra*, 1 Cal.App.4th 1611, 1625–1627, 2 Cal.Rptr.2d 796.)

Then in early 1993, still months before Mitchell filed his first action, a plaintiff in a non-asbestos toxics exposure case was held barred from splitting her cause of action, despite hardship, the court noting: “We neither overlook nor underestimate the dilemma posed to a toxic-tort plaintiff by the single cause of action principle. [Citation.] The time between exposure to toxins and the onset of disease may, and likely will, be long. The plaintiff who secures an award for immediate physical injury, monitoring costs, or some other proper item of damage, might be foreclosed from recovering damages in a second suit filed when the disease actually develops, years, perhaps decades, after the exposure, on the ground a cause of action cannot be ‘split.’ [Citation.] The problem is magnified if the plaintiff is unable to recover, in the first action, damages for the increased risk of disease. In addition, statute of limitations rules may prevent the plaintiff from waiting until the disease develops before bringing an action. [Citations.]” (*Miranda v. Shell Oil Co.*, *supra*, 17 Cal.App.4th 1651, 1659, 26 Cal.Rptr.2d 655.) The court offered, “Although judicial solution may be possible [citations], we encourage the Legislature to look into the matter.” (*Ibid.*)

For the narrow subset class of asbestos-related actions, of course, the Legislature had already looked into the matter and in 1979 specially crafted [section 340.2](#) to reduce hardship in applying the limitation period. When *Darden* held in October 1995 that this legislation conformed to the rule against splitting a cause of action, the result should have come as no surprise. The language of [section 340.2](#), coupled with the backdrop of cases holding to the no-splitting rule generally, made the result in *Darden* predictable.

We reject Mitchell's invitation to give *Darden* and our own decision only prospective effect. “Unlike statutory enactments, judicial decisions, particularly those in tort cases, are generally applied retroactively. [Citation.] But considerations of fairness and public policy may require that a decision be given only prospective application. [Citations.] Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by

the new rule. [Citations.]” (*Woods v. Young* (1991) 53 Cal.3d 315, 330, 279 Cal.Rptr. 613, 807 P.2d 455.) Any reliance on the former “rule” or “promise” of General Order No. 27 was unreasonable. Also, the order was of limited local rather than statewide impact and was at odds with both the language of [section 340.2](#) and the general case law against splitting a tort cause of action.

IV. Waiver or estoppel

We next explore whether ACL waived or was estopped to assert the statute. We find neither theory supported by the record.

Waiver. Waiver of the statute of limitations typically occurs through failure to plead, or adequately plead, the defense (*Hall v. Chamberlain* (1948) 31 Cal.2d 673, 679–680, 192 P.2d 759), which is not the case here. ACL answered in part, as a seventh affirmative defense, the action was “barred by the provisions of Code of Civil Procedure ... [section] 340.2....” While ACL evidently did not yet know it had been named in the unserved prior action at the time it answered, this general pleading language was sufficient (§ 458). Waiver also may, and ordinarily must, be accomplished by a signed *21 writing (§ 360.5), but there is no such writing in the record.

What we have, then, is a pleaded defense where waiver, if any, occurred through ACL's conduct. We are aware of no case finding a waiver on facts like these. Mitchell's sole cited case is one where the statute, while pleaded, was *never* raised, either at trial or on appeal. The discussion is also dictum, the court ruminating in a footnote about an issue not raised or briefed. (*RRLH, Inc. v. Saddleback Valley Unified School Dist.* (1990) 222 Cal.App.3d 1602, 1605–1606, fn. 2, 272 Cal.Rptr. 529.) Our case is easily distinguished. ACL vigorously raised the statute at trial, before the close of evidence and again in posttrial motions, and raises the issue now on appeal. Case law allows an answer to be amended to *plead* the statute after a trial is over (*Schriber v. Alameda etc. Title Ins. Co.* (1958) 156 Cal.App.2d 700, 708–709, 320 P.2d 82), and no authority of which we are aware remotely suggests that a timely-pleaded defense is lost by waiting until just before the close of evidence to argue it. It may in fact be unclear in a given case whether the defense is valid until all evidence is in, and case law appears to require only that the defense be at some point affirmatively invoked in the lower court (*Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 107,

fn. 2, 54 Cal.Rptr.2d 669). ACL did affirmatively invoke the pleaded defense here.

Viewing waiver generally as the voluntary and intentional relinquishment of a known right, in this case as implied from conduct (*Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 754–755, 161 Cal.Rptr. 322), there is no support for the trial court's finding, even under the deferential review standard of substantial evidence (*In re Marriage of Paboojian* (1987) 189 Cal.App.3d 1434, 1438, 235 Cal.Rptr. 65). The most one can say is ACL should have been more vigilant in discovering whether it had been named in the first action. Tardy discovery of the fact, however, does not show intentional relinquishment of a known right, and ACL wasted no time in raising the argument once it discovered the prior naming, prompted by the court's chance comment, midtrial, about this being a consolidated matter. Not even the court apparently knew until then that ACL had been named as a defendant in *Mitchell I*. Lack of knowledge by ACL also defeats *Mitchell*'s reliance on ACL having failed to object to the admission of evidence about pre-mesothelioma ailments. Also, counsel for ACL could have felt that the *Mitchell II* complaint—the only one with which ACL was served—covered certain pre-mesothelioma ailments through language alleging injury “including, but not limited to breathing difficulties [and] asbestosis....” The record therefore does not support the waiver finding.

Estoppel. The court's estoppel finding rests apparently on *Mitchell* having been misled, by ACL's tardy reliance on the *Darden* argument, into proceeding with the trial, to his detriment. This is certainly a supported observation, and we assume for purposes of estoppel that ACL's misleading conduct did not have to be undertaken with fraudulent design (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524–525, 39 Cal.Rptr. 377, 393 P.2d 689). However, the crux of estoppel to assert the statute of limitations is conduct *inducing the plaintiff to delay commencing the action* (*id.* at p. 524, 39 Cal.Rptr. 377, 393 P.2d 689; *Benner v. Industrial Acc. Com.* (1945) 26 Cal.2d 346, 349–350, 159 P.2d 24; *Barr*, *supra*, 57 Cal.App.4th 1038, 1056, 67 Cal.Rptr.2d 494; see generally 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 685, pp. 872–873), and nothing in the record suggests ACL did anything to induce the filing of *Mitchell II* beyond the one-year period (§ 340.2). Prejudice of the sort *Mitchell* experienced by relying on ACL's conduct at the trial, after the action was already untimely filed, is immaterial.

As a matter of law on these facts (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305, 61 Cal.Rptr. 661, 431 P.2d 245), the finding of estoppel is not supported.

V. General appearance in consolidated first action

Last, we explore whether, as the trial court reasoned, ACL's participation in the consolidated actions constituted a general appearance in the unbarred but unserved first *22 action, *Mitchell I*. “Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him as provided by Chapter 4 (commencing with Section 413.10). A general appearance by a party is equivalent to personal service of summons on such party.” (§ 410.50, subd. (a).)

“‘Appearance’” by a defendant is statutorily defined as filing an answer, demurrer, motion to strike or transfer, or giving the plaintiff written notice of appearance or having counsel give notice of appearance. (§ 1014.) None of that occurred here. Nevertheless, the statutory definition “is not exclusive. [Citation.] Thus a general appearance need not be “‘a formal, technical step or act ... ’” [citation]; rather the term may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. [Citation.] What is determinative is whether defendant takes a part in the particular action which in some manner recognizes the authority of the court to proceed. [Citations.]” (*Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1397, 250 Cal.Rptr. 787 (*Sanchez*).)

In that light, a vital threshold question is whether the consolidation was for all purposes or, as ACL maintained, only for purposes of trial. “There are two types of consolidation: a complete consolidation resulting in a single action, and a consolidation of separate actions for trial. Under the former procedure, which may be utilized where the parties are identical and the causes could have been joined, the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered. In a consolidation for trial, the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy. [Citation.]” (*Sanchez*, *supra*, 203 Cal.App.3d at p. 1396, 250 Cal.Rptr. 787.) A consolidation for all purposes results in a merger of the actions and a general appearance, while a consolidation for trial does not. (*Id.* at pp. 1395–1399, 250 Cal.Rptr. 787.) Consolidation for trial “does not affect the rights of the parties. The purpose

of consolidation is merely to promote trial convenience and economy by avoiding duplication of procedure, particularly in the proof of issues common to both actions. [Citation.]” (*Wouldridge v. Burns* (1968) 265 Cal.App.2d 82, 86, 71 Cal.Rptr. 394.)

On the nature of the consolidation here, the court announced the record would “speak for itself” and read aloud the consolidation order, saying its ruling did not “turn on that distinction” in any event. As it turns out, the order is of little help; it only states the two actions are “consolidated.” To discern the nature of a consolidation, however, courts look beyond the order, to the full circumstances surrounding its making. (E.g., *McClure v. Donovan* (1949) 33 Cal.2d 717, 722–723, 205 P.2d 17 [trial only]; *Stanton v. Superior Court* (1927) 202 Cal. 478, 484–485, 261 P. 1001 [all purposes].)

A strong indicator here is the language of Mitchell's motion to consolidate (cf. *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 702, 38 Cal.Rptr.2d 413), which proposed the ambiguous order signed by the court but unambiguously requested consolidation only for trial. Invoking the court's statutory power to consolidate for common questions of law or fact (§ 1048, subd. (a)) and case law principles pertaining to consolidation for trial, he argued: evidence in one trial was applicable to the other only to the extent relevant (citing *McClure v. Donovan*, *supra*, 33 Cal.2d 717, 722, 205 P.2d 17); consolidation was proper even though the parties were not identical (citing *Jud Whitehead Heater Co. v. Obler* (1952) 111 Cal.App.2d 861, 867, 245 P.2d 608); and consolidation would not affect the rights of the parties but merely promote trial convenience and economy (citing *Wouldridge v. Burns*, *supra*, 265 Cal.App.2d 82, 86, 71 Cal.Rptr. 394).

The need to preserve the rights of the parties in each case is illuminated by the service list on the motion, which shows more than a dozen defendants besides ACL were served. While the record of settlements is not before us, a comparison with earlier service lists in each case suggests there were three remaining defendants in *Mitchell II*. *23 ACL had answered the complaint in *Mitchell II* just the day before the April 12, 1996, motion. The court granted the motion on April 30, and trial with ACL as the sole remaining defendant would not begin until July 31.

Had ACL been the only defendant when consolidation was ordered, a stronger argument for full consolidation could be made, although the existence of even identical parties is not

controlling. (See, e.g., *Sanchez*, *supra*, 203 Cal.App.3d 1391, 1396–1397, 250 Cal.Rptr. 787; *McClure v. Donovan*, *supra*, 33 Cal.2d 717, 722–723, 205 P.2d 17; *Staub v. Muller* (1936) 7 Cal.2d 221, 224–225, 60 P.2d 283; *Stanton v. Superior Court*, *supra*, 202 Cal. 478, 484, 261 P. 1001; *Johnson v. Marr* (1935) 8 Cal.App.2d 312, 313–314, 47 P.2d 489.) Given multiple defendants and the nature of the motion Mitchell made, however, the only reasonable conclusion is that the consolidation was for purposes of trial only. This construction is also consistent with ACL's lack of opposition to the motion, for its counsel would have felt there was little point in objecting and little prejudice from consolidation.

Nothing beyond ACL's bare participation in the consolidated trial suggests it recognized the authority of the court to proceed over it with regard to *Mitchell I*. Such participation alone is insufficient to constitute a general appearance. (*Sanchez*, *supra*, 203 Cal.App.3d 1391, 1397–1399, 250 Cal.Rptr. 787.) We see no filings, stipulations or other actions by ACL which we could reasonably equate with a consent to jurisdiction. In fact, ACL argued *Mitchell II* was time-barred as soon as counsel became aware of the consolidated *Mitchell I* having named ACL. It is surprising that ACL's counsel took so long after all other defendants had settled out to appreciate the inappropriateness of proceeding with consolidated cases, but nothing in this delayed reaction connotes a consent to personal jurisdiction in *Mitchell I*. Accordingly, it is unnecessary to decide how much of the jury award might be salvaged as responsive to the *Mitchell I* allegations.

DISPOSITION

The second action, *Mitchell II*, was time-barred (§ 340.2), and the court lacked personal jurisdiction over ACL in

the consolidated but unserved first action, *Mitchell I*.
Accordingly, the judgment is reversed.

All Citations

73 Cal.Rptr.2d 11, 98 Cal. Daily Op. Serv. 1918, 98 Daily
Journal D.A.R. 2648

[KLINE](#), P.J., and [HAERLE](#), J., concur.

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EXHIBIT 7

H.K. Porter

Deposition of Ernest C. Bratt

December 6, 1978

(Volume I)

VOLUME I
(December 6, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

-----X
IN RE: GENERAL DYNAMICS ASBESTOS CASES : CML No. 1.

-----X
SAMMIE L. GRAY, et al., :

Plaintiffs, :

-versus- :

Civil Action

No. H-75-327

GENERAL DYNAMICS CORPORATION, et al., :

Defendants. :

-----X
HENRIETTA C. BROWN, et al., :

Plaintiffs, :

-versus- :

Civil Action

No. H-76-434

UNITED STATES OF AMERICA, et al., :

Defendants. :

-----X
Deposition of ERNEST C. BRATT, taken
pursuant to the Federal Rules of Civil Procedure,
at the Quality Inn, 201 South McDowell Street,
Charlotte, North Carolina, before Roy F. Brown,

Registered Professional Reporter and Notary
Public within and for the State of Connecticut,
on Wednesday, December 6, 1978, commencing at
nine-twenty o'clock in the forenoon.

oOo

A p p e a r a n c e s :

KREINDLER & KREINDLER, ESQS.
Attorneys for the Plaintiffs
99 Park Avenue
New York, New York 10016

BY: STANLEY J. LEVY, ESQ.
-and-
IVAN B. RUBIN, ESQ.,
of Counsel

-and-

O'BRIEN, SHAFNER, GARVEY, BARTINIK & STUART, ESQS.
P. O. Drawer 929
Groton, Connecticut 06340

BY: MATTHEW SHAFNER, ESQ.,
of Counsel

McNAMARA & HOWD, ESQS.
Attorneys for the Defendant General Dynamics
Corporation
102 Oak Street
Hartford, Connecticut 06106

BY: HADLEIGH H. HOWD, ESQ.,
of Counsel

A p p e a r a n c e s (Cont'd):

UPDIKE, KELLY & SPELLACY, P. C.

