

EXHIBIT A

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ELIOT PRESENT

March 7, 2002

Honorable Allan L. Tereshko
Complex Litigation Center
Room 243 City Hall
Philadelphia, PA 19107

Re: Crown, Cork & Seal
Global Motion for Summary Judgment

Dear Judge Tereshko:

I have received Crown, Cork and Seal's Global Motion herein. In response I will note that the statute as enacted violates several constitutional provisions. I also note that the factual predicate that Crown was never in the asbestos business is a misstatement of facts that it has continued to make. Further, Crown's failure of due diligence of the possible problems it was acquiring in 1964 is not our problem and should not be imposed on us. Its contradictory claims to Wall Street and this Court are also of note. Twenty-Two years ago it conceded it manufactured asbestos. See Crown Cork & Seal v. AETNA 16 D&C3d 525. I will address the Constitutional issues first and then discuss the factual question.

THE STATUTE AT ISSUE VIOLATES SEVERAL PROVISIONS OF THE PENNSYLVANIA CONSTITUTION

I. THE STATUTE VIOLATES ARTICLE III, SECTION 32 AS IT IS A ONE COMPANY STATUTE

Article III, Section 32 provides as follows:

The general assembly shall pass no local or special law in any case which has been or can be provided for by general and specifically the General Assembly shall not pass any local or special law.

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Case ID: 86100001

7. Regulating Labor, Trade, Mining or Manufacturing
8. Creating corporations or amending, renewing or Extending the Charters Thereof.

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

The Courts have consistently interpreted the term "local or special" to bar a statute enacted for the benefit of one entity. Chambers v. City of Philadelphia, 250 PA 251, 95 A. 427 (1915); Perkins v. Philadelphia, 156 PA 539, 27 A. 356 (1893).

The most recent case on the subject is Harrisburg School District v. Hickok, 563 PA 391, 761 A.2d. 1132 (Pa 2000). In that case the Legislature had carved out a special exception within the Education Empowerment Act designed for the City of Harrisburg only. The Supreme Court noted its prior precedent that a classification is per se unconstitutional when the class consists of one member. id. 563 Pa at 397-398, 761 A.2d at 1135. The Court noted that the purpose of Article III Section 32 was to end the flood of privileged legislation for private purposes which was common in 1873. (Underlining added.) There can be no more private purpose than here, immunization of Crown from liability for the asbestos injuries caused by Mundet which it knew in 1963 was possible when Crown

acquired Mundet while allowing other companies to be sued.

A class consisting of one entity is per se unconstitutional. As Harrisburg makes clear, Crown's motion must be denied as Crown concedes that the whole purpose of the lobbying effort that resulted in the bill was to pass a statute solely for Crown's benefit. Crown accepted the provisions of the Pennsylvania Constitution Article 10 §2 and 3.

The Legislative debates are attached. These make clear that this was a one company bail out statute based on what the Legislature believed was Crown's financial situation to help it out. Unfortunately, such runs afoul of the Constitutional provisions.

II. THE STATUTE VIOLATES ARTICLE 3 SECTION 13

Article III, §13 bars any member of the Legislature from voting on a matter without disclosing his personal interest and bars him from voting. Senator Stack's firm represents Crown on this motion and has represented Crown in the past. He did not disclose his family's and firm's financial interest and voted. The only way this constitutional provision can be effectuated is to invalidate the statute for violation of this section.

III. THE STATUTE VIOLATES ARTICLE I, SECTION 11

Article I, §11 of the Pennsylvania Constitution

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provides as follows:

All courts shall be open; and every man for an injury done him in lands, goods, person or reputation shall have remedy by due course of law and right and justice administered without sale, denial or delay

Crown, in this statute has sought to violate this constitutional provision. The comments on the floor of the legislature do show a statute, of course is designed to benefit of one entity by enacting a statute designed to retroactively change the corporation law of the Commonwealth for one entity. The question is whether, under this provision of the Constitution the statute is acceptable.

THE RIGHT TO SUE CROWN, CORK HAD VESTED BY THE DATE OF THE ENACTMENT OF THE STATUTE

There are 3 subclasses within the category of those whom Crown seeks to deprive of their right to sue. The first are those whose cases were in suit against Crown. The second are those who were diagnosed but had not sued when the statute was enacted. As to both of these subclasses there can be no dispute that the right to sue Crown had vested and therefore under Article I §17 the statute cannot be applied to such cases to bar their claims retroactively.

The Legislature attempted to make the statute retroactive. This violates the above provision of the Constitution, see Smith v. Fenner, 399 PA 633, 161 A.2d. 150 (1960) and the statute must be construed to be prospective only, see Hartle v. Long, 5 PA 491 (1847). The only real

question is whether the statute is constitutional as to the category of plaintiffs not yet diagnosed when it was passed.

It is respectfully suggested that some of the opinions of the Courts have shown undue respect for the legislature and insufficient attention to the independence of the judiciary and its role in upholding the Constitution. These cases seem to view the legislature as Supreme. This statute is an example of a case in which the Courts should effectuate the rights set forth in Article I §1 of the Constitution as one company obtained special legislation deigned to protect it alone and deprive injured people of vested rights.

The real issue is whether Crown could bar claims against it by those not yet diagnosed on the date on which the statute was enacted. Several reasons suggest why it cannot do so. First, the disease process had already begun prior to the enactment of the statute. No one will dispute that scientifically the disease process that leads to an asbestos-caused disease begins many years before the discovery of the asbestos disease. The significance of this fact is great.

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The Superior Court noted in Cathcart v. Johns-Manville and other cases that in truth the disease process and the tort begins on the date that the injury occurred. Plaintiff has the right to sue at that point if he could prove the cellular damage and injury. This is of course beyond ability of medical science to determine in one person. However, the Courts extend that right to the date of injury.

Since Ayers v. Morgan, 397 PA 282, 154 A.2d. 788 (1950) it is clear that the Courts recognize that while the injury begins on impact, the cause of action arises on diagnosis. In essence, this means that the right to sue for that tort had vested on impact years before the enactment of the statute. Thus, the Legislature could not take away this vested right for an injury which had already begun.

The context in which this case arises is unusual. However, some assistance in evaluation can be gleaned from cases in other states involving asbestos. These cases arose when the Legislatures changed pre-existing law to cut off the rights of asbestos victims and victims of other product torts. In Jurich v. Garlock, 759 N.E. 2d. 1066 (Ind. Ct. of Appeals 2001) the Indiana Legislature had adopted a product liability statute of repose in 1978. In 1989 it adopted an exception for cases against miners and sellers of commercial asbestos. The Court held that a vested right was at issue since the inhalation and disease process began before the enactment of the statute id. at 1074. In Maryland the Legislature had enacted a cap on noneconomic damages. The

Maryland Courts have held that if plaintiffs prove medically that the disease process began before the enactment of the cap, then the cap was not applicable. Porter-Hayden v. Wyche, 128 MD APP 382, 338 A.2d. 326 (MD 1999), Owens-Corning v. Baumann, 125 MD App. 457, 726 A.2d. 745, 751 (1999). Jurich is interesting because of its focus on the precise language of the Indiana Constitution. That Constitution protected the right to a complete remedy at law. The interpretation of the statute at issue there is also of note. In that case the asbestos defendants urged an interpretation of the statute to allow claims against miners of asbestos but to bar claims against manufacturers under the 1978 statute of repose. The Court agreed with that interpretation of the 1989 statute and then held that such a statute was unconstitutional as a complete remedy was not provided to asbestos victims. Our Constitution, unlike Indiana, does not use the word "complete" remedy. Yet, the principle is the same, a remedy cannot be cut off.

Most interestingly since Crown represented facts to the Legislature reviewed by Senator Stack depositions of the senior employees of Crown need to be taken concerning the facts of the initial transactions and its true present financial problems as well as the 1980 case. Unlike other situations in which one must guess why the Legislature did what it did we know there was a factual basis. Under Rule 1035 Plaintiff needs the right to explore these reasons.

IV. THE LEGISLATIVE PURPOSE IN THE CLASSIFICATION MUST HAVE AT LEAST A RATIONAL BASIS WHICH THIS DOES NOT THUS VIOLATING STATE AND FEDERAL EQUAL PROTECTION RIGHTS

The Appellate Courts have upheld challenges to statutes of repose for violation of Article I §11. However, the Legislature must have a rational basis for the decision to deprive plaintiff of his right to sue Crown. The legislative purpose and goal is clear from Senator Stack's and Senator Waugh's remarks. The Legislature believed that Crown was somehow an unknowing victim of its own incompetence and such was the reason for the trial. In light of the 1980 lawsuit and the desire to force others to pay Crown's share this violates equal protection.

V. THE BILL VIOLATES THE COMMERCE CLAUSE

The issue of whether states can immunize their own corporation at the expense of out-of-state corporations has been extensively litigated. In the cases of PPG v. Commonwealth of Pennsylvania, 2001 WL 1523839, PPG v. Commonwealth of Pennsylvania, 1999 WL 396902, Anneseberg v. Commonwealth, 562 PA 581, 757 A.2d 338 and 562 PA 570, 757 A.2d. 333, the Supreme Court has held contrary to Crown's views on this matter.

VI. ARTICLES I §1 AND 26 ARE VIOLATED

Section 26 of the Constitution bars the Commonwealth from denying any person the enjoyment of any civil right and from discriminating against any

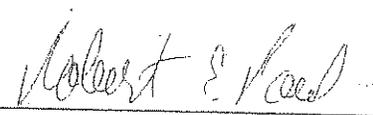
person in the exercise of any civil right. Section 1 provides for enjoyment and defense of life and possessing and protecting property. The statute interferes with those rights by barring plaintiffs from recovering damages for their injuries.

VII. FACTUAL ISSUES REMAIN FOR DETERMINING THE RATIONALE FOR THE STATUTE.

Depositions of Crown and Mundet personal need to be taken to determine whether Crown is an innocent victim or a knowing assumer of Mundet's liability in light of the 1980 lawsuit and the depositions of Stansbury, Mileaf and the other materials attached to the Kelley & Ferraro brief (Exhibit D). A list of our Exhibits is attached.

Very truly yours,

PAUL, REICH & MYERS, P.C.

BY: 

ROBERT E. PAUL

REP/bh

cc: Thomas Leonard
D. Michael Fisher

EXHIBIT LIST

EXHIBIT A DEBATES
EXHIBIT B JURICH
EXHIBIT C PORTER HAYDEN v. WYCHE
EXHIBIT D KELLEY & FERRARO BRIEF AND EXHIBITS
EXHIBIT E CROWN CORK & SEAL v. AETNA

[[RULES SUSPENDED]]A

The SPEAKER, The Chair, recognizes the majority leader.

Mr. PERZEL, Mr. Speaker, I move that the rules of the House be suspended to permit the immediate consideration of SB 216.

On the question,
Will the House agree to the motion?

The following roll call was recorded:

YEAS-194

- | | | | |
|--------------|------------|------------|------------------|
| Adolph | Evans, J. | Maier | Schoeder |
| Argall | Fairchild | Malfland | Schuler |
| Armstrong | Fesse | Major | Serimenti |
| Baker, J. | Fichter | Mandorino | Semmel |
| Baker, M. | Fleagle | Mann | Shaner |
| Barley | Fliok | Markosek | Smith, B. |
| Barzar | Foreier | Marsico | Smith, S. H. |
| Bastian | Frankel | Meyernik | Sotobay |
| Bebko-Jones | Freeman | McCall | Stabaak |
| Belardi | Gabig | McCoolan | Stairs |
| Belfanti | Ganuron | McGill | Steelman |
| Benningshoff | Grist | McInturman | Stech |
| Birmelin | George | Mellhinney | Stetler |
| Bishop | Godshall | McNeughton | Stevenson, R. |
| Blaum | Gordner | Meilo | Stevenson, T. |
| Boyes | Grucela | Metcalf | Srittmatter |
| Browne | Guitaa | Michiovic | Sturia |
| Bunt | Habay | Mianozie | Sura |
| Bulkoivitz | Hshanka | Miller, R. | Tangretti |
| Buxton | Haant | Miller, S. | Taylor, J. |
| Cabaghirone | Hshai | Mundy | Thomas |
| Cappelli | Hartert | Myers | Tigue |
| Casario | Harper | Nailer | Travagito |
| Chawley | Hasy | Nickol | Treflo |
| Civota | Hennessey | O'Brien | Trich |
| Clark | Herman | Oliver | Tulli |
| Clymer | Hershey | Pallone | Turza |
| Cohen, L. L. | Hess | Perzel | Vance |
| Cohen, M. | Haracy | Petrarca | Vean |
| Colafalla | Hutchinson | Petrone | Vitali |
| Coleman | Jadlowico | Phillips | Walko |
| Cornell | James | Pickett | Wansam |
| Carrigan | Josephs | Pippy | Washington |
| Costa | Kaiser | Pistalis | Waters |
| Coy | Keller | Preston | Watson |
| Creighton | Kernay | Raymond | Williams, J. |
| Cruz | Kirkland | Readshaw | Will |
| Curry | Krebs | Rieger | Wopas |
| Dalley | LaGrotta | Roberts | Wojnarowski |
| Daley | Laughlin | Robinson | Wright, G. |
| Dally | Lawless | Rostuck | Wright, M. |
| DeLuca | Lederer | Rohrer | Yewcic |
| Dermody | Loh | Kooney | Youngblood |
| DeWeese | Lescovitz | Ross | Yudichak |
| DiGirolamo | Leviatsky | Sabato | Zimmerman |
| Diven | Lewis | Samuelson | Zug |
| Donatucci | Lucyk | Santoni | |
| Eachus | Lynch | Sather | |
| Evans, D. | Blackereth | Saylor | Ryan,
Speaker |

NAYS-0

NOT VOTING-0

EXCUSED-8

- | | | | |
|-------|---------|---------|---------------|
| Allen | Egolf | Rubley | Steil |
| Bard | Reinard | Ruffing | Taylor, E. E. |

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The SPEAKER, Mr. Coy.

Mr. COY, Return to the order of business of leaves of absence and place the gentleman from Allegheny, Mr. MICHLOVIC, on leave for the balance of the day.

The SPEAKER, Without objection, the gentleman will be added to the leave list and his leave approved. The Chair hears no objections.

[[CONSIDERATION OF SB 216 CONTINUED]]A

On the question recurring,

Shall the bill pass finally?

The SPEAKER, Agreeable to the provisions of the Constitution, the yeas and nays will now be taken.

The following roll call was recorded:

YEAS--192

Adolph	Evans, J.	Mauer	Schuler
Argall	Fairchild	Maltland	Scrimment
Armstrong	Feese	Major	Semmel
Baker, J.	Fisher	Manderingo	Shaner
Baker, M.	Fieagle	Mann	Smith, B.
Barley	Flick	Markosak	Smith, S. H.
Batzer	Forcier	Marsico	Solobay
Bastian	Frankel	Mayeralk	Seabach
Behko-Jones	Fragman	McCall	Stais
Belardi	Gabig	McGeehan	Sizelman
Belfanti	Gannon	McGill	Sizer
Berninghoff	Geist	McIlhanna	Stetler
Birmelin	George	McIlhinney	Stevenson, R.
Bishop	Godshall	McNaughton	Stevenson, T.
Blaum	Gordner	Melio	Stratmeyer
Boyes	Grucela	Metzoff	Sturin
Browne	Gruetz	Mitcovic	Surra
Bunt	Habay	Miller, R.	Tangretti
Burkovicz	Haluska	Miller, S.	Taylor, J.
Buxton	Hanna	Mundy	Thomas
Callagirono	Harhai	Myers	Tigue
Cappelli	Harhart	Nailer	Travaglio
Casorio	Harper	Nichel	Trolio
Cawley	Hassay	O'Brien	Trick
Civera	Hennessey	Oliver	Tulfi
Clark	Herman	Pozzel	Turzai
Clymer	Hershey	Pebracka	Vance
Cohen, L. I.	Hess	Petrone	Veon
Cohn, M.	Hortoy	Phillips	Vitall
Colafella	Hutchinson	Pickett	Walke
Coleman	Jadlowiec	Piggy	Wansacz
Cornell	James	Pizzella	Washington
Corrigan	Joseph	Freston	Waters
Cosia	Kaiser	Raymond	Watson
Coy	Keller	Readsnow	Williams, J.
Croighton	Kenny	Rieger	Will
Cruz	Kirkland	Roberts	Wogan
Curry	Krebs	Robinson	Wojnarowski
Dalley	LaGratta	Rachuck	Wright, G.
Daley	Laughlin	Rohrer	Wright, M.
Daily	Lawless	Rooney	Yowse
DeLuca	Lederer	Ross	Youngblood
Dermody	Leh	Samato	Yudichak
DeWeese	Lescovitz	Samuelson	Zimmerman
DiGirolamo	Lavdansty	Santoni	Zug
Diven	Lewis	Sather	
Donatucci	Lucyk	Saylor	
Eachus	Lynch	Schroder	Ryan,
Evans, D.	Maskerati		Speaker

NAYS--1

Fallone

NOT VOTING--0

EXCUSED--9

Allen Michlovic Rubley Stell

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SENATOR J COSTA

Fax: 717-783-5976

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Hard
Egolf

Reinard

Ruffing

Taylor, E. Z.

The majority required by the Constitution having voted in the affirmative, the question was determined in the affirmative and the bill passed finally.

Ordered, That the clerk return the same to the Senate with the information that the House has passed the same with amendment in which the concurrence of the Senate is requested.

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DECEMBER 11,

An Act amending the act of August 6, 1941 (P.L.861, No.323), referred to as the Pennsylvania Board of Probation and Parole Law, further providing for membership of an advisory committee.

Considered the second time and agreed to,
Ordered, To be printed on the Calendar for third consideration.

BILLS OVER IN ORDER

SB 533 and SB 537 - Without objection, the bills were passed over in their order at the request of Senator PICCOLA.

BILL ON SECOND CONSIDERATION

SB 656 (Pr. No. 1574) - The Senate proceeded to consideration of the bill, entitled:

An Act amending Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for definitions; defining the offense of unlawful access to information; and further providing for unlawful use of computer and for bases of personal jurisdiction over persons outside this Commonwealth.

Considered the second time and agreed to,
Ordered, To be printed on the Calendar for third consideration.

BILL OVER IN ORDER

HB 1333 - Without objection, the bill was passed over in its order at the request of Senator PICCOLA.

REPORTS FROM COMMITTEES

Senator THOMPSON, from the Committee on Appropriations, reported the following bill:

HB 1944 (Pr. No. 3070) (Amended) (Rereported)

An Act amending Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes, authorizing municipalities to deny issuing permits, variances, licenses or other approvals to persons who are delinquent in tax payments or are in violation of certain codes, statutes or regulations; codifying provisions on taxation and fiscal affairs for cities of the first class; making repeals; and providing for funds for specified fines and penalties.

