Nuts and Bolts of Asbestos

June 7, 2017

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ERIE INSTITUTE OF LAW
AGENDA

9:00 a.m.  What is Asbestos?
Keith R. Vona, Esq., Lipsitz & Ponterio, LLC
Robert J. Mullins, II, Esq., Gibson, McAskill & Crosby LLP

- Asbestos 101
- Diseases and Latency
- Product & Occupations
- Liability of Defendants
- Q&A

10:00 a.m.  Discovery
Kenneth A. Krajewski, Esq., Brown & Kelly LLP

- Expedited Trial Preferences
- Depositions, including Video
- Motions/Summary Judgement/Burden of Proof
- Q&A

11:00 a.m.  Trial
Robert J. Mullins, II, Esq., Gibson, McAskill & Crosby LLP
Keith R. Vona, Esq., Lipsitz & Ponterio, LLC

- Motion in Limine
- Voir Dire
- Trial & Experts
- Jury Charge/Instruction
- Q&A

12:00 p.m.  Adjourn
What is Asbestos?

Keith R. Vona, Esq.
Lipsitz & Ponterio, LLC

Robert J. Mullins II, Esq.
Gibson, McAskill & Crosby LLP
Nuts & Bolts of Asbestos

“Asbestos 101”

Keith R. Vona, Esq.
Lipsitz & Ponterio, LLC
135 Delaware Avenue
Buffalo, N.Y. 14202
“WHAT’S IT ALL ABOUT?”
SUREBONDER GLUE GUN
FPC Corporation-Wauconda, IL
WARNING:
NOZZLE & GLUE WILL BURN
UNPLUG AFTER SUING
FAIL
What Is Asbestos?
Three Commercial Fiber Types

Chrysotile

Crocidolite

Amosite
How small is asbestos?

2-3 rice grains

20,000 Asbestos Fibers

5-6 human hairs
1 Gram of Asbestos
Asbestos Diseases

Pleural Plaques
Asbestosis

Mesothelioma (3)
Fatal Cancer

Lung Cancer
Asbestos = Mesothelioma

“Signal Tumor”
Myth

Asbestos only bad in large doses
No Safe Level Asbestos

Dose Response
Asbestos Products & Who is at Risk
Asbestos Products & Who is at Risk
Asbestos Products & Who is at Risk
Asbestos Products & Who is at Risk
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Manufacturers’ Liability
“State of the Art”
The evil effects of asbestos dust have also attracted my attention…

…the effects have been found to be injurious, as might be expected…

Latency
1930 – Merewether and Price

- M.D. & IH working together
- Implement ventilation and exhaust
- Use of wet methods vs. dry
- “Educate the worker(s) to a sane appreciation of the risk”

READ BY 80% of U.S. Physicians
1935 – Lynch and Smith

First case report of asbestosis and lung cancer in the American Literature.

Lung cancer was an uncommon disease in 1935, and the occurrence of even one case of asbestosis with lung cancer was noteworthy.

1960 - Wagner

Wagner’s study of miners, millers, and transporters of asbestos and of non-mining residents looked at 47 cases, occurring between 1956 and 1960 and found primarily mesothelioma of the pleura.
1964 – Dr. Irving Selikoff

NEW YORK ACADEMY OF SCIENCES

Held in October 1964

Published in December 1965

Discussed studies showing excess incidence of mesothelioma in asbestos-exposed workers.

By 1964, there were over 700 articles published in the medical and scientific literature which addressed the hazards of asbestos.
YOU’RE NOT SORRY BECAUSE YOU DID IT,
YOU’RE SORRY BECAUSE YOU GOT CAUGHT
September 22, 1958

To: D. L. Kieran – Subject: Hazardous Pigments

From: Buffalo Operations

This has reference to your September 12th letter addressed to J. G. Stapler and his September 18th letter addressed to J. Volk.

Research is checking to learn the names of the products for which you sent labels. Until I get this specific information, I can comment generally about what you can do to prevent pigment stains and exposure to hazardous dust.

Men handling the bags of material should be required to wear the respirator approved by the U. S. Bureau of Mines for silica dusts.

A West Disinfecting Company representative should be called in and he will be able to recommend for you the proper protective gowns that men can apply before they work with the pigment, and thus avoid stains of the skin. We know that you will never lose sight of the fact that perhaps the greatest hazard in your plant is with men handling asbestos. Because just as certain as death and taxes is the fact that if you inhale asbestos dust you get asbestosis.

M. C. M. Pollard
K. C. M. Pollard

CC: E. W. Seifert

PERSONAL & CONFIDENTIAL

“We know that you will never lose sight of the fact that perhaps the greatest hazard in your plant is with men handling asbestos. Because as certain as death and taxes is the fact that if you inhale asbestos dust you get asbestosis.”
June 9, 1970

Mr. F. J. Rogers, Secretary
Cyprus Association Safety Committee
201 North Wells Street
Chicago, Illinois 60606

Dear Fred:

We believe the attached is of great importance to the Association and member companies.

You are aware that joint systems contain approximately 5% asbestos, some nics and the balance is limestone.

Based on threshold limits adapted by A.C.G.R., nics (when exceeding 5% free silica) can be classed as a respiratory irritant. Asbestos is very harmful, however we question whether the percentage used in a formula and after it is mixed in a batch could be considered harmful.

We realize that some one will be the whipping boy, also product liability will be stressed. It is our position that the entire blame can be placed on the contractor, for not insisting on respirators and dust masks when sanding.

We will keep you posted of any other problems that may develop.

In all probability, U. S. Cyprus and National Cyprus have been alerted, and we will be interested in their approach to minimizing the problem.

Please send 500 "Watchful Waltz" stickers and bill this office. Thank you.

Sincerely,

H. F. [Signature]
Safety Supervisor

"Asbestos is very harmful......... We realize that someone will be the whipping boy, also product liability will be stressed. It is our position that the entire blame can be placed on the contractor, for not insisting on respirators and dust masks when sanding."
“My answer to the problem is: if you have enjoyed a good life while working with asbestos products why not die from it. There’s got to be some cause.”
What to do if you get a case?
Discovery

Kenneth A. Krajewski, Esq.
Brown & Kelly LLP
Nuts and Bolts of Asbestos

Wednesday, June 7, 2017

1. Expedited Trial Preferences (~15 minutes)
2. Depositions, including Video (~15 minutes)
3. Motions/Summary Judgement/Burden of Proof (~ 15 minutes)
4. Q&A (~15 minutes)
1. Expedited Trial Preferences

- The starting point is the CPLR.

  Rule 3407. Preliminary conference in personal injury actions involving certain terminally ill parties.

  (a) Request for conference. At any time, a party to an action who is terminally ill, and who asserts in a pleading in such action that such terminal illness is the result of the culpable conduct of another party to such action, may request an expedited preliminary conference in such action. Such request shall be filed in writing with the clerk of the court, and shall be accompanied by a physician's affidavit stating that the party is terminally ill, the nature of the terminal illness, and the duration of life expectancy of such party, if known. The court shall hold a preliminary conference in such action within twenty days after the filing of such a request.

  (b) 1. Preliminary conference. At such preliminary conference, the court shall issue an order establishing a schedule for the completion of all discovery proceedings, to be completed within ninety days after the date of the preliminary conference, unless it can be demonstrated for good cause that a longer period is necessary.

    2. At such preliminary conference, the court shall issue an order that a note of issue and certificate of readiness be filed in such action within a period of time specified in the order, that the action receive a preference in trial, and that the trial be commenced within one year from the date of such order. In its discretion, and upon application of any party, the court may advance or adjourn such trial date based on the circumstances of the case.

    3. Notwithstanding the provisions of subdivision (b) of rule 3214 of this chapter, the service or pendency of a motion under rule 3211, 3212 or section 3213 of this chapter shall not stay disclosure in an action where a preliminary conference order has been entered pursuant to this rule.

- Next look to the Case Management Order (CMO).
There are multiple asbestos litigation dockets across New York State. Practice within New York City is dictated by New York City Asbestos Litigation (NYCAL). This is outside the scope of today’s presentation, but further information may be found at the official NYCAL website:


Upstate, practicalities associated with expedited trial preference is generally divided by practice within the:

- **5th** Judicial District (Herkimer, Jefferson, Lewis, Oneida, Onondaga, Oswego Counties) with Justice Charles C. Merrell, J.S.C. presiding;
  - Amendment to Amended Case Management Order No. 1, Fifth Judicial District Asbestos Litigation (March 24, 2003), http://www.nycourts.gov/courts/5jd/onondaga/supremeconomy/Rules_Asbestos.pdf (last visited April 19, 2017). A copy of the 5th Judicial District Amended Case Management order is attached as Exhibit A.
    - Follows general CPLR 3407 framework.

- **3rd** Judicial District (Albany, Columbia, Greene, Schoharie, Sullivan, Rensselaer, Ulster Counties), **4th** Judicial District (Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren, Washington Counties), and **6th** Judicial District (Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, Tompkins Counties) with Justice Richard T. Aulisi, J.S.C. presiding;

  - Case Management Order, Seventh Judicial District Asbestos Litigation (March 01, 2012), http://nycourts.gov/courts/7jd/courts/s&c/asbestos/pdfs/CMO.pdf (last visited April 19, 2017). A copy of the 7th Judicial District Case Management order is attached as Exhibit B.
• In addition to CPLR 3407 framework, requires five additional offerings by Plaintiff:

i. Medical affidavit executed by a treating physician specifying the injured Plaintiff’s present diagnosis and prognosis and indicating any prescribed medication which would in any way affect the injured Plaintiff’s mental faculties and ability to understand and respond to questioning;

ii. A copy of the summons and complaint and any amended and/or supplemental summonses and complaints;

iii. Plaintiff’s responses to Defendants’ standard Interrogatories and to any supplemental interrogatories previously served;

iv. All medical records and reports in the possession of Plaintiff and Plaintiff’s counsel; and

v. All other documents in Plaintiff’s or Plaintiff’s counsel’s possession relating to taxes, workers’ compensation and social security.

• Plaintiff may not conduct videotaped trial testimony of an in extremis injured Plaintiff unless the above materials have been provided to all defense counsel and defense counsel have completed their discovery deposition.

• Parties are encouraged to act reasonably concerning scheduling, and will make a good faith effort to schedule the in extremis discovery deposition and videotaped trial testimony at mutually agreeable times and locations.
8th Judicial District ( Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming Counties) with Justice Deborah A. Chimes, J.S.C. presiding.

- Case Management Order Number 8, Eighth Judicial District Asbestos Litigation, (January 24, 2000). A copy of the 8th Judicial District Case Management order is attached as Exhibit C.
  - In addition to CPLR 3407 framework, its purpose is, to the extent feasible:
    - Standardization of pleadings and discovery so that the parties can obtain necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;
    - Conducting early pretrial conference to explore settlement opportunities, resolve pretrial management problems and establish cut-off dates;
    - Grouping, ordering and firm scheduling of cases for pretrial procedures and trial; and
    - Coordination of discovery, the use and compensation of Liaison Counsel, and other orders as necessary to avoid duplication, contain costs and expedite disposition through settlement or trial.

Given the nature of asbestos litigation, cases are generally not heard by multiple judges within a county or even judicial district. Rather, as evidenced above, throughout all of upstate New York, there are only a handful of judges who preside over all asbestos cases. On many occasions the courts are able to align their trial calendars in order to fully accommodate in extremis Plaintiffs. See Exhibit D. However, it is not infrequent for a judge, particularly one responsible for presiding in numerous counties, to be unable to fully accommodate in extremis Plaintiffs, necessitating trial scheduled more than one year out. Best efforts are still made to promptly schedule such cases and have them tried as quickly as possible. See Exhibit E.

A sample physician’s affirmation which was successfully used to obtain an in extremis scheduling order is appended as Exhibit F. As can be seen, bare bones can still carry the day.
2. Depositions, including Videotaped Trial Depositions

The overwhelming majority of depositions scheduled in asbestos litigation are for testimony of plaintiffs and their fact witnesses, often co-workers of a plaintiff / decedent. As such, that will be the focus of today’s presentation.

*How Deposition is Scheduled:*

Based on a plaintiff’s alleged prior breadth of contact to asbestos-containing products, there is a good chance that multiple dozens of defendants will be named in any given lawsuit. It is commonplace for over one hundred defendants to be so named. It would be difficult if not impossible to actively coordinate discovery, including depositions, if each party were required to be fully active in scheduling.

Remedy devised for this issue is appointment of liaison counsel, to serve as primary voice and contact of collective interests of either plaintiffs or defendants. For any case, liaison counsel is on record with the court, having been chosen from among a class to be the voice of that class for limited purposes (e.g., defense counsel for defendant X serves as liaison for all defendants in a particular case). The limited purposes include coordinating the conduct of discovery procedures, coordinating examination of witnesses in depositions, and case management issues.

When liaison counsel’s client(s) are no longer active in litigation of the matter, that attorney often approaches the court for a new liaison counsel to be named. In practice, defense liaison counsel is named in almost every case, while liaison counsel for plaintiffs is an infrequent occurrence. The 8th Judicial District Case Management order appoints liaison counsel for the plaintiffs bar and the defense bar. While the other Judicial Districts’ Case Management Orders do not appoint specific firms as liaison counsel, such counsel are typically appointed by the court at the CPLR 3407 preliminary conference.

Defense liaison counsel will coordinate depositions well in advance of deposition date. However, CPLR 3107 sometimes takes a backseat. When scheduling depositions, and in the spirit of advancing cases and maintaining good will, defense liaison counsel often will acquiesce to requests from plaintiff’s counsel to conduct depositions on short notice, particularly when a witness is in poor health.

As health of witnesses is often not the greatest, depositions are frequently adjourned by a plaintiff with hopes of being rescheduled.
What to Expect at Deposition:

As a result of the number of defendants sued in any given action, there are usually dozens of defense counsel present at depositions.

Given the latency period (usually decades) of alleged asbestos exposure and manifested disease, depositions of fact witnesses and parties are usually of persons in excess of 50 years of age, with many deponents being much more advanced in age. Natural effects of age and illness are to be expected. As a result, counsel should not be surprised to encounter frequent breaks, loud medical equipment, frail voice of a deponent, and recollections that have faded with the years. The equivalent of one full day of testimony may require a week to elicit.

Provided the health of a deponent will allow it, depositions are often but not always conducted in spaces designed to house a sizable number of people, such as hotel banquet/meeting rooms. Particularly when deponent is an in extremis plaintiff, depositions take place in homes, hospice settings, and hospitals with some regularity.

As a courtesy to deponents who are looking out into a room full of attorneys, defense counsel usually does not wear a suit, opting instead for more relaxed attire, in attempts to make the deponent a little more at ease.

Keep in mind that, regardless of liability, most witnesses are in a very physically and emotionally compromised position that is directly related to the lawsuit for which they are testifying in. This is especially true for plaintiffs and their immediate family. Often times raw emotion, in the form of anger or sadness, or some combination, takes over. Have some empathy if you meet such a reaction when examining a witness. Similarly, do not take any perceived hostility as a personal attack, reflect on the situation deponent is in, and move on with your questioning.

Course of Examination at Deposition:

Taking of deposition, particularly one of an injured plaintiff, follows a general pattern, which is only loosely similar to other tort/bodily injury depositions. There are significant differences.

Take for example a workplace accident that results in a healthy worker falling and immediately suffering paralysis. While safety, equipment, supervision and the like may be areas of focus, the window on causation will be limited to a fairly brief period of time.
Juxtapose that with plaintiffs in asbestos litigation. These plaintiffs often advance suit against a number of named defendants. Yet, the underlying injury may or may not have actually been caused by exposure to asbestos, let alone asbestos for which a named defendant has liability. As such, when possible to elicit, a thorough history of a plaintiff's life from birth to present is desired, to determine the extent of liability of a particular party, as well as non-parties and other external sources. Depending on the breadth of the exposure, the deposition of an elderly plaintiff can take several days.

Assuming the deposition is being taken by defense and not plaintiff’s counsel, it will follow the same rough pattern. An example order of questioning when conducting deposition of a plaintiff is as follows:

- General history on plaintiff, from birth through present, including his life history, all of the addresses that the plaintiff has lived, work history and all types of product (e.g., insulation, raw asbestos fibers, or equipment that may have utilized asbestos-containing components) that he believes exposed him to asbestos. He will also be asked to identify the brand, trade, or manufacturer names of all such product.

  - This examination often takes several hours or longer to complete. It is asked by a defense attorney who is conversationally referred to as the ‘lead examiner,’ with that attorney serving as the first to carry the baton of questioning, charting a map that all other defense attorneys at the deposition will follow.

  - In accord with the Case Management Order of the 7th Judicial District, initial questioning of plaintiffs is to be taken by defendants’ liaison counsel, unless liaison counsel does not have client in the matter.

- Depoent will then be queried by various defense attorneys who represent the various defendants that were sued in the case and that were specifically identified during the deposition as a source of plaintiff’s alleged exposure to asbestos.

  - For various strategic reasons, defense counsel for defendants that were in no way identified during deposition as a source
of plaintiff's asbestos exposure may still desire to question deponent. This is particularly true when the defendant that attorney represents has been enumerated in plaintiff's verified answers to Interrogatories. At this juncture, the goal of defense counsel is to fully position for dismissal motion, particularly when deponent indicates that he/plaintiff never encountered the particular product.

- Once defendants have theoretically exhausted from questioning, plaintiff's counsel will then examine the deponent. This often leads to follow-up questions by defense counsel.

- The defense attorney who initiated questioning will again assume examiner's chair, querying on plaintiff's medical history, and a long list of names of bankrupt entities that may have also been liable for plaintiff's alleged injuries.

- End of Deposition.

A sample product-specific line of questioning is appended as Exhibit G.

_Videotaped Depositions:_

Videotaped depositions are typically taken of plaintiffs who are not expected to be healthy enough to testify at trial.

While there may be subtle nuances from one venue to the next, generally, CPLR § 3113(b) and 22 N.Y.C.R.R. §202.159 permit testimony to be perpetuated on videotape or any other mechanical or electronic mode of transcription. Text of each is reprinted below.

**Rule 3113. Conduct of the Examination.**

(a) Persons before whom depositions may be taken. Depositions may be taken before any of the following persons except an attorney, or employee of an attorney, for a party or prospective party and except a person who would be disqualified to act as a juror because of interest in the event or consanguinity or affinity to a party:

1. within the state, a person authorized by the laws of the state to administer oaths;
2. without the state but within the United States or within a territory or possession subject to the jurisdiction of the United States, a person authorized to take acknowledgments of deeds outside of the state by the real property law of the state or to administer oaths by the laws of the United States or of the place where the deposition is taken; and

3. in a foreign country, any diplomatic or consular agent or representative of the United States, appointed or accredited to, and residing within, the country, or a person appointed by commission or under letters rogatory, or an officer of the armed forces authorized to take the acknowledgment of deeds. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Authority in (here name the state or country)."

(b) Oath of witness; recording of testimony; objections; continuous examination; written questions read by examining officer. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction, record the testimony. The testimony shall be recorded by stenographic or other means, subject to such rules as may be adopted by the appellate division in the department where the action is pending. All objections made at the time of the examination to the qualifications of the officer taking the deposition or the person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree. In lieu of participating in an oral examination, any party served with notice of taking a deposition may transmit written questions to the officer, who shall propound them to the witness and record the answers.

(c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of
actions in open court. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

(d) The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically. The stipulation shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means.

22 CRR-NY 202.15 Videotape recording of civil depositions.

(a) When permitted.

Depositions authorized under the provisions of the Civil Practice Law and Rules or other law may be taken, as permitted by section 3113(b) of the Civil Practice Law and Rules, by means of simultaneous audio and visual electronic recording, provided such recording is made in conformity with this section.

(b) Other rules applicable.

Except as otherwise provided in this section, or where the nature of videotaped recording makes compliance impossible or unnecessary, all rules generally applicable to examinations before trial shall apply to videotaped recording of depositions.

(c) Notice of taking deposition.

Every notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped and the name and address of the videotape operator and of the operator's employer, if any. The operator may be an employee of the attorney taking the deposition. Where an
application for an order to take a videotaped deposition is made, the application and order shall contain the same information.

(d) Conduct of the examination.

(1) The deposition shall begin by one of the attorneys or the operator stating on camera:

(i) the operator's name and address;
(ii) the name and address of the operator's employer;
(iii) the date, the time and place of the deposition; and
(iv) the party on whose behalf the deposition is being taken.

The officer before whom the deposition is taken shall be a person authorized by statute and shall identify himself or herself and swear the witness on camera. If the deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced by the operator.

(2) Every videotaped deposition shall be timed by means of a time-date generator which shall permanently record hours, minutes and seconds. Each time the videotape is stopped and resumed, such times shall be orally announced on the tape.

(3) More than one camera may be used, either in sequence or simultaneously.

(4) At the conclusion of the deposition, a statement shall be made on camera that the recording is completed. As soon as practicable thereafter, the videotape shall be shown to the witness for examination, unless such showing and examination are waived by the witness and the parties.

(5) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

(e) Copies and transcription.

The parties may make audio copies of the deposition and thereafter may purchase additional audio and audio-visual copies. A party may arrange to have a stenographic transcription made of the deposition at his or her own expense.
(f) Certification.

The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by the officer and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification in accordance with the provisions of section 3116 of the Civil Practice Law and Rules.

(g) Filing and objections.

(1) If no objections have been made by any of the parties during the course of the deposition, the videotape deposition may be filed by the proponent with the clerk of the trial court and shall be filed upon the request of any party.

(2) If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted to the court upon the request of any of the parties within 10 days after its recording, or within such other period as the parties may stipulate, or as soon thereafter as the objections may be heard by the court, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose, as the court may prefer. The court may view such portions of the videotape recording as it deems pertinent to the objections made, or may listen to an audiotape recording. The court, in its discretion, may also require submission of a stenographic transcript of the portion of the deposition to which objection is made, and may read such transcript in lieu of reviewing the videotape or audio copy.

(3)

(i) The court shall rule on the objections prior to the date set for trial and shall return the recording to the proponent of the videotape with notice to the parties of its rulings and of its instructions as to editing. The editing shall reflect the rulings of the court and shall remove all references to the objections. The proponent, after causing the videotape to be edited in accordance with the court's instructions, may cause both the original videotape recording and the deleted version of the recording, clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any
party. Before such filing, the proponent shall permit the other party to view the edited videotape.

(ii) The court may, in respect to objectionable material, instead of ordering its deletion, permit such material to be clearly marked so that the audio recording may be suppressed by the operator during the objectionable portion when the videotape is presented at the trial. In such case the proponent may cause both the original videotape recording and a marked version of that recording, each clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party.

(h) Custody of tape.

When the tape is filed with the clerk of the court, the clerk shall give an appropriate receipt for the tape and shall provide secure and adequate facilities for the storage of videotape recordings.

(i) Use at trial.

The use of videotape recordings of depositions at the trial shall be governed by the provisions of the Civil Practice Law and Rules and all other relevant statutes, court rules and decisional law relating to depositions and relating to the admissibility of evidence. The proponent of the videotaped deposition shall have the responsibility of providing whatever equipment and personnel may be necessary for presenting such videotape deposition.

(j) Applicability to audio taping of depositions.

Except where clearly inapplicable because of the lack of a video portion, these rules are equally applicable to the taking of depositions by audio recording alone. However, in the case of the taking of a deposition upon notice by audio recording alone, any party, at least five days before the date noticed for taking the deposition, may apply to the court for an order establishing additional or alternate procedures for the taking of such audio deposition, and upon the making of the application, the deposition may be taken only in accordance with the court order.

(k) Cost.

The cost of videotaping or audio recording shall be borne by the party who served the notice for the videotaped or audio recording of the
deposition, and such cost shall be a taxable disbursement in the action unless the court in its discretion orders otherwise in the interest of justice.

(l) Transcription for appeal.

On appeal, visual and audio depositions shall be transcribed in the same manner as other testimony and transcripts filed in the appellate court. The visual and audio depositions shall remain part of the original record in the case and shall be transmitted therewith. In lieu of the transcribed deposition and, on leave of the appellate court, a party may request a viewing of portions of the visual deposition by the appellate court but, in such case, a transcript of pertinent portions of the deposition shall be filed as required by the court.

In practice, when videotaped testimony is taken, it is almost always preceded by discovery deposition that is not videotaped.

3. Motions/Summary Judgement/Burden of Proof

_Motions at Large:

As in other areas of litigation, timeliness of motions is dictated by CPLR and court rules. Always follow deadlines provided in Scheduling Order, keeping in mind that various counties you will be filing in are not presently e-file compatible.

_Summary Judgment:

a. As to Plaintiff

Pleadings and deposition are complete, and Note of Issue is filed. Outside being named in the Complaint, defendant X has not been identified in any manner, let alone as a defendant who will have liability in tort as to the plaintiff. If a particular defendant is not identified in the plaintiff's interrogatory responses as a potential source of the plaintiff's exposure to asbestos, the burden of establishing entitlement to summary judgment shifts to the plaintiff. _Gorzka v. Insulation Distributors, Inc._ 23 A.D.3d 1191 (4th Dept. 2006).

Counsel for defendant X will presumably move for summary judgment. But, in accord with Scheduling Order, that defense counsel must first write to the plaintiff's counsel for any and all proofs/documentation that will be relied upon
by the plaintiff to prove premises/product liability as against that defendant. A sample of such letter to the plaintiff's attorney is appended as Exhibit H.

Assuming plaintiff does not furnish satisfactory - - or any - - proof as in the form of premises/product liability documentation to substantiate claim of liability as to defendant X, that defense counsel will bring motion for summary judgment.

Defense counsel's motion will set forth procedural and factual history of the case, and why defendant X must be dismissed from the matter. Much more often than not, this motion is made when there is no evidence in admissible form to support the position that a plaintiff was exposed to defendant X's product. It follows that a plaintiff would not have been exposed to any asbestos if no contact ever occurred. A sample of such a motion is appended as Exhibit I.