Attorneys for the Defendant American Asbestos
Textile Corporation
One Constitution Plaza
Hartford, Connecticut 06103

BY: ELIZABETH R. COLLINS, ESQ.,
of Counsel

HOWARD B. FIELD III, ESQ.

Attorney for the Defendant Eagle Picher
809 Main Street
East Hartford, Connecticut 06118

ROBERT G. MONTSTREAM, ESQ.

Attorney for the Defendant Eastern Refractories
Company, Inc.
65 Connecticut Boulevard
East Hartford, Connecticut 06108

GORDON, MUIR & FOLEY, ESQS.

Attorneys for the Defendants Johns-Manville
Corporation, Johns-Manville Sales Corporation
and Johns-Manville Products Corporation
39 Lafayette Street
Hartford, Connecticut 06106

BY: PETER C. SCHWARTZ, ESQ.,
of Counsel

DANAHER, LEWIS & TAMONEY, ESQS.

Attorneys for the Defendant Pittsburgh-Corning
Corporation
39 Russ Street
Hartford, Connecticut 06106

BY: R. CORNELIUS DANAHER, JR., ESQ.,
of Counsel

A p p e a r a n c e s (Cont'd):

HOWARD, KOHN, SPRAGUE & FITZGERALD, ESQS.
Attorneys for the Defendants H. K. Porter Co.,
Inc., and The Southern Asbestos Co.
229 Buckingham Street
Hartford, Connecticut 06106

BY: JOHN R. FITZGERALD, ESQ.
-and-
JAMES M. MOHER, ESQ.,
of Counsel

BAI, POLLOCK & DUNNIGAN, ESQS.
Attorneys for the Defendant Raybestos-Manhattan,
Inc.
10 Middle Street
Bridgeport, Connecticut 06604

BY: JAMES E. COYNE, ESQ.,
of Counsel

BAILEY & WECHSLER, ESQS.
Attorneys for the Defendant Shook & Fletcher
One Financial Plaza
Hartford, Connecticut 06103

BY: HENRY C. IDE, ESQ.,
of Counsel

WILLIS & WILLIS, ESQS.
Attorneys for the Defendant Westinghouse Electric
P. O. Box 1109
955 Main Street
Bridgeport, Connecticut 06604

BY: FREDERICK W. CHRISTIE, ESQ.,
of Counsel

A p p e a r a n c e s (Cont'd):

KENNY & BRIMMER, ESQS.
Attorneys for the Defendant UNARCO
5 Grand Street
Hartford, Connecticut 06100

BY: JOSEPH P. KENNY, ESQ.,
of Counsel

COONEY, SCULLY & DOWLING, ESQS.
Attorneys for the Defendant Owens-Corning
Fiberglass Corporation
266 Pearl Street
Hartford, Connecticut 06103

BY: HENRY F. COONEY, ESQ.,
of Counsel

DARCI ROCK, ESQ.
Attorney for the Defendant United States of
America
Department of Justice
Tort Section, Civil Division
Safeway Building
Washington, D. C. 20040

REGNIER, TAYLOR, CURRAN & LANGENBACH, ESQS.
Attorneys for the Defendant Defense Apparel
41 Lewis Street
Hartford, Connecticut 06103

BY: EDMUND T. CURRAN, ESQ.,
of Counsel

oOo

MR. FITZGERALD: Before we commence the deposition of Mr. Ernest Bratt, the president of Southern Asbestos, I'd like to place on the record that all counsel present have assented to the granting of our protective order dated December 1, 1978, according to the terms of a letter which Mr. Levy wrote, dated December 5, 1978. I have read the letter in full prior to the time of opening this morning's proceedings, all counsel are aware of the contents of the letter, and all counsel have assented to the granting of that protective order and will be bound by its terms.

We noted prior to the time we went on the record this morning that the documents requested by Mr. Levy in his notice to produce documents in connection with the taking of an oral deposition are here and are available for counsel at this time.

Before we commence with the questioning, I'd like to note for the record that we have certain corrections to make, or notations to make,

with respect to our answers to the first set of interrogatories -- and I am including in these the supplemental answers to the first set of -- interrogatories. They are not lengthy. I will simply note them.

With respect to answer No. 2, which related to the corporate history of the named defendant, we will provide a more complete summary of the corporate history. It may be that the history described in answer to interrogatory 2 was incomplete.

With respect to No. 6(c), from September 15, 1970, E. C. Bratt was the person responsible.
His predecessor was Mr. K. W. Sulser.--

MR. SCHWARTZ: Can I have the date again?

MR. FITZGERALD: Yes. From September 15, 1970, Mr. E. C. Bratt was the person responsible. His predecessor was Mr. K. W. S-u-l-s-e-r, and he was the person responsible from January 1, 1970 to September of 1970. His predecessor was Mr. L. E. Moody.

With respect to interrogatory No. 7 and the

Q In 1969, could you tell me, Mr. Bratt, what facilities or plants were being operated in the asbestos group of the thermoid division?

A The Charlotte Works, at Charlotte, North Carolina; the Davidson Works -- that's D-a-v-i-d-s-o-n -- at Davidson, North Carolina; the Bennettsville Works, Bennettsville, South Carolina; the St. Louis Works, St. Louis, Missouri.

Q Was there also a facility at Richmond, Kentucky, at that time?

A Not in the asbestos group.

Q Which group was the Richmond facility in?

A Friction.

Q And Huntington, Indiana?

A Friction.

Q Did they then fall under the friction and textile group?

A Yes, sir.

Q Essentially, would you define for me what your job was when you were hired in June of '69 as works manager?

A As works manager, I was to be in charge of the manufacture of asbestos products at Charlotte and concerned only with that manufacture and the support people necessary to

requirements of EPA and OSHA, both of whom were in the wings. I'm not sure that either one had issued any regulations at that minute or moment in time, but I know that that was a factor in the decision, that we just didn't feel that they were going to be viable operations if we had to spend a tremendous amount of money to get into compliance.

Q By EPA" you are talking about the federal government's Environmental Protection Agency?

A I am.

Q And OSHA is the Occupational Safety & Health Administration?

A Yes, sir.

Q In terms of the size of the four plants in 1969, could you tell me what the sizes were in square feet and the number of employees?

A I certainly cannot in terms of square feet. I can only roughly approximate employees.

Q If you will, give me your best approximation.

A All right.

Charlotte would have had roughly 300 people; Davidson probably in the area of somewhere between 40 and 60, probably 50 people --

Q Was that 40 to 60?

A Yes, somewhere in there.

(Continuing) -- St. Louis would have been roughly the same -- it would be under a hundred, anyway; and the Bennettsville Works possibly 75 people.

Q How long had Porter owned the Bennettsville Works prior to 1969?

A I believe five years.

Q Do you know whether this was a new plant or whether they had purchased it from somebody else?

A If I am correct -- and I believe I am -- they acquired the Bennettsville Works by acquiring the Middletown Manufacturing Company. It was a building or a plant already in operation.

Q How long had Porter owned the St. Louis Works?

A That was purchased, I believe, in 1968.

Q Do you know from whom it was purchased?

A Tallman McCluskey.

Q Essentially, you're saying that the plant was purchased in '68 or '69 and closed in '70?

A I know it was not '69. It was '68, And closed in '70, yes.

Q When Porter acquired the Tallman McCluskey

not a fully operational textile plant. So when we were expanding the operation, putting Davidson and St. Louis into it, it was necessary that we get control of the air, put in dust collection and the type of thing that Bennettsville did not have.

Q When St. Louis and Davidson were closed, did Bennettsville then begin manufacturing asbestos cloth and yarn and the other types of asbestos products which it had not been manufacturing in 1969?

A Yes, to manufacturing other products, other than they manufactured in 1969.

Q You had indicated in 1969 they were essentially manufacturing the electrical glass tape, some yarn and thise loose-weave material?

A Yes.

Q You had not said anything about cloth or tape or rope or any of the other things that were being manufactured at Charlotte, for example?

A That's correct.

Q Did Bennettsville then begin to manufacture this broader range of asbestos textile products?

A It began to manufacture cloth and tape.

Q Did it then continue to manufacture the cloth and tape until it was closed in November of '76?

A Yes, sir.

Q Between your return to Charlotte in May of '74, when you became president and chairman of the board of Southern, did your duties and responsibilities essentially remain the same?

A Essentially, yes.

Q So, essentially, during that entire period, you were functioning as the asbestos group manager and, for practical purposes, as the works manager?

A Yes, sir.

Q Would it be fair to say that during that period of time you had responsibility for the health, safety and welfare of all the employees at the Charlotte and Bennettsville plants?

A Yes, sir.

Q And also for the environmental conditions at those plants?

A Yes, sir.

Q Throughout that period, until May of '74, the operation was essentially being conducted as a group within

Q But this would have been a purchase of the asbestos fiber, which you then used to produce your asbestos textiles?

A Yes.

Q In addition to North American Asbestos and the government, can you recall any other amosite asbestos suppliers that you purchased from?

A I do not believe there were any.

Q From whom did you purchase the chrysotile?

A Various suppliers. Do you want me to run down the list, sir?

Q If you could.

Q Cassiar Asbestos Company; Bell Asbestos Mines; Asbestos Corporation; Lake Asbestos Company; Johns-Manville; Rhodesian and General.

That ought to cover them.

Q With regard to the Asbestos Corporation that you mentioned, was that Asbestos Corporation, Limited, or Asbestos Corporation of America?

A I was not even aware of the difference.

Q Do you know where it was located?

A Thetford Mines, Quebec.

EXHIBIT 8

H.K.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DOROTHY ST. JACQUE, et
al.,
Plaintiffs,

No. C 137 465

vs

JOHNS-MANVILLE PRODUCTS
CORPORATION., etc., et
al.,
Defendants.

AND ALL RELATED CASES

DEPOSITION OF ERNEST BRATT,
Taken on behalf of the
Plaintiffs, at Pittsburgh,
Pennsylvania, on February 5, 1980,
commencing at 9:00 A.M., pursuant
to Notice.

Reported By: Jerry Lefler, CSR
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APPEARANCES

For Plaintiff(s)

VOORHIES, GREENE, O' REILLY, AGNEW & BROILLET
BY: AARON SIMON, ESQ.
1122 Wilshire Boulevard
Los Angeles, CA 90017

ROSE, KLEIN & MARIAS
BY: Not present
888 West 6th Street
Second Floor
Los Angeles, CA 90017

GRISHAM, VANDENBERG, NOTT, CONWAY & CANNON
BY: Not present
120 East Ocean Boulevard
Long Beach, CA 90802

THOMAS MARTIN
BY: Not Present
4647 Long Beach Boulevard
Long Beach, CA 90805

IRMAS, SIMKE & CHODOS
BY: Not present
6300 Wilshire Boulevard
Los Angeles, CA 90801

CANTRELL & GREEN
BY: Not present
200 Pine Avenue, Suite 309
Long Beach, CA 90806

DAVID A. CARTER
BY: Not present
830 West Willow
Long Beach, CA 90806

THEODORE A. EAGANS
BY: Not present
8484 Wilshire Boulevard
Beverly Hills, CA 90211

GIRARDI, KEESE & CRANE
BY: Not present
445 South Figueroa Street
Los Angeles, CA 90071

NICHOLAS GRANET
BY: Not present
1888 Century Park East
Los Angeles, CA 90067

HADLEY & HADLEY
BY: Not present
3942 Maine Avenue
Baldwin Park, CA 91706

KANDER & HALL
BY: Not present
4266 Atlantic Avenue
Long Beach, CA 90807

MAGANA, CATHCART & PIERRY
BY: Not present
301 North Avalon Boulevard
Wilmington, CA 90744

KOPALD & MARK
BY: Not present
8888 Olympic Boulevard
Beverly Hills, CA 90211

MALLERY & STERN
BY: Not present
666 South Indian Hill Boulevard
Claremont, CA 91711

EDWIN C. MARTIN, JR.
BY: Not present
501 Shatto Place
Los Angeles, CA 90020

OLNEY, LEVY & KAPLAN
BY: Not present
106 East C Street
Wilmington, CA 90744

POLLET & HYMES
BY: Not present
8350 Santa Monica Boulevard
Los Angeles, CA 90069

SCHWARTZE & SCHWARTZE
BY: Not present
10680 West Pico Boulevard
Los Angeles, CA 91711

WILLIAM M. SHERNOFF
BY: Not present
666 South Indian Hill
Claremont, CA 91711

RICHARD A. CAPLAN
BY: Not present
354 West Ocean Boulevard
Long Beach, CA 90802

GEORGE & MILLER

BY: Not present
357 South Robertson Boulevard
Beverly Hills, CA 90211

For Defendant (s)

ADAMS, DUQUE & HAZELTINE
BY: PETER ROMO, ESQ.
523 West 6th Street
Los Angeles, CA 90017

STEARNS & NELSON
BY: Not present
1800 North Highland
Collywood, CA 90028

LaFOLLETTE, JOHNSON & SCHROETER
BY: Not present
320 North Vermont Avenue
Los Angeles, CA 90004

COYLE, MARRONE & ROBINSON
BY: Not present
3356 Barham Boulevard
Los Angeles, CA 90068

HAIGHT, DICKSON, BROWN & BONESTEEL
BY: A. WILLIAM STEIN, ESQ.
2400 24th Street
Santa Monica, CA 90405

BUCK, MOLONY, NIMMO & AMMIRATO
BY: MARK RUTTER, ESQ.
100 East Ocean Boulevard., Suite 620
Long Beach, CA 90802

McHALE & CONNOR
BY: SCOTT PLYLER, ESQ.
626 Wilshire Boulevard
Los Angeles, CA 90017

BOLTON, HEMER & DUNN
BY: Not present
900 Wilshire Boulevard
Los Angeles, CA 90017

JAMES E. CUSICK, ESQ.
BY: Not present
4201 Wilshire Boulevard
Los Angeles, CA 90010

