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16 JUL 2010 03:34 pm REGIONAL DEFENSE LITIGATION LAW FIRM

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July 16, 2010

VIA ELECTRONIC DELIVERY

Honorable Sandra Mazer Moss
Philadelphia Court of Common Pleas
Complex Litigation Center
City Hall, Room 622
Philadelphia, PA 19107

Attention: Donna Candelora, Esquire

CONTROL NUMBER:

ASBESTOS LITIGATION

Plaintiffs Counsel: Brookman, Rosenberg, Brown & Sandler, Howard, Brenner & Nass, P.C., Lockes Law Firm, Kline & Specter, P.C., Shein Law Center, Ltd., Paul, Reich & Myers, P.C., Baron & Budd, P.C., Simon, Eddins, Greenstone, LLP, and Law Offices of Peter G. Angelos, P.C.

In re: Asbestos Litigation
October Term 1986, No. 8610-0001

Plaintiffs' Response Due: _____
Defendants' Sur-Reply Due: _____

CERTAIN DEFENDANTS' MOTION FOR AN ORDER DIRECTING THAT TRIALS OF ASBESTOS CASES PROCEED IN ACCORDANCE WITH Pa.R.C.P. 224 AND OPPOSING THE AUTOMATIC IMPOSITION OF REVERSE BIFURCATION AND CONDOLIDATION

Dear Judge Moss:

The Court has requested that the parties to asbestos personal injury litigation in the Philadelphia Court of Common Pleas file appropriate motions addressing the Court's unwritten practice of indicating that asbestos

personal injury cases must be reverse bifurcated, as well as the consolidation of multiple cases for a single reverse bifurcated trial.

This Motion is filed by The Lincoln Electric Company, Hobart Brothers Company, Linde, LLC, and those additional entities whose names appear at the end of this motion (collectively, "these Defendants").

Although these Defendants acknowledge that this Court has a long history and wealth of experience trying, settling, and managing asbestos personal injury cases, over the many decades in which these cases have been brought the landscape of this litigation has undergone a paradigm shift. The method of handling these cases through reverse bifurcation that may have promoted a more prompt, consensual resolution and the conservation of judicial as well as the parties' resources, has proven in the current climate to be unworkable, unfair, and indeed, unconstitutional.

The three most important changes that have occurred and that have caused the rather tectonic shift in the litigation have been (1) the lower volume of cases;¹ (2) the significantly greater percentage of the trial docket consumed with malignancies (particularly mesotheliomas);² and (3) the advent of defendants with viable product and fiber release defenses that make a phase two trial all but inevitable in the majority of instances.³

For the reasons set forth in detail below, these Defendants oppose both the automatic ordering of reverse bifurcation for all asbestos cases and the consolidation of cases for a single reverse bifurcated trial because:

- Reverse bifurcation is an extraordinary measure that is not to be taken lightly or as a "norm." In short, a practice of reverse bifurcating cases carries with it no presumption of correctness, and it is somewhat extraordinary that these defendants, who oppose it, should have to make a motion to remove it.
- Whether or not one deems these Defendants and others as the moving parties, they should not bear the burden of proving that reverse bifurcation is wrong for these cases. There is no question in the case law of Pennsylvania and other jurisdictions that reverse bifurcation is an exceptional measure that must be undertaken only after a very careful examination of the facts and circumstances of an individual case, and is not appropriate as an "across the board" measure.⁴

Therefore, these Defendants respectfully suggest that the question before the court should not be whether to continue a practice of nonconsensual reverse bifurcation, but whether there is anyone who desires to have

¹ Lower volume: 7000 cases in the mid 1980s vs. fewer than 700 cases today.

² Greater percentage of malignancies: in the mid 1980s the typical population of asbestos claimants was 85% non-malignant, 13% lung cancer and other cancers, and 1-2% mesotheliomas vs. the proposed 2011 trial docket, which is composed of 86% malignancies (42% mesotheliomas alone) and 14% non-malignant cases.