On occasion, summary judgment motions also incorporate additional theories as to why defendant must be dismissed. For example, that defendant X, or any predecessor for which it bears liability, simply did not exist during the period at which plaintiff alleges exposure to asbestos from that defendant's product/premises.

b. Derivative

Naturally, there will be no derivative injury if the underlying theory of liability is quashed, such as via dismissal of an injured plaintiff's claim as against a particular defendant. But, what if the underlying claim may have merit, but the derivative claim does not?

Usually, a lot of life happens between a plaintiff's last exposure to asbestos and development of asbestos-related disease. Marriages, deaths, and divorces are a common occurrence in the world, and the same is true in the life of asbestos plaintiffs.

Assuming the underlying claim to have merit, for a derivative claim to be successful, the spouse must have been married to the injured party at the time of the injury. Briggs v. Julia L. Butterfield Mem. Hosp., 104 A.D.2d 626, 479 N.Y.S.2d 758 (2d Dept. 1984); Rademacher v. Torbensen, 257 A.D. 91, 13 N.Y.S.2d 124 (4th Dept. 1939) (per curiam). Note with respect to asbestos exposure claims, injury means the exposure. Thus, New York law prohibits loss of consortium claims by an injured plaintiff's spouse where the injury occurred prior to marriage. In Re Joint Eastern and Southern Districts Asbestos Litigation,

The rationale behind this rule is to prevent a third-party from creating an ex post facto liability for loss of consortium where none existed before, simply by marrying an injured person. Walsh v. Armstrong World Industries, 700 F.Supp. 783 (S.D.N.Y. 1988). Note that the derivative claim is based on the life expectancy of the plaintiff/decedent, not the life expectancy of the spouse making the derivative claim.

A sample motion for dismissal of derivative claim is appended as Exhibit J.

**Burden of Proof:**

A defendant does not have the burden to prove the negative – that the injured plaintiff did not sustain any asbestos exposure related to its products. Rather, a plaintiff bears the burden of proof on this threshold issue and the defendant’s burden on a dispositive motion is to show that based upon admissible evidence in the case, it is entitled to summary judgment.

The following sentence has probably been repeated, nearly verbatim, tens of thousands of times by defense counsel over the course of asbestos litigation in New York State.

**In order to succeed in an asbestos exposure claim, the plaintiff must first establish that he “was exposed to the defendant’s product and that it was more likely than not that this exposure was a substantial factor in his injury.”** Diel v. The Flintkote Company, 204 A.D.2d 53, 611 N.Y.S.2d 519 (1st Dept. 1994)

Moreover, a plaintiff cannot prevail under New York law simply by showing that he was present, as on a ship, where a defendant’s products were present and were wrapped in asbestos. Perkins v. Air & Liquid Systems Corp., 2015 WL 4610671 (S.D.N.Y. 2015). Note that the federal summary judgment standard differs significantly from the New York state standard.

Many times, if defendant X’s product has not been identified throughout discovery as a source of a plaintiff’s exposure to asbestos, and satisfactory product/premises liability materials have not been furnished once solicited, a defendant will make a motion for summary judgment that will go unopposed by the plaintiff.
In some instances, a plaintiff will "piggyback" testimony from other cases in which a particular defendant was identified as a source of exposure at the same location that the plaintiff claims exposure.
EXHIBIT A
SUPREME COURT OF THE STATE OF NEW YORK
FIFTH JUDICIAL DISTRICT

In RE: FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Relates To:

All Cases

FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION
(SJDAL)

AMENDED CASE MANAGEMENT ORDER NO. 1

Date: March 22, 2001

I. Application of This Order

This Order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter commenced in the Supreme Court, State of New York, Fifth Judicial District, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable, and supersedes all previous case management orders and amendments thereto entered in the asbestos litigation previously pending in all counties in the Supreme Court, Fifth Judicial District.
II. **Filing Procedures**

A. **Files**

1. A master file, known as Fifth Judicial District Asbestos Litigation ("5JDAL") Master File, has been established in the Office of the County Clerk of Onondaga County for all asbestos cases commenced in the Fifth Judicial District and assigned to the undersigned "in the first instance." Entries on the 5JDAL Master File shall be applicable to each asbestos case assigned to the undersigned for coordinated pretrial proceedings.

2. The original of this Order shall be filed by the Supreme Court Clerk in the Master File previously established, and a copy shall be deemed to be part of the record of each coordinated action.

3. A separate file shall also be maintained under a separate index number for each individual action in the office of the County Clerk [identity of county or counties of filing to be resolved], and entries shall be made therein in accordance with this Order.

B. **Caption of Cases**

Every document filed in these coordinated actions, that has general application to all cases, shall bear a caption similar to the caption of this Order:
SUPREME COURT OF THE STATE OF NEW YORK
FIFTH JUDICIAL DISTRICT

In RE: FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Relates To:

All Cases

C. Filing of Papers

1. When a paper has general application to all cases, the caption shall bear index number _______ and the Supreme Court Clerk of Onondaga County shall file such a paper in the 5JDAL Master File. No further copies of the papers need to be filed. Any document so filed shall be deemed to have been filed in each case to which this Order applies and shall constitute part of the record of each such case.

2. When a paper, like a Plaintiff's Initial Fact Sheet ("PIFS") or a motion, is applicable only to an individual case, the attorney submitting such paper for filing shall supply a cover sheet containing the caption, name and index number to which the paper is applicable. Such paper shall not be filed in the 5JDAL Master File but, rather, in the individual case file under the appropriate index number.

3. When a paper is filed that is applicable to two or more but less than all of these coordinated actions, the captions shall state the case names and separate index numbers of the actions to which that paper is applicable. The Clerk shall file a copy in the separate file bearing the index number so identified to which the paper is intended to be applicable.

-3-
4. It shall be the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, names and index numbers of all cases to which the paper is applicable and supply the Clerk with sufficient copies of any such paper to facilitate compliance with the directions of this paragraph.

III. Rules of Procedure

The Civil Practice Law and Rules and the applicable court rules, together with the express provisions of this Order shall govern all proceedings in asbestos cases.

IV. Pleadings

A. Plaintiff’s Initial Fact Sheet (“PIFS”), in the form annexed as Exhibit A, shall be included with the complaint or served upon the defendants within sixty (60) days after filing of the complaint or sixty (60) days from the date of this Order, whichever date is later. The PIFS shall be filed in the file of the individual action pending in the Fifth Judicial District to which the PIFS applies. The PIFS shall include plaintiff’s specific work site. In a case of alleged derivative exposure, the PIFS shall include the specific work site of the person(s) through whom plaintiff was exposed, to the extent known. If more than one work site or injurious exposure is claimed, the PIFS shall list each of them. Plaintiffs’ counsel shall use best efforts to provide complete information to defense counsel. However, PIFS are not intended to limit proof and are not admissible for any purpose.

B. To the extent not previously done, plaintiffs’ counsel shall file in the 5JDAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, counsel may and

-4-
should, to the maximum extent feasible, serve and file short form complaints which incorporate by reference all of the allegations contained in the appropriate standard complaint. In the case of previously filed complaints, leave is hereby granted to file such short form complaints as amended complaints.

C. Each defendant may file in the 5JDAL Master File and serve on plaintiffs' Liaison Counsel a standard answer with affirmative defenses to each of plaintiffs' standard complaints. When such standard answers have been filed, a defendant may serve an acknowledgment of service incorporating a standard answer by reference. All defendants to which any cross claim has been asserted will be deemed to have denied all material allegations contained in the cross claim. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

D. Any plaintiff may, without further leave of the Court, amend his or her complaint (1) to add claims based on change of the disease alleged or loss of consortium or society, (2) to sever any joined claims, or (3) to add additional defendants. In the event of the death of a plaintiff, within ten days of learning of the death, counsel for plaintiff shall notify all defendants. Upon receiving notice of the appointment of an estate representative, but in no event before such representative is appointed, counsel for plaintiff, without further leave of the Court, shall promptly amend the complaint to add any claims based on survivorship or death of the original plaintiff. Where an amended complaint adding claims based on survivorship or death of the original plaintiff has been filed and served, a motion to substitute parties pursuant to CPLR 1015 will be deemed to have been made and granted.
E. Defendants who have previously answered shall be deemed to have answered any amended complaint without need for further pleading. Where an amended complaint adds claims based on the death of the original plaintiff, defendants' standard answers to plaintiff's counsel's standard wrongful death complaint shall be deemed to have been filed.

F. Any other amendments to the pleadings shall be made in compliance with CPLR 3025. However, the parties are encouraged to consent to such amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

V. Liaison Counsel

A. Appointment of Liaison Counsel to act on behalf of plaintiffs' counsel and on behalf of defendants' counsel on scheduling and the matters described herein after appropriate consultation where necessary will facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual positions or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

1. To call meetings of counsel for plaintiffs and defendants respectively for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts; and
2. To receive orders, notices, correspondence and telephone calls from the Court, and the Clerk of the Court on behalf of all defendants and plaintiffs, and

3. To notify all counsel of all communications received from the Court.

4. To coordinate the briefing of motions;

5. To coordinate the argument of motions;

6. To coordinate the conduct of discovery procedures, including, but not limited to the coordination of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;

7. To coordinate the examination of witnesses at depositions;

8. To coordinate the selection of counsel to act as spokespersons at pretrial conferences.

C. Except as otherwise set forth in this Order, Liaison Counsel may not be used by any party for service of papers, orders, notices or correspondence to other counsel.

D. Liaison Counsel for the plaintiffs shall be the firm of Baron & Budd, P.C.

E. Liaison Counsel for the defendants shall be the firm of Anderson Kill & Olick, P.C.

F. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.
G. Liaison Counsel shall not have the right to bind any party except Liaison Counsel's own respective clients as to any matter without the consent of counsel for any other party.

H. Plaintiffs' Liaison Counsel and defendants' Liaison Counsel shall be reimbursed periodically but not less than every six months by counsel for plaintiffs and counsel for defendants respectively for their necessary and reasonable expenses actually incurred in performing their tasks pursuant to this Order and shall keep records of such expenses in reasonable detail for examination by counsel. Liaison Counsel shall be paid by each plaintiff's and defendant's counsel on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defendant having to pay a proportionate share of the costs incurred by its respective Liaison Counsel in representing its interests.

I. Liaison Counsels' invoices for services as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of their submission.

VI. Standard Consolidated Discovery

A. Interrogatories

Standard Interrogatories (CPLR 3120) and Requests for Production of Documents (CPLR 3120) shall be used as set forth herein. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to CPLR 3130.

1. Defendants' Interrogatories
a. Defendants have developed a single, standard joint set of interrogatories to plaintiffs which, to the extent not previously done, shall be filed in the 5JDAL Master File and provided to plaintiffs’ Liaison Counsel. These standard interrogatories are captioned Defendants’ Standard Set of Interrogatories and Requests for Production of Documents. A copy is annexed as Exhibit B.

b. Plaintiffs shall serve upon all defendants in the action responses to defendants’ standard set of interrogatories in accordance with the time line in each case. The interrogatories shall be answered in full and verified by each individual plaintiff according to the CPLR.

c. After the standard set of interrogatories are answered, any defendant may, with the consent of the plaintiff or by order of the Court, serve supplemental, non-repetitive interrogatories in accordance with the time lines in each case. Defense Counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

2. Plaintiffs’ Interrogatories

a. Plaintiffs have developed a single, standard joint set of interrogatories designed to obtain general liability information. A copy is annexed as Exhibit C.

b. To the extent not previously done, each defendant shall file in the 5JDAL Master File a single set of responses which shall be applicable to all coordinated actions. Responses by defendants to this set of interrogatories shall be served on plaintiffs’
Liaison Counsel and when so served shall be deemed served in each case. In the event that a defendant not previously named in these actions is named by a plaintiff, the plaintiff's counsel will so inform plaintiffs' Liaison Counsel, who will serve a set of standard interrogatories on such defendant. Response by such defendant shall be due within sixty (60) days of service. If plaintiff's Counsel agrees, defendants may designate, file and serve answers to interrogatories which have been filed in other actions as their standard interrogatory answers in 5JDAL.

c. Plaintiffs may submit to individual defendants standard product and contractor identification interrogatories in the form attached as Exhibit D with respect to particular work sites. To the extent not previously done, a copy of such interrogatories shall be filed in the 5JDAL Master File. Each defendant shall have sixty (60) days from receipt of the product and contractor identification interrogatories to serve its response.

d. After the standard set of general liability and product/contractor identification interrogatories are answered any plaintiff may, with the consent of the defendant or by order of the court, serve supplemental, non-repetitive interrogatories in accordance with the time line in each case. Plaintiff's counsel are admonished to exercise the utmost good faith in determining the necessity for such further interrogatories.

B. Document Requests

1. General Guidelines

   a. Subject to Paragraph B.2. below, the provisions of CPLR 3120 shall govern all requests for documents. The requesting party shall specify a reasonable time,
place, and manner for making the inspection. The request will describe each item with reasonable particularity.

b. Counsel are directed to exercise the utmost good faith in making requests for production and in responding to requests. Counsel are directed to exercise their best efforts to resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.
2. Defendants' Requests for Documents

a. Counsel for the defendants have developed a standard document request to the plaintiffs which is captioned Defendants' Standard Set of Interrogatories and Requests for Production of Documents. See Exhibit B. To the extent not previously done, this discovery request shall be filed in the 5JDAL Master File and is deemed to apply to all cases without the necessity of further filing and service of the request in individual cases, except that defendants' Liaison Counsel shall serve a set of standard document requests upon a plaintiff's counsel who has not previously appeared on behalf of some other plaintiff in this litigation who requests such service.
b. Plaintiffs shall serve upon defendants' Liaison Counsel and to a mutually agreed-upon record retrieval service the necessary authorizations for each case in accordance with the schedule set forth in each case. In the event counsel for any defendant does not wish to utilize the records retrieval service, he or she shall so notify plaintiff's counsel, in writing. Under such circumstances, plaintiff shall provide counsel for that defendant with a photocopy of an authorization to obtain records from other persons, which authorization shall recite that it shall be honored to the same extent as an original. Such a photocopied authorization shall be deemed sufficient to authorize release of records from third persons of any requested documents pertaining to this litigation. In the event of the death of a plaintiff, upon receipt of notice of appointment of a representative, counsel also shall cause new medical release authorization forms to be executed by the representative and shall deliver such executed releases, a copy of the Letters of Administration or their equivalent, and a copy of the death certificate to the records retrieval service and liaison counsel. If plaintiff's counsel is aware that autopsy has been conducted, medical liaison counsel shall be notified promptly.

c. After plaintiffs have responded to the standard set of document requests, defendants may, with the consent of the plaintiff or by order of the court, serve supplemental, non-repetitive requests for documents in accordance with the time lines set forth in each case. Counsel are admonished to exercise the utmost good faith in determining the need for such further document requests. Plaintiff shall produce or arrange for production of documents pursuant to defendant's supplemental document request within sixty (60) days
of receipt. If plaintiffs have previously provided such documents to a defendant or defendant’s counsel, plaintiffs may respond to defendants’ demand by letter adopting such prior production.

d. Copies of any records obtained by any defendant pursuant to authorizations of a plaintiff, other than those records that are obtained through a mutually agreed upon records retrieval service, shall be made available to the plaintiff’s counsel by notice of receipt mailed to plaintiff’s counsel within twenty [20] days of receipt. If medical records are received by a party less than twenty [20] days before jury selection is scheduled to begin, then the records shall be made available within five [5] business days, or the next business day if jury selection has commenced.

3. Plaintiffs’ Requests for Documents

a. Plaintiffs have developed a single, standard document request to the defendants. A copy is annexed as Exhibit E.

b. To the extent not previously done, each defendant shall produce or arrange for production of documents pursuant to plaintiffs’ standard document requests within sixty (60) days of service, subject to agreement between plaintiffs’ Liaison Counsel and the particular defendant’s counsel about the specific time and place and on a reasonable schedule for production. Each defendant shall produce documents by serving one set of the requested documents on plaintiffs’ Liaison Counsel, who will permit other plaintiffs’ counsel to inspect and copy such documents as they desire, or by arranging for production of such documents at a document depository.
c. After the defendants have responded to the standard set of document requests, plaintiffs may, with the consent of the defendant or by order of the court, serve supplemental, non-repetitive document requests in accordance with the time line set forth in each case. Counsel are admonished to exercise the utmost good faith in determining the need for such further document requests. Defendants shall produce or arrange for production of documents pursuant to plaintiffs' supplemental document requests within sixty (60) days of receipt. If defendants have previously provided such documents to a plaintiff or plaintiff's counsel, defendants may respond to plaintiffs' demand by letter adopting such prior production.

C. General Discovery Provisions

1. Disputes with regard to discovery shall be called immediately to the attention of the Court for resolution and shall not be relied upon by any party as a justification for not adhering to the time line unless otherwise directed by the Court.

2. Document production shall be in such form as will make clear the request to which the document is responsive.

3. Objections based on privilege shall clearly identify the privilege claimed and sufficient information concerning (i) the basis for the claim of privilege to establish prima facie the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.
4. Responses to requests calling for business or medical records shall state, if requested, whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible under CPLR 4518. If not so described, the document shall be deemed admissible under the rule.

5. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production or as too burdensome shall state a reasonably available alternative as a counterproposal.

6. Any response that a document cannot be located or information not determined shall state with reasonable particularity the efforts made to obtain the requested document or information.

7. Any party wishing to propound any discovery on a party in a given case other than that provided in this Order may do so only upon application to the Court or by stipulation with opposing counsel.

8. In accordance with the CPLR, formal discovery demands served upon a non-party shall be served contemparaneously upon all parties to the action.
VII. **Medical Examinations of Plaintiffs**

Defendants shall, if they desire, jointly obtain a medical examination(s) of the plaintiff in accordance with CPLR 3121 and in accordance with the time line set forth in each case. A report of the medical examination together with copies of all tests shall be provided to plaintiff in accordance with the time line. No more than one examination for any medical specialty will be scheduled.

VIII. **Depositions**

A. **General Guideline**

1. All depositions shall be taken in accordance with the New York Civil Practice Law and Rules and this Order. The parties shall attempt, to the extent practicable for the witness, to convene the depositions in Syracuse.

2. All counsel shall avoid unnecessary and repetitive questioning of witnesses and shall work towards completing a deposition as soon as is reasonably possible. Any party found to be frustrating this process may be sanctioned by the Court. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be reserved until the time of trial. Any objection as to form shall be clearly stated, and upon request, the reasons shall be given in order to enable the questioner to amend or change the question or correct any possible error as to form. All questions shall be answered except where a claim of privilege is made, which claim, if not resolved, shall be forthwith brought before the Court for resolution.
3. All counsel may attend any deposition. All depositions shall be taken before a notary public, who will swear the witness.

4. Counsel may notice any deposition to apply to more than one case and shall use best efforts to ensure that appropriate depositions are noticed to apply to all appropriate cases. Nothing in this provision shall be deemed to prohibit a party from moving the Court to limit the use of deposition testimony taken in another case based upon good cause shown.

5. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent. If an in extremis deposition is noticed to be taken outside of the state, the noticing party must provide, together with the notice, medical confirmation that the deponent is unable to travel due to his present condition. Upon application to the Court, plaintiff's counsel may be required to pay the travel expenses of at least one, but no more than two, defense counsel incurred in attending any deposition noticed to be taken outside of the state.

B. **Depositions of Plaintiff**

Depositions shall be limited to depositions of plaintiff, plaintiff's spouse, and up to four co-workers, unless plaintiff intends to call more than those four co-workers as witnesses at trial. Plaintiffs will provide defendants with identification of the fact witnesses in accordance with the time line in each case. Once a defendant has answered such standard interrogatories for a specific site, that defendant will be relieved from having to answer such interrogatories again for that site as to the time period covered by defendant's prior response,
except as new information may become available. No other depositions of plaintiff, members of plaintiff’s family, or co-workers shall be conducted except by Order of the Court or by agreement of counsel, which shall set a deadline sufficiently in advance of the close of discovery to permit defendants to depose such witness.

C. Depositions of Defendants

1. The parties shall make every effort to use depositions as well as other discovery obtained from defendants in the preparation of other cases both in this State and throughout the country for all purposes as if taken in each action in these cases in accordance with the provisions of this Order. Except as otherwise provided in this Order, no other depositions of defendants shall be taken in these cases except as provided below.

2. By request to the Court, any plaintiff may seek to serve notice of intent to take non-repetitive depositions of defendants’ representatives pertaining to issue(s) which were not covered or not adequately covered by prior depositions of that defendant. Objections to any such deposition shall be brought by the affected defendant before the Court who shall issue a ruling. All corporate depositions shall be noticed at a time and place convenient to the witness, taking into account the expense to the defendants’ witness.

IX. Video Deposition

A. Videotape Depositions of Seriously Ill Plaintiffs

1. Where a deponent is in extremis, a detailed Doctor’s Affidavit shall be served with the notice of the deposition. The affidavit shall specify the deponent’s present diagnosis and prognosis.
2. Upon plaintiff’s service of a Doctor’s Affidavit, plaintiff’s responses to interrogatories, a copy of the complaint, and receipt by defendants of all requested documents in plaintiff’s or his counsel’s possession including all medical, tax and social security records, plaintiff’s counsel may notice and take the videotape deposition of any plaintiff in extremis without further order of the Court. Plaintiff’s counsel shall confer with defendants’ Liaison Counsel before scheduling the deposition in order to reach a mutually agreeable date and time. All parties are encouraged to act reasonably concerning the scheduling. If no agreeable time can be reached, Liaison Counsel are to advise the Court by letter. The Court will then issue an order, sua sponte, setting forth the date and time of the deposition. Said videotape deposition will be scheduled not less than three (3) weeks from service of the Doctor’s Affidavit. Plaintiff shall permit defendants to take a discovery deposition at a mutually agreeable time not less than seven (7) days prior to the videotape deposition. If it appears that plaintiff will not survive to give meaningful testimony in accordance with the time mandates above, plaintiff may request a telephone conference with the Court and Liaison Counsel to seek relief from these provisions.

B. Procedures as to Videotaped Depositions

1. Videotaped depositions may be taken by any party upon service of proper notice of deposition for any use permitted by the CPLR.

2. Videotaped depositions of deponents who have not been previously deposed and who are not terminally ill may not be taken sooner than fifteen (15) days after the date of the taking of the witness’ deposition by off-camera stenographic method.
("discovery deposition") unless otherwise agreed to by counsel. Videotape depositions of
deponents who have been previously deposed may be taken the day following the completion
of the discovery deposition, if such discovery deposition was requested, unless otherwise
agreed to by counsel.

3. When a party taking a deposition, in addition to having the testimony
taken stenographically and transcribed, also desires to have the testimony videotaped, the
party shall include notice of the videotaping of the deposition in the written notice required.

4. The videotaped deposition shall be taken before a notary public who
will swear the witness.

5. At the beginning of the deposition and prior to the witness being sworn,
the videotape operator shall record an identification sign. As the sign is being recorded, the
operator shall, in addition, vocally record the information on the sign. The identification sign
shall indicate the caption of the action, the date, the time, and the name of the notary public
before whom the videotaped deposition is being taken.

6. After the identification required by the preceding paragraph has been
completed, the witness shall be sworn. The swearing shall be on camera.

7. After the witness has been sworn, testimony shall be taken in
accordance with the provisions of this Order. The taking of such testimony shall be
videotaped in its entirety.

8. During the taking of a videotape deposition, the operator before whom
the deposition is taken shall assure that the videotape records the witness in a standard
fashion at all times during the deposition, unless all counsel agree otherwise or unless, on
motion before the Court, the Court directs otherwise. The operator shall limit the use of
videotape camera techniques such as close-up views of the witness or other similar
techniques to vary the head and shoulders view which is being recorded for presentation in
the courtroom to an initial viewing of the witness and the background and up to two (2)
close-up views to demonstrate physical injuries unless otherwise agreed upon or ordered by
the Court. As an exception to the foregoing, the operator shall, at the request of the attorney
questioning the witness, cause a close-up view of a deposition exhibit to be taken while the
witness is being questioned concerning the exhibit.

9. When a videotape deposition has been taken, the videotape shall be
shown immediately to the witness for examination, unless such showing and examination are
waived by the witness and the parties.

10. The notary public before whom a videotape deposition is taken shall
cause to be attached to the original videotape recording a certification that the witness was
sworn by him or her and that the videotape recording is a true record of the testimony given
by the witness. If the witness has not waived his or her right to a showing and examination
of the videotape deposition, the witness also shall sign the certification. If the witness has
exercised his or her right pursuant to the preceding paragraph to examine the videotape and,
having done so, refuses to certify that the videotape recording is a true record of his
testimony, the notary public before whom the videotape deposition was taken shall so note
on the certification form and shall further state the reasons given by the witness for refusing
to certify that the videotape recording is a true record of his or her testimony. The operator who videotaped a deposition pursuant to the provisions of this Order shall execute the following written certification prior to the beginning of the videotape deposition

I, ____________________________, hereby affirm that I am familiar with the provisions of the Fifth Judicial District Asbestos Litigation Case Management Order pertaining to videotape depositions and will ensure that the videotaping of this deposition is done in compliance with these provisions and in an impartial manner.

11. Upon payment of reasonable charges therefor, the operator before whom the deposition was taken shall furnish a copy of the videotape deposition in the form of a videotape or an audio recording to any party or the deponent.

12. The party taking the deposition shall be responsible for ensuring that the necessary equipment for videotaping the deposition is present at the time the deposition is taken. The party desiring to use the videotape deposition for any purpose subsequent to the taking of the deposition shall be responsible for ensuring that the necessary equipment for playing the videotape deposition back is available when the videotape deposition is to be used. When a videotape deposition is used during a hearing, a trial, or any other court proceeding, the party first using the videotape deposition in whole or in part shall ensure the availability of the same or comparable videotape playback equipment to any other party for such other party’s use in further showing the videotape deposition during the hearing, the trial, or other proceeding in question.

13. The cost of the videotape as a material shall be borne by the party taking the videotape deposition. The cost of recording the deposition testimony of videotape shall
be borne by the party taking the videotape deposition. The ownership of the videotape used in recording testimony shall remain with the party taking the videotape deposition.

14. A party wishing to take a further videotape deposition, not covered in this Order, must make application to the Court.