CARLSTROEM & SANFORD
BY: Not present
6006 Wilshire Boulevard
Los Angeles, CA 90036

CHASE, ROTCHFORD, DRUKKER & BOGUST
BY: Not present
606 South Olive Street, 22nd Fl.
Los Angeles, CA 90014

PAUL, HASTINGS, JANOFKY & WALKER
BY: THOMAS P. BRENNER, ESQ.
555 South Flower Street
Los Angeles, CA 90071

MCCUTCHEN, BLACK VERLEGER & SHEA
BY: Not present
3435 Wilshire Boulevard
Los Angeles, CA 90010

SHELL & DELAMER
BY: KEN PRINDLE, ESQ.
1200 Wilshire Boulevard
Los Angeles, CA 90017

BREIDENBACH, SWAINSTON, YOKAITIS & CRISPO
BY: Not present
888 West Sixth Street
Los Angeles, CA 90017

YUSIM, CASSIDY, STEIN & HANGER
BY: STEVEN E. KUSHNER, ESQ.
8383 Wilshire Boulevard., Suite 330
Los Angeles, CA 90211

WELLS, BARBER & SHERLOCK
BY: ELLEN C. O'NEILL, ESQ.
1540 Wilshire Boulevard
Los Angeles, CA 90017

HALL, LINDEMAN, SMALL, BURNS & COLUMBO
BY: Not present
3600 Wilshire Boulevard
Los Angeles, CA 90010

GILLILAND, ROBERSON & MOSER
BY: Not present
606 South Olive Street
Los Angeles, CA 90014

BRILL, HUNT & DeBUYS
BY: Not present
3055 Wilshire Boulevard
Los Angeles, CA 90010

NORBY & BRODEUR
BY: JOSEPH B. BAGLEY, ESQ.
21533 Hawthorne Boulevard
Torrance, CA 90503

PATTERSON, RITNER & LOCKWOOD
BY: Not present
1543 W. Olympic Boulevard
Los Angeles, CA 90015

MARTIN & STAMP
BY: R. KENNETH WILLMAN, ESQ.
110 Pine Avenue
Los Angeles, CA 90802

CAPLAN & OVERLANDER
BY: Not present
727 West Seventh Street
Los Angeles, CA 90017

McKAY, BYRNE & UDKOVICH
BY: LINDA FERMOYLE RICE, ESQ.
3250 Wilshire Boulevard
Los Angeles, CA 90010

MORGAN, WENZEL & McNICHOLAS
BY: LAWRENCE RAMSEY, ESQ.
1545 Wilshire Boulevard
Los Angeles, CA 90017

MORRIS & POLICH
BY: Not present
900 Wilshire Boulevard
Los Angeles, CA 90017

HILLSINGER & COSTANZO
BY: Not present
3345 Wilshire Boulevard
Los Angeles, CA 90010

SHIELD & SMITH
BY: Not present
1200 Wilshire Boulevard
Los Angeles, CA 90010

LAW OFFICES OF JOE BOGAN
BY: Not present
401 N. Brand Boulevard
Glendale, CA 91203

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ATTORNEY NOTES

This image shows a single sheet of white paper with horizontal black ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper has a slightly textured appearance, and there are some minor dark spots or artifacts scattered across the surface, possibly from the scanning process. The edges of the paper are slightly irregular.

TUESDAY, FEBRUARY 5, 1980, PITTSBURGH, PENNSYLVANIA.

9:00 A.M.

-oOo-

MR. PRINDLE: We are going under the stipulation that all objections except as to form are reserved until the time of trial, right?

MR. SIMON: Ken, was any agreement reached with Bob Steinberg or anybody else with regard to the request to produce documents?

MR. PRINDLE: No. His request to produce was an amended request to produce from one from the first deposition scheduled, which we responded to, with objections, and he took no action from there.

MR. SIMON: Okay. That was my question.

ERNEST BRATT,

having been duly sworn by the Reporter,
was examined and testified as follows:

EXAMINATION

BY MR. SIMON:

Q. Sir, would you up state your full name for the record, please?

A. Ernest C. Bratt.

Q. What does the "C" stand for?

A. Conrad.

Q. C-o-n-r-a-d?

1 A. Yes.

2 Q. Sir, have you had your deposition taken before?

3 A. Yes.

4 Q. I take it you have had an opportunity to
5 discuss with your counsel the nature and purpose of a
6 deposition?

7 A. Yes.

8 Q. You do understand, sir, that you are testifying
9 under penalty of perjury?

10 A. I do.

11 Q. And that perjury is a criminal offense?

12 A. I do.

13 Q. On how many prior occasions, sir, have you had
14 your deposition taken with regard to asbestos litigation?

15 A. There are two that I am aware of; although
16 one of those two is in perhaps three parts.

17 Q. Would --

18 A. Of a continuing nature. In other words, they
19 came back.

20 Q. Would that second one that you are referring to
21 be the deposition taken by Stan Levy?

22 A. Yes.

23 Q. Do you recall when that was taken?

24 A. Not specifically, but approximately two years
25 ago, a year and a half anyway.

26 Q. Around December 6 of 1978?

27 A. That would be good.

28 Q. Do you recall, sir, the name of the attorney

1 plant in which various manufacturing processes --

2 A. Yes.

3 Q. Okay.

4 Sir, you said that you were in charge of the
5 operation of four plants. Would one of those have been
6 Charlotte?

7 A. Yes.

8 Q. What would the other three have been?

9 A. One was at Davidson, North Carolina, one at St.
10 Louis, Missouri, one at Bennettsville, South Carolina.

11 Q. At the time when you assumed your job
12 responsibilities as Group General Manager in September 15th
13 of 1970, did all four of these plants manufacture
14 asbestos-containing products?

15 A. Yes.

16 Q. Did all four plants manufacture asbestos
17 insulation products? Thermal insulation.

18 A. The products were used in insulation, yes.

19 Q. Were there products manufactured at any of
20 those four plants in 1970 which were not thermal insulation
21 products, asbestos-containing products?

22 A. No.

23 Q. In 1970, sir, were any products manufactured at
24 any of those four plants which were not asbestos-containing
25 materials or products?

26 A. Yes.

27 Q. What would those have been?

28 A. Bennettsville, South Carolina manufactured a

1 Q. Sir, at some point in time, Southern or H.K.
2 Porter owned a mining operation in Copperopolis, California;
3 is that correct?

4 A. Yes.

5 Q. Do you know which entity owned that mine?

6 A. Which entity.

7 Q. H.K. Porter, Southern Asbestos?

8 A. It was H.K. Porter.

9 Q. Is it still owned?

10 A. No, sir.

11 Q. Do you know when it ceased operations?

12 A. Not specifically, no.

13 Q. Do you know who its customers were?

14 A. Well, they were far and far east.

15 Q. Were there any sales in the United States, to
16 the best of your knowledge, from that mine?

17 A. I believe they had some sales west of the
18 Mississippi. I don't believe they sold anything east of
19 the Mississippi.

20 Q. H.K. Porter and Southern Asbestos and Southern
21 Textile have used both chrysotile and amosite asbestos
22 fibers?

23 A. Yes.

24 Q. And the amosite, main supplier of amosite, was
25 the North American Asbestos Company; is that correct?

26 A. Yes.

27 Q. The main suppliers of chrysotile have been
28 Cassiar Asbestos Company, Bell Asbestos Mines, Asbestos

1 Corporation in Quebec, and Asbestos Company, Johns-Manville,
2 Rhodesian and General Asbestos; is that correct?

3 A. Rhodesian and General has just changed their
4 name.

5 Q. To what, sir?

6 A. Shabanie -- wait a minute. Yeah, Shabanie and-
7 Mashaba Mines, Limited.

8 Q. Are you able to spell that?

9 A. It's phonetic. S-h-a-b-a-n-i-e.

10 Q. What was the --

11 A. Mashaba, M-a-s-h-a-b-a.

12 MR. PRINDLE: What was that first one again? Would
13 you spell that again?

14 THE WITNESS: The first one was --

15 MR. SIMON: S-h-a-b-a-b-i-e.

16 THE WITNESS: Shabanie.

17 Q. BY MR. SIMON: Sir, referring again to your
18 discussions with Mr. Moody at the time of your first
19 employment; was there a discussion at that time, prior to
20 his heart attack, of dust counts being taken at the
21 Charlotte plant?

22 A. Yes.

23 Q. Was it your understanding that those dust
24 counts were being taken in accordance with North Carolina
25 law?

26 A. Yes.

27 Q. Do you know when those dust counts began?

28 A. We had indications that dust counting was going

EXHIBIT 9

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	<u>ORDER</u>
DAVIS MECHANICAL	)	
CONTRACTORS, INC. , et al.	)	
	)	
Defendants.	)	

CAME ON _____, 2021, to be heard the Plaintiff's Motion to Appoint a Receiver Over Payne & Keller Company, pursuant to S.C. Code §15-65-10(4). This Court finds that the application is meritorious under the applicable statute because Payne & Keller Company ("Payne & Keller") dissolved and Payne & Keller, a Texas Corporation, has forfeited its charter and has further failed to answer this case and therefore, Plaintiff requests for an expedited ruling on this motion is appropriate and also granted.

Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Payne & Keller, accept service on behalf of Payne & Keller, engage counsel on behalf of Payne & Keller and take any and all steps necessary to protect the interests of Payne & Keller whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller's insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership. The Receiver will provide potential insurers with lists of work sites, contractors, and insurance brokers and agents to facilitate

the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of the company in receivership or any company for whom the company in receivership did work as an "additional insured" under coverage written to another entity). The Court expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

The Court further orders that, as the Receiver Court, that the Receiver or Payne & Keller Insulation, Inc. may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so.

AND IT SO ORDERED this ____ day of _____ 2021.

Jean Hoefer Toal, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al
Case Number: 2021CP4003484
Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

EXHIBIT 14

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joan H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727

Lenora Childers, Individually and as Personal Representative of the
Estate of Lewis C. Childers, ... Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.;
General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Dean
Company, Inc.; Payne & Keller Company; SFB, Incorporated;
Stafford Insulation Company; Standard Insulation Company of
N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of
Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-
Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., ... Defendants,

Flame Refractories, Inc., United Construction Co. of Rome, Inc.,
Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe &
Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.,
Payne & Keller Company, and PBI QSF, LLC, By and Through
Their Duly Appointed Receiver Peter D. Protopapas, ... Third-Party
Plaintiffs,

v.

Zurich American Insurance Company (Individually and as
Successor to Northern Insurance Company of New York, Maryland
American General Insurance Company, and Maryland Casualty
Company); Allstate Insurance Company; John Tighe; Sean
Anthony Beatty; Dennis William Cahill; Catherine Ann Carlino;
Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael
Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel
Robert Keddie; Julie Ann Fortune; Michael John Crall; James
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;
Arrowpoint Capital Corp.; Admiral Insurance Company;
Continental Insurance Company (Individually and as Successor in
interest to Harbor Insurance Company); Hartford Accident and

Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party
Defendants,

of which

Payne & Keller Company, by and through its Receiver Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the Appellants.

APPELLANTS' EMERGENCY MOTION TO CLARIFY AND ENFORCE RULE 205

WOMBLE BOND DICKINSON (US) LLP

STEPTOE & JOHNSON LLP

M. Todd Carroll
M. Elizabeth O'Neill
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Harry Lee (*admitted pro hac vice*)
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000
Attorneys for Appellant Travelers

MURPHY & GRANTLAND PA

Wesley B. Sawyer
4406-B Forest Drive (29206)
PO Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorney for Counsel for Third-Party
Defendants *AIG Property Casualty*
Company, formerly known as
Birmingham Fire Insurance
Company; National Union Fire
Insurance Company of Pittsburgh,
PA; Berkshire Hathaway Specialty
Insurance Company, formerly known
as Stonewall Insurance Company;
and The Continental Insurance
Company, individually and as
successor in interest to Harbor
Insurance Company.

INTRODUCTION

The circuit court appointed Respondent Peter D. Protopapas as the Receiver of Payne & Keller Company (“Payne & Keller”), a former Texas corporation whose existence was terminated by the state of Texas more than 30 years ago. Based on Payne & Keller’s terminated status, which has never been challenged and which has precluded the company from being sued since 1989, Appellant Travelers Casualty and Surety Company (“Travelers”) filed a motion to dissolve the Payne & Keller Receivership established by the South Carolina circuit court, because given the inability of anyone to sue Payne & Keller, continuation of the Receivership is unnecessary and improper.¹

The circuit court denied Appellants’ motion to dissolve the Receivership in an order dated March 30, 2023. The circuit court rejected Appellants’ argument that Texas’s statute of repose for claims against terminated Texas corporations like Payne & Keller precludes claims by or against Payne & Keller more than three years after the date of its dissolution, *i.e.*, 1989, thereby rendering the Receivership pointless and requiring its dissolution. Over Appellants’ objections, the circuit court held that the Receiver had made a prima facie showing that Payne & Keller was terminated as a result of fraud or constructive fraud under a new Texas law, Section 11.153(a) of the Texas Business Organizations Code, such that Texas’s three-year statute of repose does not apply to Payne & Keller. The court also rejected Appellants’ argument that applying Section 11.153(a) would violate the Texas Constitution, as it specifically forbids the retroactive application of the

¹ Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (hereinafter collectively referred to as “Other Insurers,” collectively with Travelers as “Appellants”) joined Travelers’ motion to dissolve.

new statute. The circuit court's order also suggests that a South Carolina state court somehow has the power to revoke the termination of a foreign corporation and reinstate its corporate existence in another state as if the dissolution never happened.

Appellants have appealed the circuit court's order, and this Court has confirmed, on two separate occasions, that the appeal shall proceed. Thus, this Court has squarely before it the various issues raised by Appellants, including whether Texas's statute of repose applies to preclude claims by or against Payne & Keller. Per Rule 205, SCACR, this Court's jurisdiction over the issues on appeal is exclusive—the circuit court is divested of jurisdiction over all matters affected by the appeal, including issues regarding Payne & Keller's supposedly fraudulent termination and the application of Texas's statute of repose.