³ Defenses: In the most recent set of cases addressed in the Weitz & Luxenberg request to add defendants to a group of 2011 mesothelioma cases, of the 78 defendants named in the six cases, at least 49 of those have viable encapsulation, non-fiber release or low-fiber release product defenses, and several of the remaining 29 have at least fiber-related product defenses. By contrast, the transcript of a hearing on May 19, 1976 in the case of *Tyler et al. v Keene* and numerous other asbestos plaintiffs, there were 21 defendants who were named and appeared at the hearing, all of which produced friable asbestos containing products from insulation to raw asbestos fiber to friable textiles, and many who were conspiracy targets.

⁴ Of course, it is possible that reverse bifurcation could be instituted as a matter of course if all parties agreed. Whether or not mutual consent provided the foundation for reverse bifurcation in Philadelphia at its inception, these Defendants were not a part of that original agreement, have not sought reverse bifurcation and do not consent to its use as a matter of course.

such a practice instituted. If there are, then those parties should be the movants and should bear the burden of both going forward and justifying the relief they seek in terms of the current litigation. To date, neither Plaintiffs in the current litigation nor Defendants have done so.

- To the extent that this Court intends to institute a practice regarding the form of the trial that departs from a one-plaintiff all-issues trial in favor of a more aggregative proceeding, the Court must make a written order including specific findings of fact and conclusions of law supporting these extraordinary procedures in the context of the state of asbestos litigation in Philadelphia today, and cannot, consistent with Due Process, impose a blanket order for reverse bifurcation on all asbestos personal injury cases.
 - the automatic implementation of reverse bifurcation in asbestos cases creates at the very least a "Local Rule" of court that has been adopted without the statutorily-mandated procedures for creating such a Rule, and unconstitutionally singles out "asbestos cases" for unfair and extraordinary treatment.
- The conditions that once may have made reverse bifurcation an effective and appealing tool for efficiently managing asbestos litigation for those involved in the litigation at the time of its adoption no longer exist. In the current asbestos climate, reverse bifurcation deprives these Defendants of Due Process of Law, virtually guarantees pro-Plaintiff awards in phase 2, and eliminates any opportunity for Defendants with "safe product" defenses to have their cases fairly tried to an impartial jury.

I. BECAUSE PLAINTIFFS HAVE NOT MOVED FOR THE AUTOMATIC IMPOSITION OF A REVERSE BIFURCATION RULE, THIS COURT SHOULD NOT ORDER IT

The classical structure of a common law tort action involves one Plaintiff bringing suit against one or more Defendants for injuries alleged to have been proximately caused by the Defendant(s). In modern asbestos personal injury actions a typical Plaintiff alleging injury from asbestos exposure brings suit against a host of defendants. For most jurisdictions over many years, and even today, asbestos personal injury cases are tried as all-issues cases in which the Plaintiff bears the burden of proving all the issues essential to his recovery, including exposure, injury, medical causation, liability, proximate causation and damages. Even today, after decades of asbestos, litigation the overwhelming majority of jurisdictions, including every jurisdiction in Pennsylvania other than Philadelphia, follows this "all issues" model, whether or not they aggregate multiple Plaintiffs' cases into a single trial.

Reverse bifurcation, in which a jury renders a verdict first solely on the question of whether a Plaintiff has an asbestos-related injury caused by some exposure to asbestos, has to be conceded by everyone to split causation and to artificially carve out certain limited issues, so that if the case does not resolve at the end of phase one there is no judicial economy in the reverse bifurcation process, and the defendant is most certainly prejudiced in its presentation in phase two.

The imposition of such an extraordinary trial form requires that, absent consent of all parties, the party seeking that type of trial format must move the Court for an Order permitting the bifurcation. The moving party, under well-established Pennsylvania law, bears the burden of demonstrating that the procedure is necessary to

prevent prejudice or promote convenience and comports with Due Process, and that there are no less drastic measures that could be employed that would achieve the same objectives.