X. Use of Discovery and Depositions from Other Cases

A. Various employees of parties, former employees of parties, and witnesses with knowledge have been deposed in other cases involving alleged asbestos-related personal injuries, and there has been extensive document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue expense, duplication and unnecessary imposition on counsel, the parties, and the witnesses, parties may use depositions taken in other state and federal jurisdictions and in cases where a party or a predecessor or successor in interest had notice and opportunity to attend and participate as provided in CPLR 3117. The issue of the admissibility of any deposition at trial against a particular defendant is expressly left for resolution by the trial court.

B. Any party seeking to use any portion of such prior deposition as substantive evidence at trial may, at any time, advise counsel for any party against whom a deposition may be used of the deposition he intends to offer as substantive evidence. Any party objecting to the use of the deposition shall file a statement setting forth the specific objections and grounds within thirty (30) days. Such depositions can be used as if noticed and taken in these cases against those parties or their successors in interest. If objection is
made, the objecting party shall make an appropriate in limine motion setting forth the
grounds it asserts for excluding the use of the deposition.

XI. Motion Practice

A. All motions will be returnable on motion dates to be determined by the Court,
in Syracuse New York, unless otherwise noted. The Court will notify liaison counsel of the
return dates by letter prior to January 1 of each year.

B. All motions are upon submission only, unless the Court shall direct otherwise.

C. A short form motion for summary judgment on notice to all parties may be
filed with the Court if there is written consent that there is no opposition to the motion.

D. Parties are strongly encouraged to resolve all discovery disputes without the
need for Court intervention. However, when a dispute cannot be resolved amongst the
parties, a motion may be brought pursuant to the applicable provisions of the CPLR.

XII. Case Lists

A. Within seven (7) days of the entry of this Order, each of the plaintiffs’ firms having
asbestos cases pending in the Fifth Judicial District shall file with the Court a current chronological
list of each and every active asbestos personal injury/wrongful death case pending under this Court’s
jurisdiction. The cases shall be listed by filing date. The list shall include the name, date of birth and
trade of the plaintiff, site(s) as identified in the PIFS and alleged disease. A copy of the list shall be
provided to Liaison Counsel. Plaintiffs shall make a good faith effort to be inclusive, but the list shall
not have any preclusionary effect. Thereafter, plaintiffs’ counsel shall promptly notify the Court
of the filing of any new asbestos action subject to this Order. In addition, the Index Purchase Cover Sheet and any Request for Judicial Intervention shall indicate that the action is an "Asbestos" action.

B. Plaintiffs are not required to list on their inventories any cases in which only bankrupt defendants remain. Rather, a list of these cases shall be separately provided to the Court and, thereafter, the Court will establish a "bankrupt" docket to group together and account for these cases.

XIII. Pre-Trial Conferences

A. The Court will set forth the discovery schedule in each case.

B. A pre-trial conference will be scheduled the day before trial is scheduled to commence. All parties are required to appear at the pre-trial conference with full settlement authority. There will be no exception made to this rule.

XIV. Pre-Trial Submissions

A. Pretrial submissions shall be served in accordance with the time line in each case.

B. All parties shall submit a proposed request to charge, verdict sheet, or similar pre-trial or trial-related submission proposed for adoption or issuance by the Court in a computer-readable form compatible with Word Perfect 8.0 or any alternative format as designated by the Court.

C. The cases shall also, as much as practicable, proceed in chronological order from the date of filing.

XV. Reverse Bifurcation

Reverse bifurcation is left to the discretion of the trial judge.

XVI. Miscellaneous
The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiffs' counsel, among defense counsel, and among defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by itself, render such information or documents privileged.

Liaison Counsel for plaintiffs and defendants are hereby directed to mail a copy of this Order to all counsel who have appeared in these actions.

SO ORDERED.

Dated: ____________________

Hon. James McCarthy, A.J.S.C.
Introduction:

More than 200 asbestos-related actions for personal injury or wrongful death are now pending in the Fifth Judicial District. Of that number less than 5% of the claimants or decedents suffer or suffered from asbestos-related malignant diseases, and a small percentage of the remainder have sustained functionally impairing asbestosis. For the great majority of plaintiffs and decedents, however, the only clinical markers of asbestos exposure are pleural thickening or plaques that caused no discernible physical impairment.
To protect the interests of the significantly impaired, the "first in, first out" system of docket management ("FIFO") heretofore used in the Fifth Judicial District as set forth in the Amended Case Management Order (the "CMO") shall be modified to establish a (1) a "Deferred Docket" of claimants with minimal or no impairment, (2) "Active Docket" for clustering and trying cases of significantly impaired claimants who are ineligible for the Accelerated Trials under the CMO [see also, New York Civil Practice Law and Rules § 3407], and (3) a procedure for transferring cases from the Deferred Docket to the Active Docket.

I. Amendment of CMO

To the extent that this order conflicts with any provisions of the CMO, this order supersedes those provisions. except that this order shall not apply to or affect any case which has already been assigned a trial date.

II. Definitions

For purposes of this order:

1. A "board-certified pulmonary specialist" or "board-certified internist" means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspeciality of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).

2. A "currently certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored X-ray interpretation course and whose NIOSH-certification is up-to-date.

3. IL0 grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of
Pneumoconiosis" (1980).

4. "Chest X-rays" means chest films taken in four views (PA, Lateral, Left and Right Oblique) that are graded quality 1 for reading according to the ILO criteria.

5. "Pulmonary Function Testing" shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American ‘Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 American Review of Respiratory Disease 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, Clinical Pulmonary Function Testing, 2d ed., Intermountain Thoracic Society (1984).

6. The minimum criteria for activation" shall be defined as follows:

Non-Malignant Changes Shown by Testing:

A. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of IL0 grade 1/0; and pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(i) FVC ≤80% of predicted value with FEV-l/FVC ≥65% (actual value), or
(ii) TLC≤ 80% of predicted value.

OR

B. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of IL0 grade l/l or greater; and

pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:
(iii) FVC $\leq$ 80% of predicted value with FEV-1/FVC $\geq$ 65% (actual value), or
(iv) TLC$\leq$ 80% of predicted value

OR

C. Chest X-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an IL0 grade B2 or greater and with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either:

(i) FVC $\leq$ 80% of predicted value with FEV-1/FVC $\geq$ 68% (actual value), or
(ii) TLC$\leq$ 80% of predicted value

and with a statement by a board-certified pulmonary specialist or internist that, based upon a complete review of the claimant’s entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

OR

Non-Malignant Changes Shown by Pathology:

D. In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is unaffected by any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchyma scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;
OR

Diagnosis of Cancer:

E. A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

III. Deferred Docket

1. The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for activation. All proceedings with respect to cases on the Deferred Docket are stayed, except for stipulations (as described below) to transfer cases to the Active Docket, as hereinafter defined, and motions for leave to amend the complaint (as described below), until further order of the Court.

2. Any case that, as of the date of this order, has been assigned a trial date is deemed to be on the Deferred Docket, unless:

   A. On or before June 15, 2003:
      
      (i) plaintiffs and (ii) Special Liaison Counsel for the defendants stipulate that the party allegedly injured from asbestos exposure satisfies the minimum criteria for activation;
      
   B. On or before May 15, 2003:
      
      (i) the plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure satisfies the minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, and
(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied if the minimum criteria for activation have not been satisfied.

C. Any case that is commenced after the date of this order is deemed to be on the Deferred Docket, unless the complaint, as initially filed and served, alleges with specificity that the party claiming injury from asbestos exposure meets the minimum criteria for activation and annexes the requisite documentation as evidence thereof. No plaintiff may file a Request for Judicial Intervention for any Deferred Docket case commenced after the date of this order.

3. Any case that:

A. is commenced after the date of this order and initially deemed to be on the Deferred Docket.

OR

B. was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, under the procedures set forth above in section III(2), shall be removed from it and placed on the "Active Docket," as described below, if

C. plaintiffs and Special Liaison Counsel for the defendants, Linda Clark, stipulate that the party allegedly injured from asbestos exposure now satisfies the minimum criteria for activation,

OR

D. (I) The plaintiff or plaintiffs (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure meets the
minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, and

(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied and the case shall remain on the Deferred Docket if the minimum criteria for activation have not been satisfied.

IV. Active Docket

1. All cases which (A) as of the date hereof have been assigned a trial date shall be prosecuted and tried in the manner now set forth in the CMO.

2. All other cases which are not on the Deferred Docket are deemed to be on the Active Docket. A case on the Active Docket shall be scheduled for trial strictly in FIFO order except as described below. For cases on the Active Docket, FIFO order is determined by the date that the action was commenced, except for:

A. Cases which receive a preference pursuant to New York Civil Practice Law and Rules § 3407, or

B. Is commenced after the date of this order which is initially on the Deferred Docket, and which is later placed on the Active Docket by stipulation or Order of the Court granting leave to amend the complaint, or

C. was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, pursuant to Section III(2), shall be determined by the date of said stipulation or Order.
V. Docket Lists

On or before July 1, 2003, counsel for plaintiffs shall submit to the Court and plaintiffs' and defendants' liaison counsel, complete lists of (1) the inventory of cases on the Deferred Docket and (2) the inventory of cases on the Active Docket, specifying for each the disease alleged and FIFO date. The lists shall be every six months thereafter.

So Ordered:

________________________
Hon. James W. McCarthy
Acting Justice, Supreme Court
SUPREME COURT OF THE STATE OF NEW YORK
SEVENTH JUDICIAL DISTRICT

In RE: SEVENTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Relates To:
All Cases

Master Index No:
2001-012718

SEVENTH JUDICIAL DISTRICT ASBESTOS LITIGATION
(7JDAL)

CASE MANAGEMENT ORDER

Revised: March 1, 2012
Table of Contents

I. Applicability of This Order
II. Purpose and Objections
III. Index Numbers and Filing Procedures
   A. Files
   B. Captions of Cases
   C. Filing of Papers
IV. Judicial Hearing Officers
V. Pleadings
   A. Plaintiff's Statement
   B. Standardized Pleadings
   C. Amendments/Substitution Following Death of Plaintiff
   D. Other Amendments to Pleadings
VI. Liaison Counsel
VII. Standard Consolidated Discovery
   A. Interrogatories and Document Requests
      1. Defendants' Interrogatories and Document Requests
      2. Plaintiffs' Interrogatories and Document Requests
   B. General Guidelines Regarding Document Requests
   C. General Guidelines Regarding Discovery
VIII. Medical Examinations of Plaintiff(s)
IX. Depositions
   A. General Guidelines
   B. Depositions of Plaintiff(s)
   C. Depositions of Defendants and Non-Party Witnesses
   D. Stenographers' Fees
   E. Videotaped Depositions
X. Expedited Discovery and Trials for In Extremis Plaintiffs
XI. Motion Practice
A. General Provisions
B. Discovery Motions
C. Accelerated Judgment

XII. Scheduling of Trials and Discovery
    A. Trial Dates
    B. Procedure for Scheduling Trial Dates
    C. Schedule

XIII. Pretrial Submissions

XIV. Settlements

XV. Miscellaneous
I. Applicability of This Order

This Order applies to procedures involving all personal injury and wrongful death cases, based upon claims of exposure to asbestos, whether commenced prior to this order and currently pending, or hereafter commenced in the Supreme Court, State of New York, Seventh Judicial District, comprising the Counties of Monroe, Livingston, Ontario, Wayne, Cayuga, Seneca, Yates and Steuben, except as otherwise directed by the Court upon motion and for cause shown. This order supersedes all previous case management orders and amendments in regard to such litigation.

Pursuant to separate orders, all cases, now pending or hereinafter filed, will be assigned to one or more Supreme Court Justices, to be designated, therein.

A copy of this Case Management Order, as well as other material pertaining to the Seventh Judicial District Asbestos Litigation, including the trial calendar, is available on the Monroe County Supreme Court website: http://www.nycourts.gov/courts/7jd/courts/s%26c/asbestos/

II. Purpose and Objectives

It is in the interests of justice to encourage and bring about the fair, expeditious, and least expensive resolution of these cases. This Case Management Order (CMO) is established in an effort to achieve this goal by allowing the parties to obtain necessary documents and information without imposing undue burdens, and to permit the parties to evaluate these cases, reach early settlements, and frame the issues in order to prepare unsettled cases for trial. The essential elements of the CMO include to the extent feasible:

11. Automatic assignment of all pending and hereafter commenced asbestos litigation in each of the counties of the Seventh Judicial District to one designated Part of Supreme Court.

12. Standardization of discovery in order that parties may obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum expense.

13. Scheduling and conducting pre-trial conferences within 60 days of the filing of a
Request for Judicial Intervention (RJI) to resolve pretrial management problems, establish discovery schedules, set a trial Day Certain pursuant 22NYCRR §125.1(g), appoint Liaison Counsel(s) on behalf of Defendants, and obtain consent for utilization of one of the panel of available JHO's provided herein to preside over motions and trials.

14. Consider settlement opportunities including the grouping of cases and any other orders as necessary to avoid duplication, contain costs and expedite disposition through settlement or trial.

III. Index Numbers and Filing Procedures

A. Files

A master file, known as Seventh Judicial District Asbestos Litigation ("7JDAL") Master File, has been established in the Office of the County Clerk of Monroe County for all asbestos cases commenced in the Seventh Judicial District and designated as Monroe County Index No. 2001-012718. Entries in the 7JDAL Master File shall be applicable to each personal injury and wrongful death case, commenced in the Seventh Judicial District, which is governed by this Order or any amendment thereof.

The original of this Order shall be filed by the County Clerk in the 7 JDAL Master File, and a copy shall be provided to each of the County Clerk's Offices in the remaining seven Counties in the Seventh Judicial District, and a copy shall be deemed to be part of the Record of each and every case commenced in the Seventh Judicial District.

A separate file shall also be maintained under a Separate Index Number in the County, venue by the Plaintiff(s), for each individual action and each individual Plaintiff in the applicable County Clerk's Office, and entries shall be made therein in accordance with this Order.

Copies of all papers filed under the Master Index Number and in the respective County Clerk's offices must also be submitted to the Supreme Court Justice designated to receive all assignments under this Order.
B. Captions of Cases

Every document filed in these coordinated actions, which has general application to all cases, shall bear a caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK
SEVENTH JUDICIAL DISTRICT

In RE: SEVENTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Applies to:  Master File
                           Index No. 2001-012718

C. Names of Defendants

1. Pursuant to an order signed by this Court and filed with the County Clerk of each respective county in the Seventh Judicial District, Counsel may substitute “et al” in place of a full list of defendants’ names on the captions of motions, stipulations, judgments or other related papers. Note: the Summons, Complaint, Amended Complaint, and RJI will still require a full caption. A copy of the Court’s order on the issue may be found as a link on the Asbestos web page.

D. Filing of Papers

1. Whenever a paper has general application to all cases, such as a Notice of Filing of Bankruptcy by a named Defendant, the caption shall bear Index No. 2001-012718 and the Monroe County Clerk shall file such a paper in the 7 JDAL Master File. Any document so filed shall be deemed to have been filed in each case to which this Order applies, and shall constitute part of the record of each such file.

2. Whenever a paper, such as a Plaintiff's Initial Fact Sheet ("PIFS") or a motion, is applicable only to an individual case, the attorney submitting such paper for filing
shall supply to the Clerk of the County in which the action is venued a cover sheet containing the caption, name, and Index Number to which the paper is applicable. The County Clerk shall file such paper in the individual file for the action under the appropriate Index Number. The Monroe County Clerk shall NOT file such paper in the 7 JDAL Master File.

3. Whenever a paper is filed that is applicable to two or more, but less than all of these coordinated actions, the captions shall state the case names and separate Index Numbers of the actions to which that paper is applicable. The Clerk of the counties, in which the actions so identified are venued, shall file a copy of the paper in each separate file under the index numbers so identified. It is the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, titles, and index numbers of all actions to which the paper is applicable and to supply the appropriate County Clerks with sufficient copies of the paper to facilitate compliance with the directives of this paragraph.

4. When a paper is filed that requires some action by the Court, such as an RJI, Notice of Motion, Request for a Pre-Trial conference, or a Note of Issue and Certificate of Readiness, the attorney submitting such paper to the appropriate County Clerk shall be responsible for serving a copy to all counsel of record and forward a copy to the Court.

5. Following the filing and service of the Complaint and the appearance by or on behalf of defense counsel, but in no event more than ninety (90) days from the filing of the Complaint, Counsel for the Plaintiff(s) shall cause to be filed an RJI in the office of the appropriate County Clerk, where the case is venued, requesting a Preliminary Conference. In addition, counsel for the Plaintiff(s) shall submit to the Court a copy of said RJI, together with a list of the Defendants' counsel, including mailing address, telephone, fax, and e-mail address, by e-mail or on a disk, in a format which may be converted to Word Perfect. Plaintiff(s)' counsel shall have the obligation to update said disk within thirty (30) days of any change. Counsel for each Plaintiff and Defendant shall be obligated to identify trial counsel within 14 days of the trial date,
as provided in the scheduling order issued in each case, and to so advise the designated Supreme Court Justice, accordingly, including trial counsel's phone number, fax, and e-mail address.

6. Following receipt of the RJI, together with the required information for Defendants' counsel, Chambers of the designated Supreme Court Justice, shall notify all counsel of record of a date and time for a Preliminary Conference, which will be scheduled within sixty (60) days, at the Hall of Justice, Rochester, New York.

7. In addition to the foregoing, all counsel representing Plaintiffs shall file with the Court, and serve Liaison Counsel, a current chronological list of each and every personal injury and wrongful death case pending and subject of this Case Management Order. The list shall include the name, date of birth, and trade of the Plaintiff, or decedent, as well as filing date of the action. The list shall be updated on a monthly basis.

IV. Judicial Hearing Officers

The Civil Practice Law and Rules and the applicable Uniform Court Rules, together with the express provisions of this Order, shall govern all cases, based upon claims of exposure to asbestos, in the Seventh Judicial District.

Consistent with the objectives of this CMO and in order to expedite the processing of these claims, a panel of Judicial Hearing Officers shall be available for assignment to rule on motions and preside over jury trials. Failure, at the Preliminary Conference, on the part of any party to object to the assignment of a JHO from this panel to hear and determine any part of the case will be deemed a consent pursuant to CPLR Section 4317(a). Following the Preliminary Conference, and absent objection by a party, counsel for the Plaintiff(s) and Liaison Counsel for the Defendants shall execute a Stipulation, as required by CPLR 4317, and in a form annexed hereto and contained in Appendix "D." The Stipulation shall be filed in the Office of the Clerk of the County, in which the case has been venued, under the Index Number for that case, and a copy provided to the Court. Thereafter, an Order will be issued appointing a specific Judicial Hearing Officer to preside over issues in the
case. The panel of Judicial Hearing Officers will be contained in a separate Court Order, which will be filed in the Master File.

V. Pleadings

A. Plaintiff’s Statement:

A Plaintiff’s Initial Fact Statement ("PIFS"), annexed hereto as Appendix "A," shall be submitted to the Court and be included with the Complaint or served upon the Defendants within sixty (60) days after filing of the Complaint or sixty (60) days from the date of this Order, whichever date is later. If the PIFS is not attached to the Complaint, the original PIFS shall be filed by counsel in the office of the County Clerk of the County in which the action is vened under the Index Number of the action to which it applies. The PIFS shall include the Plaintiff’s specific work site(s) at which it is claimed that injurious asbestos exposure occurred. In a case of alleged derivative exposure, the PIFS shall include the specific work site(s) of the person(s) through whom Plaintiff was exposed, to the extent known. In no event are the PIFS intended to limit proof and are not admissible for any purpose.

If at any time after the filing of the PIFS, but before service of Plaintiff’s Answer to Standard Interrogatories, Plaintiff’s claimed asbestos-related illness changes from a non-malignancy to a malignancy, the PIFS shall be amended accordingly. All such amendments must be filed and served, as hereinbefore set forth, within sixty (60) days of notification to Plaintiff’s counsel of such change in claimed illness.

B. Standardized Pleadings:

1. Plaintiff’s counsel may file in the 7 JDAL Master File and serve on Defendants, a Complaint, or set of Complaints, containing standard allegations generally applicable to all claims of a similar nature. Thereafter, counsel may file and serve a short form Complaint which incorporates by reference all of the allegations contained in the appropriate standard Complaint.

2. Regardless of whether or not Plaintiff has elected to serve and file a Standard Complaint, any Defendant may file in the 7 JDAL Master File and serve on
Plaintiff(s)' and other Defendants' counsel a standard Answer with affirmative defenses. When such standard answer has been filed, a Defendant may within 60 days of service of the Complaint, serve an Acknowledgment of Service, in a form annexed hereto, and contained in Appendix "B," incorporating a standard answer by reference. All Defendants to which any cross claim has been asserted will be deemed to have denied all material allegations contained in the cross claim. Nothing herein shall preclude a Defendant from filing an individual answer, which may be served within 60 days of service of the Complaint.

3. Third-Party Plaintiff(s)' counsel may file in the 7JDAL Master File and serve on Third-Party Defendants a Third-Party Complaint or set of Third-Party Complaints containing standard allegations generally applicable to all Third-Party claims of a similar nature. Thereafter, Third-Party Plaintiffs may file and serve short form Third-Party Complaints that incorporate by reference all of the allegations contained in the appropriate standard Third-Party Complaint.

4. A Third-Party Defendant may file, in the 7JDAL Master File and serve on Third-Party Plaintiff(s), a Standard Answer to a Third-Party Complaint with affirmative defenses. When a Standard Answer to a Third-Party Complaint has been filed, a Third-Party Defendant may serve a Third-Party Plaintiff in an action with an Acknowledgment of Service of Third-Party Complaint, in a form annexed hereto and contained in Appendix "C." Upon service of an Acknowledgment of Service of a Third-Party Complaint, a Third-Party Defendant will be deemed to have denied all material allegations contained in the Third-Party Complaint, except as stated in such Acknowledgment, and to have raised each affirmative defense contained in its Standard Answer to Third-Party Complaint, except as stated in such Acknowledgment. Nothing herein shall preclude a Third-Party Defendant from filing an individual answer, if it so chooses.

C. Amendments/Substitution Following Death of Plaintiff

Upon the death of an injured Plaintiff, and prior to the date set for filing the Note of Issue, the personal representative of the deceased injured Plaintiff may be substituted as Plaintiff,
without leave of the Court, if said personal representative submits to the Court and serves upon all attorneys of record in the pending action:

1. The date and place of the deceased injured Plaintiff's death;
2. The name and address of the deceased injured Plaintiff's personal representative;
3. A copy of the death certificate for the deceased injured Plaintiff;
4. A copy of the Surrogate's certification of the appointment of the personal representative; and
5. A proposed Order of Substitution.

Prior to the date set for filing the Note of Issue, a substituted Plaintiff may, without leave of Court, amend the original Complaint to add a claim of wrongful death. Service of such amendments on counsel who has appeared for a Defendant shall be considered service on that Defendant. Defendants may answer as set forth in this Order.

A substituted Plaintiff seeking to amend a Complaint to add claims, based upon wrongful death, must support the enlargement of the Complaint, to include such cause of action, with medical documentation including: the certificate of death; and an autopsy report or hospital admission/discharge summary or a report prepared and signed by a physician supporting the allegation of a connection between the alleged injurious exposure to asbestos and the death. No presumption regarding causation is created by such enlargement of a Complaint. The issue of the connection between the alleged injurious exposure to asbestos, if any, and the death shall be preserved for the trier of fact or for the Court upon motion. A Defendant who served an Acknowledgment of Service or answer in the original action is not required to serve an answer to the amended Complaint as all new material allegations contained in the amended Complaint will be deemed denied by any such Defendant.

D. Other Amendments to Pleadings

Amendments to the pleadings, other than those set forth in Section V(C) of this Order shall be made in compliance with CPLR Section 3025. The parties are encouraged to consent to amendments where appropriate based upon New York State's recognition that leave to amend is to be freely granted.
VI. LIAISON COUNSEL

A. Appointment of Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel to act on behalf of Plaintiffs' counsel and Defendants' counsel, respectively, after appropriate consultation where necessary, will facilitate communication between the Court and counsel, minimize duplication of effort, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual positions or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

1. Coordinating the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;

2. Coordinating the examination of witnesses in depositions;

3. Calling meetings of counsel for Plaintiffs' counsel and Defendants' counsel, respectively, for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts.

4. Draft and consent to proposed scheduling and other orders, and agree upon stipulations.

C. Liaison Counsel are authorized to receive orders, notices, correspondence and telephone calls from the Court regarding general case management issues on behalf of all Defendants, and receive medical authorizations from counsel for Plaintiffs. Liaison Counsel shall be responsible for notifying all Defense counsel of all communications received from the Court and to send medical records received from counsel for Plaintiff(s) to any counsel for a Defendant upon request for same. Liaison Counsel is not responsible for obtaining medical records from other Defendants, and further, may not be used by any party for service and/or distribution of papers, orders, notices or correspondence to other counsel.

D. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.
E. Liaison Counsel shall not have the right to bind any party except Liaison Counsel’s own respective clients as to any matter without the consent of counsel for any other party.

F. Subject to approval of the Court, Plaintiffs’ Liaison Counsel and Defendants’ Liaison Counsel shall be reimbursed periodically, by counsel for Plaintiffs and Defendants, respectively, for necessary and reasonable disbursements actually incurred in performing their responsibilities pursuant to this Order. Liaison Counsel shall keep records of such disbursements in reasonable detail for examination by counsel. Liaison Counsel shall be paid, respectively, by each Plaintiff or Defense law firm on an equitable basis to be agreed upon by the parties or fixed by the Court with each Plaintiff and Defense law firm having to pay a proportionate share of the disbursements incurred by its respective Liaison Counsel in representing its interest. Liaison Counsellors’ invoices for services as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of their submission.

G. In the event that the client of Liaison Counsel ceases to be a party, because of settlement, discontinuance, dismissal or otherwise, counsel may be relieved of further responsibility as liaison upon application to the Court, or arranging for substitute Liaison Counsel.

VII. Standard Consolidated Discovery

A. Interrogatories and Document Requests:

Standard Interrogatories and Requests for Production of Documents shall be used as set forth herein. The Court on its own motion hereby permits the use of interrogatories in addition to depositions pursuant to CPLR §3130.