Unfortunately, after this Court confirmed that it was moving forward with the appeal, the circuit court issued an order on October 5, 2023, that expressly addresses and relies on its own view of the issues on appeal. Specifically, the circuit court's October 5, 2023 order states that Payne & Keller's Texas termination was improper and must be revoked because "Payne & Keller committed, at a minimum, constructive fraud when dissolving and thus revocation of the termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code is appropriate." The order relies on arguments copied-and-pasted from the Receiver's opposition to Travelers' motion to dissolve the Receivership. It purports to affirmatively revoke Payne & Keller's termination and to reinstate its corporate existence in Texas.

The circuit court issued its October 5, 2023 order revoking Payne & Keller's termination with the clear awareness that its order addressed and decided issues that were no longer within its jurisdiction. In briefing and at oral argument, Travelers and other parties made clear to the circuit court that per Rule 205, SCACR, these issues are exclusively before this Court, *i.e.*, the order

addressed and decided matters affected by this appeal and, as such, the circuit court is divested of jurisdiction over them. The circuit court effectively conceded this point during hearings in July and August 2023, acknowledging its lack of jurisdiction. Yet the circuit court abandoned that position without warning and issued an order that directly addresses and decides matters that are already within the exclusive jurisdiction of this Court.

To make matters worse, Appellants learned today, October 23, 2023, that the Receiver, without notice to any other party, provided the Texas Secretary of State with a copy of the circuit court's October 5, 2023 order, and asked her to enforce the order and formally revoke Payne & Keller's corporate termination. The Texas Secretary of State apparently issued a "Certificate of Revocation of Dissolution" on October 12, 2023, which the Receiver provided to the circuit court and Appellants for the first time earlier today. These subsequent actions stemming from the circuit court's order further impair one of Payne & Keller's and Appellants' main defenses regarding Payne & Keller's dissolution status and the applicability of Texas's statute of repose—issues that have been on appeal to this Court and are within this Court's exclusive jurisdiction since April 28, 2023, when Appellants filed their notices of appeal.

Appellants do not make this motion lightly. But because the circuit court has chosen to intrude on this Court's exclusive jurisdiction, and the Receiver has taken follow-up actions that further interfere with key issues on appeal, Appellants respectfully move for an emergency order from this Court that enforces Rule 205, SCACR, and enjoins the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal. Appellants also request that the current deadlines in this appeal be held in abeyance pending resolution of this motion, because if the circuit court's October 5, 2023 order is effective, and the Texas Secretary of State's

October 12, 2023 “Certificate of Revocation” is viewed as controlling despite the circumstances under which it was obtained, it will materially change critical issues in this appeal.

PROCEDURAL BACKGROUND

Ms. Childers Sues Payne & Keller in South Carolina Circuit Court

Payne & Keller is a former Texas corporation that dissolved in 1986 and was terminated by law in 1989. (App. Vol. I 1-5, Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company (Nov. 25, 1986).) Despite its terminated status, on July 14, 2021, the underlying plaintiff in this case, Lenora Childers, commenced an asbestos personal injury case against Payne & Keller and various other defunct companies in South Carolina circuit court. (App. Vol. I 6-44, Compl. dated July 14, 2021, in *Childers v. Davis Mechanical Contractors, Inc.*, Case No. 2021-CP-40-03484.) The apparent purpose of suing only defunct companies was to create a series of unlawful nationwide receiverships.

Ms. Childers Requests and the Circuit Court Appoints a Receiver Over Payne & Keller

On August 23, 2021, Ms. Childers filed a motion asking the circuit court to appoint Peter Protopapas as Payne & Keller’s Receiver, even though Payne & Keller was terminated as a corporation more than 30 years ago and has no property in South Carolina. (App. Vol. I 45-47, Mot. to Appoint dated Aug. 23, 2021.) Four days later, on August 27, 2021—without any notice to Appellants—the circuit court granted Ms. Childers’ motion and appointed Mr. Protopapas as the Receiver for Payne & Keller despite the fact that that company no longer exists. (App. Vol. I 48-51, Order Appointing Receiver dated Aug. 27, 2021.) The circuit court did so without any hearing.² The Receiver, ostensibly acting on behalf of Payne & Keller, a terminated company

² Ms. Childers voluntarily dismissed one of the other nine named defendants. She filed motions seeking the appointment of Mr. Protopapas as a receiver over each of the other eight remaining defendants. The circuit court granted all of these motions without a hearing.

that cannot sue or be sued, subsequently filed an improper third-party insurance coverage complaint against Appellants and other alleged historical insurers of Payne & Keller. (App. Vol. I 52-135, Second Am. Third-Party Compl. dated July 14, 2022.)

Travelers Moves to Dissolve the Receivership

On August 24, 2022, Travelers filed a motion to dismiss the Receiver's third-party complaint and to dissolve the Receivership. (App. Vol. I 136-69, Mot. to Dismiss and Dissolve dated Aug. 24, 2022.) Other Insurers joined the motion to dissolve the Receivership. (App. Vol. I 170-73, Notice of Mot. and Joinder dated Sept. 19, 2022.) Travelers argued, among other things, that Payne & Keller can no longer sue or be sued under Texas law, so the Receiver's claims against Travelers, purportedly on Payne & Keller's behalf, necessarily fail and the Receivership must be dissolved. Travelers also explained that because Payne & Keller is a defunct foreign corporation without any property in South Carolina, the South Carolina circuit court did not have the power to appoint a Receiver over Payne & Keller. The Receivership was improper from the start and must be dissolved.

The Receiver opposed Travelers' motion. (App. Vol. I 174-97, Receiver for Payne & Keller's Response to Travelers' Mot. to Dismiss and Dissolve dated Jan. 13, 2023.) Remarkably, in an effort to avoid Texas's statutory repose period that has barred any claims by or against Payne & Keller for more than 30 years (*i.e.*, since 1989, three years after its termination), the Receiver speculated in his opposition brief that Payne & Keller may have engaged in some sort of fraud at the time of its 1986 dissolution, and argued that the circuit court—a state court located in South Carolina—should somehow reinstate Payne & Keller's corporate existence in another state, *i.e.*, Texas. (*Id.* at 181-86.)

The Circuit Court Denies Appellants' Motion to Dissolve

In a March 30, 2023 order, the circuit court denied Appellants' motion to dismiss and dissolve the Payne & Keller receivership. (App. Vol. I 198-207, Order Denying Mot. to Dismiss and Dissolve dated Mar. 30, 2023 (filed Mar. 31, 2023).) The March 30 order not only rejected the dissolution grounds Appellants raised and continued the Receivership, but it also modified the scope and purview of the Receivership by authorizing the Receiver to pursue his unpled fraud theory, with the ultimate goal of revoking Payne & Keller's termination in Texas. (*Id.* at 202.)

Appellants Appeal the Order Denying the Motion to Dissolve

On April 28, 2023, Appellants timely appealed the circuit court's order denying the motion to dissolve the Payne & Keller Receivership. The appeal remains pending before this Court. The appeal asks this Court to decide, among other things:

- Whether the circuit court erred by appointing a Receiver over Payne & Keller, a dissolved Texas corporation that does not have any property in South Carolina, and by denying Travelers' motion to dissolve the Receivership.
- Whether the circuit court erred in finding that alleged liability insurance policies issued by non-South Carolina-based insurers to Payne & Keller in Texas are "property within [South Carolina]" so as to justify the appointment of the Receiver under S.C. Code Ann. § 15-65-10(4).
- Whether the circuit court erred in finding Texas's statute of repose for claims against dissolved Texas corporations like Payne & Keller does not apply to preclude claims by or against Payne & Keller more than three years after the date of its dissolution—1989 for Payne & Keller—thereby rendering the Receivership a nullity and requiring its dissolution.
- Whether the circuit court erred in finding the Receiver had made a prima facie showing that Payne & Keller was terminated as a result of fraud or constructive fraud under Section 11.153(a) of the Texas Business Organizations Code, such that Texas's three-year statute of repose does not apply to Payne & Keller.
- Whether the court erred in finding that the retroactive application of Section 11.153(a) of the Texas Business Organizations Code would not violate the Texas Constitution.

- Whether the circuit court erred in rejecting Travelers’ argument that a South Carolina circuit court does not have the power to revoke the termination of a foreign corporation like Payne & Keller and reinstate its corporate existence in another state, Texas, as if the dissolution never happened.

On May 5, 2023, this Court asked the parties to file memoranda addressing the issue of appealability. In an Order dated August 9, 2023, the Court ruled: “After careful consideration of the parties’ memoranda on appealability, this appeal shall proceed.”

On August 23, 2023, the Receiver filed an “Expedited Motion to Clarify the Court’s Order on Appealability.” In his Motion to Clarify, the Receiver asked the Court to “clarify that the pendency of this appeal does not stay the underlying Receivership action and the Receiver may continue carrying out his court-appointed duties while this appeal is pending.” (Mot. to Clarify at 5.). The Motion to Clarify did not reference the issue of jurisdiction under Rule 205, SCACR; rather, it was limited to the subject of a “stay” at the circuit court level.

On September 8, 2023, the Court issued an Order “clarify[ing] that Appellants’ appeal of the circuit court’s March 31, 2023 order denying their motion to dismiss third-party claims and dissolve the Payne & Keller receivership shall proceed” and “further clarify[ing] that the March 31, 2023 order is not stayed during pendency of this appeal.” (Order dated Sept. 8, 2023 at 1.) The Court explained that “the receivership action and the receiver’s ability to carry out his duties are not stayed.” (*Id.*) Neither the Receiver’s Motion to Clarify nor the Court’s Order addressed the issue of *jurisdiction* under Rule 205, SCACR.

Ms. Childers Moves to Revoke Payne & Keller’s Corporate Termination for the Exact Same Reasons Raised in the Receiver’s Opposition to Appellants’ Now-Appealed Motion to Dissolve

On June 14, 2023, Ms. Childers filed a motion asking the circuit court to revoke the corporate termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code. (App. Vol. I 208-214, Pl. Childers’s Mot. to Revoke dated June 14, 2023.)

The motion was copied-and-pasted from the Receiver’s opposition to Travelers’ motion to dissolve the Receivership, which is now on appeal before this Court. (*Compare* App. Vol. I 209-13, Pl. Childers’s Mot. to Revoke at 2-6, *with* App. Vol. I 182-86, Receiver’s Opp’n to Travelers’ Mot. to Dissolve at 9-13.) Travelers filed an opposition to Ms. Childers’s motion to revoke on July 7, 2023, and Other Insurers joined in Travelers’ opposition. (App. Vol. I 215-41, Travelers’ Opp’n to Pl. Childers’s Mot. to Revoke dated July 7, 2023); (App. Vol. I 242-43, Other Insurers’ Joinder dated July 7, 2023.) The circuit court held a hearing on the motion on July 10, 2023, at which time it deferred ruling on the motion due to its admitted lack of jurisdiction, *i.e.*, because the Motion to Revoke depends on the resolution of matters that are pending before this Court in the present appeal. For example, the circuit court noted: “I am acutely aware of my role as a circuit court judge. I am not supposed to get outside my guard rails and that’s what I don’t want to do in connection with something that’s pending in front of an appellate court.” (App. Vol. I 312, July 10, 2023 Hearing Tr. at 69:7-11.) During a subsequent hearing on August 21, 2023, the Court once again declined to rule on the motion, also because of its lack of jurisdiction. (App. Vol. I 343, August 21, 2023 Hearing Tr. at 64:5-8.)

Ms. Childers Emails the Circuit Court a Proposed Order Granting Her Motion to Revoke

Despite all of this, on September 26, 2023, Ms. Childers’s counsel emailed the circuit court judge a proposed order granting her motion to revoke, entitling the order “Findings of Fact and Conclusions of Law on Plaintiffs’ [sic] Motion to Revoke the Termination of Payne & Keller Company” (the “proposed order”). (App. Vol. I 359-60, Email from Pl. Childers’ Counsel dated September 26, 2023.) Travelers’ counsel sent a response email on September 28, 2023, noting again the circuit court’s lack of jurisdiction to issue the proposed order due to Rule 205, SCACR, and requesting 10 days to respond if the circuit court intended to consider the proposed order.

(App. Vol. I 361-62, Email from Travelers' Counsel dated Sept. 28, 2023.) The circuit court judge never responded to counsel's email and, instead, before the expiry of 10 days, entered the proposed order submitted by Ms. Childers's counsel. (App. Vol. I 363-71, Findings of Fact and Conclusions of Law on Pl.'s [sic] Mot. to Revoke the Termination of Payne & Keller Company dated Oct. 5, 2023.)

The Circuit Court Revokes Payne & Keller's Termination

The circuit court's October 5, 2023 order is substantially identical to Ms. Childers's proposed order. It purports to revoke Payne & Keller's termination and reinstate its corporate existence in Texas. The order is not only unconstitutional on its face, the circuit court plainly did not have jurisdiction to issue it under Rule 205, SCACR. On October 16, 2023, Appellants filed motions to vacate or reconsider the circuit court's order. (App. Vol. II 1-371, Motion to Vacate or Reconsider; App. Vol. III 1-231, Joinders.)

On October 20, 2023, the circuit court judge emailed the parties:

Chief Justice Toal has scheduled a hearing on the Motion to Vacate or in the Alternative Motion to Reconsider the Court's October 5, 2023 Order filed by Certain Insurers and Travelers' Joinder. She would like to discuss whether she should consider reopening the matter, have an additional hearing at another date or now, and to discuss how to move forward regarding these latest filings. The hearing has been added to the agenda for October 25, 2023 at 9:30 AM.

(App. Vol. III 232-33, Oct. 20, 2023 Circuit Court Email; App. Vol. III 234-35, Oct. 20, 2023 Circuit Court Email.) The Receiver sent a response email asking the circuit court to "schedul[e] Payne & Keller's motions for a different day," even though the Receiver neither filed nor responded to the motion to revoke that was the subject of the scheduled hearing. (App. Vol. III 240, Oct. 20, 2023 Email from the Receiver.) Nonetheless, 35 minutes later, the circuit court approved the Receiver's request to cancel and reschedule the hearing. (App. Vol. III 242, Oct. 20,

2023 Circuit Court Email; App. Vol. III 243, Notice of Cancellation of Hearing.) The hearing has not been rescheduled. All of this occurred after the Receiver had without any form of notice secretly moved ahead in Texas unbeknownst to any other party.