Remarkably, the Plaintiffs in these cases have not made such a Motion. Apparently the plaintiffs believe that the force of outdated history is sufficient to up-end the fact that reverse bifurcation is an extraordinary measure and to place the burden on the Defendants to justify an all issues trial that is the norm in every other jurisdiction in the country and in Pennsylvania. With the greatest respect, these Defendants assert that the rote imposition of reverse bifurcation based on outdated history and an unwritten practice is not entitled to any deference or presumption of correctness. Rather, those seeking to impose this system must follow the requirements of the law in all respects, including filing a motion for the relief they seek.⁵

II. THIS COURT MAY NOT ORDER AUTOMATIC REVERSE BIFURCATION IN ALL ASBESTOS CASES ABSENT SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING ITS ORDER

Although a trial court has broad discretion to shape the form of trial, its discretion cannot be exercised in a manner that violates the parties' Due Process rights. The imposition of an unwritten rule broadly sweeping all asbestos personal injury cases under its umbrella, applying to all cases but made without specific findings of fact with respect to a given case, notice to the parties and a hearing on the record does indeed violate these Defendants' Due Process rights.

Legal scholarship established long ago that the form of a trial largely affects the outcome of the trial. A monumental shift away from all issues trials to mandated, automatically reverse bifurcated trials - especially in consolidated actions that raise the stakes dramatically for the Defendants - requires this Court to make a specific record finding facts and making conclusions of law supported by the facts of the case at hand.

Both the Supreme and Superior Courts have recognized that bifurcated trials are a rare and drastic exception to the normal practice of unified trials and that trial courts in any case in which bifurcation is contemplated must undertake an analysis of whether bifurcation is appropriate. *See Stevenson v. General Motors Corp.*, 521 A.2d 413 (Pa. 1987); *Wolk v. Wolk*, 464 A.2d 1359 (Pa. Super. 1983). The Pennsylvania Supreme Court has concluded that "the decision to bifurcate should only be made after the careful consideration of the trial judge. In determining whether to bifurcate a trial, the trial judge should be alert to the danger that evidence relevant to both issues may be offered at only one-half of the trial." *Stevenson*, 521 A.2d at 419.

The Pennsylvania Superior Court has rejected the automatic bifurcation of cases. *Wolk*, 464 A.2d at 1363. In *Wolk*, the Superior Court rejected Allegheny County's "accepted practice" of bifurcating certain issues in divorce cases and held that the trial court "failed to exercise its discretionary powers" when it routinely bifurcated divorce cases. *Id.* The Superior Court concluded that it would only defer to the trial judge's decision

⁵ It is perhaps not surprising that no plaintiffs' counsel in Philadelphia has moved for reverse bifurcation in asbestos cases, because at least one of them has opposed it in prescription diet drug (PPH) and hormone replacement therapy (HRT) trials before this very Court and in other contexts here in Philadelphia. The PPH and HRT experience demonstrates that plaintiffs and the Court recognize that the extraordinary relief of reverse bifurcation must be a case by case determination, and that if consent of all parties is not achieved, a very specific record must be made to justify its use.

to bifurcate if the judge “assemble[d] adequate information, thoughtfully studie[d] this information, and then explain[ed] his decision regarding bifurcation.” *Id.*

Pennsylvania appellate courts have consistently held that bifurcated trials are an exception to normal civil practice and that it is improper for trial courts to routinely bifurcate cases. Rather, the decision to bifurcate can only be made after the trial court carefully examines the particular facts of an individual case and determines whether bifurcation is appropriate. Those considerations must include avoidance of prejudice, promotion of convenience, and completely independent and non-overlapping issues. See Pa. R. C. P. 213 (b).

III. THE INFORMAL DEVELOPMENT OF AUTOMATIC REVERSE BIFURCATION IN ASBESTOS CASES HAS EFFECTIVELY CREATED A NEW LOCAL RULE OF PENNSYLVANIA CIVIL PROCEDURE WITHOUT ADHERING TO THE STRICT REQUIREMENTS OF Pa.R.Civ.P. 239, IN VIOLATION OF THE PARTIES’ RIGHTS TO DUE PROCESS OF LAW

Whether or not a trial court has the discretion in any single particular case to order an extraordinary procedure such as reverse bifurcation or consolidation with other cases, it is undeniable that this Court has made reverse bifurcation its “default setting” in all asbestos personal injury cases. Under this Court’s reverse bifurcation plan, this extraordinary procedure is to be automatically applied in literally hundreds of cases. This unwritten policy, unsupported by specific factual findings in a given case and applied in hundreds of pending cases, effectively creates a new Pennsylvania Rule of Civil Procedure specifically for a particular class of cases, to be levied against a particular class of Defendants, and has been implemented in violation of the Civil Rules Committee’s exclusive jurisdiction to create the Rules of Civil Procedure that apply throughout Pennsylvania.