1. Defendants' Interrogatories and Document Requests:

   a. A standard set of interrogatories to Plaintiff(s) has been filed in the 7JDAL Master File. These standard interrogatories, captioned "Defendants' First Set of Interrogatories and Request for Production of Documents" ("Defendants' Standard Interrogatories"), are annexed hereto and contained in Appendix "F." An alternative, short form, standard set of interrogatories have also been
filed in the 7IDAL Master File. These alternative, standard interrogatories, captioned "Defendants' Short Form, First Set of Interrogatories and Requests Production of Documents" ("Defendants' Alternative Standard Interrogatories") are annexed hereto and contained in Appendix "E."

b. Unless otherwise directed by the Court, upon request by a Defendant, Plaintiff(s) may respond to either "Defendants' Standard Interrogatories" or "Defendants' Alternative Standard Interrogatories." Plaintiff(s) shall serve responses to such Interrogatories ("Plaintiffs' Answers to Standard Interrogatories") upon all Defendants in an action and in accordance with the applicable discovery and trial submission schedule for that action. Such Interrogatories shall be answered in full, unless appropriate objections are stated in lieu of an answer. "Plaintiffs' Answers to Standard Interrogatories" shall be verified by the individual injured Plaintiff(s) or Plaintiff estate representative. In the event that Plaintiff(s) has responded to "Defendants' Alternative Standard Interrogatories," and upon receipt of same, any Defendant may specifically make a written request, to the Court, that Plaintiff(s) also respond to "Defendants' Standard Interrogatories."

c. Defendant may serve supplemental, non-repetitive interrogatories and requests for production of documents ("Defendant's Supplemental Interrogatories") in accordance with the applicable discovery and trial submission schedule for an action.

d. Copies of any records obtained by a Defendant pursuant to authorization of a Plaintiff, other than those records which are obtained through a mutually agreed upon records retrieval service, shall be made available to Plaintiff's counsel by notice of receipt mailed to Plaintiff's counsel within ten (10) days of Defendant's receipt of such records.

2. Plaintiffs' Interrogatories and Document Requests:
   a. Plaintiffs' standard set of general liability interrogatories have been filed in
the 7JDAL Master File. These standard interrogatories, captioned "Plaintiffs' First Standard Set of Liability Interrogatories and Request for Production of Documents" ("Plaintiffs' Standard Interrogatories"), are annexed hereto and contained in Appendix "G." In the event that a Plaintiff's counsel commences an action against a Defendant not previously a party, said Plaintiff's counsel will serve Plaintiffs' Standard Interrogatories on such Defendant.

b. Each Defendant shall file a single set of responses to "Plaintiffs' Standard Interrogatories" ("Defendants' Answers to Standard Interrogatories") and shall give notice of the filing to, or serve same on, Plaintiff's counsel in accordance with the applicable discovery schedule in each individual action. In the event that a Plaintiff's counsel commences an action against a Defendant not previously a party, and fails to serve Plaintiffs' Standard Interrogatories, such Defendant is not required to file and serve responses to Plaintiffs' Standard Interrogatories.

c. A Plaintiff may serve supplemental, non-repetitive interrogatories and requests for production of documents ("Plaintiffs' Supplemental Interrogatories") in accordance with the applicable discovery and trial submission schedule for an action.

d. A Plaintiff may serve non-duplicative, standard product identification interrogatories with respect to particular work sites ("Plaintiffs' Standard Product Identification/Work Site Interrogatories") in accordance with the applicable discovery and trial submission schedule for an action.

B. General Guidelines Regarding Document Requests:

1. A party requesting discovery and inspection of documents shall specify a reasonable time, place, and manner for making the inspection. The request will describe each item with reasonable particularity.

2. Responses to requests for discovery and inspection of documents should be, to the extent practicable, in such form as will make clear the request to which the document is responsive.
3. Any response that a document cannot be located, shall state with reasonable particularity the efforts made to obtain the requested document.

4. Counsel are to exercise good faith in making requests for and in responding to requests to production of documents.

5. Counsel are to exercise their best efforts to resolve, on an informal basis, disputes arising out of the document requests and responses and objections thereto.

C. General Guidelines Regarding Discovery:

1. Disputes with regard to discovery shall be called immediately to the attention of the Court for resolution and, unless otherwise directed by the Court, shall not be relied upon by any party, as a justification for not adhering to any applicable discovery and trial submission schedule.

2. Objections to discovery based on privilege shall clearly identify the privilege claimed and shall provide sufficient information concerning (i) the basis for the claim of privilege to establish, prima facie, the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

3. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection to the time, place, or manner of production shall state a reasonable alternative as a counterproposal.

4. Any response that information cannot be determined, shall state with reasonable particularity, the efforts made to obtain the requested information.

5. Any notice and/or motion for discovery served upon a non-party shall be served contemporaneously upon all parties to the action.

VIII: Medical Examinations of Plaintiff(s)

Physical examinations of Plaintiff(s) shall be conducted in accordance with the CPLR and applicable case law. Counsel for Plaintiff(s) shall provide Liaison Counsel with original, or duplicate
original, authorizations for Plaintiff(s)' medical records.

IX. Depositions

A. General Guidelines:

1. All depositions of parties shall be held in the Seventh Judicial District unless otherwise ordered by the Court or agreed to by the parties, and coordinated with Liaison Counsel.

2. All counsel shall avoid unnecessary and repetitive questioning of witnesses.

3. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be reserved for determination by the trial judge.

4. All counsel may attend any deposition.

5. Counsel may notice any deposition to apply to more than one case and shall use best efforts to insure that depositions are noticed to apply to all appropriate cases. Nothing in this provision shall be deemed to prohibit a party from moving to limit the use of deposition testimony based upon good cause shown.

6. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent.

7. In the event that a notice for a discovery deposition is not served, but such deposition is scheduled by agreement of counsel or order of the Court, any such deposition of an injured Plaintiff, Plaintiff's spouse or personal representative will be deemed to have been noticed for or scheduled by Defendant's counsel and any such depositions of a Defendant will be deemed to have been noticed for or scheduled by Plaintiff's counsel.

8. Deposition testimony may be used only against those parties which received actual written notification of the deposition stating the date, time and location of the deposition. Said notification must be served in compliance with the CPLR, this Order, or other court order and, in any event, unless good cause is shown, must be served no later than three (3) business days prior to the scheduled date of the deposition.
B. **Depositions of Plaintiff(s)**

1. Depositions of injured Plaintiff(s) will be scheduled by Liaison Counsel when preparing discovery and trial submission schedules for actions scheduled for trial. In all actions, the rights of Defendants and Third Party Defendants to depose Plaintiff's spouse, personal representative, and distributees of a decedent at any time prior to jury selection are reserved. Such a deposition may be requested, noticed for, and/or scheduled by any defense counsel.

2. Questioning of the injured Plaintiff by defense counsel shall begin with interrogation by Defendants' Liaison Counsel, followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by Defendants' Liaison Counsel when such an agreement cannot be reached.

3. Questioning a Plaintiff's spouse, personal representative and distributees of a decedent shall begin with interrogation by the defense counsel who requested, noticed, and/or scheduled the deposition, followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by Defendants' Liaison Counsel when such an agreement cannot be reached. If the above deponent is a present or former officer or employee of a Defendant, such Defendant shall question first, followed by other defense counsel in the order described in Section IX (B) (2) of this Order.

C. **Depositions of Defendants and Non-Party Witnesses**

1. Depositions of Defendants and non-party witnesses will be noticed for, and/or scheduled, by the party seeking the deposition during the period of time provided in the applicable discovery and trial submission schedule for the action.

2. The parties shall make every effort to use depositions as well as other discovery obtained from Defendants in other actions in New York State and other jurisdictions for all purposes as if taken in each action in these cases in accordance with this Order.

3. Any Plaintiff may serve notice of intent to take non-repetitive depositions of Defendants' representatives pertaining to issues which were not covered or not
adequately covered by prior depositions of that Defendant. All corporate depositions shall be noticed at a time and place convenient to the parties and witnesses, taking into account the expense to the parties and the health of the Defendants' witnesses.

4. Questioning by Plaintiff’s counsel shall begin with interrogation by the Plaintiff’s counsel, who noticed the deposition, followed by other Plaintiffs’ counsel in the order of their appearance in this litigation and defense counsel in the order described in Section IX (B)(2) of this Order. If the above deponent is a present or former officer or employee of a Defendant, questioning by a defense counsel shall begin with counsel for such Defendant, followed by other defense counsel in the order described in Section IX (B)(2) of this Order.

D. Stenographers' Fees

1. Unless otherwise agreed, when a deposition of a party to an action is taken at the request of any other party, the cost of the stenographer's appearance, the preparation of the transcript, and the party deponent's copy of the transcript shall be divided equally among all counsel who appear at the deposition, other than counsel for the party-deponent. Each party, other than the party-deponent, who requests a copy of the transcript shall bear the cost of that copy.

2. Unless otherwise agreed, when a party elects to take his, her, or its own testimony, that party shall bear the cost of the stenographer's appearance and the preparation of the transcript. Any party who requests a copy of the transcript shall bear the cost of that copy.

3. Unless otherwise agreed, when a deposition of a non-party is taken, the cost of the stenographer's appearance, the preparation of the transcript, and the non-party's copy of the transcript will be divided equally among all counsel who appear at the deposition, other than counsel for the non-party. Any party, other than the non-party's counsel, who requests a copy of the transcript shall bear the cost of that copy.

E. Videotaped Depositions

1. For the purpose of this section, the term videotaped depositions shall include videotaped trial testimony.
2. Any party, upon service of a proper notice of deposition, may videotape the depositions for any use permitted by the CPLR. All videotape depositions shall be conducted in accordance with 22 NYCRR 202.15, with the exceptions and stipulations set forth below:
   a. If the party noticing for or scheduling a deposition wants the deposition to be videotaped, that party shall so advise all parties either in its notice of the deposition or by letter;
   b. The video technician may not be an employee of any party or any party's counsel.
   c. The videotaped deposition shall be taken before a person authorized by statute who will swear the deponent and make a stenographic record of the proceedings;
   d. At the beginning of the deposition, the video technician will state, on camera, in addition to that required by Uniform Rule Section 202.15(d)(1): the title and venue of the action; the name of the deponent; and the name of the officer before whom the deposition is being taken.

3. Unless otherwise agreed to by counsel, videotaped depositions of deponents who have not been previously deposed in the pending action and who are not terminally ill may not be taken sooner than fifteen (15) days after completion of that witness' non-videotaped discovery deposition. Upon agreement of all counsel, this provision may be waived.

4. A videotape deposition of a terminally ill Plaintiff, who has previously submitted to a discovery deposition, and whose availability for trial may reasonably be doubted, may be promptly taken on notice and without further order of the Court provided that Plaintiff serves on all parties: a medical affidavit executed by a treating physician specifying Plaintiff's present diagnosis and prognosis and indicating any prescribed medication which would in any way affect Plaintiff's mental faculties and ability to understand and respond to questioning; and all other documents, requested by defense counsel, including, but not limited to, supplemental responses to Defendants'
Standard Interrogatories and all new medical records and reports in the possession of Plaintiff and Plaintiff's counsel. Plaintiff's counsel should confer with Defendants' Liaison Counsel to schedule the deposition with reasonable notice, giving due consideration to Plaintiff's medical condition. If notice of the deposition is given seven (7) days or less prior to the date when the deposition is to be taken, notice must be served by facsimile. In no event shall the taking of the videotape deposition be delayed more than ten (10) days from the date of receipt of Plaintiff's counsel certification and notice to take the videotape deposition, except with agreement of Plaintiff's counsel, or by order of the Court. Plaintiff's counsel shall permit Defendants to take a further discovery deposition for the purposes of obtaining non-repetitive testimony off-camera at Defendants' expense prior to the videotape deposition.

5. Unless all counsel agree otherwise or unless the Court on motion directs otherwise, only one camera may be used and the camera will record the witness' head and shoulders view only, with the exception that, at the request of questioning counsel, the camera may record a close-up of a deposition exhibit or other exhibit, including demonstrative exhibits, while the witness is being questioned concerning the exhibit.

6. All objections to questions and testimony given, at a videotaped deposition, except as to the form of the question, are preserved until the time of trial.

7. The cost of the videotape, as a material, and the cost of recording the deposition on videotape will be borne by the party noticing the videotaped deposition; that party shall have ownership of the videotape.

8. **X. Expedited Discovery and Trials for In Extremis Plaintiffs**

A. When an injured Plaintiff is *in extremis*, Plaintiff's counsel may make application to the Court for an Order providing for a jury selection date and an expedited discovery and trial submission schedule, in accordance with CPLR Rule 3407. Any such application shall be served on all parties and/or prospective parties and in addition to the requirements of CPLR Rule 3407, shall
include and/or be accompanied by:

1. A medical affidavit executed by a treating physician specifying the injured Plaintiff's present diagnosis and prognosis and indicating any prescribed medication which would in any way affect the injured Plaintiff's mental faculties and ability to understand and respond to questioning.

2. A copy of the summons and complaint and any amended and/or supplemental summonses and complaints.

3. Plaintiff's responses to Defendants' Standard Interrogatories and to any supplemental interrogatories previously served;

4. All medical records and reports in the possession of Plaintiff and Plaintiff's counsel; and

5. All other documents in Plaintiff's or Plaintiff's counsel's possession relating to taxes, workers' compensation and social security

B. In the event that Plaintiff's counsel seeks to conduct videotaped trial testimony of the injured Plaintiff, Plaintiff's counsel will permit Defendants to conduct a discovery deposition prior to the videotaped trial testimony.

C. Plaintiff may not conduct videotaped trial testimony of an in extremis injured Plaintiff unless the materials set forth in Section X(A) have been provided to all defense counsel and defense counsel have completed their discovery deposition.

D. The parties will make a good faith effort to schedule the in extremis discovery deposition and videotaped trial testimony at mutually agreeable times and locations. All parties are encouraged to act reasonably concerning the scheduling.

XI. Motion Practice

A. General Provisions

Unless otherwise directed by the Court, all motions shall be made returnable in Monroe County.
B. Discovery Motions:

Parties will make a good faith effort to resolve all discovery disputes without the need for Court intervention. However, when a dispute cannot be resolved by the parties, a motion may be brought pursuant to the applicable provisions of the CPLR.

C. Accelerated Judgment:

Each party, at any time, has a right to seek or oppose an accelerated judgment pursuant to CPLR Sections 3211 and/or 3212. However, in an effort to avoid unnecessary motion practice and to streamline the conclusion of these cases, the Court hereby adopts the following process:

1. At any time, Plaintiff’s counsel may notify a Defendant that, upon the review of a particular action, it appears unlikely that Plaintiff will be able to produce any evidence of Defendant’s presence at a job site and/or identification of products containing asbestos manufactured, supplied or applied by that particular Defendant. Upon receipt of such notification, such Defendant may prepare and serve on Plaintiff’s and co-Defendants’ counsel a proposed order dismissing Plaintiff’s claims and all cross-claims, giving notice to all parties of Defendant’s intention to enter said order. If no party serves written objection to such proposed order within twenty (20) days of its service, the Defendant may submit the proposed order to the Court, with copies to all parties. If, within twenty (20) days of service of a proposed order and notice pursuant to this paragraph, any co-Defendant advises in writing that it intends to pursue in good faith its cross-claims against the submitting Defendant, that co-Defendant’s cross claims and reflecting the revised caption, or may move for other or different relief.

2. Unless otherwise specified in the scheduling order, at any time after Plaintiff’s service of Responses to Defendants’ Standard Interrogatories and Requests for Production of Documents, or at any time after the date for Plaintiff’s disclosure of job site and/or Product Identification, pursuant to a scheduling order, whichever is later, a Defendant may, in good faith, serve upon the Plaintiff a statement in writing that there is no evidence that the Defendant was present at any of the job sites identified by Plaintiff ("Job site Identification Letter") and/or that there is no evidence of product identification ("Product Identification Letter"). When a Product Identification Letter
and/or "Job site Identification Letter" is served, Plaintiff shall within 30 days, respond by:

a. Advising the Defendant of the identities of co-worker(s) or other witness(es) who will testify concerning job site and/or product identification or specifying documents that will evidence job site and/or product identification, and in doing so, Plaintiff will not be precluded from presenting additional witnesses or documents at the time of trial so long as such witnesses or documents have been identified as required by the CPLR and/or this Order; or

b. By advising the Defendant that no evidence of job site and/or product identification will be forthcoming, in which case, defendant may proceed to enter an order in accordance with Section XI(C)(1) of this Order.

3. In the event that a Plaintiff responds by advising Defendant of identities of co-workers and/or other witnesses, the Plaintiff must refer the Defendant to prior testimony substantiating job site and/or product identification or provide sworn affidavit(s) of the designated witnesses stating: (a) the job sites and the time period's, affiant was at the job sites; and (b) a summary of the anticipated testimony regarding the identification of products and the circumstances of injured Plaintiff's/decedent's exposure to the product.

4. If Plaintiff fails to respond to Defendant's demand for job site and/or product identification, such Defendant is entitled to submit to the Court, on notice, an order dismissing Plaintiff's complaint against that Defendant. Plaintiff retains the right to be heard in opposition to the signing and entry of such an order by the Court, and also retains their right to oppose an accelerated judgment pursuant to CPLR Sections 3211 and 3212, or both.

5. If, based upon Plaintiff's response to its Job site and/or Product Identification Letter, a Defendant desires to depose co-workers and/or other witnesses, such Defendant shall advise Plaintiff's counsel in writing. Noticing and/or scheduling of the depositions will proceed in accordance with Section IX of this Order.
6. When a Plaintiff discontinues an action against a Defendant, such Defendant may proceed in either of the following manners:

a. Such Defendant may serve written notice of the discontinuance upon all parties to the action and a proposed order dismissing all claims and cross-claims against it, giving notice to all parties of Defendant's intention to enter said order. If no party serves written objection to such proposed order within twenty (20) days of its service, the Defendant may submit the proposed order to the Court, with copies to all parties. If, within twenty (20) days of service of said proposed order and notice, a co-Defendant serves a written objection to dismissal on the ground that it intends to pursue in good faith its cross-claims against the Defendant obtaining the discontinuance, the Defendant's cross-claims may be converted to third-party claims in accordance with Section 1007 of the CPLR. The Defendant obtaining the discontinuance may then submit to the Court a revised order dismissing all claims and all cross-claims except those of the objecting co-Defendant and reflecting the revised caption, or may move the Court for other or different relief.

b. In the alternative, such Defendant may move for an order dismissing all claims and cross-claims against it in the action. The return date of such motion shall be at least twenty (20) days following service of said motion unless, by Order to Show Cause, the Court permits a shorter notice period. If no party serves written objection to such dismissal within twenty (20) days following service of such motion, or within such other time period as the Court may set, the motion will be granted and the moving Defendant may submit to the Court, with copies to all parties, an order dismissing all claims and cross-claims against it and deleting it from the action. If any party to the action serves written objection to such motion for dismissal within the applicable time period, the Court shall hear the motion and issue such order as is just.
XII. Scheduling of Trials and Discovery

At the Preliminary Conference, the Court will, issue Orders setting forth dates for filing of Notes of Issue and trials in actions pending in the 7JDAL in accordance with this Order. For the purpose of this section of this Order, the term "injured Plaintiff" is meant to refer to the individual who was allegedly injured by reason of exposure to asbestos and, when the Plaintiff is a personal or estate representative, is meant to refer to the decedent.

A. Trial Dates:

The Court will issue individual trial dates for asbestos actions pending in the 7JDAL. The Court may group for discovery and trial purposes: (1) actions of injured Plaintiffs, who were the direct employees of a legal entity at a plant site in the Seventh Judicial District (2) the action of an injured Plaintiff who alleges injurious exposure to asbestos by reason of kinship or cohabitation with the action of a related person who also has an action pending in the 7JDAL; and (3) other cases which under the circumstances would warrant discovery and/or trial grouping. Nothing in this Case Management Order shall be construed to prevent the Court from consolidating two or more actions in groups for trial. Nothing in this Case Management Order shall be construed to prevent the Court from directing the removal or severance of one or more Plaintiffs from a group for a trial.

B. Procedure for Scheduling Trial Dates:
At the Preliminary Conference, the Court will set a day certain trial date for each case or group of cases. In the event of a severance of one or more cases within a group, the cases with the earliest Index Numbers, together with other cases continued to be joined in the same group, will first proceed to trial, followed by the severed cases, in an order based upon the same procedure, unless otherwise ordered by the Court.

C. Schedule:
Following the Preliminary Conference, Liaison Counsel will meet and confer in order to develop a proposed Scheduling Order for each action assigned a trial date. Unless otherwise agreed upon, the Discovery and Trial Submission Schedule will be in the form and contain dates as set forth in Appendix H.
XIII. Pretrial Submissions

A. Pretrial submissions shall be served in accordance with the applicable discovery and trial submission schedule. Pretrial submissions include a list of all expert witnesses, fact witnesses and all exhibits that the parties intend to use at trial. Counsel shall have an opportunity to designate additional witnesses and exhibits in response to their adversaries’ designations as set forth in the discovery and trial submission schedule or at some later time for good cause shown.

B. The trial judge shall make such further orders, deemed appropriate, for submission of proposed voir dire, requests for jury charges or other submissions. Additionally, the trial court shall direct a schedule for objections to exhibits or proposed deposition testimony, as necessary and as the Court so chooses.

C. Plaintiff’s counsel shall deliver seventy (70) copies of the completed juror questionnaire (attached as Appendix I) to the appropriate county’s Jury Commissioner no later than the Thursday before the commencement of jury selection.

D. All motions in limine shall be served in letter form. No transcripts or exhibits need be attached. Counsel may be required to provide additional information at the Court’s discretion. In the instance where counsel seeks to serve expanded papers to support a motion on a truly novel issue, leave of Court shall be required in writing.

XIV. Settlements

A. Counsel attending specifically designated settlement conferences must have authority to settle their case or shall have persons with such authority available by phone during the conference.

B. If Plaintiff(s) and Defendant(s) stipulate to discontinue the action, the parties’ counsel shall sign a Stipulation of Discontinuance, provide all parties with 20 days notice, thereof, and forward same to the Court, with an Order approving same, and providing that said discontinuance/dismissal is on the merits and applies to any and all cross-claims or counterclaims.
C. Any settlement of a wrongful death case will be subject to the approval of this Part, and shall be submitted to the designated Supreme Court Justice and no other Court or Judge. EPTL §5-4.6, as interpreted by the Court of Appeals, in Pollincina v. Misericordia Hospital, (82 NY2d 332 [1993]), requires the “Court to evaluate and resolve the fairness and reasonableness of the settlement, including the amount to be paid, the manner in which the payment obligation is amortized and the parties’ arrangements for payment of costs and attorney’s fees.”

Accordingly, within 60 days of resolution of all claims, in a pending wrongful death action, Plaintiff’s counsel must submit a proposed order for approval of the settlement, including an allowance for attorney’s fees and expenses. The papers, submitted in support of such application, should include an affidavit from the personal representative, consenting to the compromise on behalf of the distributees. In lieu of an affidavit, a personal representative may be produced, in person, for purposes of examination by the Court.

In addition, an affirmation from counsel should be submitted, setting forth the time expended and other bases for the requested amount of attorney’s fees and an itemized list of expenses. Further, the application should contain the specific amounts to be contributed by each Defendant, who has participated in the settlement, and the reasons for agreeing to accept such amounts. If a settlement has been reached with a Defendant for a total amount, which encompasses other, unrelated claims, Plaintiff’s counsel must set forth the manner and method used in the allocation of such amount among the respective cases. In the event that monies have been paid by a Defendant, such amounts are to be retained in an interest bearing trust account, maintained by Plaintiff’s counsel for the benefit of the distributees, and thereafter, disbursed only after approval by the Court, and in accordance with the Order.

D. If claims against one or more, but not all, Defendants are resolved by settlement, approval by the Court, as required herein, will be withheld until final resolution of all claims. Alternatively, the parties may request approval of settlement of one or more such claims as well as permission to disburse monies already or to be paid, prior to resolution of all claims, but only upon compliance with the foregoing requirements relating to approval following resolution of all claims. In such circumstances, the affirmation, submitted by Plaintiff’s counsel, should indicate the reasons for such request and, insofar as possible, an estimate of anticipated future proceeds.

E. An application, made pursuant to this section, may request issuance of an order approving the total amount of a settlement without an allocation between wrongful death and
other types of claims. In such event, and upon approval, the Court will refer the matter to the appropriate Surrogate's Court for purposes of making such allocation and directing distribution of the proceeds. Alternatively, Plaintiff(s) may request that the entire proceeds, or a portion, thereof, be allocated to the wrongful death claim. In such event, and upon approval, the Court may make a determination concerning the proper allocation for the wrongful death claim, and after making an allowance for payment of counsel fees and disbursements, direct a distribution of the net proceeds. Any portion of the settlement, which has not been allocated to the wrongful death claim, will be referred to the appropriate Surrogate's Court for approval and distribution.

F. An action, which has been resolved by settlement, following the filing of a Note of Issue and Certificate of Readiness, will remain on the trial calendar until compliance with the requirements of this section. Nevertheless, a case may be marked “Off” the calendar, and subject to restoration to the trial calendar, if counsel submits an application for, and the Court grants, preliminary approval of a settlement, pending a formal application for approval in compliance with the requirements of this section. Such application for preliminary approval must include a statement from Plaintiff's counsel, certifying that the personal representative has consented to the compromise, the specific amounts to be contributed by each Defendant, and a brief statement of the reasons for compromise of such amounts.

G. Upon the entry of any order, approving a settlement of a wrongful death claim under this section, counsel for Plaintiff(s) shall give written notice, thereof, to all counsel of record for Defendants who have agreed to pay monetary amounts in consideration of resolution of the claim.

XV. Miscellaneous

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the Plaintiff's counsel, among defense counsel, and among Defendants shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by
itself, render such information or documents privileged.

The failure to comply with any provision contained in this Order, or subsequent Scheduling Order, either upon a party's motion or the Court's own motion, may result in a case being marked Off the calendar, preclusion, dismissal, the imposition of costs or sanctions, or other appropriate remedy.