Senator BRIGHTBILL, from the Committee on Rules and Executive Nominations, reported the following bill:

SB 216 (Pr. No. 1617) (Amended) (Rereported) (Concurrence)

An Act amending Titles 15 (Corporations and Unincorporated Associations) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for limitations on asbestos-related liabilities relating to certain mergers or consolidations; and further providing for certain statutes of limitations and for certain transfers.

SB 696 (Pr. No. 1618) (Amended) (Rereported) (Concurrence)

An Act amending the act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank and Spill Prevention Act, defining "environmental media"; and providing for certain notification when there are releases from storage tanks.

SB 837 (Pr. No. 1619) (Amended) (Rereported) (Concurrence)

An Act amending the act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank and Spill Prevention Act, further providing for payment of certain claims from the Underground Storage Tank Indemnification Fund; and for Underground Storage Tank Environmental Cleanup Program.

HB 1633 (Pr. No. 3033) (Rereported) (Concurrence)

An Act amending the act of June 2, 1915 (P.L.736, No.338), known as the Workers' Compensation Act, further defining "occupational disease."

SPECIAL ORDER OF BUSINESS
SUPPLEMENTAL CALENDAR No. 1

SENATE CONCURS IN HOUSE AMENDMENTS
AS AMENDED

SB 216 (Pr. No. 1617) - The Senate proceeded to consideration of the bill, entitled:

An Act amending Titles 15 (Corporations and Unincorporated Associations) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for limitations on asbestos-related liabilities relating to certain mergers or consolidations; and further providing for certain statutes of limitations and for certain transfers.

On the question,
Will the Senate concur in the amendments made by the House, as amended by the Senate, to Senate Bill No. 216?

Senator PICCOLA, Madam President, I move that the Senate do concur in the amendments made by the House, as amended by the Senate, to Senate Bill No. 216.

On the question,
Will the Senate agree to the motion?

The PRESIDING OFFICER. The Chair recognizes the gentleman from Bucks, Senator Tomlinson.

Senator TOMLINSON, Madam President, an amendment that was put into Senate Bill No. 216 in the Committee on Rules and Executive Nominations is an amendment that will help the company Crown Cork & Seal, an international company with its world headquarters located in Philadelphia, about 5 minutes from my district. Crown Cork & Seal is a company that makes cans and bottles and bottle caps. It has a thousand employees and a payroll of about \$47 million, pays local taxes and State taxes of about \$4 million, and besides that it does about a billion dollars'

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worth of business in the State of Pennsylvania with other Pennsylvania companies. So, its financial impact on this State is very, very important, and at a time when we are losing more and more jobs and at a time when we are losing good, family-sustaining jobs, and at a time when we are losing manufacturing jobs, this company is critically important to the financial welfare of many, many families in my district.

But something has happened to them. They have been under siege by litigants and lawyers from Texas and Mississippi, and they are now paying to the tune of about \$100 million a year in litigation and claims to people who have asbestos claims against Crown Cork & Seal.

Now, the thing that aggrieves me about that is that Crown Cork & Seal does not and never has made asbestos or used asbestos in its products. It did, however, in 1963 acquire a bottle cap company that had an asbestos division, but within 90 days sold off that division and relieved itself of that business. Because of that and an investment of about \$6 million, they now have paid out almost \$300 million in claims in Texas and Mississippi. What that has done to this company is destroyed its bond rating. Its bond rating is now junk-rates bonds, it is having difficulty borrowing money, and that has impacted on the company very, very severely. I think it is important that we try to protect Pennsylvania jobs and a Pennsylvania company against out-of-State litigants when they do not even have asbestosis. Not one of the claimants has been found to be sick or have asbestosis, and the company does not make asbestos. So, what we have done here is tried to limit the liability of the company to the amount that it paid for the subsidiary that it bought in 1963, and that is about \$6 million.

Madam President, it does not make any sense to me to have an 80-year-old litigant in Mississippi who does not have asbestosis get an award of \$25 million from a company that did not make asbestos. Yet, I have a retired couple in my district who worked all their life, raised a family, they have now retired, they have done everything right, they have saved their money, and now they are looking at losing their pension, and they certainly have looked at the stock they bought from a company that they worked for all their life go from \$45 to \$50 a share down to about \$1.50 a share.

It makes no sense to me that I have people who are 55 years of age working in Bensalem, Philadelphia, Wilkes-Barre, Connellsville, working and giving a lot of their life to this company who are now not sure they are going to have a job, when a 55-year-old litigant in Mississippi gets a \$25 million award. What we are doing is transferring money from a company that makes bottles and cans to people in Mississippi and Texas who do not have asbestosis. Yet, I have workers who are working for a company who are worried about their jobs, who are worried about their futures, who are worried about their retirements, and who are worried about their pensions.

So, Madam President, I ask that we adopt Senate Bill No. 216 with the amendment that Senator Conti put into it in the Committee on Rules and Executive Nominations, and I ask for the Members' support on this issue.

The PRESIDING OFFICER: The Chair recognizes the gentleman from Philadelphia, Senator Stack.

Senator STACK: Madam President, I also rise in support of Senate Bill No. 216. I rise today to discuss legislation that will have an important impact on Pennsylvania public policy. It should be a basic governmental interest to make sure our corporate merger laws do not unfairly expose innocent companies to ruin solely because of a merger.

It is now evident that as an unforeseen consequence of mergers that happened in the past, Pennsylvania corporations that never themselves produced, sold, or installed asbestos products may become subject to asbestos-related liabilities. Similarly, the amount of assets fairly available to satisfy those asbestos-related liabilities may have become unfairly and unjustly enlarged. There is an unprecedented avalanche of asbestos-related claims made in the United States today. What has been described by the U.S. Supreme Court as an elephantine mess that the court has called out for legislative solutions. In view of this historically unprecedented situation, it is an essential governmental interest and matter of public policy that the amount of assets available to satisfy asbestos-related claims be fairly limited to the value of assets of the person or company that actually caused the damage through the production, sale, or installation of asbestos.

What this all boils down to is really an issue of fairness. That is the goal of this legislation, to achieve some measure of fairness for Pennsylvania companies like Crown Cork & Seal. Now, I believe many of you are familiar with the problems that Crown Cork & Seal is facing, but I want to provide a brief summary to put this issue into perspective.

Crown Cork & Seal, a solid Pennsylvania company that employs 1,000 Pennsylvania residents and contributes close to \$1 billion to the State economy, is teetering on the brink of bankruptcy. It is in this predicament, in large part, because of an avalanche of asbestos-related lawsuits the company faces, hundreds of thousands of lawsuits amounting to hundreds of millions of dollars in claims. Crown Cork & Seal faces these lawsuits and this dire financial situation despite the fact the company never manufactured, sold, or installed a single asbestos-containing product, not a single asbestos product in the company's 100 year history.

The origins of this problem began some 40 years ago when Crown Cork & Seal, a manufacturer of bottle caps and beverage and food containers, was seeking to expand its operations. As part of that effort, it acquired a stock interest in Mundet Cork Company, a manufacturer of cork-lined bottle caps, called crown corks, that were first invented in the 1800s by Crown Cork & Seal's founder. A small division of Mundet, prior to any Crown involvement with the company, had at one time manufactured cork and asbestos insulation. However, those asbestos manufacturing operations were shut down before any Crown involvement with Mundet. In addition, what was left of that insulation division was sold off to another company within 93 days of Crown's first stock interest in Mundet, and 2 years later the remainder of Mundet was merged into Crown.

Now Crown's very existence is threatened, the result of an avalanche of lawsuits against the company for a product it never produced or sold. Today, we have a chance to restore fairness for companies like Crown Cork & Seal. We have in this amendment a fair and equitable solution. One section of the amendment limits liability inherited solely because of the merger law to the total

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value of the assets of the merged company that was actually in the asbestos business. And in an independent section, the amendment places the assets of a Pennsylvania corporation that exceed that total value beyond the reach of claimants. The amendment eliminates what is essentially a windfall to claimants, a windfall that is destroying innocent corporations and innocent working people's jobs.

The amendment to Title 15 that will become law as part of Senate Bill No. 216 is substantively the same as the amendment to section 7104 of Title 42 in Senate Bill No. 818, with revisions to certain terms to conform with the definitions in Title 15.

Now, I know many of my colleagues are concerned about insuring that individuals injured by asbestos receive just compensation, but it should be those companies that were actually involved in the production and installation of asbestos that should bear the cost of compensating individuals exposed to asbestos and suffering health problems. Crown Cork & Seal is not one of those companies. Beyond that fact, there are typically dozens, if not hundreds, of companies named in asbestos lawsuits. Do not let anyone fool you by saying that these people will not be compensated. I think it is clear they will. More importantly, they will be compensated by the companies that actually bear some responsibility.

I have also heard arguments against the bill that say it will only apply to Pennsylvania claimants. That is plain wrong. This bill will apply to out-of-State claimants in out-of-State courts. Yes, in the case of Crown Cork & Seal, claims against Mandet will continue to be filed in out-of-State courts, and each court will use its own State liability law to determine the impact that Mandet's products had on claimants. However, each out-of-State court will have to look to Pennsylvania corporate law to determine the extent which Crown, as a successor by merger, is responsible for Mandet's liability.

Pennsylvania public policy should insure that domestic corporations like Crown Cork & Seal that engage in a merger do not become the subject of unfair, unjustifiable, and unprecedented liability solely as a result of the merger.

This legislation also provides protections for working families and retirees. Specifically, the legislation states that the provisions shall not apply to insurance companies, workers' compensation benefits, collective bargaining agreements, or obligations arising under the National Labor Relations Act. These protections, as well as a significant number of Pennsylvania jobs this bill will save, are why so many labor unions are backing this legislation. The International Association of Machinists and Aerospace Workers, the Teamsters, and the Seafarers International Union, as well as other local Pennsylvania unions, are all supporting this bill. It is not often that Pennsylvania's business community and labor unions join together in support of an issue such as this. When they do, I think it is important to take notice.

Today, we have the opportunity to make a significant statement in terms of Pennsylvania's public policy. By voting "yes," you can ensure that a major Pennsylvania company like Crown Cork & Seal is treated equitably, and that jobs will be protected for our Pennsylvania citizens and families.

Thank you, Madam President.

The PRESIDING OFFICER: The Chair recognizes the gentleman from York, Senator Waugh.

Senator WAUGH, Madam President, the legislation before us today, Senate Bill No. 216, is legislation that I support. I rise today to just make a few comments for the record on the proposal. It has obviously been here for quite some time in the General Assembly and been identified, as the two speakers before me so eloquently pointed out, as the Crown Cork & Seal legislation.

I would like to, first of all, just say for the record, make no mistake, this legislation does affect some 150 to 200 jobs in the legislative district that I represent. In Hanover, there is a Crown Cork & Seal plant. But I would like to just say to the Members briefly that there is really more to this legislation than just the jobs that we have heard about. Before you make your decision, please consider the subject, and that subject is asbestos litigation. Under the history and future of asbestos-related litigation in the United States, asbestos claims have been going on for nearly a generation, Madam President. Tens of thousands of claims are filed each year by a relatively small number of "specialized," quote, unquote, law firms. It has been said that the asbestos attorneys, as they are called, file claims using a shotgun approach. This method of naming claimants is that they list every possible manufacturer of asbestos products or a parent corporation that may have been the cause of harm to their clients. After a court finds liability or the company is ready or agrees to settle the lawsuit, the lawyers simply go after the deepest pockets to satisfy that judgment.

Over the years, the list of defendants with a direct relationship to asbestos manufacturing and installation has really been shrinking. Corporations named as defendants in these suits have been falling into bankruptcy, quite frankly. When one of the big guys falls, their pockets are finally empty, the asbestos attorneys focus their efforts on the next biggest, and then the next, and then the next. Right or wrong, that is just the way the game is played in asbestos litigation. Since 1987, 28 national companies have declared or been involved in bankruptcy because of asbestos-related claims. Among those corporations that have fallen in just the past year alone, Owens Corning International, W. E. Grace Company, Babcock and Wilcox Company, Armstrong World Industries, and G-I Holdings. All of these corporations have sought bankruptcy protection because of liabilities from claims for asbestos-containing products that they stopped using decades ago. The fact is, more than 40,000 asbestos-related cases are filed each year; 40,000 asbestos-related cases are filed each year. Even more startling, 1,200 companies have been drawn into asbestos litigation so far. Even though asbestos has not been used since the mid-1970s, insurance experts believe that claims will continue to be filed until the year 2050. By then the tab for asbestos-related claims is expected to hit \$200 billion in compensation and punitive damage payments. Madam President, that is equivalent to the budget of the Commonwealth of Pennsylvania for 10 full years.

A recent study conducted by the Rand Corporation's Institute for Civil Justice predicts that all of the remaining asbestos manufacturers will be driven into bankruptcy within the next 2 years alone. The study goes on to predict that when the companies that actually caused the harm all go under, asbestos attorneys will file claims against a whole new list of targets, including oil refining businesses, retailers, automobile manufacturers and distributors of automobiles, textile manufacturers, and other businesses, busi-

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nesses that had little or absolutely no relationship to asbestos products or asbestos industries.

I ask the Members of this body to look to their own senatorial districts. Think about it. Consider whether you have a company, a manufacturer, a retailer, a refinery that could be named as a defendant in an asbestos-related claim sometime in the near future. According to the Rand Corporation study, every Senate Member likely does, and in my case, as I pointed out earlier, there are more than 150 employees of the Crown Cork & Seal Company in York County. I am deeply concerned about those workers, and I am concerned about the futures for their families. I have received a number of letters, phone calls, and faxes from them over the last several weeks. I would like to give you one example. This one constituent wrote to me with his perspective. His sentiments were echoed time and time again in the messages I received. Here is what he wrote: quote, "The company I work for was in the wrong place at the wrong time. They are getting hammered 40 years after the temporary ownership of an asbestos-producing company, even though they never even produced asbestos, and now we are being pushed to the brink of financial ruin by lawsuits," unquote. They have families, homes, hopes for the future that may well ride on the passage of this bill.

Make no mistake, Madam President, I support Senate Bill No. 216 for the jobs, the constituents that I have just alluded to, but any legislation, in my book at least, that we pass here really has to be fundamentally fair, and that was mentioned earlier by Senator Stack. Senate Bill No. 216 is fair. I doubt that there is anyone who would stand on this Senate floor today and argue that persons afflicted with asbestosis or a malignant cancer of some type related to asbestos inhalation should not be compensated for their injury. There is no one in this Senate who would say compensation is not due if you have that type of an injury. Certainly, they should receive compensation. They have been harmed, they should be allowed to go after the companies that manufactured and installed asbestos products and be permitted to extract a fair, a fair amount of compensation for the harm done to them.

Madam President, that is exactly what the legislation before us today does. It does nothing to stop a person suffering from an asbestos-related injury from going after the ones who are responsible for causing the harm. This legislation is about ensuring that the list of potential or possible defendants in these lawsuits only includes the ones that have actually done harm. Today that list of defendants includes a company that is headquartered in Pennsylvania, with employees in my senatorial district. It is a company that never, ever manufactured or installed an asbestos product in all the years of its operation. Today it is Crown Cork & Seal. If the Rand Corporation study is to be believed, in the not-too-distant future that hit list of named defendants and asbestos-related claims will possibly include a company in the senatorial district that you represent, with employees that you serve as constituents.

I urge your support of this legislation this evening. Thank you, Madam President, for the time.

The PRESIDING OFFICER. The Chair recognizes the gentleman from Schuylkill, Senator Rhoades.

Senator RHOADES. Madam President, will Senator Tomlinson submit to interrogation.

Senator TOMLINSON. Yes, Madam President.

Senator RHOADES. Madam President, will this amendment affect anthracosilicosis or any black lung claims?

Senator TOMLINSON. Madam President, no, it will not. In fact, as Senator Waugh and Senator Stack have stated, it will not affect those even with asbestosis claims, so it will not affect black lung.

Senator RHOADES. Madam President, it affects no present, no future black lung claims?

Senator TOMLINSON. No, Madam President.

Senator RHOADES. Madam President, and it is not intended to limit anthracosilicosis or black lung claims?

Senator TOMLINSON. Madam President, that is true; it is not intended to limit that.

Senator RHOADES. Thank you, Madam President.

POINT OF ORDER

The PRESIDING OFFICER. The Chair recognizes the gentleman from Philadelphia, Senator Stack.

Senator STACK. Madam President, I rise to ask the Chair for a ruling under Senate Rule XXI, section 2. As a partner in a law firm that represents Crown Cork & Seal, is it appropriate for me to vote on this bill, or should I recuse myself?

The PRESIDING OFFICER. The Senator has requested a ruling from the Chair as to whether he is required to vote on the motion. He cites his membership in a law firm that is involved in the matter. The rules require that a Member not voting have a direct pecuniary interest in the outcome of the matter before this body. We find that as an attorney, Senator Stack is a member of a class and has, at best, if any interest, an indirect pecuniary interest, and it is the ruling of the Chair that you are required to vote on the motion.

Senator STACK. Thank you, Madam President.

And the question recurring.

Will the Senate agree to the motion?

The yeas and nays were required by Senator PICCOLA and were as follows, viz:

YEA-44

Armstrong	Greenleaf	Mellow	Stack
Bodack	Holl	Mowery	Stout
Boscote	Hughes	Murphy	Thompson
Brightbill	Jubasier	Musca	Tomlinson
Conif	Kuzniec	O'Pake	Wagner
Connan	Kitchen	Piccola	Waugh
Costa	Kukovich	Funt	Weniger
Dent	LaValle	Rhoades	White, Donald
Erickson	Lanmond	Robbins	White, Henry Jr
Fumo	Logan	Servani	Williams, Anthony E.
Gerlach	Madigan	Schwartz	Wozniak

NAY-5

Ezell	Orin	Tortagious	Williams, Constantine
Heston			

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Secretary of the Senate inform the House of Representatives accordingly.

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Court of Appeals of Indiana

Carole JURICH, individually and as Special
Administrator of the Estate of
Nicholas Jurich, Appellant-Plaintiff,
v.

GARLOCK, INC., et al., Appellees-Defendants.

No. 45A03-0010-CV-366.

Oct. 18, 2001.

Spouse, as an individual and administrator of deceased pipe fitter's estate, sued manufacturers of asbestos-containing products. The Superior Court, Lake County, Jeffrey J. Dywan, J., granted summary judgment for manufacturers, and spouse appealed. The Court of Appeals, Barnes, J., held that: (1) exception to statute of repose on asbestos claims applied to entities that sold commercial asbestos, even if they did not mine it; (2) exception did not apply to pipe fitter's claims as sellers of asbestos-containing products were not selling commercial asbestos; but (3) statute of repose was unconstitutional as applied to pipe fitter's claims.

Reversed and remanded.

West Headnotes

[1] Statutes ⇨ 206
361k206

[1] Statutes ⇨ 212.6
361k212.6

All statutory language is deemed to have been used intentionally; words or clauses in statutes are to be treated as surplusage only in the absence of any other possible course.

