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State of Minnesota
In Supreme Court

In re Continental Casualty Company and
Continental Insurance Company,

Appellants,

Continental Casualty Company, et al.,

Appellants,

vs.

3M Company,

Respondent,

ACE Bermuda Insurance, Ltd., et al.,

Defendants,

Transamerica Premier Insurance Company,
n/k/a Fairmont Premier Insurance,

Respondent.

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STATEMENT OF THE LEGAL ISSUES

I. Did the district court err in ruling that a commercial contract declaratory judgment action concerning insurance coverage for numerous kinds of toxic tort claims including silica, coal dust, benzene and perfluoronated chemicals, in addition to asbestos, must be transferred to the court designated to hear all asbestos personal-injury, death and property-damage lawsuits pursuant to this Court's order in *In Re Minnesota Asbestos Litigation*?

The district court, affirmed by the court of appeals, held that this complex declaratory judgment action—which will involve the interpretation of hundreds of insurance policies issued over the course of fifty years by well over 100 insurers—must be transferred to an asbestos judge pursuant to this Court's consolidation order, under which all asbestos personal-injury, death and property-damages cases are assigned to a single court to ensure the efficient and economical handling of those claims.

Apposite Authority:

In re Minnesota Asbestos Litigation, C4-87-2406 (Minn. Dec. 17, 1987)

II. When the district court's determination that venue transfer would serve the interests of justice is based on an error of law, and there is no evidence in the record that transfer to a court fewer than ten miles away would serve the convenience of the witnesses, did the district court err in finding that venue transfer was permitted under Minn. Stat. § 542.11(4)?

The district court, affirmed by the court of appeals, held that transfer of venue from Hennepin County to Ramsey County was warranted under Minn. Stat. § 542.11(4).

Apposite Authority:

Minn. Stat. § 542.11(4) (2006)

Chellico v. Martire, 227 Minn. 74, 34 N.W.2d 155 (1948)

STATEMENT OF THE CASE AND FACTS

I. The Nature Of This Declaratory Judgment Action

Since 1980, 3M has been the target of more than 400,000 toxic-exposure claims. (App. 52.)[1] Approximately 370,000 claims allege that respiratory masks 3M manufactured and marketed were inadequate to protect against a variety of contaminants, including silica, coal dust and asbestos. (App. 89-52.) Other claims allege bodily injury due to exposure to products containing benzene and asbestos manufactured by 3M. (App. 50.) Finally, a number of claims, including those pending in Washington County, allege personal-injuries and property-damage stemming from 3M's production of perfluoronated chemicals ("PFCs") at its facilities, including those in Cottage Grove and Woodbury. (App. 50.)

For nearly three decades, 3M defended, settled, and paid these toxic-exposure claims without affording its insurers timely and adequate notice, any opportunity to associate in the defense, or any opportunity to evaluate settlement of each claim as required by its insurance policies. (App. 51.) Only recently did 3M seek reimbursement for these settlements from its insurers. Continental denies 3M is entitled to the coverage it seeks.

On January 5, 2007, Continental commenced this complex declaratory judgment action in Hennepin County District Court to determine the extent of its insurance coverage obligations, if any, for the wide variety of toxic-tort claims filed against 3M throughout the United States. (App. 35-65.) Continental and the sixty-three insurers presently named as defendants issued excess liability insurance policies to 3M in effect at various times after approximately 1960.[2]

---

[1] References to "App." are to Appellant's Appendix attached hereto.

[2] 3M recently disclosed the names of 167 insurers who issued policies to 3M from the 1940s through 1996. Once venue is resolved, Continental intends to file in the appropriate court an amended complaint naming most of the 167 insurers identified by 3M, omitting certain insolvent or foreign insurers who are subject to anti-suit injunctions.

(App. 38-49.) 3M and several other named defendants, such as AIG, Allstate Insurance Company, Zurich North America, and First State Insurance Company, maintain offices in Hennepin County. (App. 66-70; 100-106; 127-132; 34; 71; 107.) Accordingly, Continental appropriately chose Hennepin County as the venue for this action. The matter was assigned to the Honorable Robert A. Blaeser.