SO ORDERED.

[Signature]
Hon. Ann Marie Taddeo
Supreme Court Justice

3.1.12
SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In re EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Applies to All Cases

EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION
MASTER FILE

CASE MANAGEMENT
ORDER NUMBER 8
Master Index Number: H95716

I. Applicability of This Order

This Order applies to all pretrial procedures involving all asbestos personal injury and wrongful death cases now or hereafter commenced in the Supreme Court of State of New York, Eighth Judicial District, except as otherwise directed by the Court upon motion and for cause shown by the party seeking to have this Order declared inapplicable. This Order supersedes all previous case management orders and amendments entered in the asbestos litigation pending in the Eighth Judicial District.

II. Purpose of This Order

It is in the interest of justice to encourage and bring about the fair, expeditious and inexpensive resolution of these cases. This Case Management Plan ("CMP") is established in an effort to achieve this goal, to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens, and to permit the parties to evaluate these cases, reach early settlements, and prepare unsettled cases for trial. The essential components of the
CMP include, to the extent feasible:

A. Standardization of pleadings and discovery so that the parties can obtain the necessary information to evaluate cases for settlement or to prepare them for trial at minimum cost;

B. Conducting early pretrial conferences to explore settlement opportunities, resolve pretrial management problems and establish discovery cut-off dates;

C. Grouping, ordering, and firm scheduling of cases for pretrial procedures and trial; and

D. Coordination of discovery, the use and compensation of Liaison Counsel, and other orders as necessary to avoid duplication, contain costs and expedite disposition through settlement or trial.

III. Index Numbers and Filing Procedures

A. Index Numbers and Files:

A master file, known as the Eighth Judicial District Asbestos Litigation ("EJDAL") Master File and designated as Erie County Index Number H95716, has been established in the Erie County Clerk's Office for all asbestos cases commenced in the Eighth Judicial District. Entries on the EJDAL Master File are and shall be applicable to each asbestos personal injury and wrongful death case ("asbestos action") commenced in the Eighth Judicial District.

The original of this Order shall be filed by the Erie County Clerk in the EJDAL Master File and a copy of this Order shall be deemed to be part of the record of each asbestos case commenced in the Eighth Judicial District.

All asbestos actions now or hereafter commenced in the EJDAL as multi-plaintiff actions are hereby severed and shall proceed as individual plaintiff (or plaintiff and spouse) actions pursuant to the terms of this Order.
B. Captions of Cases:

Every document filed in the EJDAL which has general application to all asbestos actions shall bear a caption similar to the caption of this Order.

C. Filing of Papers:

1. When a paper has general application to all asbestos actions, the caption shall bear Erie County Index Number H95716 and the Erie County Clerk shall file such a paper in the EJDAL Master File. No further copies of the paper need to be filed. Any document so filed shall be deemed to have been filed in each action to which this Order applies and shall constitute part of the record of each such action.

2. When a paper is applicable only to an individual asbestos action, the attorney submitting such paper for filing shall supply to the Clerk of the County in which the action is venued a cover sheet containing the caption, name and index number to which the paper is applicable. The County Clerk shall file such paper in the individual file for the action under the appropriate index number. The Erie County Clerk shall not file such a paper in the EJDAL Master File.

3. When a paper to be filed is applicable to two or more but less than all of the asbestos actions, the caption of the paper shall state the titles and the index numbers of each action to which that paper is applicable. The Clerk of the Counties in which the actions so identified are venued shall file a copy of the paper in the each separate file under the index numbers so identified. It is the responsibility of the attorney submitting such paper for filing to supply a cover sheet containing the captions, titles and index numbers of all actions to which the paper is applicable and to supply the appropriate County Clerks with sufficient copies of the paper to facilitate compliance with the directives of this paragraph.

IV. Rules of Procedure

The Civil Practice Law and Rules and the Rules of the Fourth Department, the Eighth Judicial District and the Counties comprising the Eighth Judicial District, together with the express provisions of this Order, shall govern all proceedings in the EJDAL.
The Court may depart from the procedures contained in this Case Management Order based on the needs and circumstances of a particular case.

V. Pleadings

A. Plaintiff’s Statement:

A Plaintiff’s Statement form, a copy of which is annexed as Appendix A, shall be completed for each injured plaintiff or plaintiff’s decedent and shall be either: attached to the complaint; or served upon the defendants within sixty (60) days after filing of the complaint or sixty (60) days from the date of this Order, whichever date is later. When the Plaintiff’s Statement is not attached to the complaint, the original Plaintiff’s Statement shall be filed by the Clerk of the County in which the action is vened under the index number of the action to which it applies. A Plaintiff’s Statement shall include, to the extent possible, the primary work site(s) at which it is claimed that injurious asbestos exposure occurred. Plaintiff’s Statements are for compilation of trial lists and statistical purposes. In no event are Plaintiff’s Statements intended to limit proof and they are not admissible for any purpose.

If at any time after the filing of the Plaintiff’s statement, but before service of plaintiff’s Answers to Standard Interrogatories, plaintiff’s claimed asbestos-related illness changes from a non-malignancy to a malignancy, the Plaintiff’s Statement shall be amended accordingly. All such amendments must be filed and served within sixty days of notification to plaintiff’s counsel of such change in claimed illness.

B. Standardized Pleadings:

1. Plaintiffs’ counsel may file in the EJDAL Master File and serve on defendants a complaint or set of complaints containing standard allegations generally applicable to all claims of a similar nature. Thereafter, plaintiffs may file and serve short form complaints that incorporate by reference all allegations contained in the appropriate standard complaint. With respect to asbestos actions commenced prior to the date of this Order, leave is hereby granted to file and serve such short form complaints as amended complaints.

2. A defendant may file in the EJDAL Master File and serve on all
plaintiffs' and defendants' counsel a Standard Answer with affirmative defenses. When a Standard Answer has been filed, a defendant may serve a plaintiff in an action with an Acknowledgment of Service, a sample form for which is annexed as Appendix B. Upon service of an Acknowledgment of Service, a defendant will be deemed to have denied all material allegations contained in the complaint, except as stated in such Acknowledgment, and to have raised each affirmative defense contained in its Standard Answer, except as stated in such Acknowledgment. Nothing herein shall preclude a defendant from filing an individual answer, if it so chooses.

3. Third-party plaintiffs' counsel may file in the EJDAL Master File and serve on third-party defendants a third-party complaint or set of third-party complaints containing standard allegations generally applicable to all third-party claims of a similar nature. Thereafter, third-party plaintiffs may file and serve short form third-party complaints that incorporate by reference all of the allegations contained in the appropriate standard third-party complaint.

4. A third-party defendant may file in the EJDAL Master File and serve on third-party plaintiffs a Standard Answer to Third-Party Complaint with affirmative defenses. When a Standard Answer to Third-Party Complaint has been filed, a third-party defendant may serve a third-party plaintiff in an action with an Acknowledgment of Service of Third-Party Complaint, a sample form for which is annexed as Appendix C. Upon service of an Acknowledgment of Service of Third-Party Complaint, a third-party defendant will be deemed to have denied all material allegations contained in the third-party complaint, except as stated in such Acknowledgment, and to have raised each affirmative defense contained in its Standard Answer to Third-Party Complaint, except as stated in such Acknowledgment. Nothing herein shall preclude a third-party defendant from filing an individual answer, if it so chooses.

C. Substitution of Proper Party Upon Death of Plaintiff and Assertion of Additional Claims Following Death of Plaintiff:

1. Upon the death of an injured plaintiff, the personal representative of the deceased injured plaintiff may be substituted as plaintiff, without leave of Court, if said personal
representative, within one year of injured plaintiff's death, serves upon all attorneys of record in the pending action:

a. The date and place of the deceased injured plaintiff's death;
b. The name and address of the deceased injured plaintiff's personal representative;
c. A copy of the death certificate for the deceased injured plaintiff;
d. A copy of the Surrogate's certification of the appointment of the personal representative; and

e. A proposed Order of Substitution.

If there are no written objections to the proposed Order of Substitution within 15 days of its mailing, the plaintiff's attorney, without further notice, may submit said Order to the Court for signature and filing.

2. Within one year of an injured plaintiff's death, a substituted plaintiff may, without leave of Court, amend the original complaint to add claims based on survivorship or death of the original plaintiff. Service of such amendments on counsel who has appeared for a defendant shall be considered service on that defendant. Defendants may answer as set forth in this Order.

A substituted plaintiff seeking to amend a complaint to add claims based on the death of the original injured plaintiff must support the enlargement of the complaint to include a cause of action for wrongful death with medical documentation including: the certificate of death; and an autopsy report or hospital admission/discharge summary or a report prepared and signed by a physician supporting the allegation of a connection between the alleged injurious exposure to asbestos and the death. No presumption regarding causation is created by such enlargement of a complaint. The issue of the connection between the alleged injurious exposure to asbestos, if any, and the death shall be preserved for the trier of fact or for the Court upon motion. A defendant who served an Acknowledgment of Service or answer in the original action is not required to serve an answer to the amended complaint as all new material allegations contained in the amended complaint will be deemed denied by any such defendant.
D. Other Amendments to Pleadings:

Amendments to the pleadings, other than those set forth in Section V © of this Order shall be made in compliance with CPLR §3025. The parties are encouraged to consent to amendments where appropriate in light of New York State's recognition that leave to amend is to be freely granted.

VI. Liaison Counsel

A. Appointment of Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel to act on behalf of plaintiffs' counsel and defendants' counsel, respectively, after appropriate consultation where necessary, will facilitate communications among the Court and counsel, minimize duplication of effort, and provide for the efficient progress and control of this litigation.

B. Subject to the right of any party to present individual positions or divergent positions or to take individual actions, Liaison Counsel are vested by the Court with the following responsibilities and duties:

1. Coordinating the conduct of discovery procedures, including but not limited to coordination of the preparation of joint written interrogatories, joint requests to admit, and joint requests for the production of documents, where applicable;

2. Coordinating the examination of witnesses in depositions;

3. Calling meetings of counsel for plaintiffs' counsel and defendants' counsel, respectively, for the purpose of proposing joint actions, including but not limited to responses to questions and suggestions of the Court or of adversaries with regard to orders, schedules, briefs, and stipulations of the facts.

C. Co-Liaison Counsel for the plaintiffs shall be the firms of: Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP; and Lipsitz & Ponterio, LLC.

D. Co-Liaison Counsel for the defendants shall be the firms of: Anderson Kill & Olick, P.C. (Smith, Murphy & Schoepperle, LLP, as local counsel); and Damon & Morey.

E. Liaison Counsel are authorized to receive orders, notices, correspondence and
telephone calls from the Court regarding general case management issues on behalf of all plaintiffs and defendants. Liaison Counsel shall be responsible for notifying all plaintiff counsel and defense counsel, respectively, of all communications received from the Court. Liaison Counsel may not be used by any party for service and/or distribution of papers, orders, notices or correspondence to other counsel.

F. Notwithstanding the appointment of Liaison Counsel, each counsel shall have the right to participate in all proceedings before the Court as fully as such counsel deems necessary.

G. Liaison Counsel shall not have the right to bind any party except Liaison Counsel’s own respective clients as to any matter without the consent of counsel for any other party.

H. Plaintiffs’ Liaison Counsel and Defendants’ Liaison Counsel shall be reimbursed periodically, but not less than every six months, by counsel for plaintiffs and defendants, respectively, for necessary and reasonable disbursements actually incurred in performing their responsibilities pursuant to this Order. Liaison Counsel shall keep records of such disbursements in reasonable detail for examination by counsel. Liaison Counsel shall be paid, respectively, by each plaintiff or defense law firm on an equitable basis to be agreed upon by the parties or fixed by the Court with each plaintiff and defense law firm having to pay a proportionate share of the disbursements incurred by its respective Liaison Counsel in representing its interests. Liaison Counsels’ invoices for services as Liaison Counsel pursuant to this Order shall be due and payable when submitted. Interest shall be computed at the rate applicable to judgments starting thirty (30) days after the date of their submission.

VII. Standard Consolidated Discovery

A. Interrogatories and Document Requests:

Standard Interrogatories and Requests for Production of Documents shall be used as set forth herein. The Court on its own motion hereby permits the use of interrogatories
in addition to depositions pursuant to CPLR §3130.

1. Defendants' Interrogatories and Document Requests:

a. Defendants' standard set of interrogatories to plaintiffs have been filed in the EJDAL Master File and have been provided to Plaintiffs' Liaison Counsel. These standard interrogatories, captioned "Defendants' First Set of Interrogatories and Request for Production of Documents (revised)" ("Defendants' Standard Interrogatories"), are annexed by reference.

b. Plaintiffs shall serve responses to Defendants' Standard Interrogatories ("Plaintiffs' Answers to Standard Interrogatories") upon all defendants in an action and in accordance with the applicable discovery and trial submission schedule for that action. Defendants' Standard Interrogatories shall be answered in full, unless appropriate objections are stated in lieu of an answer. Plaintiffs' Answers to Standard Interrogatories shall be verified by the individual injured plaintiff(s) or plaintiff estate representative.

c. A defendant may serve supplemental, non-repetitive interrogatories and requests for production of documents ("Defendant's Supplemental Interrogatories") in accordance with the applicable discovery and trial submission schedule for an action.

d. Copies of any records obtained by a defendant pursuant to authorization of a plaintiff, other than those records which are obtained through a mutually agreed upon records retrieval service, shall be made available to plaintiff's counsel by notice of receipt mailed to plaintiff's counsel within twenty (20) days of defendant's receipt of such records.

2. Plaintiffs' Interrogatories and Document Requests:

a. Plaintiffs' standard set of general liability interrogatories have been filed in the EJDAL Master File and have been provided to Defendants' Liaison Counsel. These standard interrogatories, captioned "Plaintiffs' First Standard Set of Liability Interrogatories and Request for Production of Documents" ("Plaintiffs' Standard Interrogatories"), are annexed by reference. In the event that a plaintiffs' counsel commences an action against a defendant not
previously sued, said plaintiff's counsel will serve Plaintiffs' Standard Interrogatories on such
defendant.

b. To the extent not previously done, each defendant shall file a
single set of responses to Plaintiffs' Standard Interrogatories ("Defendants' Answers to Standard
Interrogatories") in the EJDAL Master File and shall serve same on plaintiffs' counsel.
Defendants' Answers to Standard Interrogatories shall be applicable to all EJDAL actions.
When so filed and served, Defendants' Answers to Standard Interrogatories shall be deemed
served in accordance with the applicable discovery schedule in each individual action.

c. A defendant who has served answers to standard interrogatories in
any jurisdiction in New York State other than the Eighth Judicial District is entitled to adopt
those interrogatories answers as and for their responses to Plaintiffs' Standard interrogatories in
the EJDAL, provided that the defendant files and serves responses to any non-duplicative
interrogatories contained in Plaintiffs' Standard Interrogatories in the EJDAL.

d. A plaintiff may serve supplemental, non-repetitive interrogatories
and requests for production of documents ("Plaintiff's Supplemental Interrogatories") in
accordance with the applicable discovery and trial submission schedule for an action.
Plaintiffs' counsel are to exercise good faith in determining the need for such further
interrogatories.

e. A plaintiff may serve non-duplicative, standard product
identification interrogatories with respect to particular work sites ("Plaintiffs' Standard Product
Identification/Work Site Interrogatories") in accordance with the applicable discovery and trial
submission schedule for an action. If a defendant has previously responded to such
interrogatories for that work site, that defendant may respond by letter adopting said prior
response.

B. General Guidelines Regarding Document Requests:

1. A party requesting discovery and inspection of documents shall specify a
reasonable time, place, and manner for making the inspection. The request will describe each
item with reasonable particularity.
2. Responses to requests for discovery and inspection of documents should be, to the extent practicable, in such form as will make clear the request to which the document is responsive.

3. Any response that a document cannot be located shall state with reasonable particularity the efforts made to obtain the requested document.

4. Counsel are to exercise good faith in making requests for and in responding to requests for production of documents.

5. Counsel are to exercise their best efforts to resolve on an informal basis disputes arising out of the document requests and responses and objections thereto.

C. General Guidelines Regarding Discovery:

1. Disputes with regard to discovery shall be called immediately to the attention of the Court for resolution and, unless otherwise directed by the Court, shall not be relied upon by any party as a justification for not adhering to any applicable discovery and trial submission schedule.

2. Objections to discovery based on privilege shall clearly identify the privilege claimed and shall provide sufficient information concerning (i) the basis for the claim of privilege to establish *prima facie* the validity of the claim, and (ii) the privileged information to permit identification of the information or document as to which privilege is claimed. If not so identified, the privilege shall be deemed waived. The parties shall negotiate in an effort to preserve the confidentiality of trade secrets.

3. Responses to requests for discovery and inspection of business or medical records shall state whether the record is or is not a record made in the course of a regularly conducted activity so as to be admissible under CPLR § 4518. If not so described, the document shall be deemed admissible under the rule.

4. Any objection to discovery based on burdensomeness shall describe the burden with reasonable particularity. Any objection based on burdensomeness and any objection to the time, place, or manner of production shall state a reasonable alternative as a counterproposal.
5. Any response that information cannot determined shall state with reasonable particularity the efforts made to obtain the requested information.

6. Any notice and/or motion for discovery served upon a non-party shall be served contemporaneously upon all parties to the action.

VIII. Medical Examinations of Plaintiffs

Physical examinations of plaintiffs shall be conducted in accordance with the CPLR and applicable case law.

IX. Depositions

A. General Guidelines:

1. All depositions of parties shall be held in the Eighth Judicial District unless otherwise ordered by the Court or agreed to by the parties.

2. All counsel shall avoid unnecessary and repetitive questioning of witnesses.

3. Unless all parties otherwise agree, all objections, except as to the form of the question, shall be reserved for determination by the trial judge.

4. All counsel may attend any deposition.

5. Counsel may notice any deposition to apply to more than one case and shall use best efforts to insure that depositions are noticed to apply to all appropriate cases. Nothing in this provision shall be deemed to prohibit a party from moving to limit the use of deposition testimony based upon good cause shown.

6. All depositions shall be conducted with due regard for the physical and emotional condition, health, and disability of the deponent.

7. In the event that a notice for a discovery deposition is not served, but such deposition is scheduled by agreement of counsel or order of the Court, any such deposition of an injured plaintiff, plaintiff spouse or personal representative will be deemed to have been noticed
for or scheduled by defendants’ counsel and any such depositions of a defendant will be deemed to have been noticed for or scheduled by plaintiffs’ counsel.

8. Deposition testimony may be used only against those parties which received actual written notification of the deposition stating the date, time and location of the deposition. Said notification must be served in compliance with the CPLR, this Order, or other Court order and, in any event, unless good cause is shown, must be served no later than three (3) business days prior to the scheduled date of the deposition.

B. Depositions of Plaintiffs:

1. Depositions of injured plaintiffs will be scheduled by Liaison Counsel when preparing discovery and trial submission schedules for actions scheduled for trial. In all actions, the rights of defendants and third party defendants to depose plaintiff spouses, personal representatives and distributees of decedents at any time prior to jury selection is reserved. Such a deposition may be requested, noticed for and/or scheduled by any defense counsel.

2. Questioning of the injured plaintiff by defense counsel shall begin with interrogation by Defendants’ Liaison Counsel, followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by Defendants’ Liaison Counsel when such an agreement cannot be reached.

3. Questioning of plaintiff spouses, personal representatives and distributees of decedents shall begin with interrogation by the defense counsel who requested, noticed and/or scheduled the deposition, followed by interrogation by other defense counsel in an order agreed to by defense counsel or as decided by Defendants’ Liaison Counsel when such an agreement cannot be reached. If the above deponent is a present or former officer or employee of a defendant, that defendant shall question first, followed by other defense counsel in the order described in Section IX (B)(2) of this Order.

C. Depositions of Defendants and Non-Party Witnesses:

1. Depositions of defendants and non-party witnesses will be noticed for and/or scheduled by the party seeking the deposition during the period of time that is provided in
the applicable discovery and trial submission schedule for the action for the conducting of such depositions.

2. The parties shall make every effort to use depositions as well as other discovery obtained from defendants in other actions in New York State and other jurisdictions for all purposes as if taken in each action in these cases in accordance with of this Order. No other depositions of defendants shall be taken in these cases except pursuant to Section IX (C)(3) of this Order.

3. Any plaintiff may serve notice of intent to take non-repetitive depositions of defendants’ representatives pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant. Objections to said depositions shall be brought by the affected defendant before the Court who shall issue a ruling. All corporate depositions shall be noticed at a time and place convenient to the parties and witnesses, taking into account the expense to the parties and the health of the defendants’ witnesses.

4. Questioning by plaintiffs’ counsel shall begin with interrogation by Plaintiffs’ Liaison Counsel or by the plaintiffs’ counsel who noticed the deposition, followed by other plaintiffs’ counsel in the order of their appearance in this litigation and defense counsel in the order described in Section IX (B)(2) of this Order. If the above deponent is a present or former officer or employee of a defendant, questioning by defense counsel shall begin by questioning by that defendant, followed by other defense counsel in the order described in Section IX (B)(2) of this Order.

D. Stenographer’s Fees:

1. When a deposition of a party to an action is taken at the request of any other party, the cost of the stenographer’s appearance, the preparation of the transcript and the party deponent’s copy of the transcript shall be divided equally among all counsel who appear at the deposition, other than counsel for the party-deponent. Any party, other than the party-deponent, who requests a copy of the transcript shall bear the cost of that copy.

2. When a party elects to take his, hers or its own testimony, that party shall bear the cost of the stenographer’s appearance and the preparation of the transcript. Any party who requests a copy of the transcript shall bear the cost of that copy.

14
X. Expedited Discovery and Trials for In Extremis Plaintiffs

A. When a injured plaintiff is in extremis, plaintiff’s counsel may petition the Court for an Order providing for a jury selection date and an expedited discovery and trial submission schedule. Any such petition to the Court shall be served on all parties and/or prospective parties and shall include and/or be accompanied by:

1. A medical affidavit executed by a treating physician specifying the injured plaintiff’s present diagnosis and prognosis and indicating any prescribed medication which would in any way affect the injured plaintiff’s mental faculties and ability to understand and respond to questioning;

2. A copy of the summons and complaint and any amended and/or supplemental summonses and complaints;

3. Plaintiff’s responses to Defendants’ Standard Interrogatories and to any supplemental interrogatories previously served;

4. All medical records and reports in the possession of plaintiff and plaintiff’s counsel; and

5. All other documents requested by defense counsel and in plaintiff’s or plaintiff’s counsel’s possession including all tax, workers’ compensation and social security records.

B. In the event that plaintiff’s counsel seeks to conduct videotaped trial testimony of the injured plaintiff, plaintiff’s counsel will permit defendants to conduct a discovery deposition prior to the videotaped trial testimony.

C. Plaintiff may not conduct videotaped trial testimony of an in extremis injured plaintiff unless the materials set forth in Section X (A) have been provided to all defense counsel and defense counsel have completed their discovery deposition.

D. The parties will make a good faith effort to schedule the in extremis discovery deposition and videotaped trial testimony at mutually agreeable times and locations. All parties are encouraged to act reasonably concerning the scheduling.
3. When a deposition of a non-party is taken, the cost of the stenographer’s appearance, the preparation of the transcript, and the non-party’s copy of the transcript will be divided equally among all counsel who appear at the deposition, other than counsel for the non-party. Any party, other than the non-party’s counsel, who requests a copy of the transcript shall bear the cost of that copy.

E. Videotaped Depositions:

1. For the purpose of this section, the term videotaped depositions shall include videotaped trial testimony.

2. Any party upon service of proper notice of deposition may videotape depositions for any use permitted by the CPLR. All videotape depositions shall be conducted in accordance with 22 NYCRR 202.15, with the exceptions and stipulations set forth below:
   a. If the party noticing for or scheduling a deposition wants the deposition to be videotaped, that party shall so advise all parties either in its notice of the deposition or by letter;
   b. The videotographer may not be an employee of any party or any party’s counsel;
   c. The videotaped deposition shall be taken before a person authorized by statute who will swear the deponent and make a stenographic record of the proceedings;
   d. At the beginning of the deposition, the videotographer will state on camera, in addition to that required by Uniform Rule Section 202.15(d)(1): the title and venue of the action; the name of the deponent; and the name of the officer before whom the deposition is being taken.

3. Unless otherwise agreed to by counsel, videotaped depositions of deponents who have not been previously deposed in the pending action and who are not terminally ill may not be taken sooner than fifteen (15) days after completion of that witness’ non-videotaped discovery deposition. Upon agreement of all counsel, this provision may be waived.

4. A videotape deposition of a terminally ill plaintiff who has previously submitted to a discovery deposition and whose availability for trial may reasonably be doubted
may be promptly taken on notice and without further order of the Court provided that plaintiff serves on all parties: a medical affidavit executed by a treating physician specifying plaintiff's present diagnosis and prognosis and indicating any prescribed medication which would in any way affect plaintiff's mental faculties and ability to understand and respond to questioning; and all other documents requested by defense counsel including, but not limited to, supplemental responses to Defendants' Standard Interrogatories and all new medical records and reports in the possession of plaintiff and plaintiff's counsel. Plaintiff's counsel should confer with Defendants' Liaison Counsel to schedule the deposition with reasonable notice, giving due consideration to plaintiff's medical condition. If notice of the deposition is given seven (7) days or less prior to the date when the deposition is to be taken, notice must be served by facsimile. In no event shall the taking of the videotape deposition be delayed more than ten (10) days from the date of receipt of plaintiff's counsel's certification and notice to take the videotape deposition except with agreement of plaintiff's counsel or by order of the Court. Plaintiff's counsel shall permit defendants to take a further discovery deposition for the purposes of obtaining non-repetitive testimony off-camera at defendants' expense prior to the videotape deposition.

5. Unless all counsel agree otherwise or unless the Court on motion directs otherwise, only one camera may be used and the camera will record the witness's head and shoulders view only, with the exception that, at the request of questioning counsel, the camera may record a close-up of a deposition exhibit or other exhibit, including demonstrative exhibits, while the witness is being questioned concerning the exhibit.