All “local rules,” such as this Court’s policy of routine reverse bifurcation, must be in writing, made available at the Prothonotary’s office for public inspection, and published in the Pennsylvania Bulletin. Pa. R.Civ.P. 239. All local rules must be published, notice of their intended enactment must be given, and a period of comment must be allowed before new rules may be enacted. *Id.* These steps give the Civil Rules Committee of the Pennsylvania Supreme Court an opportunity to review local rules and, if necessary, recommend to the Supreme Court that the proposed Rule or change be suspended, vacated, or modified. Neither the Civil Rules Committee nor the Pennsylvania Supreme Court has considered the propriety or constitutionality of Philadelphia’s unpublished, unwritten, unsupported local rule requiring the automatic reverse bifurcation of asbestos personal injury cases. Thus, this Court in ordering the automatic reverse bifurcation of all asbestos personal injury cases has exceeded its authority, usurped the exclusive jurisdiction of the Rules Committee, and unconstitutionally deprived these Defendants of the Due Process guarantees inherent in the civil rule-making procedures required by Pennsylvania law. For this reason alone, this Court cannot order the automatic imposition of reverse bifurcation in asbestos personal injury cases.

IV. REVERSE BIFURCATION IS AN INAPPROPRIATE CASE MANAGEMENT TOOL FOR THE MODERN ASBESTOS PERSONAL INJURY CASE

When the flood of asbestos litigation threatened to overwhelm the courts, with careful study and much experimentation courts began to employ novel forms of trial. This Court in the mid-to-late 1970s experimented with various novel trial techniques in an attempt to reduce its backlog of over 7,000 cases. See *Jones v. Johns-Manville Corp.*, 22 Phila. 91 (Phila. C.C.P. 1991). This Court eventually employed the consensual use of

automatic reverse bifurcation and consolidation of asbestos trials. There is no question that the employment of consensual reverse bifurcation in the 1980s and 1990s played a significant role in reducing the backlog. However, in the decade of the 2000s, the most significant factor in reducing case volume nationally as well as in Philadelphia has been the virtual elimination of non-malignant cases.⁶

Despite the fact that the asbestos backlog has for all practical purposes been cleared in Philadelphia, this Court has maintained its historical posture on reverse bifurcation even as the cases involved in the litigation changed dramatically both as to the plaintiffs' diseases and the defendants and their products. But as the facts currently show, what once may have been an effective tool for case management and operated by consent of the parties is no longer an appropriate measure; the modern landscape of asbestos litigation reveals reverse bifurcation to be a bludgeon to be used against Defendants, depriving them of their Due Process right to a fair trial by an impartial jury.

When reverse bifurcation was first implemented in Philadelphia, the Defendants at trial did not present "safe product" defenses; they were, for the most part, manufacturers of friable asbestos-containing insulation products for which there was no claim of safety, at worksites where product presence was not seriously contested and where exposure in general was a virtual certainty. The consensual nature of the implementation of reverse bifurcation virtually eliminated any serious consideration of its more troublesome consequences, because trials rarely went beyond phase one.

More specifically:

- There was no complex litigation center and only a few judges sometimes available to try asbestos cases;
- There was a backlog of over 7,000 asbestos cases;
- It appeared to many judges and litigants that there was a danger if the cases were not processed at a reasonable speed that all of the available money would go to injured parties from other states and the defendants would ultimately go bankrupt;
- Most of the cases were going to trial, at least to begin the case;
- Most of the plaintiffs had a history of working at a shipyard in the Philadelphia area, primarily the Navy Yard and New York Ship. They worked either as pipe coverers, boiler makers or next to these trades in closed rooms on shipboard. They all had considerable asbestos exposure from pipe covering and cement as they were either insulators themselves or worked around the insulators who were tearing out old asbestos and installing new asbestos;
- Most of the claims were for non-malignant conditions, including fear and risk of cancer;
- Neither product identification nor fiber release from the products was an issue in these cases: the issue was typically whether the plaintiff had an asbestos related disease in light of other conditions that could or might exist as a result of a given plaintiff's lifestyle, e.g. smoking;
- The plaintiffs were proceeding on negligence as well as strict liability theories, which lengthened the liability portion of the trial significantly;
- Jury verdicts varied greatly and were unpredictable as jurors attempted to assess the risk and fear of future cancer;

⁶ The courts of Pennsylvania have contributed significantly to the reduction in non-malignant cases with decisions involving risk and fear of cancer and the non-compensable nature of cases involving pleural changes without impairment.