[2] Limitation of Actions ⇨ 95(5)
241k95(5)

Exception to statute of repose for asbestos-related product liability claims against "persons who mined and sold commercial asbestos," which exception provided that cause of action accrued on date when the injured person knew he or she has an asbestos-related injury or disease, applied to entities that sold commercial asbestos, even if they did not mine it. West's A.I.C. 34-20-3-2.

[3] Limitation of Actions ⇨ 95(5)
241k95(5)

Sellers of asbestos-containing products did not sell "commercial asbestos" for purposes of exception to statute that provided that asbestos-related product liability claims accrued against "persons who mined and sold commercial asbestos" when an injured person knew he or she had an asbestos-related injury or disease, as "commercial asbestos" referred to either raw or processed asbestos that was incorporated into other products, rather than to products which contained some components composed of asbestos. West's A.I.C. 34-20-3-2.

[4] Constitutional Law ⇨ 45
92k45

A court should not formulate a rule of constitutional law broader than is required by the precise facts at issue.

[5] Limitation of Actions ⇨ 170
241k170

Regardless of whether a product has an inherent defect at the time of its initial delivery, the statute of repose may constitutionally bar a product liability claim if no injury actually results from that defect until after ten years from the product's initial delivery. West's A.I.C. Const. Art. 1, § 12; West's A.I.C. 34-20-3-1(b).

[6] Constitutional Law ⇨ 38
92k38

A facially constitutional statute may be unconstitutional as applied to a particular plaintiff.

[7] Limitation of Actions ⇨ 4(2)
241k4(2)

Statute of repose that would have otherwise barred cause of action for asbestos-related injury was unconstitutional as applied to injured worker's claim, where injury occurred before the repose period expired but did not manifest itself due to a very long latency period until after the expiration of repose period, as a claim that exists cannot be constitutionally barred before it is knowable. West's A.I.C. Const. Art. 1, § 12; West's A.I.C. 34-20-3-1(b).

[8] Common Law ⇨ 11
85k11

Individuals have no vested or property right in any rule of common law, and the General Assembly can make substantial changes to the existing law without infringing on citizen rights.

[9] Limitation of Actions \Rightarrow 6(1)
241k6(1)

Even if worker's asbestos-related injury was caused by exposure to asbestos products when such products were more than ten years old, retroactive application of Product Liability Act's (PLA) ten-year statute of repose could not constitutionally bar worker's claim, as worker's exposure to asbestos dust from such products occurred over a twenty-five year period before PLA's effective date, and worker had a vested common law right to a tort remedy before that date, though injury did not manifest itself until after PLA was passed. West's A.I.C. Const. Art. I, § 12; West's A.I.C. 34-20-3-1(b).

[10] Limitation of Actions \Rightarrow 4(2)
241k4(2)

Fact that worker and surviving spouse may have been able to sue other defendants for his asbestos-related injuries under limited exception to Product Liability Act's (PLA) statute of repose did not save constitutionality of statute of repose as applied to worker's claims, as state constitution required that justice be administered completely, and defendants who could be sued would have been able to raise defense of contributory negligence against parties which worker would have been unable to join due to bar of statute of repose. West's A.I.C. Const. Art. I, § 12; West's A.I.C. 34-20-3-1(b).

*1067 Donald J. Berger, Berger, James & Gammage, South Bend, IN, Robert G. McCoy, Mark R. Penney, Cascino, Vaughn Law Offices, Ltd., Chicago, IL, Attorneys for Appellant.

David A. Temple, Lowe, Gray, Steele & Darke, LLP, Indianapolis, IN, Thomas W. Hayes, Law Office of William M. Koziol, Long Grove, IL, Attorneys for John Crane, Inc.

Thomas S. Ehrhardt, Kopka, Landau & Finkus, Crown Point, IN, Attorney for WTI Rust Holdings, Inc.

OPINION

BARNES, Judge.

Case Summary

Carole Jurich, individually and as administrator of Nicholas Jurich's estate, appeals the grant of summary judgment in favor of Anchor Packing Company, Garlock Inc., John Crane Company, and WTI Rust Holdings, Inc., which was granted on the basis that the action was barred by the Indiana Product Liability Act's ten-year

*1068 statute of repose. We reverse and remand.

Issues

There are two issues before us today:

- I. whether the exception to the Indiana Product Liability Act's (PLA's) ten-year statute of repose for certain asbestos-related actions applied to these defendants; and
- II. whether the PLA's general ten-year statute of repose, as applied to the Jurichs' claims, violates the Indiana Constitution.

Facts

The facts most favorable to the summary judgment nonmovant, Carole Jurich, follow. Nicholas Jurich worked at Inland Steel in East Chicago from 1946 to 1986. In the 1950's, Mr. Jurich began to work as a pipe fitter at the mill; in 1970, he became a mill mechanic. His duties included the cutting of pipe covering insulation and the installation and removal of gaskets. Both of these processes resulted in the release of asbestos dust, which Mr. Jurich inhaled. He also worked near furnaces that used asbestos panels and he personally worked with a powdered form of asbestos that, when mixed with water, was used to temporarily patch holes in the furnaces. He also replaced asbestos-containing gaskets on the furnaces. Mr. Jurich was able to specifically identify some of the asbestos-containing products he handled as being manufactured by Garlock, John Crane, and Anchor Packing. He identified the furnaces as Swindell-Dressler models, and the trial court ruled in WTI's earlier motion for summary judgment alleging a lack of product identification evidence that there was "a fair showing that a line of responsibility for the manufacture and sale of Swindell-Dressler furnaces can be extended to defendant WTI Rust Holdings, Inc." Record p. 1215.

On October 10, 1996, more than ten years after he ceased working for Inland Steel, a biopsy revealed that Mr. Jurich was suffering from mesothelioma. [FN1] This disease has a latency period of between five and seventy years. He and his wife Carole filed their first complaint against the defendants on April 3, 1997, seeking damages for personal injuries and loss of consortium. Mr. Jurich died of mesothelioma on November 19, 1997, and Mrs. Jurich has continued to prosecute the case on her own and the estate's behalf. The defendants moved for summary judgment on the ground that the Jurichs' claims were barred by the PLA's ten-year statute of repose and that they (the defendants) did not fall within the PLA's exception for certain asbestos-related actions. The trial court granted the

motions on August 28, 2000, and this appeal ensued.

FN1. This is a rare form of cancer in which malignant cells are found in the sac lining the chest (the pleura) or abdomen (the peritoneum). See National Cancer Institute CancerNet tm, at <http://cancer.net.nci.nih.gov> (last modified May 2001).

Analysis

I. Summary Judgment Standard

The standard of appellate review of a summary judgment ruling is the same as that used by the trial court: summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind.2000). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Boggs*, 730 N.E.2d at 695. When the moving party asserts the statute of limitations as an affirmative defense and establishes *1069 that the action was commenced beyond the statutory period, the burden shifts to the nonmovant to establish an issue of fact material to a theory that avoids the defense. *Id.*

II. Exception to the PLA's Statute of Repose

The defendants argue that because Mr. Jurich was diagnosed with mesothelioma more than ten years after he ceased working at Inland Steel, which necessarily means more than ten years after he could have been exposed to asbestos from any of their products following their initial delivery, the PLA's ten-year statute of repose acts to bar the Jurichs' cause of action. Mrs. Jurich responds that the defendants fall within a legislative exception to the statute of repose for certain asbestos related actions.

Indiana Code Section 34-20-3-1(b) provides:

Except as provided in section 2 of this chapter, a product liability action must be commenced:

- (1) within two (2) years after the cause of action accrues; or
- (2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Section 34-20-3-2, on the other hand, provides:

(a) A product liability action that is based on:

- (1) property damage resulting from asbestos; or
- (2) personal injury, disability, disease, or death

resulting from exposure to asbestos; must be commenced within two (2) years after the cause of action accrues...

(b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.

* * * * *

(d) This section applies only to product liability actions against:

- (1) persons who mined and sold commercial asbestos; and
- (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.

* * * * *

(f) Except for the cause of action expressly recognized in this section, this section does not otherwise modify the limitation of action or repose period contained in section 1 of this chapter.

(Emphasis added).

[1][2] The trial court concluded that because there was no evidence that the defendants ever mined asbestos, this exception to the statute of repose did not apply to them. However, another panel of this court recently interpreted Indiana Code Section 34-20-3-2(d)(1) to mean that the statute of repose exception was intended to apply "to entities that sell commercial asbestos, even if they do not mine it." *Black v. ACandS, Inc., et al.*, 752 N.E.2d 148, 155 (Ind.Ct.App.2001) [FN2]. That interpretation *1070 strikes us as reasonable. We need not rehash the reasoning of the *Black* panel. We do note the rule of statutory construction that "[a]ll statutory language is deemed to have been used intentionally. Words or clauses in statutes are to be treated as surplusage only in the absence of any other possible course." *Preston v. State*, 735 N.E.2d 330, 333 (Ind.Ct.App.2000) (quoting *Baker v. State*, 483 N.E.2d 772, 774 (Ind.Ct.App.1985), *trans. denied*). We find it difficult to accept that anyone would have mined and accumulated large quantities of asbestos strictly for their own use, or that such a product would have been distributed gratuitously. It would be redundant to place the words "and sold" after "persons who mined," unless "and sold" is interpreted to mean "persons who sold" commercial asbestos as separate and distinct from "persons who mined" and, as a matter of common sense, also necessarily sold asbestos at some point to some other entity. We also observe that a company that mined but did not sell asbestos would not

have placed any asbestos into the stream of commerce, as required to sustain a product liability action, unless by some unlikely scenario in which a miner gave away its asbestos. See Ind.Code § 34-20-2-1.

FN2. In *Black*, we noted that we had not been previously presented with "cogent argument and legal authority identifying the ambiguity of this section and directly addressing the question of its meaning," *Black*, 752 N.E.2d at 152, and we distinguished our opinions in *Holmes v. ACandS, Inc.*, 711 N.E.2d 1289 (Ind.Ct.App.1999), *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322 (Ind.Ct.App.1999), and *Sears, Roebuck, and Co. v. Noppert*, 705 N.E.2d 1065 (Ind.Ct.App.1999), in which we had only considered the exception in dicta.

[3] The *Black* court, however, did not discuss whether sellers of "commercial asbestos" include entities that sold any asbestos-containing products. The same rule of construction that leads us to conclude that "and sold" refers to a different group of entities than miners--i.e., words or clauses in a statute generally should not be considered surplusage--requires us to construe and give meaning to the word "commercial" as it modifies asbestos. "Commercial" has been defined as "[o]f, relating to, or being goods, often unrefined, produced and distributed in large quantities for use by industry." American Heritage College Dictionary 280 (3d ed. 2000). [FN3] Jurich cites us to 40 C.F.R. § 61.141 to support her argument that "commercial asbestos" includes any asbestos-containing product. However, our reading of the entirety of this Environmental Protection Agency regulation leads us to the opposite conclusion. The regulation states that "[c]ommercial asbestos means any material containing asbestos that is extracted from ore and has value because of its asbestos content." Elsewhere, there are clear indications that the EPA considered "commercial asbestos" to be a bulk product separate from asbestos-containing products, for example: "Fabricating means any processing ... of a manufactured product that contains commercial asbestos..." *Id.* (emphasis added). Also, "[m]anufacturing means the combining of commercial asbestos ... with any other material(s), including commercial asbestos, and the processing of this combination into a product." *Id.* (emphasis added). Thus, we agree with *Sears Roebuck and Co. v. Noppert*, 705 N.E.2d 1065, 1068 (Ind.Ct.App.1999), *trans. denied*, to the extent that panel believed "commercial asbestos" did not refer to sellers of "products which contained some components *1071 composed of asbestos." Here, the defendants sold asbestos-containing products, not "commercial asbestos," which we conclude refers to either "raw" or processed asbestos that is incorporated into other

products. The legislature did not intend the exception to the PLA's statute of repose to apply to these defendants.

FN3. The word is also defined as "[o]f or relating to commerce," i.e., "[t]he buying and selling of goods." *Id.* As already suggested, all asbestos would be commercial in this sense, unlike, for example, agricultural products, where one might reasonably expect that an individual farmer may consume some of his or her own products without placing them into the stream of commerce.

III. Constitutionality of the PLA's Statute of Repose

[4] Our conclusion that the legislature did not intend to include entities who sell asbestos-containing products, such as defendants, in the exception to the PLA's general ten-year statute of repose requires us to address Mrs. Jurich's constitutional challenges to that statute. If, as here, a product liability claim does not fall under the limited exception found in Indiana Code Section 34-20-3-2, the general ten-year statute of repose applies. Ind.Code §§ 34-20-3-1(b) and 34-20-3-2(f). We conclude that the PLA's statute of repose, to the extent used to bar the Jurichs' claims, is unconstitutional as applied to the facts of this case. [FN4] We limit our discussion of Mrs. Jurich's argument to Article I, Section 12 of the Indiana Constitution and not to address Article I, Section 23, keeping in mind that we should not "formulate a rule of constitutional law broader than is required by the precise facts at issue." *Martin v. Richey*, 711 N.E.2d 1273, 1282 (Ind.1999).

FN4. We emphasize that our analysis focuses on the constitutionality of the general statute of repose, Indiana Code Section 34-20-3-1, and not that of the exception to the statute, Indiana Code Section 34-20-3-2.

There are at least three contexts in which the statute of repose could be considered in this case. First, is the statute constitutional as applied to a plaintiff who is exposed to asbestos from and injured by a product more than ten years after that product's initial delivery? Second, is the statute constitutional as applied to a plaintiff who is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed? Third, in the absence of evidence of the length of time between a product's initial delivery and an injury (as was the case here), can the statute constitutionally be applied to a plaintiff who was injured by a product before the PLA's passage?

[5] We need not definitively resolve the first question

today, although at least one case from our supreme court strongly suggests that the statute would be constitutional as applied in such a factual scenario. That is, regardless of whether a product has an inherent defect at the time of its initial delivery, the statute of repose may properly bar product liability claims if no injury actually results from that defect until after ten years from the product's initial delivery. See *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 527-28, 418 N.E.2d 207, 211-12 (1981). Here, however, the defendants have made no claim that Mr. Jurich was exposed to asbestos from their products more than ten years after the products' initial delivery, nor have they designated any evidence that would support such a claim. All that the designated materials and defendants' assertions clearly establish is that the Jurichs did not sue until more than ten years after Mr. Jurich possibly could have been exposed to asbestos from any of their products. The statute of repose is an affirmative defense that the defendants bear the burden of proving. See Ind. Trial Rule 8(C); *Madison Area Educ. Special Serv. Unit v. Daniels*, 678 N.E.2d 427, 430 (Ind.Ct.App.1997), *trans. denied*. Summary judgment cannot be affirmed here based upon speculation, with *1072 no basis in the record, that Mr. Jurich may have been exposed to asbestos from defendants' products more than ten years after the products' initial delivery.

[6] As for the second and third questions, Article I, Section 12 of the Indiana Constitution provides: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Our supreme court recently upheld the constitutional validity of Indiana Code Section 34-20-3-2 under Article I, Section 12 in *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind.2000). "However, a facially constitutional statute may be unconstitutional as applied to a particular plaintiff." *Martin*, 711 N.E.2d at 1279. *McIntosh* and its related predecessor, *Dague*, are distinguishable from the present case in at least two respects and do not convince us that the statute of repose is constitutional as applied to Jurich.

In *Dague*, an individual died after the thirteen-year-old plane he was piloting crashed on July 7, 1978. *Id.* at 522, 418 N.E.2d at 209. Our supreme court held that the ten-year statute of repose properly barred the product liability lawsuit of the pilot's widow. Her rights under Article I, Section 12's "open courts" provision were not affected because she "was not in the position of having had a vested right taken from her," and "at the time of her loss and damages, there was no cause of action existing, by virtue of [the ten-year statute of repose]"

Id. at 528-29, 418 N.E.2d at 212-13. In *McIntosh*, the plaintiff was injured in an accident involving a skid steer loader that occurred thirteen years after the product's initial delivery. 729 N.E.2d at 973-74. Our supreme court said, "the General Assembly has determined that injuries occurring ten years after the product was delivered to a user are not legally cognizable claims for relief." *Id.* at 978. This was a permissible legislative choice to place a time limitation on product liability actions, consonant with Article I, Section 12. *Id.* at 980. Additionally, the supreme court clarified the difference between an "injury," for which the law may or may not provide a right to redress, as opposed to a legally cognizable "wrong." *Id.* at 979. It was a reasonable exercise of legislative power to provide that "after the product is in use for ten years, no further claims accrue." *Id.* at 978. Also, both the pilot in *Dague* and the plaintiff in *McIntosh* were injured after the PLA's effective date of June 1, 1978. See Ind.Code § 34-20-1-4.

In *Martin v. Richey*, the plaintiff's doctor failed to diagnose her breast cancer after conducting tests in March 1991, and the plaintiff did not learn she had cancer until April 1994, by which time the cancer had spread extensively into her lymph nodes. 711 N.E.2d at 1276-77. Plaintiff initiated a malpractice action in October 1994. *Id.* at 1277. The trial court granted summary judgment to the doctor on the ground that her claim was barred by the "occurrence-based" statute of limitations found in the Medical Malpractice Act, which purports to require malpractice claimants to file an action within two years of the alleged act, omission, or neglect. *Id.* at 1278 (citing Ind.Code § 34-18-7-1(b)). Our supreme court held the statute of limitations, although facially constitutional, was unconstitutional as applied to this plaintiff, and we quote extensively from their reasoning, which we find applicable to our case:

This Court has acknowledged ... that there is a right of access to the courts, and that the legislature cannot unreasonably deny citizens the right to exercise *1073 this right. Similarly, we have reasoned that the legislature cannot deprive a person of a complete tort remedy arbitrarily and unreasonably, consistent with the protections Section 12 affords, and that legislation which restricts such a right must be a rational means to achieve a legitimate legislative goal....

* * * * *

If Section 12 has any meaning at all, it must preclude the application of a two-year medical malpractice statute of limitations when a plaintiff has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period because, given the nature of the asserted malpractice

and the resulting injury or medical condition, plaintiff is unable to discover that she has a cause of action. Stated another way, the medical malpractice statute of limitations is unconstitutional as applied when plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice, because in such a case the statute of limitations would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim. To hold otherwise would be to require a plaintiff to bring a claim for medical malpractice before becoming aware of her injury and damages, an essential element of any negligence claim, and this indeed would be boarding the bus to topsy-turvy land.

Id. at 1283-84 (internal citations omitted).