6. All objections to questions and testimony given at a videotaped deposition, except as to the form of the question, are preserved until the time of trial.

7. The cost of the videotape, as a material, and the cost of recording the deposition on videotape will be borne by the party noticing the videotaped deposition; that party shall have ownership of the videotape. When an edited version is required, the cost of the videotape, as a material, and the cost of producing the edited version of the videotape recording for use at trial shall be borne by the party who caused to be recorded testimony or other evidence subsequently determined to be objectionable and ordered stricken from the tape by the Court; that party shall have ownership of the edited version of the videotape.
XII. Motion Practice

A. Discovery Motions:
Parties will make a good faith effort to resolve all discovery disputes without the need for Court intervention. However, when a dispute cannot be resolved by the parties, a motion may be brought pursuant to the applicable provisions of the CPLR.

B. Accelerated Judgment:
Each party has a right to seek or oppose an accelerated judgment pursuant to CPLR Sections 3211 and/or 3212. However, in an effort to avoid unnecessary motion practice and to streamline the conclusion of these cases, the Court hereby adopts the following process:

1. At any time, plaintiff’s counsel may notify a defendant that, upon the review of a particular action, it appears unlikely that plaintiff will be able to produce any evidence of identification of products containing asbestos manufactured, supplied or applied by that particular defendant. Upon receipt of such notification, such defendant may prepare and serve on plaintiff’s and co-defendants’ counsel a proposed order dismissing plaintiffs’ claims and all cross-claims, giving notice to all parties of defendant’s intention to enter said order. If no party serves written objection to such proposed order within twenty (20) days of its service, the defendant may submit the proposed order to the Court, with copies to all parties. If, within twenty (20) days of service of a proposed order and notice pursuant to this paragraph (B)(1), any co-defendant advises in writing that it intends to pursue in good faith its cross-claims against the submitting defendant, that co-defendants’ cross-claims may be converted to third-party claims in accordance with Section 1007 of the CPLR. The submitting defendant may then submit to the Court a revised order dismissing plaintiff’s claims and reflecting the revised caption, or may move for other or different relief.

2. A defendant may in good faith serve upon the plaintiff a statement in writing that there is no evidence of product identification ("Product Identification Letter"). When a Product Identification Letter is served upon plaintiff, plaintiff shall respond by:

   a. Advising the defendant of the identities of co-worker(s) or other witness(es) who will testify concerning product identification or specifying documents that will
evidence product identification, and in doing so plaintiff will not be precluded from presenting additional witnesses or documents at the time of trial so long as such witnesses or documents have been identified as required by the CPLR and/or this Order; or

b. By advising the defendant that no evidence of product identification will be forthcoming, in which case defendant may proceed to enter an order in accordance with Section XII (B)(1) of this Order.

3. In the event that a plaintiff responds by advising defendant of identities of co-workers and/or other witnesses, the plaintiff must refer the defendant to prior testimony substantiating product identification or provide sworn affidavit(s) of the designated witnesses stating: (a) the job sites and the time periods affiant was at the job sites; and (b) a summary of the anticipated testimony regarding the identification of products and the circumstances of injured plaintiff’s/decedent’s exposure to the product.

4. Product Identification Letters are to be served and responded to in accordance with the applicable discovery and trial submission schedule. If plaintiff fails to respond to defendant’s demand for product identification in accordance with the applicable discovery and trial submission schedule, such defendant is entitled to submit to the Court, on notice, an order dismissing plaintiff’s complaint against that defendant. Plaintiff retains the right to be heard in opposition to the signing and entry of such an order by the Court, and also retains his or her right to oppose an accelerated judgment pursuant to CPLR Sections 3211 and 3212, or both.

5. If, based upon plaintiff’s response to its Product Identification Letter, a defendant desires to depose co-workers and/or other witnesses, such defendant shall advise plaintiff’s counsel in writing. Noticing and/or scheduling of the depositions will proceed in accordance with Section IX of this Order.

6. When a plaintiff discontinues an action against a defendant, such defendant may proceed in either of the following manners:

(a) Such defendant may serve written notice of the discontinuance upon all parties to the action and a proposed order dismissing all claims and cross-claims against it.
giving notice to all parties of defendant's intention to enter said order. If no party serves written objection to such proposed order within twenty (20) days of its service, the defendant may submit the proposed order to the Court, with copies to all parties. If, within twenty (20) days of service of said proposed order and notice, a co-defendant serves a written objection to dismissal on the ground that it intends to pursue in good faith its cross-claims against the defendant obtaining the discontinuance, that defendant's cross-claims may be converted to third-party claims in accordance with Section 1007 of the CPLR. The defendant obtaining the discontinuance may then submit to the Court a revised order dismissing all claims and all cross-claims except those of the objecting co-defendant and reflecting the revised caption, or may move the Court for other or different relief.

(b) In the alternative, such defendant may move for an order dismissing all claims and cross-claims against it in the action. The return date of such motion shall be at least twenty (20) days following service of said motion unless, by Order to Show Cause, the Court permits a shorter notice period. If no party serves written objection to such dismissal within twenty (20) days following service of such motion, or within such other time period as the Court may set, the motion will be granted and the moving defendant may submit to the Court, with copies to all parties, an order dismissing all claims and cross-claims against it and deleting it from the action. If any party to the action serves written objection to such motion for dismissal within the applicable time period, the Court shall hear the motion and issue such order as is just.

XIII. Scheduling of Trials and Discovery

The Court will periodically issue Orders setting forth dates for Jury Selection in actions pending in the EJDAL in accordance with this Order. For the purpose of this Section of this Order, the term injured plaintiff is meant to refer to the individual who was allegedly injured by reason of exposure to asbestos and, when the plaintiff is a personal or estate representative, is meant to refer to the decedent.

A. Jury Selection Dates:

The Court will issue individual Jury Selection dates for asbestos actions pending in the EJDAL. The Court may group for discovery purposes: (1) actions of injured plaintiffs
2. On or before the first business day of June in each calendar year, all plaintiffs' counsel shall submit to all defense counsel a list of actions for which Jury Selection Dates are requested for the following calendar year ("Proposed EJDAL Trial List"). The Proposed EJDAL Trial List shall include the following information for each action: the proposed date for jury selection; and the information set forth in Section XIII (B)(1) of this Order. If plaintiffs' counsel requests any groupings of cases for discovery purposes, plaintiffs' counsel must submit a copy of the Plaintiff's Statement for each member of the proposed group.

3. In June of each calendar year Liaison Counsel will confer for the purpose of reaching an agreement as to the actions which will be assigned Jury Selection Dates for the following calendar year. By the last Thursday of June, Defendants' Liaison Counsel will report the status of their negotiations with Plaintiffs' Liaison Counsel to other defense counsel. If all EJDAL counsel reach an agreement by the first Thursday of July, Liaison Counsel will so advise the Court and, on notice to all counsel, will submit to the Court for its approval and execution a proposed Order or Orders setting forth the agreement as to the assignment of Jury Selection Dates for the next calendar year ("Trial Calendar"). If EJDAL Counsel are unable to reach an agreement by the first Thursday of July, Plaintiffs' Liaison Counsel, Defendants' Liaison Counsel, and any other interested counsel will submit their Proposed EJDAL Trial Lists to the Court by the second Thursday of July. The Court will then schedule a meeting of all counsel for the third Thursday of July, or at such other time as the Court may set. Following said counsel meeting the Court will issue an Order setting forth the assignment of Jury Selection dates for the next calendar year.

4. General Guidelines for Assignment of Jury Selection Dates:
   a. The assignment of Jury Selection Dates for a calendar year shall take into consideration the inventory of actions from each plaintiff law firm and be consistent, to the extent practicable, with the number and age of the actions on each plaintiffs' counsel's List of Pending EJDAL Actions, as well as the occupational and disease mix of the actions on said List. There shall be no requirement, however, that the cases assigned Jury Selection Dates represent the exact percentages of the numbers of certain disease categories which appear on the List of Pending EJDAL Actions.
who were the direct employees of a legal entity at a plant site in the Eighth Judicial District (for example, employees of Bethlehem Steel, Carbon Graphite, Carborundum, DuPont, Durez Plastics, General Motors, Goodyear, Hooker Chemical, Linde Division, and Olin Matheson); (2) the action of an injured plaintiff who alleges injurious exposure to asbestos by reason of kinship or co-habitation with the action of a related person who also has an action pending in the EJDAL; and (3) other cases which under the circumstances would warrant discovery grouping. Nothing in this Case Management Order shall be construed to prevent the Court from consolidating two or more actions for trial. Nothing in this Case Management Order shall be construed to prevent defendants from applying to the Court for the removal of one or more plaintiffs from a discovery group for good cause shown.

B. Procedure for Scheduling Jury Selection Dates:

1. On or before the first business day of June in each calendar year, all plaintiffs' counsel shall submit to the Court and Defendants' Liaison Counsel a list of all asbestos actions which said counsel has commenced in the EJDAL as of May 15 of that year and which have not been assigned Jury Selection dates ("List of Pending EJDAL Actions"). All Lists of Pending EJDAL Actions shall remain confidential, shall not be distributed to anyone by Defendants' Liaison Counsel, and shall be destroyed by Defendants' Liaison Counsel upon completion of the scheduling of trials and discovery process. Plaintiffs' counsel's List of Pending EJDAL Actions shall be in order of date of commencement and shall contain the following information:

a. The full name of the injured plaintiff and whether the injured plaintiff is deceased;

b. The nature of the exposure claimed (i.e., trade, plant, kinship, etc.) together with the applicable trade union affiliation, or the plant employer and plant site;

c. The name of each asbestos related condition from which the injured plaintiff allegedly suffers (i.e., asbestos related pleural disease, asbestosis, lung cancer, mesothelioma and/or other condition);

d. The date on which the action was commenced, the county in which the action was commenced and the index number assigned to the action.
b. The assignment of actions for Jury Selection shall be, to the extent practicable, in a chronological order from the date of filing.

c. Ordinarily each Jury Selection Date will be a Monday at 9:30 in the morning. For a week in which a court holiday occurs on Monday, the Jury Selection Date will be Tuesday.

D. Jury Selection Dates for In Extremis Actions:

The Court may schedule expedited Jury Selection dates for in extremis plaintiffs in accordance with Section X of this Order. Any Order providing for an expedited Jury Selection date will also include an expedited discovery and trial submission schedule in accordance with the checklist annexed as Appendix D.

E. Scheduling of Discovery:

Following the assignment of Jury Selection Dates for a given calendar year, Liaison Counsel will meet and confer in order to develop a Discovery and Trial Submission Schedule for each action assigned a Jury Selection Date. The Discovery and Trial Submission Schedule will set forth a date for each of the following discovery and trial submissions steps:

Step 1. The last day by which plaintiffs are to: serve responses to defendants' standard interrogatories and document requests; provide copies of all medical, personnel, union, earning, social security, worker's compensation and tax documents in their possession; and serve written authorizations on defendants or defendants' record retrieval service.

Step 2. The last day for defendants to serve: responses to plaintiffs' standard interrogatories and document requests; non-repetitive, supplemental interrogatories; and any objections to plaintiffs' interrogatory responses.

Step 3. The last day for plaintiffs to serve: non-repetitive, supplemental interrogatories; and responses to defendants' non-repetitive, supplemental interrogatories.

Step 4. The last day for defendants to serve responses to plaintiffs' non-repetitive, supplemental interrogatories.

Step 5. The date of injured plaintiff's deposition. In all actions, the rights of defendants and third party defendants to depose plaintiff spouses, personal representatives and distributees of decedents at any time prior to jury selection is reserved.
Step 6. The date of commencement of depositions of defendants, third-party defendants, and non-parties. In all actions, the rights of all parties to depose defendants, third-party defendants, and non-parties at any time prior to jury selection is reserved.

Step 7. The date by which plaintiffs are to provide all original medical materials to defendants. It is plaintiffs’ duty to locate and obtain possession of all original medical materials and to provide them to the defendants.

Step 8. The date by which defendants are to commence third party actions, if any.

Step 9. The date by which defendants are to have forwarded Product Identification Letters.

Step 10. The date by which plaintiffs are to have responded to Product Identification Letters.

Step 11. The date by which plaintiffs are to serve and file Requests for Judicial Intervention, notes of issue and statements of readiness and to serve on each defendant a settlement demand.

Step 12. The date by which plaintiffs are to serve expert information and trial witness and exhibit lists and by which both plaintiffs and defendants are to serve all motions in limine and, unless good cause is shown, all motions for summary judgment.

Step 13. The date by which defendant are to serve expert information and trial witness and exhibit lists.

Step 14. The date by which plaintiffs and defendants are to serve counter submissions for trial.

Step 15. The date on which motions in limine will be argued and a pretrial conference will be conducted. Ordinarily, this date will be the Thursday prior to the Jury Selection date.

Step 16. The Jury Selection Date. Ordinarily, this date will be a Monday. Plaintiffs’ Liaison Counsel and Defendants’ Liaison Counsel will provide a copy of the Discovery and Trial Submission Schedule to the Court. In addition, Plaintiffs’ Liaison Counsel will provide a copy of same to all plaintiffs’ counsel and Defendants’ Liaison Counsel will provide a copy of same to all defense counsel.
F. Removal of Actions from the Trial Calendar:

1. An action will be removed from the Trial Calendar if the plaintiff fails to comply with Discovery Step 1 within 28 days of the scheduled date for compliance.

2. An action may be removed from the Trial Calendar if plaintiff fails to comply with or Discovery Step 11. Any party wishing to avail themselves of the sanction provided by this paragraph shall make a written application, by Order to Show Cause, to the Court. The Court will issue a ruling within five (5) days after hearing oral argument.

3. If an action is removed from the Trial Calendar, it may be reinstated upon application to the Court and a showing of a reasonable excuse for failure to comply and absence of prejudice to defendants.

XVI. Pretrial Submissions

A. Pretrial submissions shall be served in accordance with the applicable discovery and trial submission schedule. Pretrial submissions include a list of all expert witnesses, fact witnesses and all exhibits that the parties intend to use at trial. Counsel shall have an opportunity to designate additional witnesses and exhibits in response to their adversaries designations as set forth in the discovery and trial submission schedule or at some later time for good cause shown.

B. The trial judge shall make such further orders as (s)he shall desire for submission of proposed voir dire, requests for jury charges or other submissions. Additionally, the trial court shall direct a schedule for objections to exhibits or proposed deposition testimony, as necessary and as the Court so chooses.

XVII. Miscellaneous

The Court recognizes that cooperation among counsel and parties is essential for the orderly and expeditious resolution of this litigation. The communication of information among the plaintiffs' counsel, among defense counsel, and among defendants shall not be deemed a
waiver of the attorney-client privilege, the protection afforded by the attorney work-product doctrine, or any other privilege to which a party may be entitled. Any cooperative efforts described above shall not, in any way, be used against any of the parties, shall not constitute evidence of conspiracy, concerted action, or any wrongful conduct, and shall not be communicated to the jury. The exchange of information or documents by counsel will not, by itself, render such information or documents privileged.

Liaison Counsel for plaintiffs and defendants are hereby directed to mail a copy of this Order to all counsel who have appeared in these actions.

SO ORDERED.

[Signature]
Honorable JAMES B. KANE, JR., J.S.C.

[Stamp]
GRANTED
JAN 24 2000
COURT CLERK
ROSEMARIE CARUSO
SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In re EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

This document applies to:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

Plaintiffs,

vs.

Defendants.

PLEASE STATE:

Nature of Action: Personal Injury
Wrongful Death

As to PLAINIFF:

1. Full Name:
2. Date of Birth:
3. Present Address:
4. Social Security Number:

As to PLAINIFF’S SPOUSE, if applicable:

5. Full Name:
6. Date of Birth:
7. Present Address:
8. Social Security Number:

APPENDIX A
As to PLAIN’TIF’FS DECEDENT, if applicable:

9. Full Name:
10. Date of Birth:
11. Last Address:
12. Social Security Number:
13. Date and Place of Death:
14. Cause of Death:

As to alleged ASBESTOS EXPOSURE:

15. Indicate which of the following types of activities resulted in plaintiff’s/decedent’s alleged exposure to asbestos:

A. Insulating Trade:
B. Boiler Trade (indicate trade):
C. Construction Trade (indicate trade):
D. Plant Worker (indicate trade):
E. Brake Lining or Friction Worker:
F. Non-Occupational (describe):
G. Other (describe):

16. Primary work site(s):

17. Date of First Exposure:

18. Date of Last Exposure:

19. Asbestos containing products to which plaintiff/decedent was allegedly exposed:

20. Nature of alleged asbestos related illness and date of diagnosis:

<table>
<thead>
<tr>
<th>Date of Diagnosis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asbestosis</td>
</tr>
<tr>
<td>Lung Cancer</td>
</tr>
<tr>
<td>Mesothelioma</td>
</tr>
<tr>
<td>Pleural Changes</td>
</tr>
<tr>
<td>Other (identify)</td>
</tr>
</tbody>
</table>

APPENDIX A
20. Has plaintiff or did decedent ever smoke cigarettes?

Yes ___ No ___

If so, state the number of years and the number of packs per day of plaintiff’s/decedent’s smoking:

21. Has plaintiff been or was decedent exposed to non-asbestos containing products or substances which have been demonstrated to cause of contribute to lung disease, injury or dysfunction?

Yes ___ No ___

If so, state all such products or substances:

22. State all other prior or pending asbestos actions:

Title:
Venue:
Index or Docket Number:
Status of Action:

Title:
Venue:
Index or Docket Number:
Status of Action:

Title:
Venue:
Index or Docket Number:
Status of Action:

Dated: ____________________________

(Signature of Plaintiff or Attorney)

By: (Typed name of signator)
Name, address and telephone number of
Attorney for Plaintiff(s)

APPENDIX A
SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

This Document Applies To:

County
Index Number: _____

ACKNOWLEDGMENT OF SERVICE

Defendant _____, by its attorneys ____, acknowledges receipt of a summons and complaint in this action.

Pursuant to EJDAL Case Management Order Number 8, Section V, defendant _____ hereby answers the complaint in this action and refers plaintiff(s) to its standard answer filed in the EJDAL on _____ and raises each of the affirmative defenses and cross-claims contained therein.

Respectfully submitted,

Defendant______

By its Attorneys:

(Typed name of signator)
Name, address and telephone number of
Attorney for Defendant

Dated: ________

APPENDIX B
SUPREME COURT OF THE STATE OF NEW YORK
EIGHTH JUDICIAL DISTRICT

In Re EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

This Document Applies To:

County
Index Number:

ACKNOWLEDGMENT OF SERVICE

Third-party defendant _____, by its attorneys _____, acknowledges receipt of a third-party summons and complaint in this action.

Pursuant to EJDAL Case Management Order Number 8, Section V, third-party defendant _____ hereby answers the third-party complaint in this action and refers third-party plaintiff to its standard answer to third-party complaint filed in the EJDAL on _____ and raises each of the affirmative defenses and cross-claims contained therein.

Respectfully submitted,

Third-Party Defendant _____

By its Attorneys:

(Typed name of signator)
Name, address and telephone number of
Attorney for Third-Party Defendant

Dated: ________

APPENDIX C
IN EXTREMIS DISCOVERY AND TRIAL SUBMISSION CHECKLIST

1. Date for plaintiff to serve Answers to Standard Interrogatories, to provide copies of all medical and employment documents in their possession, and to serve written authorizations on defendants:

2. Date, time and place of plaintiff's discovery deposition:

3. Date, time and place of plaintiff's videotaped trial testimony:

4. Date for plaintiff to provide all original medical material to defendants:

5. Date by which defendants are to serve product identification letters:

6. Date by which plaintiff is to respond to defendants' product identification letters:

7. Date for plaintiff to serve note of issue and statement of readiness and to serve a settlement demand on each defendant:

8. Date by which plaintiff is to serve expert designations:

9. Date by which defendants are to serve expert designations (following service of plaintiff's designations):

10. Date for plaintiff's pretrial submissions, including lay witness list, motions in limine, exhibit list and deposition designations:

11. Date for defendants' pretrial submissions, including lay witness list, motions in limine, exhibit list and deposition designations:

12. Date for argument of motions in limine and pretrial conference (usually the Thursday before jury selection at 11 a.m.):

APPENDIX D
NEW YORK STATE SUPREME COURT
COUNTY OF JEFFERSON

In Re: Fifth District Asbestos Litigation

MICHAEL KENNEDY and MARK

Plaintiffs,

v.

COMPANY

Defendants.

ORDER TO SHOW CAUSE

Upon the reading and filing of the annexed affirmation of Ambre Brandis, Esq., dated March 24, 2016, an attorney associated with the law firm of WEITZ & LUXENBERG, P.C., attorneys for the plaintiff herein, and sufficient cause appearing therefore, it is hereby,

ORDERED, that the defendants, show cause at the Supreme Court of the State of New York, Jefferson County Courthouse, located at 7660 State Street, Lowville, New York, on the 7th day of April, 2016, at 11:30 AM, or as soon thereafter as counsel can be heard,

WHY an Order should not be made and entered (1) granting plaintiffs’ request for an expedited preliminary conference pursuant to CPLR 3407; and (2) setting a discovery schedule and trial date, and (3) for such other, further and different relief as to this Court
may seem just and proper; and it is further

ORDERED, that service of a copy of this Order to Show Cause, together with the supporting papers upon which it is based, be made by regular mail and facsimile service upon counsel for the defendants on the 4th day of April, 2016, be deemed good and proper notice of this application, and that a copy be served on the Clerk the Court.

ENTER:

J.S.C.
NEW YORK STATE SUPREME COURT
COUNTY OF JEFFERSON

In Re: Fifth District Asbestos Litigation

Plaintiffs,

v.

Defendants

AFFIRMATION IN SUPPORT OF PLAINTIFFS’ REQUEST FOR A PRELIMINARY CONFERENCE PURSUANT TO CPLR 3407

Ambre Brandis, an attorney admitted to practice law before the Courts of the State of New York, affirms the truth of the following under penalties of perjury:

1. I submit this affirmation in support of plaintiff’s request for an expedited preliminary conference pursuant to CPLR 3407.

2. Plaintiff Michael Smith is terminally ill with lung cancer caused by asbestos.

3. In a complaint filed on or about December 03, 2015 plaintiffs alleged that Mr. Smith’s terminal illness is the result of defendants’ culpable conduct.

4. Dr. Ratner, a licensed physician familiar with asbestos disease has said in the attached affirmation that Mr. Smith’s lung cancer is attributed to his occupational exposure to asbestos, that his condition is terminal and that Mr. Smith is unlikely to live more than 18 months. See Ratner Aff., Exh. 1.

5. Plaintiffs respectfully request an expedited preliminary conference pursuant to CPLR 3407 in this matter to set a discovery schedule and trial date.

Dated: New York, New York
March 24, 2016

Ambre Brandis, Esq.
June 24, 2016

Deanna Morse, Chief Clerk
Jefferson County Supreme Court
State Office Building
317 Washington Street
Watertown, New York 13601

Re: [Redacted]

Dear Mrs. Morse:

Enclosed for filing please find the original Scheduling Order signed by Hon. Charles C. Merrell on today’s date in regard to the above-referenced matter.

By copy of this letter, I am providing a copy of the Scheduling Order to Plaintiff’s Counsel and Defense Liaison Counsel for distribution to counsel.

If you have any questions please contact me. Thank you.

Very truly yours,

Teresa M. Warcup
Secretary to Hon. Charles C. Merrell

/tmw

Enclosure

cc: Ambre Brandis, Esq., via electronic mail
    Gary Casimir, Esq., via electronic mail
At a Term of the Supreme Court held for the County of Jefferson, at the Lewis County Courthouse, Lowville, NY, on the 24th day of June, 2016.

PRESENT:
HON. CHARLES C. MERRELL
Justice Presiding

SUPREME COURT OF THE STATE OF NEW YORK
FIFTH JUDICIAL DISTRICT

In Re Fifth Judicial District (Jefferson County)
Asbestos Litigation

This Document Applies to:

Plaintiffs,

vs.

Defendants.

Index No.: 2015
RJI No.: 

SCHEDULING ORDER

Pursuant to 22 NYCRR 202.12, a schedule for the completion of discovery in this action having been made by the Court, it is hereby

ORDERED, the following discovery deadlines are in effect in the above-captioned asbestos case:

(N0507831-1)
<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>COMPLETED</td>
<td>Plaintiff to serve on defendants or defendants’ record retrieval service, written authorizations for all medical personnel, union earnings, social security and tax documents; plaintiff to provide defendants’ record retrieval service with copies of the above documents in their possession; plaintiff to serve product identification interrogatories and document requests upon defendants.</td>
</tr>
<tr>
<td>April 12, 2016</td>
<td>Plaintiff to serve Responses to Defendants Product Identification Interrogatories and Document Request.</td>
</tr>
<tr>
<td>June 30, 2016</td>
<td>Plaintiff to identify, by name, any non-party product identification or exposure witnesses, including co-workers, upon which plaintiffs intend to rely to establish plaintiffs alleged exposure to asbestos containing product(s).</td>
</tr>
<tr>
<td>No Less Than 60 Days After Service</td>
<td>Defendants to respond to Plaintiffs product identification interrogatories and document requests.</td>
</tr>
<tr>
<td>July 26, 2016</td>
<td>Plaintiff’s co-worker/fact witness depositions to be conducted by this date.</td>
</tr>
<tr>
<td>August 9, 2016</td>
<td>Plaintiff’s product identification discovery to be disclosed and completed. Plaintiff to file Trial Note of Issue.¹</td>
</tr>
<tr>
<td>August 31, 2016</td>
<td>Last day for plaintiff to provide witness list, exhibit list, expert witness reports and will also provide to defense liaison counsel all original medical materials, including radiology and pathology.</td>
</tr>
<tr>
<td>September 28, 2016</td>
<td>Interpleader shall be completed by this date. Last day to amend the complaint and/or answer to add new parties without motion and leave of the court.</td>
</tr>
<tr>
<td>September 28, 2016</td>
<td>Defendants may request consent to file short form summary judgment motion. See 5JDAL CMO XI(C).</td>
</tr>
<tr>
<td>October 12, 2016</td>
<td>Plaintiff to respond to defendants requests for consent to file short form summary judgment motion. If plaintiffs consent or fail to respond, the defendant may file, on notice to all defendants, a short form motion for summary judgment with the Court. Motions are returnable the first or third Thursday of</td>
</tr>
</tbody>
</table>

¹ Discovery may continue by all parties past the note of issue filing date. However, plaintiff’s product identification discovery shall be disclosed prior to the note of issue unless good cause is shown for a further extension of such deadlines.
the month on submission.