- Therefore, in the majority of cases, the major issues were whether the plaintiff actually had a compensable asbestos-related condition, and “how much” the jury would award;
- If the disease and the "value" of the claim were established, issues as to which products were in the proximity of a particular plaintiff were almost always resolved in advance. There were limited work sites, there was generally substantial asbestos exposure at each, and the same few supervisors testified as to which products were on which ships and when;
- Since there had been a track record as to the likelihood of which products would be found responsible, once there was a damage verdict, the defendants would often work out payment allocation among themselves without the need for a “Phase two” trial;
- As noted above, while there were issues as to whether asbestos in general caused a particular plaintiff's disease, there was rarely a dispute as to whether the products of the time were dangerous or about specific product presence at one of the limited jobsites. Therefore, while product identification might occasionally be an issue, there was rarely an issue as to specific product causation or liability once the product was identified;
- It was therefore very rare that a “Phase two” liability trial was necessary;
- Because of the thousands of cases and the shortage of judges, there was a prevailing view among the court and most counsel that procedures had to be put into place to move the litigation along and to see that Pennsylvania plaintiffs obtained some recovery before the available money all went to plaintiffs in other states;
- Therefore, reverse bifurcation, an unusual and drastic method of trying cases, was designed for the specific crisis brought on by the nature of the burgeoning asbestos litigation in the early years;
 - A massive backlog of cases
 - The fact that it generally was undisputed that the product involved gave off asbestos dust that caused disease
 - The need to simplify the issues for the jury rather than breaking up a case with an analysis of medical articles and testimony regarding what products were where at the shipyards
 - The fact that most cases settled once a damage figure was placed on the case without the need for a “phase two” liability trial.

In stark contrast, today's asbestos litigation brings before this Court a multitude of parties and issues that make reverse bifurcation not only inappropriate, but unwise and unconstitutional. Today's asbestos litigation poses an entirely different factual landscape:

- There is no longer a backlog of asbestos cases;
- The traditional asbestos defendants who supported reverse bifurcation have largely plummeted into bankruptcy;
- The overwhelming majority of the cases on the trial docket (86% in 2011) are malignancies as to which there may little if any dispute as to "general" asbestos causation but enormous and persistent disputes involving "product specific defenses," specifically encapsulation, fiber type, fiber release and specific causation, the presentation of which is hampered if not completely obstructed by the artificial splitting of causation resulting from reverse bifurcation;

- Unlike the industrial asbestos manufacturers who were defendants 20 years ago, the defendants in asbestos litigation today, whether brake and clutch companies, welding rod companies, or pump and valve manufacturers, have viable, credible fiber release and causation defenses. *See, e.g., Helen Freedman, Selected Ethical Issues in Asbestos Litigation, 37 Sw. U. L. Rev. 511, 511, 527 (2008).* As a result of the unique issues in a case involving such alleged exposures to these defendants' products, the defenses presented by these parties necessarily overlap into both phases of a reverse bifurcated asbestos trial;
 - The issues decided in each phase are not completely independent, but rather are inextricably intertwined, and therefore reverse bifurcation causes the issues to be illogically and confusingly split between the phases;
 - Thus, under reverse bifurcation, juries make determinations about general asbestos causation in phase one without information about how little of the plaintiff's asbestos exposure, if any, results from these products, whether any exposures from defendants' products are sufficient to cause disease and without information that numerous epidemiological studies show no association between working with such products and the development of mesothelioma and other asbestos-related diseases;
 - In most cases, therefore, the jury hears evidence of general asbestos exposure in phase one out of context and without understanding the role, if any, of the products of any of the specific defendants, and yet those defendants are relegated to sit idly by in phase one when matters of asbestos causation are presented, and are unable to present their product specific defenses until the liability phase begins.
- Because causation questions are split between phases one and two, phase two liability trials are a virtual certainty; and both documentary and testimonial evidence must be replicated in the two phases of the trial, thereby defeating any notions of judicial economy or convenience.