**The Receiver Secretly Asks the Texas Secretary of State to Enforce the
Circuit Court’s Order Revoking Payne & Keller’s Termination
Without Notice to Appellants or This Court**

On October 23, 2023, the Receiver filed with the circuit court a “Notice of Filing,” attaching a “Certificate of Revocation of Dissolution” of Frentex f/k/a Payne & Keller, dated October 12, 2023 and signed by the Texas Secretary of State. (App. Vol. III 246, Oct. 23, 2023 Notice of Filing and Oct. 12, 2023 Certificate of Revocation.) It appears the Receiver secretly sought and obtained this document from the Texas Secretary of State by providing the Secretary of State with a copy of the circuit court’s October 5, 2023 order, and asking the Secretary of State to formally revoke Payne & Keller’s termination. He did not provide any notice to Appellants or this Court of his conduct, which he says he did “[p]ursuant to the [circuit court’s] previous rulings and instructions,” (*id.*), notwithstanding the fact that issues regarding Payne & Keller’s dissolution status and the applicability of Texas’s statute of repose are on appeal and within this Court’s exclusive jurisdiction.

ARGUMENT

Under Rule 205, SCACR, the circuit court did not have jurisdiction to rule on Ms. Childers’s motion to revoke, because the matters raised in the motion are necessarily affected by this appeal, over which this Court has exclusive jurisdiction. As Travelers repeatedly explained to the circuit court (*see, e.g.*, App. Vol. I 216-17, Travelers’ Opp’n to Pl. Childers’s Mot. to Revoke at 2-3), Ms. Childers’s motion to revoke is based entirely—almost word-for-word—on arguments Payne & Keller’s Receiver made in his opposition to Travelers’ motion to dissolve the

Receivership. The circuit court explicitly addressed the Receiver’s termination-by-fraud arguments in its order, and those arguments are presently on appeal before this Court. As a result, under Rule 205, the circuit court did not have jurisdiction to address the motion to revoke or any other “matters affected by the appeal.”

This jurisdictional point is not debatable—it is black-letter law. *See* Rule 205, SCACR (“Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.” (emphasis added)); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that “Rule 205 divests the lower court or administrative tribunal of jurisdiction over ‘matters affected by the appeal’”) (emphasis provided by the Supreme Court) (quotation and other citation omitted); *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) (“Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.”); *Tillman v. Oakes*, 398 S.C. 245, 255 & n. 3, 728 S.E.2d 45, 51 & n.3 (Ct. App. 2012) (reiterating that “[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal,” and explaining that this rule “deprives the lower court of the power to address a particular issue, or ‘matter,’ during the pendency of the appeal”); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (explaining that “[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal”).

Despite the Receiver's efforts to have the appeal dismissed, this Court has rightly determined that the appeal shall proceed. *See* Order dated Aug. 9, 2023 ("this appeal shall proceed"); Order dated Sept. 8, 2023 (reiterating that the appeal "shall proceed"). Because Ms. Childers's motion to revoke asked the circuit court to issue an order to revoke Payne & Keller's Texas termination based on grounds squarely on appeal before this Court, the circuit court lacked the jurisdiction to issue the October 5 order, and it must be vacated or clarified to be without force or effect.

No one—not the circuit court, not Ms. Childers, and not the Receiver—can seriously suggest that the revocation-by-fraud issue raised in the motion to revoke is not a "matter affected by the appeal." Again, the Receiver first made this argument in his opposition to Travelers' motion to dissolve the Payne & Keller Receivership, the resolution of which is now on appeal. (App. Vol. I 216-17, 221-22, 227-29, Travelers' Opp'n to Pl.'s Mot. to Revoke at 2-3, 7-8, 13-15.) The Receiver did so in an effort to avoid Texas's statute of repose, which fully protects Payne & Keller from suit—and bars Payne & Keller or its Receiver from bringing suit against Appellants—and it has done so for over three decades. Effectively, the Receiver has asked the circuit court to revive potential liability for Payne & Keller that has been extinguished as a matter of law since 1989.

The circuit court accepted the Receiver's argument and denied Appellants' motion to dissolve. (App. Vol. I 202, Order Denying Mot. to Dissolve dated Mar. 30, 2023, at 5 (filed Mar. 31, 2023) ("this Court finds the Receiver has made a prima facie showing that Payne & Keller 'was terminated as a result of actual or constructive fraud,' § 11.153(a), and dismissal on the basis of the termination is unwarranted").) The circuit court's March 30 order authorized the Receiver to pursue his fraud theory with the ultimate goal of revoking Payne & Keller's termination under

Texas law. (*Id.* at 5.) Appellants appealed that order, but Ms. Childers then filed a copycat motion asking for the very relief the circuit court said it lacked jurisdiction to provide.

The circuit court's willingness to sign Ms. Childers's proposed order granting the motion to revoke is particularly disappointing, and surprising, given that the circuit court previously acknowledged the jurisdictional prohibition. (App. Vol. I 312, July 10, 2023 Hearing Tr. at 69:7-11 ("THE COURT: I am acutely aware of my role as a circuit court judge. I am not supposed to get outside my guard rails and that's what I don't want to do in connection with something that's pending in front of an appellate court. MR. LEE: It [*i.e.*, Rule 205 covers] matters affected by the appeal, not the same case, not the same claim, not the same motion, but -- THE COURT: It does say that."); *id.* at 36:3-4 ("THE COURT: The Court of Appeals is going have the right to make that finding [regarding constructive fraud]".)) The circuit court also indicated that there would be another hearing before it decided whether to take any action on the motion to revoke. (*See id.* at 78:6-19 ("[MR. SAWYER:] Just for point of clarification, the impact holding pending a ruling by the court, will there be another hearing. I have points I wanted to put on the record, but I don't want to waste the court's time if we're going to have the Court of Appeals. THE COURT: Yes, I should say that and make that clear, that this is an adjourned proceeding, not a -- MR. SAWYER: We're not closing the book. THE COURT: Or a paused proceeding, I guess you could say. I am not declaring the hearing at an end. I am pausing it or adjourning it until I receive further information. Right now, my main concern is the Court of Appeals and my authority. . . .").) At that time, the circuit court judge refused to consider the motion, concluding "I am going to hold my ruling in abeyance until we hear from the Court of Appeals," because "I don't want to step beyond my boundaries with the Court of Appeals." (*Id.* at 75:8-9, 14-16.)

Simply put, the circuit court openly admitted its concern that it did not have jurisdiction to rule on Ms. Childers's motion to revoke because the issues raised in that motion are squarely before this Court. Nothing has changed.

As an apparent justification for violating Rule 205, SCACR, the circuit court's October 5 order granting the motion to revoke notes that the Payne & Keller Receivership action is not "stayed" (App. Vol. I 363-64, Order at 1-2), citing this Court's September 8, 2023 Order. But this Court's September 8, 2023 Order relates only to the subject of a stay, not jurisdiction. Order dated Sept. 8, 2023 ("the receivership action and the receiver's ability to carry out his duties are not stayed."). The existence of a stay does not address, and has nothing to do with, the circuit court's lack of jurisdiction to rule on Ms. Childers's motion when matters affecting that motion are on appeal. The absence of a stay obviously does not mean the presence of circuit court jurisdiction. Rule 205 and the case law enforcing it are clear that lower courts have no power to proceed with matters that are affected by a pending appeal. *See supra* at 11.

Simply put, the circuit court is and was divested of jurisdiction to rule on Ms. Childers's motion under Rule 205, and the question of a stay was irrelevant to that analysis:

Note that the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal under Rules 205 and 2041(a).

Toal, *Appellate Practice in South Carolina*, at 121 (citing *Tillman*).

As discussed above, without any notice to Appellants, the Receiver apparently provided the Texas Secretary of State with a copy of the circuit court's October 5, 2023 order, and asked her to enforce the order and formally revoke Payne & Keller's termination and reinstate its corporate existence in Texas. On October 12, 2023, the Texas Secretary of State issued a

“Certificate of Revocation,” which purports to revoke Payne & Keller’s termination as of October 12, 2023. The Receiver did not notify Appellants of the “Certificate of Revocation” until October 23, 2023, when he filed a “Notice of Filing” with the circuit court. He did so only after the circuit court indicated that it was reconsidering its October 5, 2023 order. (App. Vol. III 236-244, Circuit Court Email and the Receiver’s Response.) This Court needs to step in immediately to stop any further efforts to undermine this Court’s exclusive jurisdiction over the issues on appeal.

CONCLUSION

Appellants respectfully request that the Court issue an order enforcing its exclusive jurisdiction under Rule 205, SCACR, confirming that the circuit court did not have jurisdiction to issue its October 5, 2023 order, and enjoining the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal.

If the circuit court’s October 5, 2023 order and the Receiver’s efforts to use the Texas Secretary of State’s October 12, 2023 “Certificate of Revocation” are allowed to continue, it would materially add to and change the issues in this appeal. As a result, Appellants respectfully request that the current deadlines in this appeal be held in abeyance pending resolution of this motion. Appellants also respectfully request that the Court grant this motion on an expedited basis so that the parties, this Court, and the circuit court can proceed with certainty as quickly and efficiently as possible.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
803.454.6504

STEPTOE & JOHNSON LLP

Harry Lee (*pro hac vice*)
hlee@steptoe.com
1330 Connecticut Avenue, NW
Washington, DC 20036
202.429.3000

*Counsel for Appellant Third-Party Defendant Travelers Casualty
and Surety Company*

MURPHY & GRANTLAND, P.A.

By: /s/ Wesley B. Sawyer
Wesley B. Sawyer, Esquire (SC 100229)
4406-B Forest Drive (29206)
P.O. Box 6648
Columbia, South Carolina 29260
(803) 782-4100
wsawyer@murphygrantland.com

*Counsel for Appellants AIG Property Casualty Company, formerly
known as Birmingham Fire Insurance Company; National Union
Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway
Specialty Insurance Company, formerly known as Stonewall
Insurance Company; and The Continental Insurance Company,
individually and as successor in interest to Harbor Insurance
Company.*

October 23, 2023

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Appellants' Emergency Motion to Clarify and Enforce Rule 205

Parties Served:

Peter D. Protopapas (pdp@rplegalgroup.com)
Brian M. Barnwell (bb@rplegalgroup.com)
John B. White, Jr. (jwhite@johnbwhitelaw.com)
Marghretta H. Shisko (mshisko@johnbwhitelaw.com)
Christopher Jones (cjones@johnbwhitelaw.com)
Griffin Littlejohn Lynch (glynch@johnbwhitelaw.com)
Scott Shutte (scott.schutte@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)

Counsel for Respondent Payne & Keller Corp., through its Receiver Peter D. Protopapas

October 23, 2023

EXHIBIT 11

The South Carolina Court of Appeals

Lenora Childers, Individually and as Personal
Representative of the Estate of Lewis C. Childers,
Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories,
Inc.; General Boiler Casing Company, Inc.; HEFCO,
Inc.; J.R. Deans Company, Inc.; Payne & Keller
Company; SFB, Incorporated; Stafford Insulation
Company; Standard Insulation Company of N.C., Inc.;
Systra Engineering, Inc.; United Construction Co. of
Rome, Inc.; Wind Up, Ltd., Individually and as
Successor-in-Interest to Pipe & Boiler Insulation, Inc.
f/k/a Carolina Industrial Insulating Co.; Defendants.

Flame Refractories, Inc.; United Construction Co. of
Rome, Inc.; Wind Up, Ltd., Individually and as
Successor-in-Interest to Pipe & Boiler Insulation, Inc.
f/k/a Carolina Industrial Insulating Co.; and Payne &
Keller Company, By and Through Their Duly Appointed
Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and
as Successor to Northern Insurance Company of New
York, Maryland All American General Insurance
Company, and Maryland Casualty Company); Allstate
Insurance Company; John Tighe; Sean Antony Beatty;
Dennis William Cahill; Catherine Ann Carlino; Andre
Lefebvre; David Dean Shumway; Gil Chandler; Michael
Davenport; Linda Young Pettigrew; Gwyn Wallace
Fuller; Daniel Robert Keddie; Julie Ann Fortune;
Michael John Crall; James Francis Meehan; Larry Gene
Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital
Corp.; Admiral Insurance Company; Continental

Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

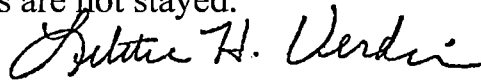
AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

ORDER

After consideration of Respondent's "motion to clarify the court's order on appealability," as well as the returns and reply, we clarify that Appellants' appeal of the circuit court's March 31, 2023 order denying their motion to dismiss third-party claims and dissolve the Payne & Keller receivership shall proceed. We further clarify that the March 31, 2023 order is not stayed during pendency of this appeal. *See* Rule 62(a), SCRCP ("Unless ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."); S.C. Code Ann. §14-3-450 (2017) ("In case of an appeal under item (4) of Section 14-3-330 the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below."). Accordingly, the receivership action and the receiver's ability to carry out his duties are not stayed.



FOR THE COURT

Columbia, South Carolina

FILED
Sep 08 2023

cc:

Wesley Brian Sawyer, Esquire
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Harry Lee, Esquire
Brian Montgomery Barnwell, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Brady Edwards, Esquire
Scott Shutte, Esquire
Christopher Rutledge Jones, Esquire
G. Murrell Smith, Jr., Esquire

Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire

EXHIBIT 12

easements, chattel, livestock, mineral rights, all useful things, liabilities capable of being re-characterized as assets, intellectual property, all rights to name, image or likeness, all publication rights to the events related in any way to Alex Murdaugh and contract rights and all other things, rights and interests without limitation that may be monetized for value, whether known or unknown, whether it is presently owned, held or controlled or was previously owned, held or controlled or will be owned, held or controlled in the future, whether actual or contingent, whether owned, held or controlled directly or indirectly and/or whether owned, held or controlled in whole or in part by Defendant Richard Alexander Murdaugh (“Alex Murdaugh”). For the avoidance of doubt, the term “Alex Murdaugh Assets” includes any and all assets transferred, concealed, hidden, sold, encumbered, or otherwise disposed of which previously were owned, held or controlled by Alex Murdaugh, directly or indirectly and in whole or in part.