We also find instructive the case of *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind.1989). There, the defendants delivered raw asbestos to the plaintiff's employer, where the plaintiff worked from 1963 to 1971. *Id.* at 383. In 1986, the plaintiff was diagnosed with asbestosis and lung cancer, and he promptly sued defendants. *Id.* Answering a certified question from the United States Seventh Circuit Court of Appeals, our supreme court held that "where the seeds of injury and latent disease are introduced into the body as a result of protracted exposure to a foreign substance, a plaintiff's cause of action cannot be barred by the [product liability] ten year statute of repose, no matter when the plaintiff knew or should have discovered the resultant disease." *Id.* at 385. The opinion was largely a matter of statutory interpretation, noting "[w]e cannot say that the Legislature intended the ten year statute of repose to bar claims such as this one, where the injury is the result of protracted exposure to a hazardous foreign substance." *Id.* at 386. This reasoning would seem to have been supplanted by the enactment of the limited exception to the statute of repose for some asbestos-related actions, (which was enacted while the case was pending before our supreme court), because it expressly provides that the statute of repose *does* apply if the exception is inapplicable. Ind.Code §§ 34-20-3-1(b) and 34-20-3-2(f).

Still, although the *Covalt* opinion does not expressly mention Article I, Section 12, it contains language very similar to cases interpreting and applying that constitutional provision, most notably foreshadowing *Martin v. Richey*:

Moreover, the Legislature has the sole duty to determine what constitutes a reasonable time for bringing an action, *unless the period allowed is so manifestly insufficient that it represents denial of*

justice. Accordingly, because of the long latency period with asbestos-related diseases, most plaintiffs' claims would be barred even before they knew or reasonably could have known of their injury or disease and *they would be denied their day in court if the ten year statute of repose were applied.* To require *1074 a claimant to bring his action in a limited period in which, even with due diligence, he could not be aware that a cause of action exists *would be inconsistent with our system of jurisprudence.*

Id. at 387 (emphases added). Furthermore, the *Covalt* court noted that "*Dague* is readily distinguishable from cases involving inherently dangerous foreign substances that are visited into the body." *Id.* at 386 (citing *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84 (Ind.1985)). We also are not convinced by the defendants' argument that *Covalt* was only relevant to defendants who sold raw asbestos, based on the fact that the defendants in *Covalt* actually were sellers of raw asbestos to whom the legislative exception to the statute of repose would now apply. There is nothing in the opinion to indicate its reasoning was limited only to such defendants, although the court did expressly limit its holding to product liability actions. *Id.* at 387.

We are well aware of the basic difference between a statute of limitation and a statute of repose: a statute of limitation marks the time within which a claim must be brought *after* a cause of action accrues, while a statute of repose acts to bar a claim *before* it accrues. This difference does not save the product liability statute of repose in this case. On one hand, if Mr. Jurich was exposed to asbestos within ten years of the product's delivery, he did not suffer from any fully-manifested asbestos-related disease until much more than ten years after delivery; in *that* sense, his "cause of action" had not accrued before the statute of repose's deadline. It is clear from *McIntosh* that the legislature may provide that no cause of action may ever accrue if an injury arises after a certain "occurrence" date--i.e., in the PLA, the date of the product's initial delivery. However, latent diseases or injuries that take many years to become known pose a special problem--when does an "injury" occur or a "valid claim" come into existence? The date when a tort cause of action "accrues" is often defined, in the absence of legislative wording to the contrary, as the date when a plaintiff knew or should have known that he or she had suffered an injury due to another's product or act. See *Degussa Corp. v. Mullens*, 744 N.E.2d 407, 410 (Ind.2001). However, under this definition the plaintiff in *Martin* did not have an "accrued" cause of action within two years of the date of the wrongful occurrence--the alleged medical malpractice--because the very point

of that case was that she could *not* have known or discovered that she was the victim of malpractice within that time frame. Where latent diseases or injuries are concerned, therefore, it appears from *Martin* that having a "valid claim," which cannot subsequently be extinguished by the legislature, is different from having an "accrued" cause of action, according to the usual definition of that phrase. On occasion, this court also has defined a cause of action as accruing "when a wrongfully inflicted injury causes damage." *Keep v. Noble County Dep't of Pub. Welfare*, 696 N.E.2d 422, 425 (Ind.Ct.App.1998), *trans. denied*, (citing *Monsanto Co. v. Miller*, 455 N.E.2d 392, 394 (Ind.Ct.App.1983)). This definition of an accrued cause of action, without reference to knowledge or ascertainability of the existence of an injury, seems applicable in cases of latent injury or disease when determining whether a "valid claim" exists for purposes of a statutory time limitation on when a "valid claim" may come into existence at all. [FN5]

FN5. Knowledge or ascertainability of the existence of an injury, however, is still relevant to determine when the two-year statute of limitations for the PLA would begin to run. Here, there is no contention that the Jurichs failed to initiate their cause of action within two years of learning, or having the ability to learn, that Mr. Jurich was suffering from an asbestos-related disease.

*1075 [7] Both the pilot in *Dague* and the plaintiff in *McIntosh* suffered no "wrongfully inflicted injury" until after the effective date of the PLA and more than ten years after the initial delivery of the products. Mr. Jurich, on the other hand, allegedly inhaled asbestos dust from defendants' products for many years before the effective date of the PLA; after that date, there is no evidence that the products from which Mr. Jurich inhaled asbestos dust were more than ten years old. Experts estimate that it can take an asbestos-related disease between ten to forty and five to seventy years after exposure to manifest itself. Also, Mrs. Jurich designated an affidavit from Arnold R. Brody, Ph.D., who stated *inter alia* that "[t]he only established environmental cause of [mesothelioma] is exposure to asbestos.... Even though mesothelioma is a dose-responsive disease, this tumor has been shown to develop in individuals with relatively brief or light exposures, and no 'safe or threshold' level of exposure to asbestos has been determined for mesothelioma." Record p. 935. Mrs. Jurich also designated an affidavit from Richard A. Lemen, Ph.D., who opined that "[e]ach and every exposure to asbestos contributes to the development of an asbestos-related disease." Record p. 971. We discern nothing in the designated materials that contradicts this

evidence. Thus, Mr. Jurich's every exposure to asbestos from defendants' products injured his lungs and contributed to his development of mesothelioma. However, this disease did not manifest itself until more than ten years after exposure. In this case, enforcement of the statute of repose would bar otherwise valid claims before the Jurichs could have been expected to have knowledge of those claims. We conclude that this runs directly afoul of *Martin v. Richey*. The holding of that case was succinctly stated in *McIntosh*: "a claim that exists cannot be barred before it is knowable." 729 N.E.2d 972, 979 (Ind.2000). [FN6] We conclude that applying the PLA statute of repose in this case has precisely that effect and therefore violates Article I, Section 12 of the Indiana Constitution.

FN6. Of course, we recognize that not everyone who is exposed to asbestos, even large quantities of it, will necessarily suffer from an asbestos-related disease, whether because of death by other causes before such a disease would manifest itself or because of other biological or pathological processes. However, to say that a person has a "claim" only at the time that an asbestos-related disease manifests itself, and that the ten-year statute of repose could act to prevent such a "claim" from accruing, would seem not to acknowledge the slow progression of such a disease and would also seem to contravene *Martin*. It is conceivable that an act of medical malpractice might never result in an injury or disease that a plaintiff is aware of--for example, what if Melody Martin had been killed in an automobile accident before she became aware of her doctor's malpractice? The fact that some persons may never become aware of injury caused to them by another's wrongdoing, or may be fortunate enough not to suffer from a fully-manifested injury or disease, is not sufficient justification to prevent those who in fact *do* become aware of such injury or who *do* develop a disease of bringing a tort action within a reasonable time of having reason to become aware of such injury or disease.

[8][9] Even if the defendants here are able to establish that Mr. Jurich was exposed to asbestos from their products when those products were more than ten years old, we still believe the statute of repose could not be used to bar this action. We do not question the axiomatic principle that "individuals have 'no vested or property right in any rule of common law,'" and that "the General Assembly can make substantial changes to the existing law *1076 without infringing on citizen rights." *McIntosh*, 729 N.E.2d at 978 (quoting *Dague*, 275 Ind. at 529, 418 N.E.2d at 213). The key distinction here is that the Jurichs did have a vested right, not in a rule of

common law in the abstract, like the McIntoshes, but because he had been injured by defendant's products at a time when Indiana courts recognized common law product liability actions without an equivalent to the later-enacted PLA's statute of repose and thus without reference to the length of time a product had been in the stream of commerce. This court observed as long ago as 1938:

It is broadly true that where the charge of negligence is based upon a breach of duty arising out of contractual relations, no cause of action arises in favor of one not in privity to such contract. As well settled and as authoritative as the general rule itself are certain exceptions. Such exceptions arise where one has, by sale or otherwise, put into circulation, so to speak, some noxious or imminently dangerous thing which is likely to cause serious injury to any person into whose hands it may come, including poisons not labeled, explosives, vicious animals, etc.

Holland Furnace Co. v. Nauracaj, 105 Ind.App. 574, 580, 14 N.E.2d 339, 342 (1938) (emphasis added). This case did not expressly recognize (or reject) the concept of strict product liability, but Mrs. Jurich's case is based on negligence as well as strict liability. By the early 1970's, the theory of strict product liability, as stated in Section 402A of the Second Restatement of Torts, was clearly the law in Indiana. See *Ayr-Way Stores, Inc. v. Chinwood*, 261 Ind. 86, 92-93, 300 N.E.2d 335, 339-40 (1973). There was no rule that automatically barred product liability claims if a person was injured after the product had been in use for a certain length of time, as the current statute of repose does. In fact, while courts recognized that all products eventually degenerate with age, the useful life of a product was considered "a question of fact to be determined in the trial." *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 222, 197 N.E.2d 519, 523 (1964). Mr. Jurich allegedly inhaled and was injured by asbestos dust from defendants' products for at least twenty-five years before the PLA's effective date, from 1953 to 1978. During this period of protracted exposure to asbestos, there was no equivalent to the PLA's statute of repose, which places a strict time limitation on bringing product liability claims based on a product's age that did not exist at common law. To the extent his twenty-five years of asbestos exposure before the PLA's effective date contributed to Mr. Jurich's later development of mesothelioma, the statute of repose cannot constitutionally be used to bar claims stemming from that exposure. Otherwise, the Jurichs' valid claims under common law, which could not be known for many years, would be effectively retroactively barred by the PLA and their vested right to a complete tort remedy would be taken away by the legislature.

[10] Finally, we find unavailing the defendants'

argument that the PLA statute of repose is constitutional because of the limited exception to the statute of repose for miners and sellers of commercial asbestos, bankruptcy funds, or funds set up to avoid bankruptcy. The difficulty with the argument is that Section 12 promises that justice shall be administered "completely." By limiting the parties from whom an injured plaintiff otherwise could have sought recovery, his or her tort remedy is far from complete. This fact is highlighted by our supreme court's recent decision in *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905 (Ind.2001). There, a jury's monetary award to a plaintiff injured by asbestos was reversed and the *1077 case was remanded for a new trial on the basis that the trial court had improperly prevented the defendant from presenting a nonparty defense. 754 N.E.2d at 910-16. Although a plaintiff may be able to sue some liable parties under the PLA's statute of repose exception, those parties could raise a contributory negligence affirmative defense claim based on the alleged liability of nonparties, which parties the plaintiff may be unable to join as defendants because the ordinary statute of repose would bar claims against them. Therefore, the fact that the Jurichs may have sued some defendants for their asbestos-related injuries regardless of time limitations does not save the constitutionality of the PLA statute of repose under Section 12 as applied in this case.

In sum, we hold that the PLA ten-year statute of repose is unconstitutional as applied to a claim such as the Jurichs': where a plaintiff is injured by an asbestos-containing product either by exposure to asbestos fibers before the enactment of the PLA, and/or where there is no evidence the product was more than ten years old at the time the plaintiff was exposed to asbestos fibers contained in the product. [FN7] Such a time limitation is an unreasonable legislative impediment on the bringing of an otherwise valid claim, due to the very long latency period of the development of asbestos-related diseases and the impossibility of the plaintiff's knowing whether such a disease is slowly progressing in his or her body. This represents a denial of justice that is inconsistent with Article I, Section 12 of the Indiana Constitution, as interpreted by *Martin v. Richey*.

FN7. As suggested, if there was evidence that a plaintiff was injured, after the effective date of the PLA, by an asbestos-containing product that was more than ten years old, a different analysis and result may obtain.

Conclusion

The exception to the PLA's statute of repose for certain asbestos-related actions did not apply to these defendants, because they sold asbestos-containing

products, not "commercial asbestos." However, the general PLA statute of repose, which would govern the claims against these defendants, is unconstitutional as applied to Mrs. Jurich's cause of action under Article I, Section 12 of the Indiana Constitution. We reverse the grant of summary judgment in favor of the defendants and remand for further proceedings consistent with this

opinion.

Reversed.

DARDEN, J., and NAJAM, J., concur.

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Court of Special Appeals of Maryland.

PORTER HAYDEN COMPANY

v.
George WYCHE, Jr., et al.

No. 5406, Sept. Term, 1999.

Sept. 30, 1999.

Worker brought products liability action against asbestos-containing product manufacturer. The Circuit Court, Baltimore City, Richard T. Rombro, J., entered judgment on jury verdict for worker. Manufacturer appealed. The Court of Special Appeals, Thieme, J., held that expert's comment failed to establish that tumor existed prior to effective date of statutory cap on noneconomic damages.

Vacated and remanded.

West Headnotes

[1] Damages ⇨ 127
115k127

[1] Evidence ⇨ 571(10)
157k571(10)

Sole expert's bare comment in worker's products liability action against asbestos-containing product manufacturer that an adenocarcinoma tumor could have existed prior to effective date of statutory cap on noneconomic damages failed to meet worker's burden to produce probative evidence regarding when disease came into existence, and thus, statutory cap applied to limit noneconomic damages. Code, Courts and Judicial Proceedings, § 11-108.

[2] Damages ⇨ 163(4)
115k163(4)

To avoid statutory cap on noneconomic damages, plaintiffs have burden of proof that disease existed before the effective date of the statutory cap. Code, Courts and Judicial Proceedings, § 11-108.

[3] Evidence ⇨ 508
157k508

Expert testimony is admissible when it would assist the jury in those instances when forming a rational judgment from the facts requires special training or skill. Md.Rule

5-702.

[4] Evidence ⇨ 547.5
157k547.5

[4] Evidence ⇨ 555.4(2)
157k555.4(2)

Experts cannot simply hazard guesses, however educated, based on their credentials; instead, expert testimony must be sufficiently definite and certain to be admissible, for neither the courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts.

[5] Evidence ⇨ 555.4(2)
157k555.4(2)

Speculative expert testimony must be excluded as incompetent. Md.Rule 5-702.

**326 *384 Dwight W. Stone, II (Gardner M. Duvall and Whiteford, Taylor & Preston LLP, on the brief), Baltimore, for appellant.

Timothy J. Hogan (William C. Burgy, Patrick Guilfoyle and Law Offices of Peter T. Nicholl, on the brief), Baltimore, for appellees.

**327 Argued before MOYLAN, THIEME and ADKINS, JJ.

THIEME, Judge.

This is an appeal from a jury verdict in favor of appellees, George Wyche, Jr., and his wife Joan, in the Circuit Court for Baltimore City. The Wyches sued several defendants, including the appellant, Porter Hayden Company, alleging that Mr. Wyche suffered from asbestosis and lung cancer, as a result of occupational exposure to asbestos-containing products, for which the defendants were allegedly responsible. [FN1] When the Wyches received a jury verdict of \$3,515,431.70, the court declined to apply Maryland's statutory cap on noneconomic damages in personal injury and wrongful death actions. See Md. Ann.Code (1974, 1995 Repl.Vol., 1998 Supp.), § 11-108, *385 Cts. & Jud. Proc. Article. Porter Hayden timely noted its appeal and presents us with the following questions:

FN1. The Wyches' case was first consolidated for trial with six others, but all of the other cases were settled or severed from the trial group. The Wyches then settled with all

thirteen defendants they were pursuing except for Porter Hayden. Porter Hayden also pursued cross-claims for contribution against several co-defendants, including Babcock & Wilcox Co. and Fibreboard Corp., Owens Corning Fiberglass, Owens-Illinois, Inc., Pittsburgh Corning Corp., Rapid-American Corp., ACandS, Inc., and GAF Corporation. The jury found in Porter Hayden's favor on its contribution claims against Owens Corning, Owens-Illinois, Pittsburgh Corning, and Rapid-American. Porter Hayden later prevailed against Babcock & Wilcox and Fibreboard in a separate proceeding after the trial. As for its claim against GAF, the trial court granted GAF's motion for judgment at the close of the evidence on the grounds that insufficient evidence of Mr. Wyche's exposure to its products had been adduced.

1. Did the trial court err when it ruled as a matter of law that the statutory cap on noneconomic damages does not apply where the plaintiffs produced scant mixed evidence about the inapplicability of the cap and the defendant produced none?
2. Did the trial court err when it allowed the jury to award damages based on alleged risk of recurrence of a surgically removed cancer and alleged fear of a cancer recurrence where the plaintiffs did not produce evidence that showed that a recurrence was probable and evidence of physical injury caused by emotional distress?
3. Did the trial court err when it granted GAF Corporation's motion for judgment based on the plaintiff's insufficient exposure to GAF's products?

We answer "yes" to the first question and explain below. As to the second and third questions, Porter Hayden told the Court in oral argument that it would waive these issues in the event that the ruling on noneconomic damages was favorable. Because we have determined that the trial court did, in fact, err on noneconomic damages, we forego any analysis of these issues.

Facts

George Wyche, Jr., worked at the Bethlehem Steel Sparrows Point steel plant from 1951 to 1993. He first worked as a laborer in the Pipe Mill for approximately twelve years, where his primary job was to sweep up the dirt and dust that accumulated at the work site.

Mr. Wyche testified that during this period he frequently worked in the vicinity of pipe coverers applying asbestos pipe covering and block insulation. He testified that these operations generated dust, and that, as part of his job, he swept up and disposed of this dust. In approximately 1963, he moved to the 56-inch Hot Strip

Mill, where he worked for about a year. His duties included the frequent cleaning of dust from industrial furnaces. From 1964 until his retirement in 1993, Mr. Wyche worked in various areas of the Rod and Wire Mill, first as a "crane follower" and eventually as a crane operator. These jobs also exposed him to asbestos dust, as he labored often in the vicinity of workers cutting and applying pipe covering material.

Mr. Wyche retired in March 1993 at the age of 62. In September 1993, the attorneys for his asbestosis claim referred him for an examination with Dr. Steven Zimmet, a pulmonologist. The chest x-ray taken at that visit revealed a "small density or a spot" on his left lung. Dr. Zimmet also noted on the x-rays what he described as interstitial markings reflecting asbestosis. In November 1993, Mr. Wyche underwent an operation in which the lower lobe of his left lung was resected, allowing the doctors to successfully remove the tumor, which was approximately one centimeter in diameter. Testing revealed the tumor to be an adenocarcinoma, a type of lung cancer. Testimony showed that cancers like Mr. Wyche's adenocarcinoma generally exist for five to ten years before they are diagnosed.