II. 3M's Demand For Change Of Venue

On January 10, 2007, 3M filed a Demand for Change of Venue, asserting that this commercial declaratory judgment action is subject to *In re Minnesota Asbestos Litigation*, No. C4-87-2406 (Dec. 17, 1987) (the "Asbestos Order") (consolidating asbestos-related tort liability suits before a single court). (App. 12-14.) Continental moved to quash 3M's Demand for Change of Venue. (App. 15-16.)

On March 7, 2007, the district court issued its Findings of Fact, Conclusions of Law and Order for Change of Venue. (App. 6-9.) It concluded that declaratory judgment actions to resolve contractual insurance disputes are subject to this Court's Asbestos Order (App. 8.) The district court reached this conclusion despite acknowledging that the instant action involves coverage for a variety of toxic substances, including silica, coal dust, PFCs, and benzene, in addition to coverage for underlying lawsuits alleging 3M masks failed to protect against asbestos exposure. (App. 6.) The district court order thus overturned Continental's choice of venue in Hennepin County and transferred the matter to Ramsey County.

III. Continental's Petition For Writ Of Mandamus

On April 16, 2007, Continental filed a Petition for Writ of Mandamus in the court of appeals. (App. 149-166.) Continental argued that the district court's decision was based on an overly broad and otherwise erroneous interpretation of this Court's Asbestos Order, and that venue should remain in Hennepin County. *Id.*

On May 16, 2007, the court of appeals denied Continental's petition. (App. 1-5.) The court of appeals held that the district court *was within its discretion* when it concluded that the Asbestos Order encompassed cases other than asbestos personal-injury and property-damage tort claims. *Id.* The court of appeals also concluded in the alternative, despite the absence of any supporting evidence in the record, that the district court properly exercised its discretion to transfer venue on the basis of the convenience of witnesses. The court reached this conclusion even though the Hennepin County and Ramsey County courthouses are less than ten miles apart. *Id.*

On August 7, 2007, this Court granted further review of the lower court's denial of Continental's Petition for Writ of Mandamus. (App. 167-168.)

ARGUMENT

I. INTRODUCTION

In response to the substantial administrative and procedural difficulties relating to the flood of asbestos-related personal-injury and property-damage lawsuits pending throughout Minnesota in the 1980s, this Court issued an order consolidating all such claims before a single district court judge. The express rationale for the Asbestos Order was that asbestos-related liability lawsuits "involve, in numerous instances, similar questions of law and fact, problems in discovery, theories of recovery and defense." (App. 10.) Consolidation before a single district court judge served the interests of judicial economy, efficiency and consistency.

Although this Court's purpose in issuing the Asbestos Order—*i.e.,* to promote the efficient handling of personal-injury and property-damage lawsuits arising from asbestos—is evidenced both by the plain language of the order and the circumstances under which it was created, recent lower court decisions have misapplied the Order. In the instant case, the district

court, affirmed by the court of appeals, held that a commercial contract dispute concerning insurance coverage for numerous kinds of underlying toxic tort claims including silica, coal dust, benzene and PFCs, in addition to asbestos, must be transferred to the already-crowded asbestos docket.

The claims at issue in this case, however, fall outside the language and intent of this Court's Order. This case involves issues of insurance contract interpretation, not "questions of law and fact, problems of discovery [or] theories of recovery and defense" raised by the asbestos personal-injury and property-damage cases assigned to the asbestos judge. Moreover, given the complexity of this case, assigning it to an asbestos judge would be antithetical to the stated purpose of the Asbestos Order, which is to encourage the "efficient and economical" handling of asbestos tort claims. This insurance contract action will involve more than 100 insurer defendants, the interpretation of hundreds of insurance policies issued over the course of fifty years, and a demand by 3M fore more than $500 million in indemnity.