The term “Buster Murdaugh Assets” as used in this Order shall mean any or all of the Alex Murdaugh Assets (as defined herein), as well as all intellectual property, all rights to name, image or likeness and all other publication and contract rights to the events related in any way to Alex Murdaugh and/or Buster Murdaugh, whether known or unknown, whether it is presently owned, held or controlled or was previously owned, held or controlled or will be owned, held or controlled in the future, whether actual or contingent, whether owned, held or controlled directly or indirectly and/or whether owned, held or controlled in whole or in part by Defendant Richard Alexander Murdaugh, Jr. (“Buster Murdaugh”) and all other assets, interests, real property including any and all rents, profits or value derived therefrom, personal property, rights, chattel and any other thing whatsoever without limitation which has value or can be monetized for value that were or will be gifted, inherited by, sold or in any other manner transferred to Buster Murdaugh from Alex Murdaugh or any other person, whether such transfer was direct or indirect, whether such transfer

involved intermediary third persons that are alive, deceased, operating or defunct, and whether such transferred assets are held, owned and/or controlled by Buster Murdaugh directly or indirectly and in whole or in part.

Temporary Injunction Granted

After careful consideration of the parties' written memoranda and arguments presented at the hearing, this Court finds that irreparable injury, loss or damage will result to Plaintiff in the absence of a temporary injunction prohibiting each of Defendant Alex Murdaugh and Defendant Buster Murdaugh from hiding, concealing, misappropriating, selling, encumbering, transferring, impairing the value of and otherwise disposing of any of the Alex Murdaugh Assets and any of the Buster Murdaugh Assets. Further, after careful consideration of all information presented to the Court, the Court finds that the balance of equities clearly weighs in favor of issuing a temporary injunction to prevent irreparable injury, damage or loss to Plaintiff's ability to recover damages from these Defendants for the wrongful death of her daughter. Therefore, this Court hereby issues a temporary injunction prohibiting each of Alex Murdaugh and Buster Murdaugh from hiding, concealing, misappropriating, selling, encumbering, transferring, impairing the value of and otherwise disposing of any of the Alex Murdaugh Assets and any of the Buster Murdaugh Assets, in whole or in part, during the pendency and through the final resolution of this lawsuit.

Appointment of Co-Receivers and Counsel; Scope and Terms of Receivership

After careful consideration of all information and arguments presented by the parties, this Court finds that Plaintiff's application to appoint the Co-Receivers is meritorious under the S.C. Code §15-65-10, the Court's equitable powers, and general principles of fraud and deceit under South Carolina law. Therefore, the Court hereby appoints Mr. Lay and Mr. McCoy as Co-Receivers over all Alex Murdaugh Assets and all Buster Murdaugh Assets and grants them the

broad rights, powers and authority as set forth in this Order. In addition, the Court hereby appoints Amy L.B. Hill, Esquire of Gallivan, White & Boyd, P.A. as counsel for the Co-Receivers in this matter, as further set forth herein.

The Court hereby grants, vests, imbues and otherwise empowers the Co-Receivers with the exclusive power and authority as to all of the Alex Murdaugh Assets and all of the Buster Murdaugh Assets (collectively, “the Subject Assets”), with the exclusive power and authority: (i) to investigate, identify and attempt to locate all of the Subject Assets; (ii) to collect, marshal and administer all of the Subject Assets; (iii) to accept service on behalf of Alex Murdaugh and/or Buster Murdaugh with respect to Alex Murdaugh Assets and/or Buster Murdaugh Assets, as the case may be; (iv) to engage counsel on behalf of Alex Murdaugh and/or Buster Murdaugh as it relates to Alex Murdaugh Assets and/or Buster Murdaugh Assets, as the case may be; and (v) to take any and all steps necessary to identify, recover, protect, collect, preserve, receive, manage, liquidate, sell, administer and marshal, and to do all things incidental, necessary and/or appropriate thereto, all of the Subject Assets during the pendency and final resolution of this lawsuit.

The Court’s granting of rights, power and authority by this Order is intended to be as broad as possible for the Co-Receivers to manage and decide all matters related in any way to the Subject Assets, to the express exclusion of any other person(s), except as expressly retained by this Court herein or that the Court is otherwise required to retain under applicable rules or law. In that regard, the Court expressly invalidates all powers of attorney or other grants of authority by Alex Murdaugh to Buster Murdaugh or any other person to act in any capacity with respect to the Subject Assets.

Without limiting any other provision of this Order, the broad rights, powers and authority granted by this Order are inclusive of, but not limited to, the right, power and authority to act in

the following ways with respect to Alex Murdaugh's and Buster Murdaugh's interests in the Subject Assets, taking into consideration the cost benefit analysis and economic viability of performing the following acts, respectively: (a) collect all accounts receivable and all rents from any tenant of any Subject Asset; (b) change locks to all premises at which any of Alex Murdaugh Assets or any of Buster Murdaugh Assets are situated in order to secure Subject Assets; (c) open any mail addressed to any business or professional entity owned solely or in part by Alex Murdaugh or Buster Murdaugh with the exception that Co-Receivers will not open any mail associated with legal clients or legal cases handled by Alex Murdaugh; (d) redirect the delivery of any mail addressed to Alex Murdaugh or to any of his businesses or professional endeavors or to Buster Murdaugh as it may reasonably relate to Buster Murdaugh Assets, so that such mail may come directly to either Co-Receiver; (e) endorse and cash all checks and negotiable instruments payable to Alex Murdaugh, except paychecks for current wages; (f) endorse and cash all checks and negotiable instruments payable to Buster Murdaugh which may relate to the Subject Assets; (f) hire a real estate broker to sell any and all real property and interests in land which constitute an Alex Murdaugh Asset or an Buster Murdaugh Asset; (g) hire any person or company to move and store any and all physical or tangible Subject Assets; (h) insure any Subject Assets (but not the obligation to do so); (i) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau, brokerage firm, custodian, investment adviser or any other third party, all financial records, bank statements, wire transfer records, checks and other financial documentation belonging or pertaining to Alex Murdaugh or concerning any Subject Asset of Alex Murdaugh or Buster Murdaugh; (j) obtain from any landlord, building owner or building manager where his or his business is a tenant, copies of the subject lease, lease application, credit application, payment history and copies of Alex Muraugh's and Buster Murdaugh's checks, wire

transfer records, Venmo records or other records of payment related to any such lease; (k) hire any person or company necessary or appropriate to accomplish any right or power under this Order; (l) direct the liquidation, sale or transfer of any or all the Subject Assets; (m) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any of the Subject Assets may be situated, and to review and obtain copies of all documents related to the same; (n) obtain copies of all tax records, financial records and any other documents and information provided to a certified public accountant (CPA) by Alex Murdaugh, Buster Murdaugh and/or concerning any of the Subject Assets; (o) obtain all tax returns and any other documents associated therewith filed or submitted by Alex Murdaugh, individually or jointly with another person, and by Buster Murdaugh with all local, state and federal governments; (p) attempt to identify all Alex Murdaugh Assets already transferred by him to another person, including but not limited to the Buster Murdaugh Assets, and recover possession, custody, control and title to such assets for potential administration; (q) sign on behalf of Alex Murdaugh or Buster Murdaugh, as applicable, any and all documents related to the identification, collection, administration and disposition of any or all of Alex Murdaugh Assets and/or Buster Murdaugh Assets; (r) partition property owned by any group of persons which includes Alex Murdaugh or constitutes an Alex Murdaugh Asset and/or constitutes a Buster Murdaugh Asset; (s) institute, prosecute, compromise or defend civil suits and actions at law or equity related to any Alex Murdaugh Asset and/or to any Buster Murdaugh Asset in order to preserve such asset if such action is economically feasible considering the value of such Subject Asset; (t) pay from the Subject Assets all brokers, contractors, accountants, servants, administrators, representatives, process servers, consultants and attorneys considered by the Co-Receivers to be necessary or advisable in order for them to take the actions permitted and responsibilities under this Order; and

(u) take whatever other actions the Co-Receivers determine is incidental to, necessary or appropriate to protect and preserve Alex Murdaugh Assets and Buster Murdaugh Assets.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Co-Receivers to reasonably investigate the existence of all insurance coverages potentially available to Alex Murdaugh and Buster Murdaugh in receivership, including as an "additional insured" under coverage for another person.

The Court further orders that, as the Receiver Court, Alex Murdaugh and Buster Murdaugh, respectively, may not be sued in a civil matter outside this Court without obtaining the Co-Receivers' consent or an order of this Court prior to doing so. Likewise, Co-Receivers and Co-Receivers' Counsel may not be sued in their respective receivership capacities in a civil matter outside of this Court without obtaining the Co-Receivers' consent and/or the Co-Receivers' Counsel's consent, as the case may be, or an order of this Court prior to doing so.

The rights, powers and authority granted herein are in addition to, and not in lieu of, all powers vested in the Co-Receivers by applicable law or rule of the Court. The Co-Receivers shall be responsible only to the Court for the performance of the responsibilities as Co-Receivers. The Co-Receivers shall file reports with the Court only upon request of the Court or of a party to this action. The Co-Receivers and Co-Receivers' Counsel, as designated below, shall each serve without bond.

The Court further orders and hereby appoints Amy L.B. Hill, Esquire, of the law firm Gallivan, White & Boyd, P.A. to serve as counsel to the Co-Receivers in all matters associated with the Co-Receivers' duties, responsibilities, rights, powers and authority granted to them through this Order and any additional duties, rights, responsibilities, rights, power and authority vested in them under South Carolina law in regard to this matter.

This Court authorizes the Co-Receivers to, and expects that the Co-Receivers will, determine between them what, if any, division of actions they will permit to be undertaken by one of them and by Co-Receivers' Counsel. The Court does not require or expect that each and every action be undertaken by both Co-Receivers. The Co-Receivers may authorize or otherwise empower Co-Receivers' Counsel to do all things incidental to, necessary or appropriate to the duties, responsibilities, rights, power and authority granted to the Co-Receivers through this Order and any additional duties, rights, responsibilities, rights, power and authority vested in them under South Carolina law.

No bond was offered by Alex Murdaugh or Buster prior to entry of this Order; however, the Court will entertain a future request for bond by Alex Murdaugh or Buster in an amount commensurate with the gravity of the allegations against each Alex and Buster, the facts of this case, potentially aggravating circumstances, and similar verdicts awarded in comparable cases in the county in which this matter is pending.

The rights, powers, and authority granted or created herein are effective immediately and shall remain effective until the final resolution of this litigation, including all appeals, or until a subsequent order of this Court terminating the same upon a showing of just cause or other applicable standard under South Carolina law.

AND IT IS SO ORDERED this ____ day of _____ 2021.

Daniel D. Hall, Circuit Court Judge



Hampton Common Pleas

Case Caption: Renee S. Beach , plaintiff, et al VS Gregory M. Parker, Inc. ,
defendant, et al
Case Number: 2019CP2500111
Type: Order/Appointment of Receiver

So Ordered

s/Daniel D. Hall 2753

EXHIBIT 13

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS

RENEE S. BEACH, as Personal Representative
of the Estate of MALLORY BEACH,

Case No. 2019-CP-25-00111

Plaintiff,

vs.

GREGORY M. PARKER, INC., a/k/a
PARKER'S CORPORATION, d/b/a PARKERS
55; RICHARD ALEXANDER MURDAUGH;
and RICHARD ALEXANDER MURDAUGH,
JR.,

**MURDAUGH DEFENDANTS'
RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION AND
APPOINTMENT OF CO-RECEIVERS
AND CO-RECEIVERS' COUNSEL**

Defendants.

Defendants Richard Alexander Murdaugh ("Alex Murdaugh") and Richard Alexander Murdaugh, Jr. ("Buster Murdaugh") (collectively, "Murdaugh Defendants") by and through their undersigned attorneys, hereby submit a Response in Opposition to Plaintiff's Motion for Preliminary Injunction and Appointment of Co-Receivers and Co-Receivers' Counsel.

I. Plaintiff has failed to establish it is entitled to the drastic remedy of a preliminary injunction under South Carolina Law.

Simply put, Plaintiff's motion for a preliminary injunction improperly seeks a drastic equitable remedy to preserve potential recovery on legal claims.

Under South Carolina law, "[f]or a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law." *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *Scratch Golf Co. v. Dunes West Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905,

907-908 (2004). The party seeking a temporary injunction has the burden of demonstrating facts and circumstances satisfying each of these elements. *Strategic Res. Co.*, 367 S.C. at 544, 627 S.E.2d at 689.

A preliminary injunction remedy is a drastic one and ought to be applied with caution. *Id.* (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950)). If there is a failure by the movant to establish *even one* of these three elements, a request for a temporary injunction must be denied. *Shapemasters Golf Course Bldrs., Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 477–78, 602 S.E.2d 83, 85-86 (2004) (emphasis added) (affirming Circuit Court’s denial of a restraining order where the Appellant could not show irreparable harm); *Scratch Golf Co.*, 361 S.C. 121-122, 603 S.E.2d at 907-908 (reversing Master in Equity’s issuance of a preliminary injunction, because the Plaintiff had another available remedy at law).

A. Plaintiff has not shown she would suffer irreparable harm if the injunction is not granted.

Under the first required element, the harm necessary to justify issuance of a preliminary injunction must be irreparable. The United States Supreme Court has explained:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974).

Here, Plaintiff argues that an injunction will “prevent irreparable damage to Plaintiff’s ability to recover financial damages from these Defendants.”¹ However, Plaintiff’s claim for irreparable harm is speculative and unsupported. As explained below, Plaintiff has not established she will likely be entitled to a monetary judgment against the Murdaugh Defendants that will not

¹ Plaintiff’s Motion for Preliminary Injunction and Appointment of Co-Receivers, p. 2.

be satisfied. The court should also consider the offset that would apply to Plaintiff's potential judgment from prior settlement monies already paid to Plaintiff in the subject action as well as insurance coverage available to be pursued as to the Murdaugh Defendants and Defendant Parker's. Further, as expounded below, Plaintiff has an adequate remedy at law. *Sampson*, 415 U.S. at 90 ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."). Thus, Plaintiff has not carried its burden to show it will suffer irreparable harm.