Prior to instructing the jury, the court heard motions for judgment on whether the statutory cap applied to the Wyches' claims. Porter Hayden argued that the cap should apply as a matter of law, or, in the alternative, that the jury must be allowed to decide whether the cause of action arose prior to the effective date of the cap, July 1, 1986. Conversely, Mr. and Mrs. Wyche moved for judgment, arguing that the cap did not apply, because Porter Hayden failed to prove that it should. The trial court granted their motion, ruling as a matter of law that the cap did not apply.

On May 28, 1997, the jury returned special verdicts in favor of the Wyches, awarding a total of \$3,515,431.70. Of this sum, \$15,431.70 represented economic damages. The jury awarded Mr. Wyche \$2,000,000.00 in noneconomic damages and awarded \$1,500,000.00 to the couple for loss of consortium. The trial court denied Porter Hayden's post-trial motions on the question presented in this appeal. After other post-trial proceedings pertaining to contribution, the court accounted for the settlements of joint tortfeasors and entered judgment against Porter Hayden for a total of \$493,205.93.

Discussion

[1][2] The trial court erred when it declined as a matter of law to apply Maryland's statutory cap on noneconomic damages. Simply stated, the Wyches failed to bear their

burden of proof that Mr. Wyche's lung cancer existed before the effective date of the cap, and the meager evidence they adduced could just as easily have shown that the cancer originated after that date. The court below thus committed reversible error when it found that the opinion evidence presented would bolster its finding that the cap did not apply as a matter of law. Even a sympathetic plaintiff cannot doff his burden of proof or override the will of the legislature.

For the trial court to have ruled as a matter of law that the statutory cap did not apply, it needed evidence showing that the genesis of Mr. Wyche's lung cancer predated July 1, 1986, which is the date that the statutory cap became effective. [FN2] In an earlier case involving asbestos-induced cancer, this Court determined that the cause of action for cancer "arises" when malignancy first comes into existence. *Anchor Packing Co. v. Grimshaw*, 115 Md.App. 134, 160, 692 A.2d 5,18 (1997), *vacated on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998). [FN3] Since the filing of the **329 *388 present appeal, this Court has further identified the origin of such cancer as the time when "the carcinogen cause[s] cellular changes which [lead] to an irreversible, fatal, or disabling disease rather than the point in time when the plaintiff inhaled the asbestos, or when the plaintiff was diagnosed or manifested symptoms of such disease." *Owens-Corning v. Walatka*, 125 Md.App. 313, 319, 725 A.2d 579, 581 (1999) (citing *Owens Corning v. Bauman*, 125 Md.App. 454, 465-90, 726 A.2d 745, 751-64 (1999)).

FN2. A statutory cap of \$350,000 for noneconomic damages, such as pain, suffering, inconvenience, or loss of consortium, applies to "any action for damages for personal injury in which the cause of action arises on or after July 1, 1986...." CJ § 11-108(b).

FN3. In *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 120-21, 604 A.2d 47, 53-54 (1992), the Court of Appeals drew the distinction between the *arising* and the *accrual* of a cause of action for personal injury. By using the word "arise," the legislature tied the cap to the origin of the disease rather than to the time when "through the exercise of reasonable care and diligence," *id.* at 121, 604 A.2d at 53, the plaintiff discovered or should have discovered it. The latter often becomes the date of accrual for causes of action in the context of statutes of limitation.

Mr. and Mrs. Wyche bore the burden of showing that the cancer arose before the cap applied. In *Walatka* and *Bauman*, this Court clarified that the cap applies presumptively, and plaintiffs bear the burden of proof if

they contest its application. If there exists a genuine dispute of fact, that dispute must go to the jury, at the request of either party. See *Owens-Corning v. Walatka*, 125 Md.App. at 326-31, 725 A.2d at 585-88 (holding that plaintiffs bear the burden of proving inapplicability of the cap); *Owens Corning v. Bauman*, 125 Md.App. at 509-10, 726 A.2d at 772 (holding that, in cases where evidence presents a genuine dispute of fact regarding applicability of the cap, this issue must be resolved by a jury if so requested by either party).

Against the foregoing background, the circuit court's error becomes clear. First, *Walatka* teaches that the court below mislaid the burden of production on Porter Hayden. When Porter Hayden failed to introduce affirmative evidence that Mr. Wyche's cancer came into existence after July 1, 1986, the court found that the thread of evidence adduced by the Wyches showed as a matter of law that the cancer pre-dated the cut-off date. Second, although the parties were clearly in dispute over whether the cap should apply, the actual evidence adduced by the Wyches proved nothing and is insufficient as a matter of law to create a jury issue. [FN4] Because the proper *389 placement of the burden of proof is a settled issue, this opinion will address in more detail the weight of the evidence actually adduced by the Wyches.

FN4. Had the Wyches presented evidence that tended to prove that the tumor pre-dated July 1, 1986, this issue might have gone to the jury without error under *Bauman*. Even with the paucity of evidence the Wyches adduced, Porter Hayden expressed its willingness, as a back-up position, for the court to allow the jury to decide whether the cancer pre-dated the cap. Although such a ruling would have been in error, it would have served to resolve the present controversy in the trial court.

Although the Wyches did present some evidence regarding the period during which Mr. Wyche's lung cancer arose, the admitted evidence alone was insufficient to satisfy their burden of production. Under *Walatka*, the plaintiff must "produce evidence that is probative with respect to when the plaintiff's disease came into existence...." 125 Md. at 333, 93 A. 928. Because neither plaintiffs nor defendants introduced evidence of when *Walatka's* lung cancer came into existence, this Court found that there existed "no testimony that could support an inference that Mr. *Walatka's* mesothelioma came into existence prior to the effective date of the statutory cap." *Id.* at 334, 93 A. 928. Accordingly, we remanded the case with instructions for the lower court to apply the cap. *Id.* at 348, 93 A. 928.

In the instant case, the only probative evidence of the date of the inception of Mr. Wyche's tumor is that it was first detected by x-ray in 1993, seven years after the effective date of the statutory cap and, at diagnosis it was approximately one centimeter in diameter. As in *Walatka*, however, the plaintiffs presented no direct evidence that the tumor came into existence prior to July 1, 1986. Only one of their expert witnesses, [FN5] Dr. Edward Gabrielson, a pathologist, **330 even addressed the issue briefly in his testimony:

FN5. In their brief, the Wyches also identified Dr. Samuel Hammar as one of their witnesses, and to be sure, Dr. Hammar's testimony at the trial, had it been admitted for their claim, might have been helpful to their cause. Regarding the average time from first malignancy to diagnosis, Dr. Hammar said, "[I]f you look at the years from when the cell first became malignant to this time when this was diagnosed, you can see, again, that for squamous carcinomas it was 7.2 years to the earliest diagnosis, from adenocarcinoma is 13.2 years." Although Porter Hayden seems to take issue in its reply brief with the use of general epidemiological testimony to draw inferences in specific cases, in *Grimshaw*, this Court accepted such testimony about the average time frame between malignancy and diagnosis for mesothelioma as probative. 115 Md.App. at 165, 692 A.2d at 20-21.

It should be noted, however, that the plaintiffs in *Grimshaw* asked multiple expert witnesses to address this issue. The jury thus had plenty of grist for consideration. Here, in contrast, Dr. Gabrielson was the *only* witness to address the issue for Mr. Wyche's claim. More importantly, the trial court did not allow Dr. Hammar to testify specifically as to Mr. Wyche, because he was not identified prior to trial as a witness for Mr. Wyche.

*396 Q: And it would be your best estimate that the first time he would have had a cancer cell--a cancer cell or cancer cells in his body would have been five to ten years from the date of his diagnosis?

Mr. Burg: Objection as to form.

The Court: Overruled.

A: I think that is a reasonable estimate. Again, adenocarcinoma is a relatively slow-growing type of lung cancer. So, I would probably push it toward the longer interval of that five to ten-year window.

All that one can infer from Dr. Gabrielson's estimate is that the tumor *may have* pre-dated the 1986 cut-off date--or that it *may not have*. If the tumor began forming five or six years prior to 1993, the cap would apply. If it began forming seven or more years prior to 1993, the cap would not apply. The testimony proves

nothing. Without additional evidence, Dr. Gabrielson's comment alone leaves the trier of fact no more informed than the court in *Walatka*, where neither side presented evidence. Dr. Gabrielson's comment that he would "probably push it toward the longer interval of that five to ten-year window" only emphasizes the non-probative quality of his testimony.

[3][4][5] Furthermore, the fact that Dr. Gabrielson testified as an expert avails the Wyches nothing when his testimony regarding the cancer's date of origin was insubstantial. Although Porter Hayden gives talismanic importance in its brief to the words "reasonable degree of medical certainty," it is clear when one compares the handling of other questions in *391 the transcript that Dr. Gabrielson addressed this issue with considerably less force than he did the others. In fact, his testimony was so carefully hedged that it seems to be little more than speculation. Expert testimony is admissible when it would assist the jury in those instances when "form[ing] a rational judgment from the facts requires special training or skill." *Davidson v. Miller*, 276 Md. 54, 60, 344 A.2d 422, 427 (1975) (quoting *Consolidated Gas, Elec. Light & Power v. State ex rel. Smith*, 109 Md. 186, 203, 72 A. 651, 658 (1909)). See also Md. Rule 5-702. Yet, experts cannot simply hazard guesses, however educated, based on their credentials. Instead, expert testimony must be sufficiently definite and certain to be admissible, for "neither the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts." *Id.* at 61, 344 A.2d at 427 (quoting *Ager v. Baltimore Transit Co.*, 213 Md. 414, 421, 132 A.2d 469, 473 (1957)). Speculative testimony must thus be excluded as incompetent. Furthermore, Rule 5-702 requires that expert testimony be sufficiently grounded in fact. See also *Bentley v. Carroll*, 355 Md. 312, 337, 734 A.2d 697 (1999) (citing *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988)). Here, the only applicable facts adduced were the date of diagnosis and the size of the tumor, neither of which would infer a conclusion stronger than the one Dr. Gabrielson rendered. In **331 summary, a sole expert's bare comment that a tumor *could have* existed prior to the effective date of the cap statute fails to meet the burden this Court placed on a plaintiff in *Walatka*, "to produce evidence that is probative with respect to when the plaintiff's disease came into existence...." *Id.* at 333, 725 A.2d at 589 (emphasis added).

Walatka also addresses this Court's concern at the heart of our jurisprudence on the damages cap: to remain true to the legislature's goals in limiting noneconomic damages. See, e.g., *Murphy v. Edmonds*, 325 Md. 342,

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE: ALL KELLEY & FERRARO)	CASE NO. CV-073958
ASBESTOS CASES)	
)	JUDGE LEO M. SPELLACY
)	
v.)	
)	ORDER GRANTING PLAINTIFFS'
A-Best Products Co., et al.)	MOTION FOR PARTIAL SUMMARY
)	JUDGMENT AGAINST CROWN
)	CORK & SEAL CO., INC.

Plaintiff's motion for partial summary judgment is granted as to whether Crown Cork & Seal Co., Inc. is the corporate successor to Mundet Cork Corp. Crown Cork & Seal Co., Inc. is Mundet Cork Corp.'s successor as a matter of law as shown by the Certificate of Merger dated January 4th, 1966. Consequently, Crown Cork & Seal Co., Inc. is liable for all the liabilities of Mundet Cork Corp., pursuant to the governing law of New York, Consolidated Law Service Sec. 906(b)(3). There is no just cause for delay.

Date: 3/27/2001

electronically filed
Judge Leo M. Spellacy

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

IN RE: ALL KELLEY & FERRARO
ASBESTOS CASES

CASE NO. CV-073958

2009 SEP 22 P 4

JUDGE HARRY HANNA

GERALD E. FUERSI
CLERK OF COURTS
CUYAHOGA COUNTY

PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
REGARDING DEFENDANT CROWN,
CORK & SEAL, INC.'S STATUS AS A
CORPORATE SUCCESSOR TO
MUNDET CORK CORPORATION

Now comes the Plaintiffs in Kelley & Ferraro, L.L.P. asbestos cases (collectively referred to as "Plaintiffs"), by and through counsel, pursuant to Rule 56 of the Ohio Rules of Civil Procedure, and request that this Court confirm as a matter of law that Defendant Crown Cork & Seal, Inc. ("Crown") is the corporate successor to Mundet Cork Corporation ("Mundet"). Crown's liability for Mundet's asbestos production is clear, as Crown's efforts to escape this liability in other courts have failed. Thus, the issue of Crown's successor liability has already been resolved and Crown must be estopped from disclaiming its liability for Mundet's asbestos-related tort liabilities in all Kelley & Ferraro asbestos cases. Further, Crown is a New York corporation, and New York corporate law provides that Crown is responsible for Mundet's asbestos-related tort liabilities. The reasons for this motion for partial summary judgment are contained in the attached Brief in Support.

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BRIEF IN SUPPORT

I. Introduction

Plaintiffs have brought claims against Crown and other manufacturers, sellers and distributors of asbestos-containing products, alleging exposure to these products and asserting various causes of action including negligence, breach of implied warranty, and strict liability. Further, a representative sample of the Plaintiffs include the Plaintiffs in Kelley Group 4, who were all former employees of Youngstown Sheet and Tube in Youngstown, Ohio. Co-workers of the Kelley Group 4 Plaintiffs have specifically identified that Mundet products were present at Youngstown Sheet and Tube while they worked there.¹ Hence, Crown is a defendant based upon these and other identifications and its status as a corporate successor to Mundet. Yet, Plaintiffs believe that Crown will likely assert that it is not the successor to Mundet's liability. The following facts and case law show that such an argument is false, and that Crown is indeed liable for Mundet's asbestos-containing products and for Plaintiffs' exposure to those products.

Mundet's merger into Crown

The factual background of Mundet and its merger into Crown is as follows. The Mundet corporation was formed in the late 1800's and by the 1940's had become a manufacturer of asbestos products through its insulation division.² Mundet's insulation division was divided into two distinct businesses: (a) the manufacture and sale of thermal insulation; and (b) the

¹ See Exhibit 1, Depositions of Willie Williams, May 24, 2000, at pp. 9, 20, 37; Theodore W. Johnson, April 27, 2000, at pp. 10, 14; William Jordan, Sr., May 16, 2000, at pp. 14, 23.

² See Exhibit 2, United States Maritime Commission purchase order for Mundet Woven Amosite dated September 30, 1943; Mundet Heat Insulation brochure, circa 1951; 85% Magnesia Insulation Manual, approx. 1955.

installation of thermal insulation (the "Contracting Division"). On November 7, 1963, Mundet entered into an agreement with Crown for the sale of 16,689 shares of Mundet stock, with an offer to Crown for the purchase of the remaining 7,091 of issued and outstanding shares.³ Thus, Crown purchased nearly all of Mundet's assets. Crown continued to conduct the business of both thermal insulation divisions, including that involving asbestos (and Mundet's Cork division), until February of the following year. A former Mundet employee, E.J. Stansbury, went directly from Mundet to Crown and then worked for Baldwin-Ehret-Hill ("BEH"). He later became vice-president at Keene Corporation after its purchase of BEH. He described the aforementioned transition from Mundet to Crown at his deposition in the matter of Arty A. Hawkins, et. ux., v. Fibreboard Corporation, et al., in the United States District Court for the Western District of Texas in December, 1983.⁴

- Q: How long did you work for Mundet Cork Company?
A: I worked with Mundet from 1945 until they sold their company.
Q: Who did they sell their company to?
A: Crown Cork and Seal.
Q: Now, when Mundet sold to Crown Cork and Seal, did Mundet employees, that you know of, go to work for Crown Cork and Seal?
A: Yes.
Q: And did Crown Cork and Seal continue to sell Mundet Cork inventory?
A: Inventory?
Q: Yes.
A: Yes, for a period of about three months. They only owned it for about three months.
Q: And would this inventory include 85% magnesia products?
A: Yes.
Q: And did Crown Cork and Seal continue contracting insulation after the purchase of Mundet Cork Company?
A: Yes.

³ See Exhibit 3, Agreement by Crown to buy Mundet stock.

⁴ See Exhibit 4, excerpt from Deposition of E.J. Stansbury, December 16, 1983.

Q: And did Crown Cork and Seal continue with the same warehouses and same offices that were previously occupied by Mundet Cork Company?

A: Yes.

Q: Did Crown Cork and Seal continue using products and filling orders of products with the Mundet name on them?

A: Yes.

Q: And did you, as an employee, continue with the same employee benefits that you had with the Mundet Cork Company?

A: Yes.

Q: Did the 85 percent magnesia products that you have described for us today that were manufactured and distributed by Mundet Cork Company contain asbestos during the entire period, that you know of, that you worked for Mundet Cork?

A: Yes.⁵

BEH only purchased Mundet's Contracting Division

After Crown's purchase of the Mundet stock in November 1963, Crown began to refer to Mundet as "Division of Crown Cork & Seal."⁶ In 1964, BEH, a manufacturer of mineral fiber products, purchased the Mundet's Contracting Division.⁷ Among the assets were the installation contracts and accounts receivable of the Contracting Division, but not Crown's (Mundet's) manufacturing division. In fact the Agreement shows that the manufacturing division remain with Crown:

Seller [Mundet, a division of Crown] covenants that for five (5) years after February 28, 1964, it will not engage in the production of calcium silicate or magnesia at its North Bergen, New Jersey plant, or sell such plant to another company for the production of such products, and seller will not engage in the Thermal Insulation Contract business for such period of time.⁸

⁵ Id.

⁶ See Exhibit 5, February, 1964, Agreement by Mundet to sell partial interest to Baldwin-Ehret-Hill.

⁷ Id.

⁸ Id. at p. 4.

Hence, BEH purchased only what it wanted: Mundet's Contracting Division, presumably in order to expand its thermal insulation installation business with its own products, prohibit Crown from further manufacture of asbestos products, to quell competition from Crown/Mundet products, and increase BEH's market share. In doing so, BEH intentionally shielded itself from any of Mundet's liabilities incurred prior to the date of sale in the Assumption annexed to the Sale document:

ASSUMPTION

For value received and intending to be legally bound, Buyer for itself, its successors and assigns, hereby assumes all liabilities and obligations of the Seller arising from and after February 8, 1964, under the Leases, Contracts and Performance bonds, identified and Specified on Schedules 9, 10, 11 and 12, attached to the foregoing Bill of Sale and Assignment.⁹

Thus, Crown was left not only with all of the liabilities of the manufacturing division prospectively, but also all of the liabilities of both the manufacturing and contracting divisions prior to February 8, 1964. If BEH had assumed Mundet's liabilities, the Agreement would have so stated. Thus, Crown retained liability for Mundet's manufacture and sale of asbestos-containing products at least up to February, 1964.¹⁰

If there was any question about the intention of BEH to avoid Mundet's liabilities in the February, 1964 Agreement, these questions have been put to rest by the testimony of those with personal knowledge of the transaction. Miles Wilson was the vice president of sales of BEH at the time of the BEH purchase of Mundet's [Crown's] Contracting Division, and was a BEH

⁹ Id. at p. 6.