Despite these important issues, juries in asbestos cases in Philadelphia are routinely forced to consider damages in a vacuum—without evidence of whether the particular product of a defendant can release friable asbestos or has any causal connection to a plaintiff's alleged injuries. In fact, plaintiffs routinely present evidence in phase one about their use of defendants' products in order to prove general causation, yet defendants are unable in phase one to respond in a specific way to those allegations, thus leaving the jury with gross misperceptions in phase one as to the role of the defendants' products, if any, in causing plaintiffs' diseases.

In a reverse bifurcated trial, jurors are required to determine whether the plaintiff has an asbestos-related disease and calculate damages before they can be informed of the substantial epidemiological and scientific evidence showing that these products do not cause asbestos-related illnesses. Reverse bifurcation unconstitutionally deprives today's Defendants of the ability to present defenses in a logical and understandable way and at a meaningful time, i.e. before the jury has already committed to the belief that the Plaintiff has an asbestos-related disease and that the plaintiff should be compensated in a certain amount. In addition, reverse bifurcation invites abuses by plaintiffs' counsel who have, in certain cases, improperly informed jurors of the "consequences" of their failure to find any of these Defendants liable in phase two, i.e., that the damages awarded in phase one will be for naught and the plaintiff recovers nothing.

Thus:

- The non-consensual imposition of reverse bifurcation is an inevitably prejudicial, artificial division of causation in fact and proximate cause that illegally shifts the burden of proof to the defendants in the second phase;
- The non-consensual use of the same jury in phase one and phase two irreparably prejudices the defendants because the fundamentals of jury decision-making will unlawfully shift the burden of proof to the defendants in phase two to disprove their liability to pay the verdict the jury found in phase one;

V. ISSUES RELATING TO THE IMPLEMENTATION OF REVERSE BIFURCATION MUST BE ADDRESSED IN THE INDIVIDUAL CASE REGARDLESS OF WHETHER REVERSE BIFURCATION IS APPROPRIATE IN A GIVEN CASE

Moreover, even if in the abstract reverse bifurcation might in some circumstances be employed consensually when specific facts and circumstances warrant, additional specific safeguards and rules must be employed to protect these Defendants' rights. For example:

- Mesothelioma claims are nearly impossible to defend in phase one terms because of the overwhelming association of asbestos generally with the causation of mesothelioma generally. This fact gives the plaintiffs virtually free rein in phase one to establish themselves and their witnesses with the jury without serious cross-examination on the harder issues of individual product causation, and to argue damages in the absence of any real context for the overall case, and without the defendants' ability to put their product in context of all other exposures in the case. Thus, a defendant wishing to contest its individual product liability must sit through the plaintiffs' case twice and take on the extra burden of having to cross-examine adversarially many of the same witnesses who testified without having been subject to significant cross-examination in phase one. The witness, meanwhile, appears to the jury to be the same person who was unchallenged in phase one by a lawyer who now says that the witness' theories and opinions count for nothing. The jury cannot take their phase one verdict back, and so will inevitably look for ways in phase two to believe the plaintiff's witness and not the defendant whose lawyer is finally permitted to present his or her product specific defense.
- The question of whether a disease is "asbestos related" is one that is much more complicated than it first appears. Asbestos is not a single substance but a family of minerals that have different properties. Not all asbestos forms have the same propensity to cause disease, particularly malignancies like mesothelioma. However, in the current reverse bifurcation system, defendants who put forward a fiber type defense cannot do so in phase one, and are not permitted to even inform the jury in phase one that their product contains a type of fiber that does not cause the injury alleged. This situation alone demonstrates that the question of liability and causation

are inextricably intertwined, and that a defendant who has a fiber type defense is particularly prejudiced and damaged by being prevented from offering the complete defense in either phase.