Moreover, the rationale of the district court's decision—that the Asbestos Order mandates consolidation of *any* case "related," however tangentially, to asbestos—will burden the asbestos docket with myriad other commercial disputes. The value of coordinated handling of asbestos injury and damage cases will be lost if the asbestos docket is burdened by complex commercial actions such as this diverse insurance contract action. The circumstances that necessitated the consolidation of all asbestos tort claims in 1987 still continue today. There are currently more than 1,500 asbestos cases assigned to the Minnesota asbestos court and it does not appear that the docket will decrease significantly in the near future. Thus, the need for efficient handling of asbestos personal-injury and property-damage cases is as great today as it was when this Court issued its Asbestos Order.

To ensure that asbestos claims brought by injured individuals continue to be resolved in a timely manner, this Court should reverse the district court's decision and clarify that commercial disputes such as insurance coverage declaratory actions do not fall within the scope of the Asbestos Order.

II. STANDARD OF REVIEW

This matter involves the interpretation of a Supreme Court Order and therefore presents a pure question of law. A district court's decision based upon an interpretation of law is subject to a *de novo* standard of review. *See State v. Robb*, 605 N.W.2d 96, 99 (Minn. 2000) (district court's order that is based upon an interpretation of law is reviewed *de novo*). The court of appeals' use of the "abuse of discretion" standard to review the district court's decision in this case was erroneous.

III. THE DISTRICT COURT MISAPPLIED THE LANGUAGE OF THE ASBESTOS ORDER IN CONTRAVENTION OF ITS INTENT

A. The Plain Language Of The Asbestos Order Makes Clear That It Encompasses Only Asbestos Personal-Injury and Property-Damage Lawsuits

The district court concluded that this Court's Asbestos Order encompasses this insurance coverage declaratory judgment action that relates only tangentially to asbestos. The plain language of the Asbestos Order simply does not sustain this conclusion.

1. The Order Applies To Asbestos Personal-Injury and Property-Damage Claims

Explaining its decision in 1987 to consolidate all asbestos personal-injury and property-damage lawsuits, this Court began by acknowledging the problem, *i.e.,* the burgeoning number of asbestos personal-injury and property-damage lawsuits being filed in Minnesota state courts:

> WHEREAS, it appearing to the Court that a large number of asbestos-related claims have been and are anticipated to be brought in Minnesota state courts *as personal injury or death claims and as damage to property actions*; ....

(App. 10, emphasis supplied.) This Court then observed that these personal-injury and property-damage lawsuits involved many of the same legal and factual issues, and many of the same defendants:

> WHEREAS, these actions will involve, in numerous instances, similar questions of law and fact, problems in discovery, theories of recovery and defense; and
>
> WHEREAS, the same limited number of asbestos industry defendants appear to be involved in multiple claims; ....

(App. 10.) Finally, this Court declared that it was necessary to fashion an efficient system to manage this litigation and conserve limited judicial resources:

> WHEREAS, it being necessary for the convenience and economy of the parties, all counsel, the public and the Court that a consistent, efficient and economical system be fashioned to manage all phases of this litigation and properly allocate limited court facilities and judicial personnel;

(App. 10.) This Court therefore assigned one judge to hear all asbestos personal-injury and property-damage cases filed in Minnesota state courts:

> NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to Minn. Stat. §§480.16 and 2.724:
>
> 1. The Honorable Jack A. Mitchell of the First Judicial District, having consented pursuant to statute, is hereby appointed to hear and decide all matters, including all pretrial and trial proceedings, in all presently pending and future actions before Minnesota state trial courts, *whether relating to personal injury, death or property damage,* that arise from or seek recovery for the manufacture, distribution, use or exposure to asbestos and asbestos-containing products.

(App. 10, emphasis supplied.) In 1992, this Court reiterated, "[t]he rationale for this order was that the asbestos claims 'will involve, in numerous instances, similar questions of law and fact, problems in discovery, theories of recovery and defense,' and that the assignment of all cases to

one judge was 'necessary for the convenience and economy of the parties, all counsel, the public and the Court.'" *In re Minn. Personal Injury Asbestos Cases*, 481 N.W.2d 24, 26 (Minn. 1992).