¹⁰ For a clearer understanding of the BEH purchase, etc., see Exhibit 6, diagram of progression of Mundet Cork Corporation.

employee since 1942. He continued with BEH after its consolidation with Keene Corporation in 1968, and was first deposed in 1983 in asbestos litigation in the Eastern District of Virginia (*In Re All Asbestos Cases - C/P77-1*). He testified concerning his knowledge of the BEH/Crown transaction:

Q: In 1964, did Baldwin-Ehret-Hill purchase the contracting units from Crown, Cork, and Seal?

A: They did.

Q: What type of purchase was that?

A: The purchase was the purchase of 13 branches representing the Mundet Cork purchased by Crown, Cork and Seal and we purchased the assets, not the liabilities.¹¹

Further, at about the same time of the Wilson 1983 deposition above, Howard A. Mileaf, former vice-president and general counsel for Keene Corporation, submitted his affidavit in *Hawkins, et al. v. Fibreboard Corp., et al.*, NO. SA-81-CA-627, venued in the United States District Court for the Western District of Texas.¹² Mr. Mileaf confirmed that BEH purchased only the assets of Mundet's [Crown's] Contracting Division in an all cash transaction, "and the remaining divisions of Mundet continued to be operated as a part of CC&S [Crown]."¹³ Thus, BEH assumed only the liability relating to Mundet's Contracting Division.

Finally in 1966, Mundet, then 95% owned by Crown and recognized only as division of Crown, formally ceased to exist. Crown executed a Certificate of Merger to merge Mundet into

¹¹ See Exhibit 7, excerpt of Deposition transcript of Miles H. Wilson, March 22, 1983, at p. 20. (Emphasis Added).

¹² See Exhibit 8, Affidavit of Howard E. Mileaf.

¹³ *Id.* at ¶9.

Crown, assuming all of Mundet's asbestos-related liabilities.¹⁴

Hence, based on the foregoing, it is evident that Crown is the corporate successor to Mundet. Further, Crown is liable for any harm caused to Plaintiffs by Mundet products.

II. Law and Argument

A. Crown's Liability As Mundet's Successor Has Already Been Established in Prior Proceedings, And Crown Is Estopped from Relitigating Its Liability In This Forum.

The doctrine of issue preclusion should prevent Crown from relitigating the issue that it is the corporate successor to Mundet. Likewise, this same doctrine should preclude Crown from disclaiming any liability for Mundet's asbestos-related tort liabilities. Indeed, courts in both the states of Texas and Washington have examined this same exact issue and determined that Crown was in fact the successor to Mundet. Further, Crown itself has entered appearances as successor to Mundet in various actions. For these reasons, this Court must find as a matter of law that Crown is the successor to Mundet's asbestos-related tort liabilities.

The basic theory behind principles of issue preclusion is that if two parties undergo a full and fair trial that results in a final judgment, neither party may seek a different result upon the same facts and issues in a subsequent lawsuit. When properly applied, issue preclusion promotes fairness and judicial economy by preventing relitigation in one suit of an identical issue already resolved against the party against whom the bar is sought. Defensive use of issue preclusion occurs when a defendant evokes the doctrine to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost. Offensive use of issue preclusion occurs when a

¹⁴ See Exhibit 9, Certificate of Merger of Mundet Cork Corporation Into Crown Cork & Seal, Inc.

plaintiff seeks to foreclose the defendant from relitigating an issue that the defendant had previously litigated unsuccessfully in another action. Goodson v. McDonough Power Equip., Inc. (1983), 2 Ohio St.3d 193; Parklane Hosiery Co., Inc. v. Shore (1979), 439 U.S. 322.

Traditionally, one party could seek issue preclusion against a party opponent only if both parties had been parties to the prior lawsuit and thereby bound by the outcome of that suit; this requirement has been referred to as "mutuality." Goodson, supra, 2 Ohio St.3d at 198. However, the Ohio Supreme Court has recognized an exception in an "offensive" use of issue preclusion "upon the basis of serving justice within the framework of sound public policy." Hicks vs. De La Cruz (1977), 15 Ohio St.2d 71, 74-75. See also, Goodson, supra, 2 Ohio St.3d at 201.

In Hicks, the Ohio Supreme Court held as follows:

The modern view of res judicata embraces the doctrine of collateral estoppel [or issue preclusion] which basically states that if an issue of fact or law is actually litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. The party precluded under this principle from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that issue. [Citations omitted.] (Emphasis added.)

Hicks, supra, 52 Ohio St.2d at 74. The Cuyahoga Court of Appeals has consistently followed the holding of Hicks and recognized exceptions to the mutuality requirement in the context of "offensive" use of issue preclusion. See Cashelmara Villas Limited Partnership v. DiBenedetto (1993), 87 Ohio App.3d 809, 813, (the Cuyahoga County Court of Appeals, citing Hicks, recognizes that a requirement of mutuality of parties, in connection with a claim of "offensive" use of collateral estoppel, is waivable "upon the basis of serving justice within the framework of

sound public policy"); Crile v. Hall (October 24, 1991), Ohio App. 8 Dist. No. 59187, unreported, 1991 WL 221467, at *6 (the Cuyahoga County Court of Appeals finds that "offensive" collateral estoppel does not require a mutuality of parties).

In order to successfully assert the doctrine of issue preclusion, the following threshold requirements must be satisfied:

1. The party against whom estoppel is sought was a party or in privity with the party to the prior action;
2. There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;
3. The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and
4. The issue must have been identical to the issue involved in the prior suit.

Monahan vs. Eagle Picher Industries, Inc. (1984), 21 Ohio App.3d 179, 180-181. See also, Parklane Hosiery, supra, 439 U.S. at 326; Hicks, supra, 52 Ohio St.2d at 74-75. Accordingly, if and to the extent the identical issues raised by the Plaintiffs against Crown in these present cases have been previously litigated, the doctrine of issue preclusion must prevent the relitigation of those same issues.

A Texas court in the case of *In the Matter of All Cameron County Asbestos Cases in Where Crown Cork & Seal Company, Inc. Is A Defendant*, No. 94002380 (Cameron Cty, Texas order entered Feb. 23, 1999), found that Crown determined as a matter of law that Crown is Mundet's successor-in-interest. The court heard extensive arguments from Crown on issues identical to those in this case, including Crown's liability under New York law as Mundet's successor-in-interest by merger with Crown. The court entered summary judgment against Crown, and held that Crown was responsible for both the compensatory and punitive damages.

caused by its predecessor's asbestos-related torts.¹⁵

Likewise, the Superior Court of King County, Washington also recently confirmed Crown's status as Mundet's successor in the case of McCain, et al. v. The E.J. Bartells Co., et al., No. 00-2-00249-1 SEA, (King City, Washington order entered August 10, 2000).¹⁶ The McCain court granted Plaintiffs motion for partial summary judgment and found that Crown was in fact the corporate successor to Mundet. The court held as a matter of law that Crown's corporate successorship to Mundet is established by (1) the acquisition of Mundet by Crown on November 7, 1963; (2) the sale of Mundet's contracting division to BEH on February 8, 1964; and (3) the statutory merger between Crown and Mundet on January 4, 1966 was effected pursuant to Section 905 of the New York Business Corporation Code.

As the requirements for issue preclusion in Ohio have been met, this Court should give both the Texas and Washington decisions preclusive effect and find that Crown is the successor to Mundet as a matter of law. First, the party against whom estoppel is sought is the same, Crown. Second, the Texas and Washington courts reached their decisions only after Crown and the plaintiffs' counsel had a full and fair opportunity to argue the issue of Crown's merger with Mundet.¹⁷ Further, as just stated, the successor issue was actually argued and the merger issues

¹⁵ See Exhibit 10, Affidavit of Peter Kraus, and February 23, 1999 Order and Judgment Entry of Judge Paul Davis, Case No. 97-06428, In the 345th Judicial District Court of Travis County, Texas.

¹⁶ See Exhibit 11, King City, Washington, Judge Ann Schindler, August 10, 2000 Order Granting Plaintiff's Motion for Summary Judgment Against Crown Cork & Seal Re: Successor Liability.

¹⁷ See Exhibit 12, Reporter's Record, Pretrial Hearing, prior to February 23, 1999 Order and Judgment Entry of Judge Paul Davis, Case No. 97-06428, In the 345th Judicial District Court of Travis County, Texas.

were necessary to the Texas and Washington courts' final judgment. Lastly, the issues in the Texas and Washington courts were identical to the issues in this case, Crown's liability for asbestos-related torts as a successor corporation to Mundet. As all of the requirements for issue preclusion under Hicks, Monahan, and Parklane Hosiery, *supra*, have been met, this Court must find that Crown is the corporate successor to Mundet as a matter of law.

Further, it is important to reiterate that issue preclusion is warranted if the same facts and evidence are present in the cases involved. The Ohio Supreme Court in Norwood vs. McDonald (1941), 142 Ohio St. 299, 306, stated that the test to be used in determining the identity of issues involves a consideration of the evidence presented in support of each:

* * * If the same facts or evidence would sustain both, the two actions are considered to be the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.
[Citations omitted.] (Emphasis added.)

In the present case, the issue of Crown's successor liability for Mundet rests upon the same facts and evidence of asbestos-related liabilities as presented in the Texas and Washington decisions, therefore, summary judgment is warranted.

In addition to satisfying the threshold requirements of issue preclusion identified above, the application of this doctrine in these present cases "does not deny [Crown] the principle of fundamental fairness and/or due process. To the contrary, public policy and judicial economy requires the application of [offensive collateral estoppel]." Crile, *supra*, 1991 WL 22146 at *6.

More particularly, both the United Supreme Court in Parklane Hosiery and the Ohio Supreme Court in Goodson recognize that the offensive use of issue preclusion results in

unfairness to a defendant and violates due process if the first action was not vigorously defended, either because the plaintiff sued for small damages or future lawsuits were not foreseeable, or if procedural opportunities are available in the subsequent action for the first time. Parklane Hosiery, supra, 439 U.S. at 329-30; Goodson, supra, 2 Ohio St.3d at 201. See also Hicks, supra, 52 Ohio St.2d at 74. These concerns of unfairness and due process are not present in Plaintiffs' cases for several different reasons.

First, both the Texas and Washington cases were fully argued and the amount at stake in that litigation provided a strong financial incentive to prompt a vigorous defense by Crown. Second, it cannot be said that Crown was unaware of the future risk of asbestos cases like those brought by the Plaintiffs. Third, the Plaintiffs in these cases are proceeding to trial on the same theories of strict liability espoused in the Texas and Washington cases, and include involve the same rules of law, evidentiary requirements, and standards of proof. Fourth, as shown above in detail, there is a substantial identity of issues between the Texas and Washington cases and the cases sub judice (i.e., the same defendant; exposure by the Plaintiffs to the same or similar asbestos-containing products during the same relevant time period; exposure to an asbestos-containing product that was manufactured exactly the same way during the same relevant time period; Plaintiffs who worked at the same job site or workplace during the same relevant time period; and common facts and evidence to be presented by experts, co-workers and product identification witnesses).

Finally, it is clear that, by virtue of the unique factual and legal circumstances present in these cases, judicial economy would be promoted by the application of issue preclusion. For instance, if the Texas and Washington cases preclude Crown from disputing its status as

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Mundet's corporate successor, then numerous experts, corporate representatives, co-workers and product identification witnesses will not be required to testify at the Plaintiffs' trials. In other words, a series of lengthy and complex trials would be streamlined to an appreciable degree if the Texas and Washington cases are given preclusive effect. Moreover, the "repeated litigation of the same issue[s]" is a waste of judicial resources. Parklane Hosiery, *supra*, 439 U.S. at 331, and can be avoided in Plaintiffs' cases.

B. Crown, Having Claimed To Be Mundet's Successor In Other Lawsuits, Should Be Judicially Estopped From Contesting Its Status As Mundet's Corporate Successor.

The doctrine of judicial estoppel prevents a litigant who has successfully taken a position in one action from taking a contradictory position in a subsequent action. Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse (1996), 74 Ohio St.3d 474. Likewise, a party who previously, in a judicial proceeding, successfully asserted one of two inconsistent substantive rights may not, in a later proceeding, assert the other inconsistent right. Fish v. Lake City Bd. of Commrs. (1968), 13 Ohio St.2d 99. Thus, because Crown has argued that it is in fact the corporate successor to Mundet in prior judicial proceedings, it cannot now assert the inconsistent position that it is not Mundet's corporate successor.

For over a decade and a half, Crown has held itself out as a successor to Mundet's asbestos liabilities in countless tort suits against it.¹⁸ Crown also asserted its status Mundet's-

¹⁸ See, e.g., Fulgium v. Armstrong World Industries, Inc. (W.D. La. 1986), 645 F.Supp.761 (Crown's appearance entered as "successor to Mundet Cork Co."), attached as Exhibit 13.

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successor in coverage litigation it brought and won against Mundet's former insurers.¹⁹ Crown successfully argued that the "bodily injury" coverage in Mundet's casualty and general liability insurance policies should be interpreted expansively to encompass any part of the lengthy process that culminates in the manifestation of an asbestos-related disease -- a groundbreaking decision in Pennsylvania that has since been followed by a number of other courts. Of course, Crown accepted its role as Mundet's successor when it came to receiving insurance coverage in asbestos-related suits. Yet, this Court should not now allow it to make the inconsistent argument that Mundet is not Crown's corporate successor when liability is questioned. In other words, Crown cannot have its cake and eat it to.

C. **Crown, A New York Corporation, Is Liable As Mundet's Successor By Reason Of Crown's Statutory And/Or De Facto Merger With Mundet.**

Because Mundet and Crown are New York corporations, this Court and Crown are bound by New York corporate law when considering the consequences of Crown's merger agreement(s) with Mundet. For in Ohio, it is well settled law that the law of the state where a contract is made generally governs the contract's interpretation. Nationwide Mut. Ins. Co. v. Ferrin (1986), 21 Ohio St.3d 43, 44. Consequently, under New York law, "A corporation may be held liable for the torts of its predecessor if... there was a consolidation or merger of seller and

¹⁹ Plaintiffs do not have a copy of the Crown v. Aetna slip opinion. The decision, however, was and remains a leading opinion on the question of insurance coverage for asbestos-related tort liabilities, and has been discussed in many other published decisions. See, e.g. Eli Lilly & Co. v. Home Insurance Co., 764 F.2d 876, 880 (D.C. Cir. 1985); ACandS, Inc. v. Aetna Casualty & Surety Co., 764 F. Supp. 968, 973 (3d Cir. 1985); Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334, 1342 (D.D.C. 1986); J.H. France Refractories Co. v. Allstate Insurance Co., 14 Phila. 291, 1986 Phila. City. Rptr. LEXIS 44, at 14 (Phila. Ct. C.P. Mar. 19, 1986); vale Chemical Co. v. Hartford Accident & Indemnity Co., 340 Pa. Super. 510, 490 A.2d 896, 902 & n.9 (1985).

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purchaser." Schumacher v. Richard Shear Co., 59 N.Y.2d 239, 245, 451 N.E.2d 195 (1983); accord Hartford Accident & Indemnity Co. v. Cannon, Inc., 43 N.Y.2d 823, 825, 373 N.E.2d 364 (1977).

Mundet was merged into Crown pursuant to section 905 of the Business Corporation Law of New York, by the Certificate of Merger executed January 6, 1966.²⁰ Under New York law in Schumacher and Hartford Accident & Indemnity, supra, this merger rendered Crown liable as Mundet's successor for Mundet's tort liabilities. In addition, the New York Business Corporation Law provides that a statutory merger pursuant to section 905 transfers the merged corporation's liabilities into the surviving corporation: "The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations." N.Y. Bus. Corp. L. §906(b)(3).

Moreover, the 1966 statutory merger merely formalized the *de facto* merger of Mundet into Crown that had already occurred upon the November 1963 stock purchase. Successor liability in New York arises from such *de facto* mergers where (1) there is a continuity of management, personnel, location, assets, and general business operations; (2) there is a continuity of shareholders; (3) the seller has ceased its operations, liquidated and dissolved as soon thereafter as possible; and (4) the purchasing corporation assumes those obligations of the seller necessary for the continuation of business operations. See, e.g., Town of Oyster Bay v. Occidental Chemical Corp., 987 F. Supp. 182, 205 (E.D.N.Y. 1997); Burgos v. Pulse Combustion, Inc. 227 A.D.2d 295, 642 N.Y.S.2d 882 (1st Dep't 1996). In this case, Mundet did not survive as a separate entity after the 1963 stock purchase by Crown, as Crown continued

²⁰ See Exhibit 8.

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business operations with former Mundet employees at former Mundet factories, offices and warehouses, under the name off Mundet as a "Division of Crown Cork & Seal."²¹ Based on these facts, Crown is at least liable as Mundet's successor by *de facto* merger.

Likewise, even if Ohio law is applied to this case, Crown's 1963 purchase of Mundet's stock would also support successor liability under Ohio corporate law, as the Ohio elements for *de facto* mergers are identical to those in New York. See, e.g., Welco Industries, Inc. v. Allied Companies (1993), 67 Ohio St.3d 344, 349; Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc. (Cuyahoga City, 1996), 109 Ohio App.3d 246, 264. In fact, the Ohio Supreme Court in Welco found that "a transfer of assets for stock is the sine qua non of de facto merger." Welco, supra, at 349, citing to Travis v. Harris Corp. (7th Cir. 1977), 565 F.2d 443, 447. Thus, under Ohio law, Crown's 1963 purchase of Mundet's stock is almost conclusive proof of the *de facto* merger that occurred.

D. Under New York Corporate Law, Crown's Sale Of Mundet's Contracting Division To Baldwin-Ehret-Hill Did Not Transfer Mundet's Tort Liabilities From Crown To Baldwin-Ehret-Hill.

Under New York corporate law, a mere purchaser of assets only succeeds to the seller's tort liabilities as it agrees to assume. See Schumacher, supra; Hartford Accident & Indemnity, supra. ²²Such an assumption cannot be presumed from the transaction. New York courts usually confine such assumptions to those liabilities expressly transferred in the purchase agreement. See, e.g., City of New York v. Charles Pfizer & Co., ___ A.2d ___, 688 N.Y.2d 23, 24 (1st Dep't.

²¹ See Exhibit 3, excerpt of Deposition of E.J. Stansbury, former Mundet employee.

²² Ohio follows the same rule for assumption and successor liability. See, e.g., Welco, supra, at 349.

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1999) ("Had the parties intended that Gibsonberg assume such liabilities, they would have expressly so provided in their agreement.").