- The same prejudice to the defense as occurs with mesothelioma cases also occurs in cases involving disease processes other than mesothelioma, just not in as stark a contrast. A defendant who unsuccessfully attempts to contend that a disease is not asbestos-related in phase one faces such a loss of credibility in phase two that its arguments are virtually doomed to fall on deaf jury ears. Whether it is asbestosis, lung cancer or some other alleged asbestos-related malignancy, the inability under reverse bifurcation to demonstrate the entire context of the plaintiff's exposure to an individual defendant's product in a unified proceeding, and the inability of the defendant to place its own product into the context of the plaintiff's entire health history, occupational and exposure history and lifestyle factors in particular, impermissibly splits the causation decision and again shifts the burden to the defendant to disprove causation in fact and in law in phase two when the jury has already found against the defendant in phase one.
- It is also a denial of due process and a squandering of judicial resources to refuse to have a unified trial if the defendant concedes general causation, because imposing the requirement of reverse bifurcation in these circumstances improperly emphasizes general causation over the determination of the specific role, if any, that a particular defendant's product played in causing the plaintiff's condition. Requiring reverse bifurcation in the circumstance where a defendant is willing to stipulate, for example, that a particular plaintiff incurred a condition generally caused by asbestos exposure, is simply allowing the plaintiff the virtually unfettered ability to present evidence that the plaintiff's counsel knows is uncontested, for the sole purpose of establishing their experts' credibility, engendering sympathy and imprinting the jurors with the plaintiffs' messages about asbestos and disease without any ability of the defense to place the issues in context.

VI. CONSOLIDATION OF ASBESTOS TRIALS INCREASES PREJUDICE TO THESE DEFENDANTS

In addition to being prejudiced by the routine reverse bifurcation of asbestos cases, the Defendants are further prejudiced by the policy of consolidating unrelated cases together for trial. Other courts, including the Second Circuit, have considered consolidation of asbestos cases for trial and found this procedure to be problematic. The Second Circuit recognized that consolidation risked an "individual plaintiff's -- and defendant's -- cause [becoming] lost in the shadow of a towering mass litigation." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (quoting *In re: Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)).

Consolidation of asbestos litigation unconstitutionally deprives the Defendants of their right to a fair trial by increasing the likelihood that jurors will become confused by the large amount of evidence that must necessarily be presented. Consolidation also allows jurors to be improperly influenced by other cases within the trial group, including those with different defendants and experts, and to consider evidence otherwise irrelevant or inadmissible to that case, a situation that further prejudices the ability of the Defendants to receive a fair trial.

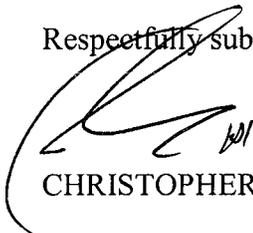
VII. ADOPTION OF OTHER DEFENDANTS' MOTIONS AND ARGUMENTS

These Defendants adopt and incorporate the motions and arguments of other defendants who oppose reverse bifurcation and consolidation of cases for trial to the extent that such motions and arguments are not inconsistent with those presented here.

CONCLUSION

Defendants respectfully request that this Court order that the trial of asbestos cases proceed in a non-bifurcated manner in accordance with Pennsylvania Rule of Civil Procedure 224.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Santoro', is written over the typed name. The signature is stylized and includes a date '7/16' at the end.

CHRISTOPHER N. SANTORO

IN RE:

ASBESTOS LITIGATION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
SPECIAL ASBESTOS DOCKET

OCTOBER TERM, 1986

NO. 0001

ORDER

AND NOW, this _____ day of _____, 2010, upon consideration of the Defendants' Motion for an Order directing that Trials of Asbestos Cases Proceed in Accordance with Pa.R.C.P.224 and Opposing the Automatic Imposition of Reverse Bifurcation and Consolidation, and any response(s) thereto, it is hereby **ORDERED** and **DECREED** that said Motion is hereby **GRANTED**. The trials of asbestos cases will proceed in an unbifurcated format pursuant to Pennsylvania Rule of Civil Procedure 224.

BY THE COURT:

MOSS, J.

CERTIFICATE OF SERVICE

I, Christopher Santoro, hereby certify that a true and correct copy of the foregoing Defendants' Motion for an Order directing that Trials of Asbestos Cases Proceed in Accordance with Pa.R.C.P.224 and Opposing the Automatic Imposition of Reverse Bifurcation and Consolidation, and proposed Order have been electronically filed and are available for viewing and downloading from the FJD electronic filing system to all Plaintiff's counsel of record on this 16th day of July, 2010.


CHRISTOPHER SANTORO