Notably absent from this Court's Asbestos Order is any reference to insurance contract declaratory judgment actions or other commercial disputes that may tangentially "involve" asbestos. Rather, the introductory sentence of the Order states that "a large number of asbestos-related claims have been and are anticipated to be brought in Minnesota state courts as *personal injury or death claims and as damage to property actions*." (App. 10, emphasis supplied.) Thus the phrase "asbestos-related claims" clearly refers to "personal injury or death claims" and "damage to property actions."

Further underscoring the Asbestos Order's focus on liability claims is the sentence contained in the last paragraph quoted above, stating that the asbestos judge shall hear and decide all matters, "whether *relating to personal injury, death or property damage*, that arise from or seek recovery for the manufacture, distribution, use or exposure to asbestos and asbestos-containing products." (emphasis added.) Again, noticeably absent from this mandate is any reference to commercial disputes that arise from contracts, such as insurance coverage actions.

2. This Case Does Not Involve The Same Parties, Legal Issues Or Factual Issues As The Personal-Injury Or Property-Damage Actions Assigned To The Asbestos Judge

Because asbestos personal-injury and property-damage cases involve many of the same factual and legal issues and many of the same parties, this Court, like others around the country, decided the most efficient way of handling the glut of lawsuits was to assign them to a single judge. The advantage of such a single assignment was that the asbestos judge would develop "knowledge regarding the litigation, provide[] consistency in rulings across cases, and establish[] procedures to coordinate and expedite discovery activities." Deborah R. Hensler et al., *Asbestos*

in the Courts: The Challenge of Mass Toxic Torts xiv-xv (1985) (The Rand Corporation Institute for Civil Justice Study).

This case does not involve the same parties typically found in asbestos personal-injury and property-damage tort cases. The defendant insurers, of course, generally are not parties to injury suits. Even 3M rarely faces asbestos claims in Minnesota: just 14 of the 1,500 cases on the consolidated docket appear to involve 3M. (App. 147-148.) The vast majority of claims against 3M have been filed elsewhere.

Moreover, this insurance coverage action will have few, if any, legal or factual issues in common with the personal-injury and property-damage cases assigned under the Asbestos Order to the asbestos judge. The typical asbestos personal-injury case involves issues such as whether the plaintiff was injured by the defendants' products, the severity of the injury, and the amount of plaintiff's damages. The trial court in this case, however, will be asked to determine, for example, whether 3M's lack of notice and/or late notice to its insurers, its failure to cooperate, and its voluntary payments to claimants violated conditions of the insurance policies. Additionally, the court will be called upon to decide whether the claims for which 3M seeks coverage fall within the known-loss doctrine, and whether they are subject to various exclusions from coverage such as those precluding pollution claims and punitive or exemplary damages. Injury claims present none of these issues, so the asbestos judge would bring no special expertise to their resolution. Hence, the efficiencies intended by consolidating all asbestos personal-injury and property-damage claims will not be obtained by assigning this case to an asbestos judge.

The district court erroneously believed that if coverage is ultimately established in this case, subsequent issues of trigger and allocation may overlap with factual disputes in the underlying asbestos personal-injury claims, thus warranting transfer to the asbestos judge.

(App. 8.) The district court, however, failed to appreciate the different issues involved in an insurance coverage action and a personal-injury tort case. "Trigger" involves a determination of which insurance policy or policies are required to respond to a claim. *See, e.g., In re Silicone Breast Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 415 (Minn. 2003). "Allocation" involves a fact-dependent determination of how claim expenses and liabilities are spread among multiple "triggered" policies. *See id.* at 417. Thus, issues of trigger and allocation in an insurance coverage action involve determinations of *when* the claimant was injured.[3] In a tort action, however, the claimant does not have to prove *when* he/she was injured in order to recover—all that has to be established is that injury resulted because of a defendant's tortious conduct. Accordingly, even if allocation and trigger eventually are addressed in this case, the factual and legal issues involved will be distinct from the facts at issue in the personal-injury or property-damage cases assigned to an asbestos judge.