In February 1964, Crown sold Mundet's Thermal Insulation Contracting Division to BEH. The Contracting Division did not manufacture or distribute Mundet's asbestos products. Those products were produced and distributed by Mundet's Thermal Insulation Manufacturing Division, which Mundet [Crown] did not sell to BEH. In fact, the sale Agreement contained an express Assumption provision where BEH assumed only Mundet's liabilities and obligations "arising from and after February 8, 1964, under the Leases, Contracts and Performance Bonds" identified in the Bill of Sale.²³ Thus, this assumption affected only certain specific obligations, and not those on which it was silent, like asbestos-related torts.

²³ See Exhibit 4 at p.6.

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III. CONCLUSION

Based on the foregoing, Plaintiffs request that the Court estop Defendant Crown, Cork & Seal from relitigating its status as corporate successor to Mundet Cork Corporation and/or determine that Crown is the corporate successor to Mundet as a matter of law in all Kelley and Ferraro, L.L.P. asbestos cases and, therefore, enter partial summary judgment in favor of Plaintiffs.

RESPECTFULLY SUBMITTED,

KELLEY & FERRARO, LLP

By: Electronically filed via CLAD

Michael V. Kelley (0002679)

John A. Sivinski (0036712)

Jason W. Richards (0069439)

1300 East Ninth Street

1901 Bond Court Building

Cleveland, Ohio 44114

(216) 575-0777

September 21, 2000

Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Motion for Partial Summary Judgment regarding Defendant Crown Cork & Seal, Inc.'s Status as a Corporate Successor to Mundet Cork Corporation was filed on CLAD, this 21th day of September 2000, and thereby served upon all counsel of record.

Electronically filed via CLAD

Jason W. Richards

E:\Group 4\mundetmsj.wpd

323a

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
3 SAN ANTONIO AND AUSTIN DIVISIONS
4

JAN 10 1984

5 ARTY A. HAWKINS, ET. UX. |
6 VS. |
7 FIBREBOARD CORPORATION, |
8 ET. AL. |

CCS

9
10 DEPOSITION OF
11 E.J. STANSBURY
12
13

14 taken on the 16th day of December, 1983, in the offices
15 of Mr. Richard Mithoff, 3450 One Allen Center,
16 Houston, Harris County, Texas, between the hours of
17 1:40 p.m. and 3:40 p.m., pursuant to the Federal
18 Rules of Civil Procedure.
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A Yes.
Q And did Crown Cork and Seal continue contracting insulation after the purchase of Mundet Cork Company?

A Yes.

Q And did Crown Cork and Seal continue with the same warehouses and same offices that were previously occupied by Mundet Cork Company?

A Yes.

Q Did Crown Cork and Seal continue using products and filling orders of products with the Mundet name on them?

A Yes.

Q And did you, as an employee, continue with the same employee benefits that you had with the Mundet Cork Company?

A Yes.

Q Did the 85 percent magnesia products that you have described for us today that were manufactured and distributed by Mundet Cork Company contain asbestos during the entire period, that you know of, that you worked for Mundet Cork?

A Yes.

MR. BUDD: I think that's all I have.

1
2 MR. BARRON: I will sustain that.

3 MR. WEBER: You don't want to
4 ask him the real crucial issue,
5 then we have objections.

6 BY MR. BUDD:

7 Q Mr. Stansbury, how long --

8 A Are you-all through?

9 Q How long did you continue working for Mundet
10 Cork Company?

11 A I worked with Mundet from 1945 until they sold
12 their company.

13 Q Who did they sell the company to?

14 A Crown Cork and Seal.

15 Q Now, when Mundet sold to Crown Cork and Seal,
16 did Mundet employees, that you know of, go to
17 work for Crown Cork and Seal?

18 A Yes.

19 Q And did Crown Cork and Seal continue to sell
20 Mundet Cork inventory?

21 A Inventory?

22 Q Yes.

23 A Yes, for a period of about three months. They
24 only owned it for about three months.

25 Q And would this inventory include 85 percent
magnesia products?

COASTAL REPORTING SERVICE
224-1659

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1
2 and mines and that sort of
3 thing.

4 MR. HARMON: I object to the
5 general question about when
6 it could be tied down to the
7 specifics of about when he
8 heard it. He has told you he
9 is unsure on the exact years.
10 He said it was the union
11 work, unless you could just
12 ask him to tell about the
13 union worker that first
14 informed him about the danger.

15 BY MR. BUDD:

16 Q How long did you continue working for Mundet
17 Cork Company?

18 A Until they --

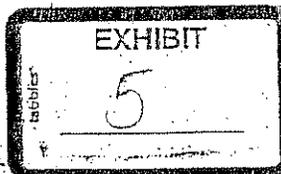
19 MR. WEBER: If you're not going
20 to address the objection we
21 made, then we are going to
22 move that the previous
23 questions and answers be
24 stricken from the record.

25 MR. BUDD: You can make any
objection you want to.

BILL OF SALE AND ASSIGNMENT

For value received and intending to be legally bound, MUNDET CORK CORPORATION, a New York corporation, located at 7101 Tonnelle Avenue, North Bergen, New Jersey (hereinafter referred to as "SELLER"), a Division of Crown Cork & Seal Company, Inc., a New York corporation, located at 9300 Ashton Road, Philadelphia 36, Pennsylvania, hereby sells, assigns, grants, conveys, transfers and sets over to BALDWIN-EHRET-HILL, INC., a Pennsylvania corporation, located at 500 Breunig Avenue, Trenton, New Jersey (hereinafter referred to as "BUYER"), the following assets, goods, chattels and rights of Seller's Thermal Insulation Contract Division:

- 1) Seller's inventory of finished goods and work in process at Seller's manufacturing cost or contract cost, less 15%, whichever is lower, all in the quantities and at the locations specified in Schedule 1, attached hereto and made a part hereof by reference;
- 2) Seller's contracts in progress, based upon costs from February 1, 1964 to February 8, 1964, as specified in Schedule 2, attached hereto and made a part hereof by reference;
- 3) Seller's contracts in progress upon which no progress billing have been made, based on costs from inception to January 31, 1964, as specified in Schedule 3, attached hereto and made a part hereof by reference;
- 4) Seller's inventory of raw materials and useable purchased materials at Seller's purchase price, all in the quantities and at the locations specified in Schedule 4, attached hereto and made a part hereof by reference.



5) All accounts receivable specified in Schedule 5, attached hereto and made a part hereof by reference, ~~based upon 57-1/2% of unpaired balance,~~

6) All of the office furniture, fixtures, equipment and small tools located in the branch offices of Seller, identified in Schedule 6, attached hereto and made a part hereof by reference;

7) Any and all rents and/or deposits on Leases as identified in Schedule 7, attached hereto and made a part hereof by reference;

8) The items of machinery and equipment located at Seller's North Bergen, New Jersey plant, as specified in Schedule 8, attached hereto and made a part hereof by reference;

9) All of Seller's right, title and interest in all Thermal Insulation Contracts and 6 Performance Bonds, identified and specified in Schedule 9, attached hereto and made a part hereof by reference;

The parties have executed a master contract and bond assignment form and agree that reproductions of such form with individual contract numbers and names inserted shall be attached to each individual contract and shall be considered as an original executed assignment.

The contract files shall be physically delivered to Buyer at a time and place designated by mutual agreement of the parties.

10) All of Seller's right, title and interest in the Branch Manager Contracts in effect, identified and specified in Schedule 10, attached hereto and made a part hereof by reference;

The time and place of physical delivery of said contracts shall be agreed to by the parties.

11) All of Seller's right, title and interest in the Branch Offices and Warehouses leased by Seller and assigned to Buyer under separate and individual Assignments, identified and specified in Schedule 11, attached hereto and made a part hereof by reference;

12) All of Seller's right, title and interest in three (3) Vehicle Leases, identified and specified in Schedule 12, attached hereto and made a part hereof by reference.

To have and to hold the assets and rights hereby transferred and assigned or intended to be transferred and assigned unto the Buyer, forever.

Upon receipt of written notice from Buyer, within one year from February 28, 1964, Seller will execute and deliver to Buyer such documents as shall be necessary to grant to Buyer a perpetual, royalty-free, exclusive world-wide license for the use, in connection with the manufacture, distribution and installation of thermal insulation, of such of Seller's present trade names and trademarks as are specified in that notice.

Seller appoints Buyer its true and lawful attorney, with full power of substitution, to demand, receive and collect all moneys, claims or rights due or to become due from the assets and rights hereby sold, assigned and transferred, and to give receipts and releases with respect thereto, and to institute any necessary proceedings to collect or enforce any such moneys, claims or rights.

Seller agrees to execute and deliver to Buyer all such further in-

struments of assignment or other documents, and to take all such other action as may be necessary or, in Buyer's opinion, desirable to fully convey and assign to Buyer title to all the assets and rights hereby sold, assigned and transferred or intended so to be.

Seller represents and warrants that Seller has and hereby conveys to Buyer good and marketable title to the assets and rights recited herein and on the schedules attached hereto, free and clear of all liens, charges, claims and encumbrances of any nature whatsoever.

Seller represents and warrants to Buyer that the amounts listed on Schedule 5 hereto are due and owing in full to the Seller on the date hereof, and are not subject to any deduction, defense, set-off, or counterclaim of any nature whatsoever.

Pursuant to Paragraph 5, page 2 herein and Schedule 5, sums of money collected through February 24, 1964 are hereby deducted from the total receivables referred to in Paragraph 5, page 2 and Schedule 5. Collections applicable to these receivables and other monies collected, owing to Buyer after February 24, 1964, will be remitted daily by Seller to Buyer.

In the event of any sales, transfer or similar taxes incurred with respect to this Bill of Sale or any Assignments thereunder, or any future Assignments necessary to be made to Buyer by Seller, such taxes shall be divided equally between Buyer and Seller.

Seller covenants that for five (5) years after February 28, 1964, it will not engage in the production of calcium silicate or magnesia at its North Bergen, New Jersey plant, or sell such plant to another company for the production of such products, and Seller will not engage in the Thermal Insulation Contract business for such period of time.

010

ASSUMPTION

For value received and intending to be legally bound, Buyer for itself, its successors and assigns, hereby assumes all liabilities and obligations of the Seller arising from and after February 8, 1964, under the Lease Contracts and Performance Bonds, identified and specified on Schedules 9, 10, 11 and 12, attached to the foregoing Bill of Sale and Assignment.

BALDWIN-EHRAT-HILL, INC.

By *E. R. Stevens*
President

Attest:
W. A. [Signature]
Secretary

STATE OF *Pa.*
COUNTY OF *Phila.*

On this, the *20th* day of February, 1964, before me, the undersigned, a Notary Public, personally appeared *E. R. Stevens* who acknowledged himself to be *President* of Baldwin-Ehrat-Hill, Inc. a Pennsylvania corporation; and that he as such *President*, being authorized to do so, executed the foregoing Assumption for the purposes therein contained by signing the name of the corporation by himself as

Witness my hand and notarial seal.

Shirley Fox
Notary Public
SHIRLEY FOX, Notary Public,
Philadelphia, Philadelphia County,
My Commission Expires February 13, 1967

1 Q Did those companies manufacture any home
2 insulation asbestos materials?

3 A No.

4 Q Did those companies ever manufacturer a 7M
5 mud?

6 A No.

7 Q In 1964, did Baldwin-Ehret-Hill purchase the
8 contracting units from Crown, Cork, and Seal?

9 A They did.

10 Q What type of purchase was that?

11 A The purchase was the purchase of 13 branches
12 representing the old Mundet Cork purchased by Crown,
13 Cork, and Seal and we purchased the assets, not the
14 liabilities.

15 Q Did those companies ever relabel any
16 insulation products which contained asbestos that were
17 manufactured by other companies?

18 A Yes.

19 Q Would you tell us about that, please?

20 A We purchased from 1957 to the end of '58
21 calcium silicate and 85 percent magnesia pipe covering
22 and block from Mundet Cork Company.

23 Q Did any other companies ever take products
24 made by those companies for which you worked and
25 relabel products with their label? Now, I am talking

Keene and BEH

3. Keene was formed in 1967 as a Delaware corporation and remained a Delaware corporation until December 31, 1979, when it changed its state of incorporation to New York. Keene has never manufactured or sold any thermal insulation products which contained asbestos.

4. In February 1968, Keene purchased for cash substantially all of the outstanding common stock of Baldwin-Ehret-Hill, Inc. ("BEH"). BEH itself had been formed in 1959 as a result of the merger of Ehret Magnesia Manufacturing Company and Baldwin-Hill Company. In 1970, there was a statutory merger between BEH and KBPC, a newly formed Delaware corporation wholly owned by Keene, with KBPC being the surviving corporation. Keene subsequently sold the stock of KBPC in 1974 to a third-party.

5. Keene expressly denies that it is the successor to the unknown and unforeseen contingent tort liabilities of KBPC and its predecessors, including BEH, and expressly reserves the right to so contend in the future. For the sake of simplicity, however, and because the facts and legal issues surrounding the successor question regarding Mundet can be readily isolated and resolved, this motion will solely address that issue and demonstrate that Keene is not the successor to Mundet.

BEH and Mundet

6. Upon information and belief, Mundet was originally

formed in the early 1900's and had two primary fields of enterprise: (1) the manufacture and sale of cork products, and (2) the manufacture, sale and installation of insulation products. Only the insulation part of the business is relevant to plaintiffs' allegations in this lawsuit. The insulation part of Mundet's business was itself really two related but nonetheless separate and distinct businesses: (a) the manufacture and sale to third parties of thermal insulation products, some of which may have contained asbestos; and (b) the installation of thermal insulation products (some of which may have contained asbestos) -- the so-called "Contracting Operations".

7. The Contracting Operations consisted of approximately 14 branch offices (in different cities), each of which bid on contracts (usually as a sub-contractor) for the installation of, inter alia, thermal insulation products in power plants, refineries and other locations. The Contracting Operations engaged in the installation of the thermal insulation products, and while they might utilize products from the manufacturing operations, were not involved in the manufacture of these products.

8. In November 1963, Mundet was purchased by Crown Cork & Seal Company, Inc. ("CC&S"). Upon information and belief, Mundet discontinued the manufacture and sale of thermal

insulation products (including any which may have contained asbestos) almost immediately after this purchase.

9. Subsequently, in February 1964, BEH purchased the assets of the Mundet Contracting Operations from CC&S. The purchase by BEH of the Mundet Contracting Operations was purely a cash transaction, the purchase price being \$3,281,818.79, and there was no exchange or sale of stock between BEH and CC&S. BEH and Mundet did not merge as a result of this transaction and the remaining divisions of Mundet continued to be operated as a part of CC&S -- except for the manufacture and sale of thermal insulation products, which had been discontinued. BEH and Mundet continued to exist after the transaction as completely distinct and separate entities. Furthermore, while certain Mundet Contracting Operations employees became BEH employees, the directors of Mundet did not become directors of BEH or remain in any way connected with the Mundet assets, and no Mundet shareholders became shareholders of BEH.

10. The documentation for the purchase of the Contracting Operations by BEH from CC&S consisted of (a) a "Bill of Sale and Assignment" (the "Agreement") signed on February 8, 1964, a true and correct copy of which is attached hereto as Exhibit A, and (b) a February 5, 1964 "Aid to Memory," a true and correct copy of which is attached as Exhibit B. In these documents Mundet is always referred to as a "Division of Crown

Cork & Seal Company, Inc.," and CC&S officers participated in the signing of the relevant documents.

11. In the Agreement, CC&S represented and warranted that it "hereby conveys to Buyer good and marketable title to the assets and rights recited herein and on the schedules attached hereto, free and clear from all liens, charges, claims and encumbrances of any nature whatsoever." (Exhibit A at 4) Under a final paragraph of the Agreement, "Assumption," BEH bound itself to assume "all liabilities and obligations" of Mundet "arising from and after February 8, 1964, under the Leases, Contracts and Performance Bonds" which were transferred in the transaction, all of which related only to the Contracting Operations (emphasis added).

12. BEH purchased the assets of the Contracting Operations. While some of the manufacturing equipment and inventory was also included in the assets transferred, there was no longer a product line of thermal insulation products or any ongoing enterprise manufacturing or selling these products. Following BEH's purchase of the Mundet Contracting Operations, BEH never manufactured any of Mundet's thermal insulation products or used Mundet's name on products manufactured by BEH in its operations.

13. It has been judicially recognized that Crown Cork & Seal is the successor to Mundet for the purposes of this litigation. In Crown Cork & Seal, Inc. v. Aetna Casualty & Surety

Co., No. 1292 (Pa. Common Pleas 1980), a true and correct copy of which is attached as Exhibit C, the court permitted CC&S to bring a declaratory judgment action against its insurance carriers with respect to the carriers' duty to defend CC&S in numerous asbestos cases which had been brought against it. Implicit in the holding entitling CC&S to bring the action was that CC&S was the successor to Mundet's asbestos-case liabilities.

14. Indeed, CC&S clearly recognizes its position as a successor. In a brief filed by CC&S in or about October of 1979 in connection with the above-mentioned declaratory judgment action, a true and correct copy of which is attached as Exhibit D, CC&S states:

"In the Declaratory Judgment Action, Crown requests that the Court of Common Pleas of Philadelphia County, review the contracts of insurance issued to Crown and its predecessor, Mundet Cork Corporation. . . ."
Brief at 5 (emphasis added)

15. Similarly, in Freeman v. Fibreboard Corp., et al., Civ. No. E-80-571-CA (E.D. Tex. Mar. 30, 1982), and numerous other cases in Texas, CC&S is obtaining judgments releasing it after settlements had been made as "Crown Cork & Seal Company, Inc. (successor to Mundet Cork Corporation)." A true and correct copy of the judgment in the Freeman case is attached as Exhibit E.

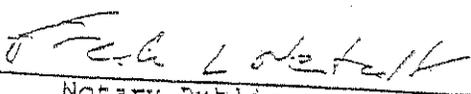
16. Since CC&S is Mundet's successor, BEH cannot be considered to be Mundet's successor with respect to any of

Mundet's activities prior to BEH's purchase of the assets of the Mundet Contracting Operations; BEH's only liability could arise from the operation and use of the purchased assets after the date of purchase, and such is not the basis for liability asserted by plaintiffs.

WHEREFORE, deponent respectfully requests that this Court dismiss plaintiffs' claims against it to the extent that they are claiming that Keene can be held liable as the successor to Mundet, and for such other and further relief as to the court may seem just and proper.


HOWARD A. MILEAF

Sworn to before me this
12th day of July, 1983.


Notary Public

FREDERIC L. NEUSTADT
Notary Public, State of New York
No. 31-4716821
Qualified in New York County
Term Expires March 30, 1985

Court of Common Pleas of Pennsylvania, Philadelphia
County.

Crown Cork and Seal, Inc.

v.

Aetna Casualty and Surety Company

No. 1292.