B. Plaintiff is unlikely to succeed on the merits against the Murdaugh Defendants.

"A trial court may consider a case's merit to the extent necessary to determine whether a temporary injunction should issue." *Curtis v. State*, 345 S.C. 557, 577, 549 S.E.2d 591, 601 (2001). "[W]hile a judge [ruling on a Motion for temporary injunction] cannot finally decide anything as to the merits, [the judge] can and ought to look into the merits whether they present issues of law or of fact, and consider them to the extent necessary to enable him to exercise his discretion wisely." *Transcontinental Gas Pipeline Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969). In examining the merits, this Court may consider any legal or factual issues subsumed within the matter on which the movant is seeking a temporary injunction. *E.g.*, *Curtis*, 345 S.C. at 577, 549 S.E.2d at 601 (holding that, in ruling on temporary injunction, trial court properly considered constitutionality of statute because plaintiff's claim raised the issue of constitutionality).

Here, Plaintiff has failed to even address this required showing in her Motion. A review of Plaintiff's Complaint and the specific allegations against the Murdaugh Defendants is necessary. Plaintiff has alleged:

As to Defendant Richard Alexander Murdaugh

- u. In knowingly and willfully allowing his minor son, under the age of twenty-one (21), to use Richard Alexander Murdaugh, Jr.'s drivers license to purchase and consume alcohol;
- v. In failing to supervise his son when he knew or should have known that the minor was using another's license to purchase and consume alcohol; and
- w. In such other and further particulars as the evidence in trial may show;

As to Defendant Richard Alexander Murdaugh, Jr.

- x. In knowingly and willfully providing his minor brother, under the age of twenty-one (21), with his driver's license for the purpose of purchasing and consuming alcohol by minors, including his brother;
- y. In knowingly and willfully allowing his minor brother, under the age of twenty-one (21), to use his driver's license for the purpose of purchasing and consuming alcohol by minors, including his brother; and
- z. In such other and further particulars as the evidence in trial may show;

Plaintiff essentially alleges Alex Murdaugh was negligent in (1) allowing his nineteen-year-old son to use Buster Murdaugh's driver license to purchase and consume alcohol and (2) in failing to supervise his nineteen-year-old son. Plaintiff has not carried its burden to show it will likely succeed on his claim for negligent parenting of his nineteen-year-old son.

Further, Plaintiff has not shown she will likely succeed on her claim against Buster Murdaugh for negligence in allegedly providing Paul Murdaugh with his driver's license. Even assuming for purposes of this Motion only, Buster Murdaugh did provide his driver's license to Paul Murdaugh in Columbia, SC, Plaintiff has not shown she will likely meet the elements to establish negligence, including the elements of duty, foreseeability, and proximate cause.

Because the Court has no competent evidence before it of irreparable harm or Plaintiffs' likelihood of success on their claims, Plaintiff's Motion should be denied.

C. Plaintiff has an adequate remedy at law.

Just like the first two elements, Plaintiff's Motion also fails to establish there is an inadequate remedy at law, which the Plaintiff has the burden of establishing. In observance that a preliminary injunction is "a drastic remedy," *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 907, "courts should issue injunctions with caution and only where no adequate remedy exists at law." *Strategic Res. Co.*, 367 S.C. at 545, 627 S.E.2d at 689.

The case *Scratch Golf Company v. Dunes West Residential Golf Properties, Inc.* is instructive. 361 S.C. 117, 119, 603 S.E.2d 905, 906 (2004). In *Scratch Golf*, the plaintiff golf course moved for a preliminary injunction to have the defendant developer place \$4.5 million into an escrow account to provide for a pool that a judgment could be collected from.² *Id.* The Master in Equity granted the motion for a preliminary injunction and ordered the developer's money be put in escrow. *Id.* Ultimately, the South Carolina Supreme Court reversed the trial court and found that the statutory remedy of attachment was available to the plaintiff golf course. *Id.* The plaintiff golf course owner argued an injunction was appropriate because it would suffer irreparable harm having no adequate legal remedy to recover a potential judgment because the developer would move its assets. *Id.* at 122. The *Scratch Golf* Court cited the attachment statute S.C. Code Ann. §15-19-10 and supporting case law to conclude that attachment was the proper remedy to freeze another's assets for the purpose of satisfying a potential judgment. *Id.* The South Carolina Supreme Court explained:

This argument that Scratch Golf asserted—that once it receives a money judgment from its contract and tort action, it may have difficulty *collecting* from the Developer because the Developer may "take its assets and run" out of the state—is not proper justification for why a preliminary injunction should be issued but rather is justification for the statutory remedy of attachment. S.C. Code Ann. § 15–19–10 (2003)[.]

² In that case, Plaintiff submitted evidence of the amount of the potential recoverable damages.

Id., 361 S.C. at 122, 603 S.E.2d at 908.

Scratch Golf is directly on point. Here, Plaintiff has an adequate remedy at law under the attachment statute as *Scratch Golf* explained. The statutory remedy of attachment permits the court “to take a defendants property into legal custody so that it may be applied to the plaintiff’s debt, when established.” *John Deere Plow Co. of St. Louis v. L.D. Jennings, Inc.*, 203 S.C. 426, 27 S.E.2d 571, 572 (1943); S.C. Code Ann. § 15-19-10 (2004). In other words, “[t]he purpose of attachment generally is to take a defendant’s property into legal custody so that it may be applied to the plaintiff’s debt when established.” 7 C.J.S. Attachment § 8.

The case *Grosshuesch v. Cramer* is instructive to explain when a preliminary injunction is appropriate. 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005). In that case, the South Carolina Supreme Court explained the reasoning in *Scratch Golf* was not applicable because *Grosshuesch* was “an equitable action in which the assets sought to be preserved, specifically \$2 million worth of accounts, monies, and personal property, are the subject of the instant dispute.” *Grosshuesch*, 367 S.C. 1, 5, 623 S.E.2d at 835 (emphasis added). The South Carolina Supreme Court’s comparison of *Scratch Golf* is illustrative:

In *Scratch Golf*, a golf course sued a developer alleging breach of contract and negligence in designing the golf course’s irrigation system. 361 S.C. at 120, 603 S.E.2d at 907. The golf course moved for a preliminary injunction freezing the developer’s assets so there would be a pool of assets out of which any judgment for the golf course could be satisfied. *Id.* The trial court granted the golf course’s request and ordered a large amount of money put in escrow. *Id.* This Court reversed, finding that the golf course’s arguments in favor of an injunction were really justifications for the statutory remedy of attachment. *Id.* at 122, 603 S.E.2d at 908. The golf course argued for an injunction on the grounds that the golf course would suffer irreparable harm having no adequate legal remedy to recover the potential judgment against the developer because the developer would move its assets elsewhere. *Id.* The Court drew guidance from the attachment statute, S.C. Code Ann. § 15–19–10 (2003), and case law, and concluded that attachment was the proper remedy when seeking to freeze

another's assets for the purpose of satisfying a potential judgment. *Scratch Golf*, 361 S.C. at 122–23, 603 S.E.2d at 908.

The trial court incorrectly applied *Scratch Golf* to the instant case. *Scratch Golf* was an action at law, and the attachment issue dealt only with preserving another's assets for satisfaction of a potential judgment. This case is an equitable action in which the assets sought to be preserved, specifically \$2 million worth of accounts, monies, and personal property, are the subject of the instant dispute. As distinguished from attachment, by which the court takes jurisdiction over the defendant's property “as a security for such judgment as a plaintiff may recover,” § 15–19–10, this case involves the quintessential hallmark of an injunction: preservation of the property at issue until the matter has been adjudicated.

Grosshuesch, 367 S.C. at 4–6, 623 S.E.2d at 835 (emphasis added).

Unlike *Grosshuesch*, here, the Murdaugh Defendants’ assets *are not the subject of the lawsuit*. Plaintiff has brought a wrongful death lawsuit arising out of a boating accident and asserted claims for negligence. Thus, this is not the situation where the subject property of the lawsuit would be preserved by issuance of a preliminary injunction. See for example, *Mailsources, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003) (“‘A temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation.’”).

Because Plaintiff has failed to establish there is no adequate remedy at law, the drastic remedy of a preliminary injunction should not be granted.

II. Further, Plaintiff is not entitled to the appointment of a receiver pursuant to S.C. Code Ann. § 15-65-10.

Under South Carolina law, the appointment of a receiver is not permitted in this case. The law is clear a receiver may be appointed by a judge of the circuit court, either in or out of court:

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action **and** which is in the possession of an adverse party **and** the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when

judgment upon failure to answer may be had without application to the court[.]

S.C. Code Ann. § 15-65-10 (emphasis added).

In other words:

A receiver may be appointed pre-judgment upon application to the court by either party to a contested action so long as four conditions are met. The applicant must show: (1) an apparent right to property; which is (2) the subject of the action; (3) in the possession of an adverse party; and (4) in danger of being lost, materially injured, or impaired.

21 S.C. Jur. Receivers § 4.

The South Carolina Supreme Court has recently discussed the circumstances under which a receiver may be appointed:

“[T]he appointment of a receiver is within the discretion of the circuit judge.” *Midlands Util., Inc. v. S.C. Dep’t of Health & Env’tl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989) (citing *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964)). **“The appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution.”** *Id.* (citing *Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957)). “[A]s a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined.” *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887) (internal quotation marks and citation omitted).

Richland Cty. v. South Carolina Dep’t of Revenue, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (emphasis added).

Stated simply, Plaintiff has *no apparent right to property which is the subject of this action*.

This is a wrongful death case arising out of a boat crash and not an action relating to the Murdaugh Defendants’ property or assets. Again, a review of Plaintiff’s allegations against the Murdaugh Defendants is telling:

As to Defendant Richard Alexander Murdaugh

- u. In knowingly and willfully allowing his minor son, under the age of twenty-one (21), to use Richard Alexander Murdaugh, Jr.'s drivers license to purchase and consume alcohol;
- v. In failing to supervise his son when he knew or should have known that the minor was using another's license to purchase and consume alcohol; and
- w. In such other and further particulars as the evidence in trial may show;

As to Defendant Richard Alexander Murdaugh, Jr.

- x. In knowingly and willfully providing his minor brother, under the age of twenty-one (21), with his driver's license for the purpose of purchasing and consuming alcohol by minors, including his brother;
- y. In knowingly and willfully allowing his minor brother, under the age of twenty-one (21), to use his driver's license for the purpose of purchasing and consuming alcohol by minors, including his brother; and
- z. In such other and further particulars as the evidence in trial may show;

Stated another way, this is an action for money damages in a wrongful death case and *not an action to recover property*. A review of South Carolina case law applying the receiver statute prejudgment further illustrates appointment of a receiver in this case is not permitted.

In *Andrick Development Corporation v. Maccaro*, the South Carolina Court of Appeals determined the statutory criteria were satisfied to appoint a receiver. 280 S.C. 103, 104, 311 S.E.2d 95, 96 (Ct. App. 1984). In that case, vendors of a condominium brought an ejectment action against the purchasers in possession of the property. *Id.* The defendants appealed “from an order of the circuit court **appointing a receiver to take possession of a disputed piece of real estate** and collect the rents and profits during the pendency of litigation.” *Id.* (emphasis added). In affirming the appointment of the receiver, the court explained that Section 15–65–10 “authorizes appointment of a receiver before judgment **where the property which is the subject matter of the action** is in the possession of the adverse party, where the **party making application for a**

receiver establishes an apparent right to the property, and where the property, or its rents and profits, are in danger of being lost or materially injured or impaired.” *Id.*, 280 S.C. at 106, 311 S.E.2d at 97 (emphasis added). The *Andrick* Court applied the receiver statute and reasoned:

The statutory criteria were satisfied in this case. The [defendants] were admittedly in possession of the property. As the holder of title to the property, [the plaintiff] had an apparent right to the rents and profits. *Greenwood Loan & Guarantee Association v. Childs*, 67 S.C. 251, 45 S.E. 167 (1903). As the circuit court observed, the [defendants] had no apparent right to take control of the property and collect the rents and profits over [the plaintiff’s] objection. Finally, there was a likelihood that the rents and profits would be dissipated or the property materially impaired. The [defendants] refused to account to [the plaintiff] for the rents received. There was no assurance that regime fees, taxes, and other maintenance charges on the condominium would be paid during the pendency of the litigation. In the circumstances it was reasonable and equitable to place the property under a receiver until the matter of rents and profits was resolved.

Andrick Dev. Corp. v. Maccaro, 280 S.C. 103, 106, 311 S.E.2d 95, 97 (Ct. App. 1984).

Andrick provides an example of when a receiver is properly appointed. The facts of *Andrick* are factually distinguishable from this case so the reasoning has no application. In this case, the Murdaugh Defendants’ property is *not the subject* of the Plaintiff’s lawsuit and Plaintiff is not a holder of title to the Murdaugh Defendants’ property.

By way of another example, in *Kirven v. Lawrence*, the defendants successfully moved for the appointment of receiver in an action where the plaintiffs sought to recover farm land from the defendants. *Kirven v. Lawrence*, 244 S.C. 572, 576, 137 S.E.2d 764, 765 (1964). In that case, the plaintiffs were the widow and grandchildren of the deceased grantee and sought to recover farm land. *Id.* There was an appointment of receiver of land claimed by the plaintiffs when the plaintiffs were not in possession of the land subject of the lawsuit. *Id.* On appeal, the South Carolina Supreme Court determined that until there had been a final determination of all issues at the trial, the right to possession of the disputed property remained in the defendants, and as they apparently did not

have possession when they applied for the appointment of the receiver, the trial judge properly appointed the receiver under his discretion. *Id.* 244 S.C. at, 580, 137 S.E.2d at 768.

In *Kirven*, similar to *Andrick*, a receiver was properly appointed prejudgment when the party had a right to possess the property which was the *subject of the action*. In contrast, in this case, the Murdaugh Defendants' property is *not the subject* of the Plaintiff's lawsuit and Plaintiff is not a holder of title to the Murdaugh Defendants' property.