November 1, 2016  Plaintiff to serve settlement demands.

November 8, 2016  Last day for defendants to file motions for summary judgment. Courtesy copies of summary judgment motions must be sent to the court. Summary judgment motions are to be made returnable January 5, 2017 on submission. Oral argument will be scheduled if requested and granted by Court.

December 1, 2016  Last day for plaintiff to answer summary judgment motions. Answering papers must be received by the court on or before this date.

December 15, 2016  Reply papers, if any must be received by the court on or before this date.

March 7, 2017  All motions in limine are to be fully briefed and filed. Courtesy copies of motions must be received by the court no later than this date.

March 30, 2017  Last day for defendants to serve fact witness lists, exhibit lists and expert reports or CPLR 3101(d) disclosures.

March 30, 2017  Counsel for plaintiff is to provide the court with a list of remaining defendants, the amount of each demand and the factual predicate for liability for each defendant.

Counsel for each remaining defendant is to provide the court with a memorandum with respect to settlement history, the amount offered for settlement and the factual predicate of each claimed defense.

These documents will be for in camera review by the court.

March 31, 2017  Opposition to motions in limine are due.

April 10, 2017  Final pre-trial conference to begin at 1:00 p.m. at Lewis County Courthouse, 7660 North State Street, Lowville, NY. All counsel must have settlement authority on behalf of their respective clients.

---

2 This Scheduling Order supersedes the summary judgment deadlines set forth in CPLR 3212(a)
DATE

April 14, 2017

May 1, 2017

EVENT

Replies on motions *in limine* are due.

Jury Selection to begin at 9:00 a.m. at the Jefferson County Courthouse, 163 Arsenal Street, Watertown, NY; oral argument of motions *in limine*.

Dated: Lowville, NY
June 24, 2016

[Signature]

HON. CHARLES C. MERRELL, J.S.C.
JOSEPH W. BELLUCK, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am a member of the law firm of Belluck & Fox LLP, attorneys for Plaintiff in the above-entitled matter, and am fully familiar with the facts and circumstances of this case.

2. This Affirmation is submitted in support of Plaintiff’s application for an expedited Preliminary Conference, pursuant to CPLR § 3407, due to Plaintiff’s terminal illness and imminent demise. As more fully described below, [REDACTED], suffers from mesothelioma. Plaintiff’s complaint alleges that Mr. [REDACTED] exposure to asbestos products and asbestos containing equipment manufactured, distributed and installed by the defendants named herein caused his mesothelioma. Plaintiff maintains that Mr. [REDACTED] was exposed to various asbestos-containing products while working for [REDACTED] and at other sites. Plaintiff’s Complaint is attached hereto as Exhibit "A".

3. By way of history, [REDACTED] was diagnosed with mesothelioma on June 20, 2015 following a biopsy performed at Saratoga Hospital in Saratoga, New York. The medical affidavit of Dr. Jose Posada which supports the patient’s poor prognosis and limited life expectancy is attached hereto as Exhibit “B”.

4. This present application under CPLR §3407 seeks an immediate Preliminary
Conference and a trial of this matter be set within twelve (12) months as required by law.

5. Plaintiff maintains that the trial of this action can proceed, assuming the Court's schedule permits, within relatively short order.

WHEREFORE, it is respectfully requested that this Court grant the instant application in all respects and order such other and further relief as this Court may deem just and proper.

Dated: New York, New York
       September 1, 2015

Respectfully submitted,

[Signature]

Joseph W. Belluck, Esq.
Belluck & Fox, LLP
546 Fifth Avenue, 4th floor
New York, New York 10036
(212) 681-1575
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Plaintiff.

against

Defendants.

IN EXTREMIS
DISCOVERY AND TRIAL
SUBMISSION SCHEDULE
AND ORDER

Index No.: 2015
RJI No.: 2015

The Court hereby adopts the attached In Extremis Discovery and Trial Submission Schedule in the
above action; and it is further

Ordered that jury selection shall commence on December 6, 2016 at 10:00 a.m. at the Albany County
Courthouse, 16 Eagle Street, Albany, New York.

ENTER: October 30, 2015
Johnstown, New York

SO ORDERED:

HON. RICHARD T. AULISI, J.S.C.
IN EXTREMIS DISCOVERY AND TRIAL SUBMISSION SCHEDULE

(Albany County  Index No.: 2015-2015  RJL No.: _________________________)

1. Date by which Plaintiff shall serve verified/certified Answers to Standard Interrogatories (including complete responses to requests for documents) or 10 days prior to deposition; provide copies of all medical and employment documents in their possession, serve product identification interrogatories and corporate liability interrogatories directed to defendants (if any), and serve written authorizations on Defendants to the extent not already completed ................................................................. 11/06/15

2. Date by which Plaintiff shall designate all fact witnesses ......................................................................................................................... 12/11/15

3. Date by which Plaintiff shall serve Proof of Claim information to the extent any Proofs of Claim have been filed (or to be provided within 30 days of submission to Trust whichever is sooner) ................................................................. 12/18/15

4. Date by which Plaintiff shall provide pathology and radiology materials to liaison counsel ........................................................................ 12/18/15

5. Date by which Defendants shall respond to product identification and corporate liability interrogatories. If any served by Plaintiff (Or within 60 days after receipt of the demand, whichever is later) ........................................................................ 01/08/16

6. Date by which Plaintiff shall serve expert designations/reports ............................................................................................................... 01/29/16

7. Date by which Plaintiff's discovery and video depositions shall be conducted ................................................................................................ 02/05/16

8. Status conference @ 11:00 AM, Fulton County Courthouse, Johnstown, NY .......................................................................................... 02/19/16

9. Date by which Plaintiff's co-worker/fact witness depositions must be conducted .......................................................................................... 04/15/16

10. Date by which Defendants shall serve product identification letters .................................................................................................. 04/29/16

11. Date by which Plaintiff shall respond to Defendants’ product identification letters and serve settlement demand on each Defendant ........................................................................................................ 05/20/16

12. Status conference @ 11:00 AM, Fulton County Courthouse, Johnstown, NY .......................................................................................... 05/20/16

13. Date by which Plaintiff shall file the note of issue ................................................................................................................................. 06/10/16

14. Date by which summary judgment motions shall be served .................................................................................................................. 06/24/16

15. Date by which Plaintiff shall respond to summary judgment motions .................................................................................................. 07/22/16

16. Date by which Defendants shall serve replies to Plaintiff’s opposition to summary judgment motions ......................................................... 08/05/16

17. Status conference @ 11:00 AM, Fulton County Courthouse, Johnstown, NY .......................................................................................... 08/19/16

18. Summary judgment motions returnable (on submission unless otherwise requested) .................................................................................. 08/19/16

19. Date by which Plaintiff shall serve pretrial submissions, including lay witness list, exhibit list and deposition designations ................................................. 10/21/16

20. Date by which Defendants shall serve pretrial submissions, including lay witness list, exhibit list, expert designations/reports and deposition designations ........................................................................................................ 11/11/16

21. Date by which Plaintiffs and Defendants shall serve motions in limine in letter form ........................................................................... 11/11/16

22. Pretrial conference @ 11:00 AM, Fulton County Courthouse, Johnstown, NY .......................................................................................... 11/18/16

23. Jury selection and oral argument of motions in limine .......................................................................................................................... 12/06/16

In accordance with the practice of this Court, discovery in preparation for trial may continue by all parties past the Note of Issue filing date. However, plaintiff's product identification discovery (for purposes of summary judgment) shall be disclosed prior to the Note of Issue unless good cause is shown for a further extension of such deadlines.
EXHIBIT F
Sanford M. Ratner, being board certified in Internal Medicine, Pulmonary Medicine and Critical Care Medicine and duly licensed to practice medicine in the State of New York, affirms the truth of the following, subject to penalties of perjury:

1. Upon information and belief, [REDACTED] was exposed to asbestos from his capacity as a Pipefitter and Auto Mechanic.

2. Mr. [REDACTED] was diagnosed with Lung Cancer via pleural biopsy on May 7, 2015.

3. Exposure to asbestos is recognized to be a substantial contributing factor in the development of Lung Cancer.

4. In my opinion, to a reasonable degree of medical certainty, Mr. [REDACTED]'s primary lung cancer arose as a result of his exposure to asbestos.

5. [REDACTED]'s life expectancy is likely less than eighteen (18) months.

Dated: Great Neck, New York
March 16, 2016

SANFORD M. RATNER, M.D.
EXHIBIT G
1  A. Yes.
2  Q. How about the -- let's talk about the gasket
3  work you performed. Can you give me a description of that
4  work, please, on the valves?
5  MS. RUSSELL: Objection; asked and
6  answered.
7  A. I can't really remember, offhand.
8  MS. RUSSELL: Do you understand what he
9  asked you?
10  A. All right.
11  Q. You said you performed gasket work on
12  valves. Can you describe this work for me?
13  A. The gasket inside and scrape it down and then
14  wire brush it, get it out. It was all dust.
15  Q. Is that the whole gasket job?
16  A. Yes.
17  Q. Do you believe that this work exposed you to
18  asbestos?
19  A. Yes, I do.
20  Q. How so?
21  A. Because the asbestos, and I was there breathing
22  it in.
23  Q. Why do you believe there was asbestos?
24  A. Because that's what they use; it was an
25  asbestos gasket.

1  Q. Can you tell me specifically, first of all,
2  with the engine rooms, was there a forward and an aft
3  engine room; is that right?
4  A. Yes, right.
5  Q. Let's talk about the forward engine room. Can
6  you tell me how many times you saw in the forward
7  engine room the
8  A. I don't really recall how many there was.
9  Q. Do you recall or can you describe for me the
10  size of any of the
11  A. No, I can't, right offhand.
12  Q. Can you tell me what system or line any of the
13  pumps in the forward engine room?
14  A. No, I don't.
15  Q. How about for the oil?
16  A. No.
17  Q. Do you have a recollection on the temperature?
18  A. No.
Q: Do you recall whether the [redacted] that you saw in the forward engine room were insulated at all?
A: I believe they were.
Q: And was the insulation on the pump or was it on the lines associated with the pump?
MS. RUSSELL: Objection.
A: I think they were around the housing on it and the lines.
Q: And can you give me an estimate as to how many times you would have worked on the [redacted] in the forward engine room on the [redacted] during the time that you were on that ship?
A: No; several times though.
Q: And as the last attorney asked you, can you give me an idea what you think several is, so you and I are thinking along the same lines?
MS. RUSSELL: Objection.
A: What?
Q: How many times to you is several times?
MS. RUSSELL: You just told him you worked on it several times and he's trying to figure out what several means.
A: Oh, probably 10 times.
Q: And in those 10 times, what type of work would you perform on a [redacted]?
MS. RUSSELL: Objection.
A: Just repacking seals and stuff.
Q: And you previously described how you repacked the seal --
MS. RUSSELL: Were you saying packing and seals or was it packing seals? Was that two separate things?
THE WITNESS: No.
MS. RUSSELL: Okay.
A: What?
Q: So, you would repack the seals?
A: Right.
Q: Okay. And can you tell me the process of how you would do that?
A: You'd pull the old seal out and put it back on the shaft or put a new one on the shaft.
Q: And specifically on [redacted] where would that seal be located?
A: I don't really recall.
Q: And on the seal that you recall replacing, was there one or more than one on a [redacted]?
A: There was one on the shaft that turned it.
Q: And when you removed the seal, was it wet or dry?
A: Dry.
A. No, I don't.
Q. And would the maintenance history for the
told us about?
A. Yes, it would.
Q. Would you review the P.M.S. card before you
worked on it?
MS. RUSSELL: Objection; asked and
answered.
A. Yes.
Q. And would that P.M.S. card also include
specifically what was done to the pump on the last
maintenance before you were working on it?
A. Yes, it would.
Q. So, it would include information about what was
replaced or when it was repaired?
A. Yes, it would.
Q. So, the 10 times that you worked on either a
water or oil pump, can you tell me the
size of those pumps?
A. I don't remember; it's too long ago.
Q. Do you remember how they were mounted or
connected to pipes?
A. No, I don't.
Q. Do you recall whether they had flanges on them?
A. Yes, they did.
Q. And were there gaskets used in conjunction with
the flanges?
A. Yes.
Q. And do you know who made the gaskets used in
conjunction with the flanges on the pumps?
A. No, I don't.
Q. Do you know if any of the you
worked on were threaded to the pipes?
MS. RUSSELL: Objection.
A. I don't know.
Q. And again, right now I just want to remind you,
we're talking about the forward engine room, right?
A. Right.
Q. Okay. You had also mentioned a casing gasket
on the . Was that on every that
you worked on in the forward engine room?
A. I believe so.
Q. And was the casing gasket also near the shaft?
MS. RUSSELL: Objection.
A. Yes.
Q. And do you know who manufactured the casing
gasket?
A. No.
Q. And when you would remove the casing gasket,
was it wet or dry?
A. Dry.
Q. And do you believe that the removal of the
casing gasket would have exposed you to asbestos?
A. Yes.
Q. And how did you come to know or understand the
casing gaskets were made of asbestos?
A. Because that's what it was.
Q. Did you ever see a label or anything that
indicated that a casing gasket was asbestos?
A. No.
Q. The that you encountered in the
forward engine room, were they all the same size or were
they different sizes?
A. I don't remember, recall that.
Q. And in the forward engine room, do you recall
how many were there?
A. No, I don't.
MS. RUSSELL: Objection; asked and
answered.
Q. Do you believe there were any other ways you
were exposed to asbestos from a in the
forward engine room, other than the replace -- repacking
of the seals and replacing of the casing gaskets?
A. No.
Q. You also indicated that you encountered [redacted] in the engine rooms on the [redacted] is that correct?
A. Yes.
Q. And were the engine rooms --
A. This is what we just talked about; isn't it?
MS. RUSSELL: That's what we talked about.
Q. Excuse me, the fire rooms. Thank you for correcting me. And there were two fire rooms on the [redacted]?
A. Yes, there was.
Q. And were they fore and aft?
A. Yes.
Q. And you worked in both?
A. Yes.
Q. Did you work in the fire rooms more or in the engine rooms more?
MS. RUSSELL: Objection.
A. Fire room.
Q. And what percentage of the time was in the fire room versus the engine rooms?
MS. RUSSELL: Objection; asked and answered.
A. I was in the fire room most of the time.
Q. And do you recall how many were located in the aft fire room on the [redacted]?
A. I don't recall.
Q. Do you recall how many times you would have worked on a [redacted] in the aft fire room?
A. No, I don't remember.
Q. Do you recall what systems the [redacted] were associated with in the aft fire room?
A. It was on oil pumps.
Q. Were all the [redacted] in the aft fire room the same size?
A. Yes.
Q. Do you have any recollection or can you describe for me that size?
A. Not offhand, no.
Q. Do you recall if the oil pumps were insulated?
A. Yes.
Q. And what work did you do on the [redacted] that you encountered in the aft fire room?
A. Same as the other pumps.
Q. So, that would have been --
A. Shaft seals and casing.
MS. RUSSELL: [redacted] we've been going about 30 minutes. We're going to have to take a break.
(Whereupon, there is a recess taken from 11:55 until 12:19 p.m.)

BY MR. [redacted]
Q. Just to refresh your recollection, we were speaking about the aft engine room -- fire room on the [redacted] excuse me, okay?
A. Okay.
Q. All right. On the [redacted] that you worked on in the aft fire room, did you replace any flange gaskets?
A. No.
Q. And I don't recall if I asked you that with respect to the engine rooms?
MS. RUSSELL: You didn't.
Q. I don't think --
A. No, I didn't ask or no --
MS. RUSSELL: You didn't ask.
A. No.
Q. On the engine rooms, did you replace any flange gaskets?
A. No.
Q. On the work that you performed on the oil pumps in the aft fire room, is that any different than the pumps in the engine rooms?
A. No.
Q. And did you specifically replace seals and casing gaskets on the oil pumps in the aft engine room?
A. Yes.
Q. Have you told me all the ways you were exposed to asbestos from working on [redacted] in the aft engine room -- fire room, excuse me?
A. Fire room. I believe so.
Q. And you also indicated that you came across [redacted] in the forward fire room; is that correct?
A. Yes.
Q. And do you recall how many in the forward fire room, how many [redacted]?
A. About 10.
Q. And do you know what systems the [redacted] were in the forward fire room?
A. Emergency feed pump and fuel pumps.
Q. Those were emergency pumps and fuel pumps?
A. Right, and big pump, fire pump.
Q. And were the [redacted] in the forward fire room all the same size?
A. Yes.
Q. Do you recall how they were mounted?
A. No.
Q. Do you recall if any of them were insulated?
A. Some of them were.
Q. Do you recall which systems were insulated?
Q. Did you have to remove the insulation in order to work on the
A. On some of them.
Q. And what was the process; how would you remove that insulation?
A. They had -- they were wired on.
Q. You would remove the wire and the insulation was attached to the wire?
A. It would come off, yes.
Q. Do you know the brand name, trade name or manufacturer of the insulation that were on the
A. No.
Q. Do you know how the that came across in the forward fire room were powered?
A. Steam.
Q. All of them?
A. One of them was oil -- like --
Q. Do you remember which one was electric?
A. The fuel pump.
Q. And then the others that you told me about would have been steam?
A. Yes.
Q. And do you have a recollection as to how many times you would have worked on the that you encountered in the forward fire room?
A. Several times; I don't know a number.
Q. As we've talked before, you can't quantify that for me, and several is subject to interpretation, I just want to make sure that --
A. Maybe 10 times.
Q. Okay, thank you. And as you told us about the other pumps, was there a P.M.S. card for each of these pumps?
A. Yes.
Q. Did you ever review any product literature or books regarding any of the you worked on?
A. MS. RUSSELL: Objection.
Q. Just the maintenance book or whatever you call it that they had in the log room on it, service manual. I don't know what the Navy called them.
Q. And was there a specific logbook or service manual for each of the
A. I believe so.
Q. And those were maintained in the log room?
A. Yes.
Q. And the work that you performed on the in the forward fire room, was that any different than the work you did on the other
A. I believe you were on the for
Q. me about earlier today?
A. No.
Q. So, the work you would have performed would have been repacking seals and casing gaskets?
A. Yes.
Q. Did you do any other work on
A. No.
Q. And how did you know that these you're telling me about today were, in fact, manufactured by
A. Because they had their name on it.
Q. Each pump had the name on it?
A. Yes, on the casing -- or the housing.
Q. In the casing and housing?
A. Housing.
Q. And how was it placed on the casing or housing?
A. It was just embedded into it or whatever when they molded it.
Q. It was stamped in or embedded?
A. Yes.
Q. Do you recall anything specific about what it said, other than the name
A. No, I don't.
Q. Whether it was script or raised or anything like that?
A. I don't remember.
Q. And the in the forward fire room, can you tell me, you indicated some were insulated. Were more insulated than not?
A. Yes.
Q. But you can't recall specifically --
A. I don't recall, no.
Q. Thank you.
Have you told me about all the work that you performed on the?
A. I believe so.
Q. Have you told me all the ways you believe you were exposed to asbestos from
A. Yes, I believe so.
Q. Did you ever install any?
A. No.
Q. And on the did you ever encounter any
A. MS. RUSSELL: Objection.
Q. It's the same setup as the
Q. And where on the did you come across
A. Fire rooms and engine rooms.
Q. And I believe you were on the for
10 (Pages 1003 - 1006)
approximately three months?
A. Yes.
Q. Do you have any recollection as to how many times you worked on a during the three months you were on the Warrington?
A. No. Probably two or three times.
Q. And of those two or three times, do you remember specifically in which engine room or fire room you would have worked on a?
A. In the forward fire room.
Q. Would all of the two or three times have been in the forward fire room?
A. Yes.
Q. I believe your previous testimony was that the time you spent on the most of the time it was undergoing speed trials?
A. Yes, and dry-dock.
Q. Did you work on the A. And dry-dock, too.
Q. While the speed trials were ongoing, did you work on any of the pumps?
MS. RUSSELL: Objection.
A. No.
Q. And of the three months you were on the how long was it in dry-dock?
MS. RUSSELL: Objection; asked and answered.
A. I don't know. We were in and out all the time.
Q. And was the work that you performed on the you saw on the different at all from what you did on the other?
A. More or less the same.
Q. When you say more or less, does that mean there was something different?
A. No, it was the same.
Q. And that would have been repacking seals and casing gaskets?
A. Yes.
Q. Do you recall any other work you performed on a --
A. No.
Q. I didn't finish, I hesitated. I'm sorry. On the?
A. No.
Q. Okay. I'm sorry for the pause there.
Have you told me now all the ways you believe you were exposed to asbestos from on the?
A. I believe so.
Q. Did you, throughout your career, encounter anywhere else, other than the and the ?
A. No.
Q. And have you told me all the ways you believe you were exposed to asbestos throughout your career from?
A. I believe so.
Q. I have to check my notes, but I think that's all I have. Thank you, sir.
A. You're welcome.
MS. RUSSELL: Let's go off the record.
(Whereupon, there is an off-the-record discussion.)
MS. RUSSELL: As the people in the room can probably see, his demeanor changed quite dramatically. During the last break I don't know what happened. I went into the room. He was crying again, saying he's exhausted. So, I just asked him to finish up that questioning and then I told him I'd give him a break. At this point in time, does anyone else have any questions? Unfortunately, I do, obviously, so I'm going to talk to him and we'll see what's going on.
MR. FIUMARA: Do you want to take a lunch or something?
MS. RUSSELL: I'm thinking we'll take a lunch break and let him sleep. Let me go talk to him.
(Whereupon, a recess is taken from 12:39 p.m. until 3:05 p.m.)
MS. RUSSELL: I just went to wake up Mr. . He is pulling himself together and then we're going to evaluate what's going on.
My question is right now does anyone have any questions of Mr. ? Does anybody on the phone have any questions for Mr. ?
(No response.)
MS. RUSSELL: Just so I'm clear nobody on the phone has any questions; right?
MR. ORTIZ: And are you planning to ask any questions?
MS. RUSSELL: If I don't ask any questions no one has questions; right?
MR. ORTIZ: I might have a question or two, I'll talk to you.
(Whereupon, there is an off-the-record discussion.)
MS. RUSSELL: If I don't ask any questions...
December 10, 2014

Via Email and Regular Mail

Richard White, Esq.
Belluck & Fox, LLP
546 Fifth Avenue, 4th Floor
New York, NY 10036

Re: [redacted] and [redacted] v. [redacted]
et al.
Index No.: [redacted]/2014
Our File No.: 11136-26168

Dear Mr. White:

We have reviewed the discovery conducted to date in this case. Plaintiffs have failed to adduce any evidence that any product manufactured, sold, or distributed by [redacted] caused Plaintiff’s alleged exposure to asbestos. Accordingly, we are enclosing a Stipulation of Discontinuance as to [redacted], and request your execution and return to me at your earliest convenience.

If you object to executing the Stipulation, please advise of any evidence upon which Plaintiffs intend to rely to establish product identification as soon as possible and no later than January 16, 2015. Please identify the specific product name(s) and product type(s); the location of use in Plaintiff’s presence; the nature of Plaintiff’s exposure and the date of Plaintiff’s alleged exposure.

If Plaintiffs intend to rely upon deposition testimony of co-workers or other witnesses, please provide the name, address and telephone number of each witness, together with a copy of all deposition transcripts corresponding to any testimony previously provided by them relating to Plaintiffs’ claims against [redacted]. In addition, if Plaintiffs intend to rely upon any documents as against [redacted], please identify all such documents and provide copies of the same, and [redacted] will object to Plaintiffs’ use of any evidence at trial or in opposition to its Summary Judgment motion which is not disclosed in response to this letter.

A proposed Order dismissing Plaintiffs’ Complaint and Co-Defendants’ cross-claims as against this Defendant is enclosed. Unless I receive an objection from you or a co-defendant before January 16, 2015, I will move the Court for entry of the enclosed Order of Dismissal.
Very truly yours,

BROWN & KELLY, LLP

Jessica J. Burgasser
Partner
jburgasser@brownkelly.com
Ext. 125

JJB:bar
Enclosure(s)
cc: All Defense Counsel of Record – w/enclosures (via email)
EXHIBIT I
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ESSEX

Plaintiffs,  

-against-  

Defendants.

ATTORNEY AFFIRMATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Index No. CV15-

KENNETH A. KRAJEWSKI, ESQ., an attorney licensed in New York, affirms the following to be true under penalties of perjury pursuant to CPLR 2106:

1. I am a Partner with the law firm of Brown & Kelly, LLP, attorneys for Defendant 
   and flew a paper locally (hereinafter "SPENCE")

2. I am fully familiar with the facts of the case and I respectfully submit this Affirmation in support of Plaintiff's Motion for Summary Judgment pursuant to CPLR §3212, dismissing the Plaintiff's Complaint and all cross-claims against it in this action.

3. Plaintiff, alleges he was exposed to asbestos-containing products manufactured, sold, or installed by Defendants identified in the Complaint. Attached hereto as Exhibit A is a copy of the Plaintiff's Summons and Verified Complaint, filed on February 06, 2015.

4. A copy of SPENCE's Verified Answer is attached hereto as Exhibit B.

5. Plaintiff served Responses to Defendants' First Set of Interrogatories and Request for Production of Documents on or about December 21, 2015. Plaintiff's responses to Interrogatories
were attorney certified but **not verified by Plaintiff.** A copy of these unverified responses is annexed hereto as Exhibit C. [REDACTED] was not identified in these unverified responses.

6. Plaintiff was deposed in connection with this matter over a couple of days, commencing April 13, 2016. Attached hereto as Exhibit D is a condensed copy of Plaintiff’s testimony transcript.