3. This Case Involves Much More Than Just Insurance Coverage for Asbestos Claims

Finally, even if this Court's Order was meant to include commercial contract actions, this case is far broader than coverage issues arising from underlying claims associated with asbestos. Rather, this case concerns coverage for numerous kinds of toxic-tort claims asserted against 3M in the past twenty-five years including silica, coal dust, benzene and PFCs, in addition to asbestos. The myriad insurance contract issues that arise from these diverse claims—including

[3] This Court has held that an "actual injury" trigger applies to insurance coverage matters. *N. States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 662 (Minn. 1994). Courts applying an actual injury trigger acknowledge that injury may not occur at the time of exposure, but rather following some period of cumulation or latency. *See, e.g., Abex Corp. v. Md. Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). Accordingly, even a claimant's allegations in his tort case as to when he was exposed to 3M's product does not resolve the issue of "trigger" in Minnesota; instead, the trial court will have to make separate determinations about when actual injury occurs for insurance purposes, which is not presented in the underlying tort cases handled by the asbestos judge.

distinct trigger and allocation issues for each toxin– obviate any reason to assign this case to the asbestos judge.

The district court found that a majority of the underlying claims against 3M—and the majority of the costs incurred by 3M in defending and resolving those underlying claims—"relate to personal injury allegedly arising from the manufacture, distribution, use of or exposure to asbestos and asbestos-containing products." (App. 6.) The district court's finding, however, was based on an incomplete factual record. Due to the procedural posture of the case—3M filed its demand for change of venue just five days after the Complaint was served—discovery into the comparative value of the various underlying toxic tort claims had not been conducted. Thus, the information presented by the district court was that which was in the public domain, and select non-public information submitted by 3M. Because the district court did not have all of the relevant information regarding the comparative value of 3M's different toxic-tort exposures when it issued its ruling, its findings should be given no deference.[4]

Moreover, the *value* of the underlying claims giving rise to this declaratory judgment action should not determine whether this case must be transferred to the asbestos judge.[5] Rather,

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[4] It is now apparent that the amount attributable to 3M's PFC exposure was underrepresented to the district court. Public reports filed after the district court's ruling reveal that 3M has increased its reserve for exposures it is facing to clean up PFC contamination in south Washington County by $121 million, bringing its cumulative PFC charges to $165 million. In addition to 3M's under-representation of PFC claims, a large portion of the mask failure claims that 3M categorized as "alleging exposure to asbestos" also allege exposure to silica or coal dust. Notably, the State of West Virginia has brought a class action against 3M seeking to recover health care costs for more than 20,000 coal miners suffering black lung disease or silicosis. *See* 3M Company Report (Form 8-K), at 7 (Apr. 26, 2007), *available at* http://www.sec.gov/Archives/edgar/data/66740/000110465907031630/a07-12418_1ex99.htm; Dee DePass, *This Time, 3M Earnings Easily Clear The Bar*, Minneapolis Star Tribune, Apr. 27, 2007, at 1D.

[5] If this Court considers the value of the underlying cases to be at all relevant, however, it should take judicial notice of 3M's recent 8-K filing cited in footnote 4 and 3M's increased PFC reserves.

the determining factor is whether *the issues to be decided* in this insurance contract action are common to asbestos personal injury, death or property damage. As discussed above, they are not.

Even if a district court were to reach issues of trigger and allocation and is ultimately required to determine when injury occurs for asbestos disease, this action still would not be predominantly an "asbestos case." Coverage for *five separate toxic torts* are at issue in this case; consequently, should the trial court reach trigger and allocation, it will need to make at least *five separate trigger determinations* based upon the different products involved in the underlying claims, including silica, coal dust, benzene, and PFCs, in addition to asbestos. Each determination will be predicated upon its own unique facts. Regardless of the monetary value of each type of claim, each separate coverage determination may necessitate a separate proceeding. Thus, in addition to determining the "trigger" for asbestos, the court would try trigger(s) for PFCs,[6] the trigger for benzene, the trigger for coal dust, and the trigger for silica.

Hence, even if one were to look past the contractual insurance disputes at issue here to the underlying liability claims, non-asbestos issues still would predominate. Plainly, this case falls outside both the intended and literal scope of the Asbestos Order. The district court's decision should be reversed.