October 9, 1980

**1 *525 Preliminary objections to complaint.

West Headnotes

Declaratory Judgment \Rightarrow 143.1
118Ak143.1

(Formerly 118Ak143)

Where injured persons asserting claims against plaintiff insured are not joined, an action for declaratory judgment nevertheless is properly before the court against defendant putative insurers for a ruling on plaintiff's rights under contracts of insurance entered into at diverse times with defendants.

Robert R. Reeder, for plaintiff.

Dean F. Murtagh, Richard M. Shusterman, Richard K. Masterson and Robert M. Britton, for defendant.

PRATTIS, J.

Crown Cork and Seal, a New York corporation with major offices in Philadelphia and plants in diverse sections of the *526 United States, brought the instant petition for declaratory judgment in this court to seek a ruling on its rights under certain contracts of insurance entered into at diverse times with defendants Aetna Casualty and Surety Company, Insurance Company of North America, Employer's Mutual Liability Insurance Company, Continental Insurance Company and Lumbermen's Mutual Casualty Company.

During part of its corporate history, Crown Cork and Seal owned the Mundet Cork Corporation, which included the Thermal Insulation Contract Division, a manufacturer of products containing asbestos.

Beginning in the fall of 1976 petitioner was named as defendant in a series of personal injuries actions in courts of diverse locations throughout the United States. These actions sought compensation for personal injuries to the claimants therein arising from their work with asbestos products. It is uncontradicted that the claimants in

question came in contact with products manufactured by petitioner or subsidiary corporations of petitioner, which products contained asbestos. Claimants claimed the asbestos caused their injuries.

At the time this petition was filed, 91 such cases had been filed against petitioner throughout the United States. At the time this case was argued in July, 1980, 650 cases had been filed against petitioner. Petitioner claims that all of these cases arise because of its ownership of Mundet Corporation and its Thermal Insulation Division.

Aetna Casualty & Surety Company was the primary liability insurance carrier for Mundet for the years 1950 through July 1, 1960. Aetna Casualty & Surety Company was the primary liability *527 insurance company for Crown Cork and Seal for the years July 1, 1960 through May 1, 1966. The Insurance Company of North America was the primary liability and excess carrier for Crown Cork and Seal for the period of May 1, 1966 to May 1, 1970. Employer's Mutual Liability Insurance was the primary liability excess carrier for Crown Cork and Seal for the period of May 1, 1970 through May 1, 1974. Continental Insurance Company was the primary carrier for Crown Cork and Seal from May 1, 1974 to July 1, 1976, with excess insurance being carried by Lumbermen's Mutual Casualty Company. From July 1, 1976 to the present, petitioner has been self-insured.

**2 Crown Cork and Seal alleges that prior to the filing of the petition for declaratory judgment, it had spent \$75,000 in the settlement of claims, as hereinbefore discussed, and \$ 15,000 in the defense of such claims. Crown Cork and Seal had sought to have defendants defend the claims and pay the settlement or verdict, if any, but in each case, where such defense and indemnity was sought, it was denied.

The crux of the present case, as in almost all of the other "asbestos cases" turns on the resolution of the question of whether the thousands of sufferers who have endured physical deterioration and death from exposure to asbestos were individuals who had suffered "accidents" within the meanings of the insurance policies carried by various manufacturers and distributors of asbestos products. Whether there had been an "accident" has been construed to depend on whether claimant manifested symptoms of the physical deterioration during the policy period or whether the claimant had been exposed to the injury causing substance during *528 the policy period. In the former instance, carriers on the risk during the frequently many years that it takes for the physical deterioration to manifest itself can successfully avoid

(Cite as: 16 Pa. D. & C.3d 525, *528, 1980 WL 740, **2 (Pa.Com.Pl.))

defending and paying. In the latter instance, the various insurance companies on the risk throughout the period of exposure to the endangering substance can each be said to have a proportionate share of responsibility for the defense and indemnification. Thus, insurance companies invariably argue for the "manifestation theory," and the claimants invariably argue for the "exposure theory." It is unnecessary at the state of this litigation to elect one theory or the other since the only issue before the court is whether the preliminary objections filed by Aetna Casualty and Surety Company can prevail.

In the preliminary objections, Aetna Casualty and Surety Company argues that the petition for declaratory judgment fails to attach the complaints that claimant has filed against petitioner and consequently determination of coverage cannot be made absent such complaint, that the petition does not set forth sufficient facts to enable Aetna to defend coverage as to each claimant's claim and finally that this court is without jurisdiction to decide the declaratory judgment petition absent the joinder of the individual claimant's actions against petitioner.

DISCUSSION

The Declaratory Judgments Act, 42 Pa.C.S.A. §7532, provides: "Courts of record within their respective jurisdictions, shall have power to declare rights, status, and other legal relations. . . ."

Section 7533 of that act provides further:

"Any person interested under a deed, will, written *529 contract, or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . contract . . . and obtain a declaration of rights, status or . . . legal relations thereunder."

**3 The Supreme Court of Pennsylvania has held that the declaratory judgment device is an appropriate means for resolving controversies relating to the extent of coverage under a policy of insurance. This is so whether the petition is brought by the insured after a denial of coverage by the insurer, *Friestad v. Travelers Indemnity Co.*, 452 Pa. 417, 306 A. 2d 295 (1973), or by the insurer seeking to determine the extent of his obligation to the insured: *Liberty Mutual Insurance Co. v. S.G.S. Co.*, 456 Pa. 94, 318 A. 2d 906 (1974). The court clearly endorsed the declaratory judgment as a viable means of resolving such controversies even when alternative forms of action are available and even when a dispute as to the facts exists, making the declaratory judgment something more than the mere construction of a written document.

What is essential for determination and what the petitioner seeks in a declaratory judgment are answers to the questions relative to specific written policies. Was there a contract of insurance? What risk is insured against? Are the claimants individuals who have been subjected to that risk? All these are questions which can be answered in a declaratory judgment proceeding.

In the present case, the extent of the underlying litigation is undisputed. The resources of defendant and plaintiff are more than ample to collect and disseminate whatever information is required for the adjudication of specific claims. If dates, medical reports, identity of parties, identity of companies, *530 beneficiaries and the like are significant issues, discovery is available.

The more difficult question is whether, having resolved these questions, an action for declaratory judgment can subsist where, as here, the injured persons whose claims have been asserted against the insured, have not been joined in a declaratory judgment proceeding between the insured and his putative insurers. The leading Pennsylvania cases seem to suggest a negative answer. Thus, in *Keystone Insurance Co. v. Warehousing and Equipment Corporation*, 402 Pa. 318, 165 A. 2d 608 (1960), the court held that an injured party who had secured a default judgment against an insured was a necessary party in a declaratory judgment action brought by the insurer to deny coverage to the insured. Similarly, in *Ins. Co. of State of Pa. v. Lumbermens Mutual Casualty Co.*, 405 Pa. 613, 177 A. 2d 94 (1962), the court held the insured and the claimant were necessary parties to a declaratory judgment action brought by one insurer for concurrent coverage from another. Both plaintiff and defendant in that declaratory judgment action had issued policies to the insured covering the time of the accident. As Mr. Chief Justice Jones pointed out in his concurring opinion in *Keystone Ins. Co. v. Warehousing and Equipment Corporation*, *supra*, what was sought in these cases was the specific termination of the rights of a third party beneficiary of the insurance contract. In both *Keystone* and *INA v. Lumbermens*, *supra*, the insurance company was seeking a declaration with reference to coverage of a single incident.

**4 Clearly these principles are reflected in the recently enacted Declaratory Judgments Act, 42 Pa.C.S.A. §7531 et seq., with the proviso in section 7540(a) that: "When declaratory relief is sought, all *531 persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ." However, none of the prior Pennsylvania cases, now codified in section 7540(a), dealt with the use of the declaratory judgment process as

applied to a real controversy-between the insured and the insurer where the class of claimants is indefinite and to some extent even unknown. Thus, in *Reifsnnyder v. Pittsburgh Outdoor Advertising Co.*, 396 Pa. 320, 152 A. 2d 894 (1959), cited with approval in *INA v. Lumbermens*, supra, the court held that failure to join known minority shareholders prevented jurisdiction in equity because their "rights are so connected with the claims of the litigants that no decree can be made between them without impairing those rights." Similarly, in *Gardner v. Allegheny County*, 382 Pa. 88, 114 A. 2d 491 (1955), the parties alleged to be indispensable were the several Federal agencies that minutely regulated the defendant county airport and in *Gavigan v. Bookbinders, Machine Operators and Auxiliary Workers Local Union No. 97*, 394 Pa. 400, 147 A. 2d 147 (1959), a seniority dispute involved construction of an employment contract to which the employer was indispensable in litigation as in fact. [FN*]

FN*. Significantly, in *Friestad v. Travelers*, supra, the failure to join a known claimant--which had in fact asked leave to intervene--was not considered as an impediment to the exercise of jurisdiction.

In view of the court's holding in *Friestad* and *Liberty Mutual Insurance Co. v. S.G.S.*, to deny the use of the declaratory judgment in the present case would be to deny its applicability in the circumstance *532 where it is most useful. If an insured has a real controversy for adjudication when there is one claim outstanding, how much more does he have a real controversy when faced with 600 claims. When the controversy is framed by the litigants as: Does "X" have rights under the contract of

insurance between insured "A" and insurer "B," obviously there is a case and a controversy (and "X" is an indispensable party). But when insured "A" sues insurer "B" to determine whether "A" or "B" must bear the cost of defending against 600 X's and to determine whether a single contract of insurance was written to cover the risk of loss to 600, or 700 or 1,000 X's that too presents a distinct case and controversy--between "A" and "B." The fact that every "X" is not present or, more likely, not known does not divest the court of jurisdiction.

A comparable problem is presented to the courts in class actions. There, the fact that all potential members of the class do not opt in does not prevent a binding adjudication as to those who do. Both class actions and declaratory judgment actions are designed to facilitate the resolution of numerous controversies through the litigation of one basic controversy. There is obvious merit in such a process even though all potential litigants are not present or bound. Hence, in the present case, an adjudication of the coverage controversy should at least prevent the present parties from relitigating that issue 650 times.

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Court of Common Pleas of Pennsylvania, Philadelphia
County.

Crown Cork and Seal, Inc.

v.

Aetna Casualty and Surety Company

No. 1292.

October 9, 1980

**1 *525 Preliminary objections to complaint.

West Headnotes

Declaratory Judgment \Rightarrow 143.1
118Ak143.1

(Formerly 118Ak143)

Where injured persons asserting claims against plaintiff insured are not joined, an action for declaratory judgment nevertheless is properly before the court against defendant putative insurers for a ruling on plaintiff's rights under contracts of insurance entered into at diverse times with defendants.

Robert R. Reeder, for plaintiff.

Dean F. Murtagh, Richard M. Shusterman, Richard K. Masterson and Robert M. Britton, for defendant.

PRATTIS, J.

Crown Cork and Seal, a New York corporation with major offices in Philadelphia and plants in diverse sections of the *526 United States, brought the instant petition for declaratory judgment in this court to seek a ruling on its rights under certain contracts of insurance entered into at diverse times with defendants Aetna Casualty and Surety Company, Insurance Company of North America, Employer's Mutual Liability Insurance Company, Continental Insurance Company and Lumbermen's Mutual Casualty Company.

During part of its corporate history, Crown Cork and Seal owned the Mundet Cork Corporation, which included the Thermal Insulation Contract Division, a manufacturer of products containing asbestos.

Beginning in the fall of 1976 petitioner was named as defendant in a series of personal injuries actions in courts of diverse locations throughout the United States. These actions sought compensation for personal injuries to the claimants therein arising from their work with asbestos products. It is uncontradicted that the claimants in

question came in contact with products manufactured by petitioner or subsidiary corporations of petitioner, which products contained asbestos. Claimants claimed the asbestos caused their injuries.

At the time this petition was filed, 91 such cases had been filed against petitioner throughout the United States. At the time this case was argued in July, 1980, 650 cases had been filed against petitioner. Petitioner claims that all of these cases arise because of its ownership of Mundet Corporation and its Thermal Insulation Division.

Aetna Casualty & Surety Company was the primary liability insurance carrier for Mundet for the years 1950 through July 1, 1960. Aetna Casualty & Surety Company was the primary liability *527 insurance company for Crown Cork and Seal for the years July 1, 1960 through May 1, 1966. The Insurance Company of North America was the primary liability and excess carrier for Crown Cork and Seal for the period of May 1, 1966 to May 1, 1970. Employer's Mutual Liability Insurance was the primary liability excess carrier for Crown Cork and Seal for the period of May 1, 1970 through May 1, 1974. Continental Insurance Company was the primary carrier for Crown Cork and Seal from May 1, 1974 to July 1, 1976, with excess insurance being carried by Lumbermen's Mutual Casualty Company. From July 1, 1976 to the present, petitioner has been self-insured.

**2 Crown Cork and Seal alleges that prior to the filing of the petition for declaratory judgment, it had spent \$75,000 in the settlement of claims, as hereinbefore discussed, and \$ 15,000 in the defense of such claims. Crown Cork and Seal had sought to have defendants defend the claims and pay the settlement or verdict, if any, but in each case, where such defense and indemnity was sought, it was denied.

The crux of the present case, as in almost all of the other "asbestos cases" turns on the resolution of the question of whether the thousands of sufferers who have endured physical deterioration and death from exposure to asbestos were individuals who had suffered "accidents" within the meanings of the insurance policies carried by various manufacturers and distributors of asbestos products. Whether there had been an "accident" has been construed to depend on whether claimant manifested symptoms of the physical deterioration during the policy period or whether the claimant had been exposed to the injury causing substance during *528 the policy period. In the former instance, carriers on the risk during the frequently many years that it takes for the physical deterioration to manifest itself can successfully avoid

(Cite as: 16 Pa. D. & C.3d 525, *528, 1980 WL 740, **2 (Pa.Com.Pl.))

defending and paying. In the latter instance, the various insurance companies on the risk throughout the period of exposure to the endangering substance can each be said to have a proportionate share of responsibility for the defense and indemnification. Thus, insurance companies invariably argue for the "manifestation theory," and the claimants invariably argue for the "exposure theory." It is unnecessary at the state of this litigation to elect one theory or the other since the only issue before the court is whether the preliminary objections filed by Aetna Casualty and Surety Company can prevail.

In the preliminary objections, Aetna Casualty and Surety Company argues that the petition for declaratory judgment fails to attach the complaints that claimant has filed against petitioner and consequently determination of coverage cannot be made absent such complaint, that the petition does not set forth sufficient facts to enable Aetna to defend coverage as to each claimant's claim and finally that this court is without jurisdiction to decide the declaratory judgment petition absent the joinder of the individual claimant's actions against petitioner.

DISCUSSION

The Declaratory Judgments Act, 42 Pa.C.S.A. §7532, provides: "Courts of record within their respective jurisdictions, shall have power to declare rights, status, and other legal relations. . . ."

Section 7533 of that act provides further:

"Any person interested under a deed, will, written *529 contract, or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . contract . . . and obtain a declaration of rights, status or . . . legal relations thereunder."

**3 The Supreme Court of Pennsylvania has held that the declaratory judgment device is an appropriate means for resolving controversies relating to the extent of coverage under a policy of insurance. This is so whether the petition is brought by the insured after a denial of coverage by the insurer, *Friestad v. Travelers Indemnity Co.*, 452 Pa. 417, 306 A. 2d 295 (1973), or by the insurer seeking to determine the extent of his obligation to the insured: *Liberty Mutual Insurance Co. v. S.G.S. Co.*, 456 Pa. 94, 318 A. 2d 906 (1974). The court clearly endorsed the declaratory judgment as a viable means of resolving such controversies even when alternative forms of action are available and even when a dispute as to the facts exists, making the declaratory judgment something more than the mere construction of a written document.

What is essential for determination and what the petitioner seeks in a declaratory judgment are answers to the questions relative to specific written policies. Was there a contract of insurance? What risk is insured against? Are the claimants individuals who have been subjected to that risk? All these are questions which can be answered in a declaratory judgment proceeding.

In the present case, the extent of the underlying litigation is undisputed. The resources of defendant and plaintiff are more than ample to collect and disseminate whatever information is required for the adjudication of specific claims. If dates, medical reports, identity of parties, identity of companies, *530 beneficiaries and the like are significant issues, discovery is available.

The more difficult question is whether, having resolved these questions, an action for declaratory judgment can subsist where, as here, the injured persons whose claims have been asserted against the insured, have not been joined in a declaratory judgment proceeding between the insured and his putative insurers. The leading Pennsylvania cases seem to suggest a negative answer. Thus, in *Keystone Insurance Co. v. Warehousing and Equipment Corporation*, 402 Pa. 318, 165 A. 2d 608 (1960), the court held that an injured party who had secured a default judgment against an insured was a necessary party in a declaratory judgment action brought by the insurer to deny coverage to the insured. Similarly, in *Ins. Co. of State of Pa. v. Lumbermens Mutual Casualty Co.*, 405 Pa. 613, 177 A. 2d 94 (1962), the court held the insured and the claimant were necessary parties to a declaratory judgment action brought by one insurer for concurrent coverage from another. Both plaintiff and defendant in that declaratory judgment action had issued policies to the insured covering the time of the accident. As Mr. Chief Justice Jones pointed out in his concurring opinion in *Keystone Ins. Co. v. Warehousing and Equipment Corporation*, *supra*, what was sought in these cases was the specific termination of the rights of a third party beneficiary of the insurance contract. In both *Keystone* and *INA v. Lumbermens*, *supra*, the insurance company was seeking a declaration with reference to coverage of a single incident.

*4 Clearly these principles are reflected in the recently enacted Declaratory Judgments Act, 42 Pa.C.S.A. §7531 et seq., with the proviso in section 7540(a) that: "When declaratory relief is sought, all *531 persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ." However, none of the prior Pennsylvania cases, now codified in section 7540(a), dealt with the use of the declaratory judgment process as

applied to a real controversy-between the insured and the insurer where the class of claimants is indefinite and to some extent even unknown. Thus, in *Reifsnnyder v. Pittsburgh Outdoor Advertising Co.*, 396 Pa. 320, 152 A. 2d 894 (1959), cited with approval in *INA v. Lumbermens*, supra, the court held that failure to join known minority shareholders prevented jurisdiction in equity because their "rights are so connected with the claims of the litigants that no decree can be made between them without impairing those rights." Similarly, in *Gardner v. Allegheny County*, 382 Pa. 88, 114 A. 2d 491 (1955), the parties alleged to be indispensable were the several Federal agencies that minutely regulated the defendant county airport and in *Gavigan v. Bookbinders, Machine Operators and Auxiliary Workers Local Union No. 97*, 394 Pa. 400, 147 A. 2d 147 (1959), a seniority dispute involved construction of an employment contract to which the employer was indispensable in litigation as in fact. [FN*]

FN*. Significantly, in *Friestad v. Travelers*, supra, the failure to join a known claimant--which had in fact asked leave to intervene--was not considered as an impediment to the exercise of jurisdiction.

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