Plaintiff baselessly concludes: "Plaintiff clearly has, at a minimum an apparent right to the Subject Assets in this wrongful death action."³ Yet Plaintiff does not set forth how the statutory requirements are met and does not even address the requirement that the property must be the *subject* of the pending lawsuit. Under Plaintiff's suggested approach, nearly every tort plaintiff suing a defendant in a personal injury or wrongful death case could request and obtain an appointment of a receiver over defendants' property in anticipation of a future judgment. This unprecedented result would greatly interfere with a person's legal right to possess and hold title to unencumbered property. Of note, Plaintiff has not provided any case law in support of his approach and the Murdaugh Defendants are not aware of any South Carolina courts applying Plaintiff's approach.

Therefore, the prejudgment appointment of a receiver is not permitted under the statute because Plaintiff does not have "an apparent right to property which is the subject of the action."

CONCLUSION

Plaintiff has failed to meet the requirements for a preliminary injunction pursuant to SCRCP Rule 65, including showing it would suffer an irreparable harm, demonstrating it would prevail on the merits, and providing no other adequate remedies exist. Therefore, the Murdaugh

³ Plaintiff's Motion for Injunction and Appointment of Co-Receivers, p. 11.

Defendants respectfully request the Court deny Plaintiff's Motion because a preliminary injunction should not be granted if Plaintiff has failed to establish just *one* of the three required elements.

Further, prejudgment appointment of a receiver is not permitted under South Carolina Code Ann. § 15-65-10 because Plaintiff does not have "an apparent right to property which is the subject of the action" as clearly required by the statute. Therefore, the Murdaugh Defendants also respectfully request the Court deny Plaintiff's Motion because a receiver is not appropriate.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: /s/ Elliot Condon
John H. Tiller (SC Bar #10174)
E. Elliot Condon (SC Bar #103795)
134 Meeting Street, Third Floor (29401)
P. O. Box 340
Charleston, SC 29402-0340
843.722.3366
jtiller@hsblawfirm.com
econdon@hsblawfirm.com

AND

M. Dawes Cooke, Jr. (SC Bar #1376)
BARNWELL WHALEY PATTERSON &
HELMS, LLC
P. O. Drawer H
Charleston, SC 29402-0197
mdc@barnwell-whaley.com

*Attorneys for Defendants Richard Alexander
Murdaugh and Richard Alexander Murdaugh, Jr.*

October 28, 2021
Charleston, South Carolina

EXHIBIT 14

Attorneys Have An Ethical Duty To Protect The Judiciary

By **Deborah Winokur** (November 21, 2023, 5:03 PM EST)

Upon joining the bench, our judges take an oath to protect and defend the Constitution of the U.S.

Sadly, these efforts can come at a steep cost to personal safety. Tragically, on Oct. 19, Maryland Circuit Court Judge Andrew Wilkinson, 52 and a father of four, was assassinated in the driveway of his home.[1]

Law enforcement believes the gunman was a disgruntled litigant in a child custody case. Judge Wilkinson's **death** also brings to mind the 2020 tragic **murder** of U.S. District Judge Esther Salas' son, Daniel Anderl, after the judge was targeted by a misogynist, racist extremist.[2]



Deborah Winokur

In December 2022, Congress passed a bill named in Daniel's honor — the Daniel Anderl Judicial Security and Privacy Act — prohibiting data collectors from selling or purchasing judges' personally identifiable information and prohibiting the publication of such information on the internet.[3]

In June 2022, the Supreme Court Police Parity Act was authorized, which provides for police protection, when deemed necessary, for immediate family members of Supreme Court justices or their staff. Various states, including New Jersey, have enacted or are considering similar measures to protect their judiciary.

According to New York City Bar Association President Susan J. Kohlmann, attacks and threats against judges have increased in the last several years.[4]

In a 2020 National Judicial College poll, three-quarters of the 572 judge-respondents said they are "not satisfied with the security measures taken by their court." [5] The legislative branch has been trying to ameliorate this safety gap, but lawyers themselves also must be part of the solution. It is not only our moral imperative, but also a requirement of our profession.

Turning Down the Heat

The tenor of public disagreement and debate has become increasingly hostile and volatile. Attorneys who publicly excoriate judges throw gasoline on the fire. But attorneys who participate in these types of scorched earth tactics do so at both their own professional peril and potentially risk harm to judges.

Attorneys should be aware that most jurisdictions hold that attorneys' right to free speech can be restricted by the American Bar Association Model Rules of Professional Conduct when attorneys make incredulous statements or statements with reckless disregard for the truth about members of the judiciary.

This was true in the case of California lawyer Ben Pavone, who referred to a judicial hearing

officer's ruling as a "succubustic adoption of the defense position" and was **charged** by the State Bar of California with impugning the integrity of a judge and violating California Business and Professions Code, Section 6068(b).[6]

New Mexico lawyer Victor Marshall **faced** a similar fate when he was suspended after implying that a judge ruled in favor of his opponent due to his own financial interests.[7]

In this context, lawyers should be mindful of the Model Rules of Professional Conduct's Rule 3.5, which prohibits lawyers from engaging in conduct that is intended to disrupt a tribunal; Rule 8.2 regarding false or reckless statements about the qualifications or integrity of a judge or adjudicatory officer; and Rule 8.4 prohibiting conduct that is prejudicial to the administration of justice.

Taken together, these rules create a minimum standard of decorous and truthful behavior for lawyers in their actions and public statements that, when properly followed, would serve as a release valve for public tensions and sentiments against judges.

Managing Clients

Lawyers also have a role to play with regard to creating an expectation that clients will proceed in a respectful tone before judges and also managing their clients' own expectations about the legal process. While it may be human nature, and thus common, for lawyers to engage with their clients in informal criticism of judges and their orders, lawyers need to be careful to clarify that an adverse judgment does not mean that the judge has a bias, lacks qualifications or is otherwise acting improperly.

Again, Rule 8.2 comes into play mandating that lawyers not recklessly disregard the truth and needlessly incite their clients over disagreements regarding judicial rulings.

In addition, lawyers may find that they do not need to press for every possible advantage in the legal process on behalf of their clients. Unnecessary motion practice is the type of obstreperous conduct that violates Rule 8.4 when it becomes prejudicial to the administration of justice.

For example, during the COVID-19 pandemic era, Michael Hierl, an Illinois attorney representing a licensing company selling "fantasy art," sought reconsideration after his initial temporary restraining order was delayed due to an emergency COVID-19 order.

U.S. District Judge Steven Seeger denied the motion and was incredulous in his order that an attorney would push for a hearing to "immediately put a stop to the infringing unicorns and the knock-off elves" during an international pandemic. He referred to "the sage words of Elihu Root: 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop,'" quoting the U.S. Court of Appeals for the Seventh Circuit in *Hill v. Norfolk and Western Railway Co.* from 1987.[8]

Educating the Public

The ethical canons of the code of conduct for U.S. judges include a number of restrictions on the ability of judges to comment on matters of public interest. Canon 3A(6) contains an admonition against commenting about cases pending before any court and particular vigilance is required for matters pending in the judge's own court.

Canon 2 requires that judges avoid the appearance of impropriety. The commentary specifically recognizes that a "judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."

With these limitations on judicial speech in mind, Comment 3 to Rule 8.2 of the Model Rules of Professional Conduct recognizes that lawyers should defend judges when they are unjustly

criticized. Lawyers must be the ones to educate the public about limitations on judicial speech and not seek to use judicial silence on political issues as a means to attack judges and their legal positions.

Lawyers should publicly reject efforts of special interest groups that demand commentary from judicial candidates about how they would rule on various issues of political interest. Bar associations and lawyer interest groups should follow the lead of the American Board of Trial Advocates, which created a protocol for responding to unfair criticism of judges. The protocol recognizes that judges' hands are tied with respect to responding to criticism of their actions in a case — and therefore calls upon lawyers within the group to set the record straight with regard to public attacks.[9]

Judges make a number of trade-offs when they join the bar — they know that certain of their free speech rights will be curtailed, and they know that they will be subject to public criticism — which could ultimately threaten their safety. Judges should also know that lawyers will stand with them in defusing attacks against them and their rulings.

The Rules of Professional Conduct contain a number of provisions mandating or recommending that lawyers comport themselves in a manner to support the judicial function, train their clients to do so, and take proactive steps to publicly correct unwarranted or inaccurate criticisms.

Deborah A. Winokur is counsel at Cozen O'Connor.

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[1] <https://apnews.com/article/maryland-judge-killed-andrew-wilkinson-pedro-argote-f5547d8c74b74421fdb2f153f85c0d61>.

[2] <https://www.bostonglobe.com/2022/06/20/opinion/i-know-firsthand-threats-judges-face-my-son-was-killed-my-husband-was-shot/>.

[3] <https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act>.

[4] <https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security>.

[5] <https://www.judges.org/news-and-info/the-verdict-is-in-on-judicial-security-judges-dont-feel-protected/>.

[6] Pavone v. Cardona, 3:2021 cv 01743 (S.D. Cal. Nov. 19, 2021).

[7] In Re: Marshall, 528 P.3d 653(N.M. 2023).

[8] Order in **Art Ask Agency v. The Individuals Identified on Schedule A,**  No. 20-cv-1666, dated March 18, 2020.

[9] American Board of Trial Advocates, Protocol for Responding to Unfair Criticism of Judges.

EXHIBIT 15

The South Carolina Court of Appeals

Donna B. Welch, individually and as Personal
Representative of the Estate of Melvin G. Welch,
deceased, Respondent,

v.

Advance Auto Parts, Inc., American Honda Motor Co.,
Inc., Atlas Asbestos Co, Atlas Turner, Inc. as successor
to Atlas Asbestos Co, a foreign company, Bahnson, Inc.,
Covil Corporation, Daniel International Corporation,
Davis Mechanical Contractors, Inc., Ellington Insulation
Company, Inc., Fluor Constructors International f/k/a
Fluor Corporation, Fluor Constructors International, Inc.,
Fluor Daniel Services Corporation, Fluor Enterprises,
Inc., General Parts, Inc. individually and as successor-in-
interest to Carquest Corporation; Goodrich Corporation
f/k/a The B. F. Goodrich Company, The Goodyear Tire
& Rubber Company, Graybar Electric Company, Inc.,
Honeywell International, Inc. individually and as
successor-in-interest to Allied Signal, Inc., as successor
to Bendix Corporation, Morse Tec LLC f/k/a Borgwarner
Morse Tec LLC, and successor-by-merger to Borg-
Warner Corporation, Occidental Chemical Corporation
as successor to Durez Corporation; O'reilly Automotive
Stores, Inc., Paramount Global f/k/a Viacomcbs Inc.,
f/k/a CBS Corporation, a Delaware corporation f/k/a
Viacom, Inc., successor-by-merger to CBS Corporation,
a Pennsylvania corporation, f/k/a Westinghouse Electric
Corporation, Pneumo Abex LLC successor-in-interest to
Abex Corporation, Redco Corporation f/k/a Crane Co.,
Reinz Wisconsin Gasket LLC f/k/a and/or successor to
Reinz Wisconsin Gasket Co. and Wisconsin Gasket
Manufacturing Co., a wholly owned subsidiary of Dco
LLC, Rust Engineering & Construction, Inc., Rust
International Inc., Southern Insulation, Inc., Spirax
Sarco, Inc., Union Carbide Corporation, Westrock
MWV, LLC individually and as successor-in-interest to

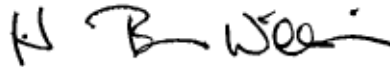
Westvaco, ZF Active Safety US Inc. f/k/a Kelsey-Hayes
Company, Defendants,

of which Atlas Turner, Inc. is the Appellant.

Appellate Case No. 2023-001096

ORDER

Appellant's motion to "confirm" the automatic stay or, alternatively, petition for supersedeas is denied. Appellant failed to petition the circuit court first or to satisfactorily establish that extraordinary circumstances made it impracticable to do so. *See* Rule 241(d)(1), SCACR ("Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court."). Because Appellant did not first petition the circuit court to supersede its order, the petition is denied.



C.J.

FOR THE COURT

Columbia, South Carolina

cc:

Aaron Daniel Chapman, Esquire
John D. Kassel, Esquire
Theile Branham McVey, Esquire
Jamie Rae Rutkoski, Esquire
Stephen Lynwood Brown, Esquire
Russell Grainger Hines, Esquire
James D. Gandy, III, Esquire
Peter Demos Protopapas, Esquire
John Kenneth Chandler, Esquire
Brian Montgomery Barnwell, Esquire
Ka'Leya Q. Hardin, Esquire
Todd Barnes, Esquire

FILED
Dec 01 2023

RECEIVED

Dec 04 2023

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2023-001461
Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiwi-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide

Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited is Appellant.

PROOF OF SERVICE

Charles W. Branham, III (SC Bar No. 106178)
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
T: 214-722-5990
F: 214-722-5991
tbranham@dobslegal.com

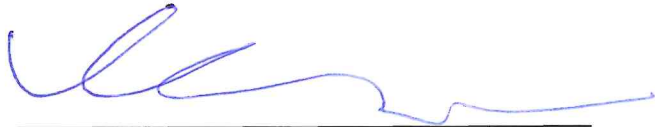
Theile B. McVey (SC Bar No. 16682)
KASSEL MCVEY ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202-1476
T: 803-256-4242
F: 803-256-1952
tmcvey@kassellaw.com
Other email: emoultrie@kassellaw.com

Attorneys for Respondent

I, Elizabeth Moultrie, of Kassel McVey, hereby certify that **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO CONFIRM AUTOMATIC STAY OR, ALTERNATIVELY, VERIFIED PETITION FOR SUPERSEDEAS** were served on all parties to this appeal on December 4, 2023, via email to their counsel of record:

Stephen L. Brown
sbrown@ycrlaw.com
Russell G. Hines
rhines@ycrlaw.com
James D. Gandy, III
tgandy@ycrlaw.com
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellant

Peter D. Protopapas, Esquire
pdp@rplegalgroup.com
John K. Chandler, Esquire
jchandler@rplegalgroup.com
Brian M. Barnwell, Esquire
bb@rplegalgroup.com
RIKARD & PROTOPAPAS, LLC
2110 N. Beltline Blvd, Columbia, SC 29204
PO Box 5640, Columbia, SC 29250
Receiver for "insurance assets"
of Atlas Turner, Inc. per appealed order



Elizabeth C. Moultrie