B. The Circumstances Under Which The Asbestos Order Was Issued Demonstrate Its Proper Scope

A review of the circumstances giving rise to the Asbestos Order illuminates the Order's intended purpose and scope.

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[6] The exposure pathway resulting in PFC claims is unclear at this time. While some material was released from landfills, other PFC material may have emanated directly from 3M products. Different trigger issues could arise from each of these circumstances.

In 1987, courts throughout the United States confronted a substantial asbestos litigation crisis. The crisis resulted from the widespread use of asbestos in the workplace from the early 1900s to the early 1970s. Due to the long latency period from initial exposure to manifestation, it was not until the 1960s that a serious increase in the number of asbestos-related diseases such as lung cancer, mesothelioma and asbestosis began to appear.

Although claimants in the 1960s and early 1970s sought recovery from asbestos manufacturers for their injuries, they were largely unsuccessful until the landmark decision of *Borel v. Fibreboard*, 493 F.2d 1076 (5th Cir. 1973). In *Borel*, the Fifth Circuit opened the floodgates of asbestos litigation when it held asbestos manufacturers strictly liable for failing to warn of an unreasonably dangerous product. Following *Borel*, filing of asbestos personal-injury claims surged in courts throughout the country; from the early 1970s until 1985, over 30,000 such claims were filed. Hensler, *supra*, at 1. Courts were ill-equipped to handle this new burden. The Chief Judge of the Fifth Circuit wrote, "no other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335-41 (5th Cir. 1985) (Clark, C.J., dissenting).

In 1985, the Rand Corporation Institute for Civil Justice published the first comprehensive analysis of how courts were reacting to the tide of asbestos tort claims and concluded, "The picture is not a pretty one." Hensler, *supra*, at iii. The Rand study noted:

> [T]he recent high-volume phase of asbestos litigation highlights the weaknesses of the system.... Rather than become enmeshed in what they regard as almost unending asbestos litigation, many judges avoid such cases altogether. Courts often defer to other priorities as they allocate their limited resources. Dispositions are slow, recoveries sometimes irrational and often inconsistent. Discovery and other costly procedures are geared to trials

> that don't happen rather than to settlements that eventually do. Legal arguments are repetitive, time-consuming, and costly, and transaction costs as a whole are high, that is, higher than for any other type of tort litigation for which costs have been estimated.

Id. at iii-iv.

The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist to study the problem, concluded in 1991 that "[w]hat has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 1-3 (1991), *quoted in In re Asbestos Prods. Liab. Litig. (No. VI),* 771 F. Supp. 415, 418-421 (Jud.Pan.Mult.Lit. 1991). The Federal Ad Hoc Committee noted, however, that "[o]ne point on which plaintiffs' counsel, defense counsel and the judiciary can agree is that the present way in which we have attempted to resolve asbestos cases has failed." *Id.* at 7. When announcing its decision to assign all asbestos personal-injury cases filed in federal court to a judge in the Eastern District of Pennsylvania, the Judicial Panel on Multidistrict Litigation concluded, "the litigation has reached a magnitude ... that threatens the administration of justice and that requires a new streamlined approach." *Asbestos Prods. Liab. Litig.,* 771 F.Supp. at 418.

It was in the context of a judicial system struggling to adjust to the large volume of asbestos-related personal-injury and property-damage claims that this Court issued its Asbestos Order. The Order expressed concerns shared by jurisdictions across the country—the influx of bodily injury claims was overwhelming court resources and threatening the fair administration of justice. In issuing its Asbestos Order, this Court intended to provide a more efficient means of litigating the mass of asbestos-related tort liability lawsuits.

As noted above, the present commercial insurance contract shares few, if any, common parties, or common questions of law, fact, or procedure with asbestos-related tort liability claims. Consequently, no efficiency or convenience could be achieved by consolidating such dissimilar actions. Moreover, as discussed next, any advantages of consolidation would be overwhelmed by the burden complex commercial disputes would place on the asbestos court.