7. Pursuant to the most recent Scheduling Order, all of Plaintiff’s depositions were to have been completed by April 29, 2016, and any/all co-worker and fact witness deposition must have been conducted by September 02, 2016. A copy of that Order is attached hereto as Exhibit E.

8. Also pursuant to the most recent Scheduling Order, Plaintiff was to have filed a Note of Issue by October 28, 2016 indicating that all necessary discovery has been completed (See Exhibit E). Appended hereto as Exhibit F is copy of Plaintiff’s Note of Issue.

9. On September 21, 2016, your Affirmant wrote Plaintiff’s counsel a timely product identification letter, requesting a Stipulation of Discontinuance in favor of [REDACTED] (See Exhibit E). A copy of said correspondence of that date is annexed hereto as Exhibit G.

10. Plaintiff has objected to voluntarily discontinuing as against [REDACTED]

11. Plaintiff has not met his burden of demonstrating that he was exposed to asbestos fibers allegedly released from a [REDACTED] product for which [REDACTED] bears liability as Plaintiff has failed to show that he ever worked with or around any such product.

12. Both this Court and New York Courts have held where there is “no proof in the record that the plaintiff...came into contact with the alleged asbestos containing components” of the defendant’s productions, summary judgment is appropriate. (See Decision and Order in Smith v. Fairbanks-Morse Pump Corp., No. 2008-1032 (Sup. Ct. Schenectady Co., Oct. 19, 2009) (Aulisi, J.). A copy is attached hereto as Exhibit H for the Court’s convenience.
13. Further, in order to succeed in an asbestos exposure claim, the plaintiff must first establish that he "was exposed to the defendant’s product and that it was more likely than not that this exposure was a substantial factor in his injury." *Diel v. The Flintkote Company*, 204 A.D.2d 53, 611 N.Y.S.2d 519 (1st Dept 1994).

14. In the matter before this Court, Plaintiff has not identified [REDACTED] as exposing him to ANY exposure at any time in his life. Further, the name [REDACTED] was never identified as being a source of his exposure during the discovery portion of this matter (See, Exhibit D).

15. Plaintiff has not identified any exposure to asbestos as a result of a product manufactured, sold or distributed by [REDACTED].

16. Plaintiff did not, in his Answers to Interrogatories, identify [REDACTED] as the manufacturer and/or distributor of any asbestos-containing products to which he alleges asbestos exposure. The Courts have uniformly held that the failure of a plaintiff to identify a specific manufacturer and/or distributor of any asbestos-containing products in his responses to interrogatories constitutes an admission that such defendant was not a source of an asbestos-containing product to which a plaintiff was exposed, and thus establishes that such plaintiff’s case is without merit. See *Gorzka v. Insulation Distributors, Inc.*, 23 A.D.3d 1191 (4th Dept. 2006). See also, *Bigelow v. Acands, Inc.*, 196 A.D.2d (436 (1st Dept. 1993); and *United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254 (1976).

17. Further, Plaintiff did not claim any [REDACTED] products were present at any of his job sites and therefore, did not allege he was exposed to asbestos in any way as a result of a [REDACTED] product (See, Exhibit D).

18. In order to overcome a motion for summary judgment, a plaintiff must present evidentiary proof that the injured party inhaled asbestos fibers from a product manufactured or sold
by the defendant. *Cawein v. The Flintkote Company*, 203 A.D.2d 105, 610 N.Y.S.2d 487 (1st Dept. 1994). In *Cawein*, the plaintiff alleged exposure to asbestos-containing products manufactured, sold or supplied by Flintkote. In opposition to Flintkote’s motion for summary judgment, the plaintiff submitted a co-worker’s affidavit averring that the coworker had seen Flintkote bags of fiber present in a plant where the plaintiff and he had worked. The court held:

It is not enough, however, that bags of Flintkote fiber be seen in the plant; it must be shown that plaintiff was exposed to asbestos fibers released from defendant’s products....Plaintiff has not presented evidentiary material creating a reasonable inference that Cawein inhaled asbestos fibers from a Flintkote product. Without some showing on this threshold question, there can be no possible finding of proximate cause in Flintkote’s products.

203 A.D.2d at 106, 610 N.Y.S.2d at 487-88 (internal citations omitted).

19. In the instant case, Plaintiff has failed to offer any evidence, admissible or otherwise, to establish:

i. That any [REDACTED] product was present at any site which [REDACTED] was present;

ii. That plaintiff [REDACTED] ever worked near or around any product manufactured, sold, distributed or otherwise supplied by [REDACTED];

iii. That plaintiff [REDACTED] was exposed to an asbestos or asbestos-containing product manufactured, sold, distributed, or otherwise supplied by [REDACTED];

iv. That plaintiff [REDACTED] inhaled asbestos from an asbestos-
containing product manufactured, sold, distributed or otherwise supplied by [REDACTED] or

v. That any asbestos or asbestos-containing product manufactured, sold, distributed, or otherwise supplied by [REDACTED] was a substantial factor in causing injury to Plaintiff.

20. [REDACTED] submits that Plaintiff will not be able produce such evidence as he has not done so during discovery and the discovery portion of this matter has ended.

21. Moreover, Plaintiff has not submitted any admissible evidence, or any evidence to be considered in determining the instant motion, that he was exposed to asbestos from a [REDACTED] product and that such exposure was a significant source of his injury. Any such allegation would be purely based on speculation and conjecture.

22. In order to defeat a motion for summary judgment, Plaintiff must allege facts and circumstances from which the liability of [REDACTED] may reasonably be inferred; Comeau v. W.R. Grace & Co., 216 A.D.2d 79, 628 N.Y.S.2d 72 (1st Dept. 1995). Plaintiff has failed to establish one iota of proof that any product manufactured, sold, or distributed by [REDACTED] was a source of his alleged exposure to asbestos.

23. Plaintiff has failed to establish that any product manufactured, sold, distributed, or otherwise supplied by [REDACTED], for which [REDACTED] bears liability, was placed in the zone of Plaintiff, causing exposure to asbestos. Comeau, 216 A.D.2d 79, 628 N.Y.S.2d 72, see also, Reid v. Georgia-Pacific Corp., 212 A.D.2d 462, 622 N.Y.S.2d 946 (1st Dept. 1995); In re Eighth Judicial District Asbestos Litigation: Stiner v. A.P. Green Corporation, 1998 NY LEXIS 722. It is not sufficient for Plaintiff to prove that a product manufactured by [REDACTED] was generally present.
24. A defendant does not have the burden to prove the negative – that the injured party did not sustain any asbestos exposure related to its products. Rather, a plaintiff bears the burden of proof on this threshold issue and the defendant’s burden on a dispositive motion is to show that based upon admissible evidence in this matter, it is entitled to summary judgment.

25. Since Plaintiff has failed to present any evidence that [redacted] was a source of plaintiff [redacted]'s asbestos exposure, and since Plaintiff cannot present evidence in opposition that [redacted] was not a source of his asbestos-exposure, [redacted] is entitled to an order dismissing the Complaint against it in its entirety, with prejudice, and dismissing all cross-claims against it.

26. No prior application for this relief has been made to this or any other Court.

WHEREFORE, defendant, [redacted] Engineering Company, Inc. demands judgment dismissing the Complaint and any Cross-Claims against it in this action, together with such other and further relief as the Court deems just and proper.

Dated: Buffalo, New York
November 10, 2016

[Signature]

Kenneth A. Krajewski
EXHIBIT J
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

[Page content]

JESSICA J. BURGASSER, an attorney licensed in New York, affirms the following to be true under penalties of perjury pursuant to CPLR 2106:

1. I am a partner with the law firm of Brown & Kelly, LLP, attorneys for Defendant [Redacted].

2. I am fully familiar with the facts of the case and respectfully submit this affirmation in support of Motion for Summary Judgment pursuant to CPLR §3212, dismissing the loss of consortium claim alleged by Mrs. [Redacted] in this action.

3. [Redacted] is entitled to summary judgment dismissing the loss of consortium claim alleged by Plaintiff [Redacted] because Plaintiff Eugene Redman's exposure to asbestos occurred decades after his alleged injury took place.

4. Plaintiffs allege that Plaintiff [Redacted] was exposed to asbestos-containing products manufactured, sold, or installed by Defendants identified in the Complaint. Attached hereto as Exhibit A is a copy of the Plaintiffs' Summons and Complaint. Also attached hereto as Exhibit
A is a copy the Plaintiffs’ First and Second Amended Summons and Complaints.

5. A copy of the Answers to Plaintiffs’ Complaints are attached hereto as Exhibit B.

6. Plaintiffs served Responses to Defendants’ First Set of Interrogatories and Request for Production of Documents, dated June 5, 2014, pursuant to the case management order. A copy of these responses is annexed hereto as Exhibit C.

7. Plaintiff’s deposition testimony was taken over the course of seven days in June and July 2014. His de bene esse videotaped testimony was taken on August 27, 2014. Attached hereto as Exhibit D is a condensed copy of only Volume I of Plaintiff’s testimony taken on June 11, 2014.

8. Pursuant to the most recent discovery and trial scheduling order, Plaintiffs must file the Note of Issue and Statement of Readiness by January 30, 2015, which thus indicates that all necessary discovery has been completed. Plaintiffs filed the Note of Issue.

9. Seeks partial summary judgment dismissing the portion of the Complaint relating to claim for loss of consortium because Plaintiff’s last claimed exposure to asbestos occurred decades before his marriage to .


13. Plaintiff's herein claim that the wrongful conduct occurred when Plaintiff [*NAME REDACTED*] in contact with asbestos due to his maintenance work on a pump manufactured by [*NAME REDACTED*] an event which occurred, at the very least, twenty-six years prior to his marriage to [*NAME REDACTED*].

14. Based on these factual allegations, [*NAME REDACTED*] submits that [*NAME REDACTED*]'s claim for loss of consortium be dismissed. There can be no loss of consortium claim because Plaintiff [*NAME REDACTED*]'s injury occurred decades before the marriage.

15. No prior application for this relief has been made to this or any other Court.

WHEREFORE, defendant, [*NAME REDACTED*] demands judgment dismissing [*NAME REDACTED*]'s claim for loss of consortium, together with such other and further relief as the Court deems just and proper.

Dated: Buffalo, New York
February 19, 2015

[Signature]

Jessica J. Burgasser
Trial

Robert J. Mullins II, Esq.
Gibson, McAskill & Crosby LLP

Keith R. Vona, Esq.
Lipsitz & Ponterio, LLC
Nuts and Bolts of Asbestos
Wednesday, June 7, 2017

Asbestos Trial

Robert J. Mullins II, Esq.
Gibson, McAskill & Crosby, LLP
&
Keith Vona, Esq.
Lipsitz & Ponterio, LLC
Motions in Limine

- Filed ahead of the trial
- Usually timing is dictated by a CMO
- Plaintiffs Rarely File Them – Preclude an Expert
- Defendants Always File Them;
- Very Few Novel Issues in Our “Litigation”
- Law is Arguably Well Settled
- Still need to make a record even though your judge may have heard it before (and may not want the Motion)
MILs in Asbestos Cases
(For the defense)

• Motion *in limine* for an order excluding or limiting the testimony of plaintiff’s expert witness at trial;

• Motion *in limine* for an order precluding reference to any governmental precautionary statements or the EPA materials;

• Motion in *limine* for an order precluding admission of or reference to the Amicus Brief to the Michigan Supreme Court, authored by Laura Welch.
MILs in Asbestos Cases

(For the defense, cont.)

• Motion *in limine* for an order precluding Hatfield / Longo;

• Motion *in limine* for an order excluding evidence related to unreliable case reports (including the Australian Mesothelioma Registry);

• Motion *in limine* for an order precluding evidence related to the Coordinating Committee for Automotive Repair (“CCAR”) and its training program.
Voir dire in Asbestos Cases

• In most cases voir dire is supervised;

• Like any trial voir dire in an asbestos case is your only chance at making a first impression;

• Objective is to identify and strike harmful jurors; and

• Possibly lay the groundwork for educating your jury.
Voir Dire, cont.

Plaintiff perspective

- Plaintiffs Start Ahead
- Focus: Damages (Big $ vs. Caps/Limits/Biases)
- Embrace B.O.P. – More Likely Right
- Tort Reform Questions
Voir dire, Cont.

Defense perspective

• Plaintiffs Start Ahead
• Background (use questionnaires)
• Attitude and experience about your client
• Burden of proof
• Occupational experience as it relates to your client;
• Cancer experience
• Asbestos attitudes, beliefs
• Warnings
• Sympathy
• Damages
EXPOSURE
1. WAS PLAINTIFF EXPOSED TO ASBESTOS FROM ______________ MANUFACTURED, SOLD OR DISTRIBUTED BY DEFENDANT?

   Yes  ______________
   No   ______________
Experts

• Pathologist / Pulmonologist (B-reader)
• Industrial hygienist
• State of the Art
• Epidemiologist vs. Occupational Medicine Physician
Pathologist

- Pathologist is a medical doctor
- Review pathology materials / slides
- Offer opinion on diagnosis
- What is Asbestos?
- disease type
- Testify Re the body’s defense mechanisms
Industrial Hygienist

- Testify about working conditions
- Introduction to OSHA
- Encapsulated vs friable
- Define permissible exposure limits ("pel")
- Testify about alleged exposures relative to the pel
Pulmonologist (B-reader)

- Most often used in a lung cancer case

- Asbestosis?

- Significance of asbestosis
NEGLIGENCE
[Failure to Warn]
2. WAS THE DEFENDANT NEGLIGENT IN MANUFACTURING, SELLING, OR DISTRIBUTING _______ WITHOUT A WARNING?

Yes

No
Negligence requires both a reasonably foreseeable danger of injury and conduct that is unreasonable in proportion to that danger. Thus, a person is not responsible for the consequence of his conduct unless the risk of injury was reasonably foreseeable. The exact occurrence or precise injury need not have been foreseeable; but some injury as a result of the negligent conduct must be not merely possible, but probable.
A manufacturer or seller has a two fold obligation. First it must keep abreast of developments in the state of the art of the effect of its product as gained through research, accidents, and other reports, scientific literature and other available methods. In addition, a manufacturer or seller is under a duty to fully test and inspect its products to uncover all dangers that are reasonably scientifically discoverable.

Second, a manufacturer or seller must take such steps that are reasonably necessary to bring that knowledge to the attention of foreseeable users. The greater the known potential hazard of the product, the more extensive must be the manufacturer’s or seller’s efforts to make the hazard known to foreseeable users.
A manufacturer, distributor or seller of a product is held to the knowledge and skill of an expert and is conclusively presumed to possess all of the knowledge that is available or could be possessed by an expert. If information was available concerning the dangers of asbestos, the manufacturer, distributor or seller of the product is conclusively presumed to know that information.
Experts

- Pathologist / Pulmonologist (B-reader)
- Industrial hygienist
- State of the Art
- Epidemiologist vs. Occupational Medicine Physician
Experts – State of the Art
(Plaintiff perspective)

- C.I.H., M.D., & Ph.D
- Familiarity with the Published Literature
- Pitfall = Liability to Settled Defendants
- Actual Knowledge Case Rules
State of the Art

Defense perspective

• What was known or knowable;

• Pre-OSHA;

• Selikoff insulator studies;

• OSHA;

• NIOSH (1975)
Even when **no warning was required at the time of sale**, if facts thereafter come to the manufacturer's attention indicative of the necessity for warning, **the manufacturer is under a duty to give adequate warnings** and instructions concerning the methods for minimizing the danger to users of the product and not merely to the entities through whom the product was sold. The post-sale duty of a manufacturer to warn involves the weighing of a **number of factors**, including the **degree of danger** that the problem involves, the number of the reported instances, the **burden of providing the warning**, and the burden and/or **ability to track a product post-sale**.
A defendant's duty to warn is **non-delegable**. This means that if a defendant has a duty to warn, that defendant may not rely upon others to issue adequate warnings.
In order for the plaintiff to prevail on his claim that the defendant knew or should have known about the dangers of its products, the plaintiff must establish that the defendants knew or should have known that *some injury* could result from exposure by the use of the defendant’s products.
SUBSTANTIAL FACTOR
3. WAS THE NEGLIGENCE OF DEFENDANT A SUBSTANTIAL FACTOR IN CAUSING INJURY TO PLAINTIFF?

Yes _________
No _________
An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury. **There may be more than one cause of an injury**, but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.
Experts

- Pathologist / Pulmonologist (B-reader)
- Industrial hygienist
- State of the Art
- Epidemiologist vs. Occupational Medicine Physician
Epidemiologist

• Expert if the field of epidemiology which is the study of disease causation

• Case control vs cohort

• What do the studies demonstrate in terms of increased risk
**TABLE II.** Risk of Pleural Malignant Mesothelioma According to Selected* Major Groups of Occupations and Industrial Activities

<table>
<thead>
<tr>
<th>ISCO code</th>
<th>Job title</th>
<th>Cases/controls</th>
<th>OR</th>
<th>CI-95%</th>
</tr>
</thead>
<tbody>
<tr>
<td>011-999</td>
<td>Professional, technical, and related workers</td>
<td>13/30</td>
<td>0.82</td>
<td>0.41–1.64</td>
</tr>
<tr>
<td>311-399</td>
<td>Clerical and related workers</td>
<td>24/51</td>
<td>0.90</td>
<td>0.52–1.55</td>
</tr>
<tr>
<td>400-490</td>
<td>Sales workers</td>
<td>27/46</td>
<td>1.19</td>
<td>0.70–2.02</td>
</tr>
<tr>
<td>500-599</td>
<td>Service workers</td>
<td>30/62</td>
<td>0.91</td>
<td>0.55–1.50</td>
</tr>
<tr>
<td>601-649</td>
<td>Agriculture, animal husbandry, forestry workers, fishermen and hunters</td>
<td>41/95</td>
<td>0.78</td>
<td>0.49–1.24</td>
</tr>
<tr>
<td>751-759</td>
<td>Spinners, weavers, knitters, dyers and related workers</td>
<td>17/34</td>
<td>0.96</td>
<td>0.50–1.84</td>
</tr>
<tr>
<td>831-839</td>
<td>Blacksmiths, toolmakers, and machine-tool operators</td>
<td>12/16</td>
<td>1.49</td>
<td>0.67–3.28</td>
</tr>
<tr>
<td>841-849</td>
<td>Machinery fitters, machine assemblers, and precision instrument makers (excluding electrical)</td>
<td>17/28</td>
<td>1.22</td>
<td>0.63–2.36</td>
</tr>
<tr>
<td>851-859</td>
<td>Electrical fitters and related electrical and electronic workers</td>
<td>12/15</td>
<td>1.64</td>
<td>0.74–3.65</td>
</tr>
<tr>
<td>871-874</td>
<td>Plumbers, welders, sheet metal and structural metal preparers and erectors</td>
<td>15/17</td>
<td>1.80</td>
<td>0.86–3.78</td>
</tr>
<tr>
<td>891-899</td>
<td>Glass formers, potters and related workers</td>
<td>13/19</td>
<td>1.37</td>
<td>0.65–2.88</td>
</tr>
<tr>
<td>921-929</td>
<td>Printers and related workers</td>
<td>6/1</td>
<td>11.9</td>
<td>1.41–101</td>
</tr>
<tr>
<td>941-949</td>
<td>Production and related workers n.e.c.</td>
<td>13/7</td>
<td>3.89</td>
<td>1.50–10.0</td>
</tr>
<tr>
<td>951-959</td>
<td>Bricklayers, carpenters and other construction workers</td>
<td>26/42</td>
<td>1.30</td>
<td>0.74–2.28</td>
</tr>
<tr>
<td>971-979</td>
<td>Material-handling and related equipment operators, dockers and freight handlers</td>
<td>30/28</td>
<td>2.42</td>
<td>1.36–4.28</td>
</tr>
<tr>
<td>981-989</td>
<td>Transport equipment operators</td>
<td>16/32</td>
<td>0.98</td>
<td>0.51–1.89</td>
</tr>
<tr>
<td>999</td>
<td>Labourers not elsewhere classified</td>
<td>21/32</td>
<td>1.34</td>
<td>0.74–2.44</td>
</tr>
</tbody>
</table>
Adequacy of Warning

CAUTION: Always use recommended work practices. Do not use abrasive disc saws. When cutting, machining and tapping, refer to Recommended Work Practice Guide furnished by manufacturer to your employer.

Why Not?

DANGER
CONTAINS ASBESTOS FIBERS
AVOID CREATING DUST
CANCER AND LUNG DISEASE HAZARD
5. WERE DEFENDANT’S ACTIONS, WHICH CAUSED PLAINTIFF’S INJURIES, TAKEN WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS?

Yes _________

No ___________
APPORTIONMENT OF FAULT & BURDEN OF PROOF
DAMAGES
WHOLE CASE
# PAIN & SUFFERING

<table>
<thead>
<tr>
<th>DAMAGES</th>
<th>PAST</th>
<th>FUTURE</th>
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</thead>
<tbody>
<tr>
<td>PAIN</td>
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<tr>
<td>SUFFERING</td>
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<tr>
<td>ENJOYMENT OF LIFE</td>
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<tr>
<td>DISABILITY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EMOTIONAL DISTRESS</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Instruction/Jury Charge

• Prepare a proposed charge prior to trial

• Set the course for your trial strategy

• Trials can be won and/or lost based on the Instruction / Charge
AND THAT'S ALL I HAVE TO SAY ABOUT THAT.
Presenter Biographies
KENNETH KRAJEWSKI of Brown & Kelly LLP leads the firm's toxic torts and products liability departments. He practices in the areas of insurance coverage, product liability, environmental and toxic tort litigation, fire loss and all areas of insurance defense and civil litigation including safe places to work, automobile/truck, and insurance coverage litigation.

Mr. Krajewski's practice involves the defense and counseling of construction equipment manufacturers, tool manufacturers, crane and specialty vehicle manufacturers, automobile and parts manufacturers, tire manufacturers, and consumer products manufacturers. A native of Western New York, Ken is a graduate of Empire State College and the Capital University Law School, cum laude. He is Senior Managing Partner and a member of the Firm's management committee. Mr. Krajewski was named a Super Lawyer in the practice area of Personal Injury Defense (2008 - 2016). In 2014, Ken was named a member of the Legal Elite of Western New York.

Mr. Krajewski is Chair of the New York Bar Association Torts, Insurance and Compensation Law (TICL) Section; former Chair of the New York Bar Association, Toxic Torts Committee, former Chair of the New York Bar Association, Automobile Liability Committee; former officer and director of the Defense Trial Lawyers Association of Western New York; and past president of The Advocates Club of Western New York. He is also a member of the Erie County Bar Association; the Defense Research Institute, the International Association of Defense Counsel, Self-Insurer's Association of the Niagara Frontier (SIANF), and the New York Bar. Ken is admitted to the Northern, Southern, and Western U.S. District Courts, the Court of Appeals - Second Circuit, and the Supreme Court of the United States.

Mr. Krajewski has served as a lecturer and moderator on insurance and personal injury topics for state and local bar associations and is a frequent in-house lecturer for insurers. He is a publication contributor on a number of legal topics.

ROBERT J. MULLINS II, of Gibson, McAskill & Crosby LLP, is a trial lawyer whose practice consists primarily of the defense of national manufacturers in complex product liability lawsuits in New York state and federal courts. Mr. Mullins is admitted to practice in the State of New York and all New York federal district courts and has defended product manufacturers involved in multidistrict litigation. His practice also includes general insurance defense litigation in personal injury matters. Previously Mr. Mullins served as a prosecutor in the United States Army Judge Advocate General’s Corp (1999-2002). As a prosecutor for the Army, Mr. Mullins successfully litigated more than one hundred cases, including several felonies. He is a graduate of the State University of New York at Geneseo (B.S. 1993) and the University of Akron, School of Law (J.D. 1998) where he was a member of the Akron Law Review.

KEITH R. VONA joined Lipsitz & Ponterio, LLC, in 2005, and he is a Junior Partner at the firm. Prior joining the firm, Mr. Vona served as a United States Marine and, for over ten years, he worked as a City of Buffalo police officer. He concentrates his practice in the areas of Asbestos Litigation and Lead Paint Poisoning.
In September 2011, Michael Ponterio, together with Neil McKinnon and Keith Vona obtained the first jury verdict in Western New York on behalf of a lead poisoned child. In November 2013, Michael Ponterio, Keith Vona and Zachary J. Woods, obtained a verdict on behalf of a Rochester, New York, child for injuries resulting from exposure to lead based paint. Since 2006, Mr. Vona has obtained over $50 million dollars in settlements on behalf of the firm’s mesothelioma clients.

Since 2008, Mr. Vona has been trial counsel in asbestos cases involving plaintiffs’ verdicts in excess of $17 million dollars:

- August 2014 - Michael Ponterio, Keith Vona and Mathew Morton, obtained a Bench Trial Decision awarding $3 million dollars to a former Durez worker.
- April 2014 - Michael Ponterio and Keith Vona, obtained a Bench Trial Decision in Buffalo awarding $3 million dollars to a former Durez worker with mesothelioma and his spouse for her loss of services and companionship as a result of his terminal cancer.
- March 2012 – Michael A. Ponterio, Keith Vona and Matt Morton, obtained a jury verdict in the amount of $325,000 on behalf of a Former Durez Plant Worker in Lung Cancer Case.
- December 2011 - Michael Ponterio and Keith Vona, obtained a jury verdict in the amount of $2 million dollars on behalf of a former Durez factory worker.
- July 2011 - Michael Ponterio and Keith Vona obtained a jury verdict in the sum of $2.5 million dollars against Ford Motor Company on behalf of a former chemist.
- November 2010 - John Comerford, Joseph Kremer and Keith Vona obtained a $1 million dollar verdict against John Crane, Inc., on behalf of a former tugboat engineer for injuries resulting from on the job exposure to asbestos.
- July 2008 - Keith Vona served as co-counsel in obtaining a $5 million dollar verdict for a former United States Navy boilerman. This verdict is believed to be the largest for a mesothelioma victim in Upstate New York.

Education
J.D., 2005, State University of New York at Buffalo Law School
B.S., 2001, State University of New York College at Buffalo

Admissions
2006 - New York State
2009 - Western District, New York State
2017 - Iowa