C. Burdening The Asbestos Judge With Complex Insurance Coverage Disputes Would Defeat The Intent Of The Asbestos Order

Under the lower courts' interpretation, the Asbestos Order would encompass *any* commercial action that could be described as "related to" asbestos, however tangentially. Thus, an action for breach of contract and fraud involving the failure to disclose asbestos liabilities in an asset transfer, or a breach of contract dispute involving the failure to pay for asbestos abatement, would have to be transferred to the asbestos judge. Similarly, a dispute over misrepresentation of the value of property that is later found to contain asbestos would be subject to the Order. Such an expansive interpretation of the Order would burden the asbestos court with time-consuming commercial disputes, defeating this Court's goal of fashioning an "efficient and economical system" and "properly allocate[ing] limited court facilities and judicial personnel" to the resolution of asbestos personal-injury and property-damage claims.

This danger is readily apparent in the present case. The demands placed on the court by this insurance coverage case will be enormous. This case will ultimately involve more than 100 insurers, each with its own policies and potentially its own coverage issues relative to those policies.

This case is complicated by the fact that it involves coverage for at least five separate types of toxic tort claims made against 3M.[7] At issue in this case will be: all of 3M's claim files for each type of toxic tort (some of which number in the hundreds of thousands); all of 3M's internal documents regarding knowledge of these claims; all of 3M's internal documents regarding the dangers presented by each of the involved products; all representations made by 3M to the public, regulators, insurers, etc., regarding the claims and each product. Discovery will be extensive, likely involving millions of documents and potentially hundreds of depositions.

This action will raise several challenging insurance coverage issues having no material relationship to personal-injury or property-damage claims. The demands presented by motion practice and trial on these issues will be immense. In the event coverage exists, and the court is required to address trigger and allocation issues, it is likely the court will have to hold five separate trials to determine the trigger for each separate toxin.

This Court only need look to *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405 (Minn. 2003) ("*SBI*"), for evidence of the demands this case will place on the court. *SBI* involved insurance coverage for only a single product failure, silicone breast implants, and involved coverage for only nine years, from 1977 to 1985. *SBI*, which was started in 1994 and is still pending, generated more than 250 orders dealing with discovery, policy interpretation, allocation and other issues; several bench trials; a five-month jury trial; and multiple appeals.

The instant case will dwarf *SBI*. Unlike *SBI*, this case is not limited to a single product—it involves several different products as well as industrial pollution caused by 3M's operations.

[7] As noted above, many claims allege exposure to multiple toxins so this action could not be effectively subdivided, at least based on pre-discovery information available to the insurers. Moreover, substantial elements of the case—such as underwriting, procurement and claim-handling – are common to all types of claims.

This case will involve insurance coverage from the 1940s through at least 1996—a period five times as long as that involved in *SBI*.

Imposing a case of this enormity on the court that is already assigned more than 1,500 asbestos cases would defeat this Court's goal of creating an efficient system for the handling of tort claims. The rationale of the lower court's rulings would compound this error by further burdening the asbestos docket with numerous commercial disputes that "relate" in some fashion to asbestos. In order to ensure the continued efficient handling of asbestos personal-injury and property-damage cases, this Court should reverse the district court's decision and hold that this complex commercial insurance coverage action does not fall within the Asbestos Order.

D. Other Courts That Have Assigned A Single Judge To Handle Asbestos Cases Have Not Transferred Insurance Coverage Actions To That Judge

Like Minnesota, courts throughout the United States have assigned their asbestos cases to a single judge in order to ensure the efficient disposition of these cases. Even in the nation's largest court systems, however, insurance coverage declaratory judgment actions, including those involving coverage solely for asbestos claims, are not assigned to the asbestos judge.

The Honorable William D. Maddux is currently the asbestos judge in Cook County, Illinois, the nation's largest unified court system. (App. 253-255; 321-322.) At least three actions involving insurance coverage for asbestos claims, however, are assigned to other judges: *John Crane, Inc. v. Admiral Ins. Co.*, No. 04CH8266 (Ill. Cir. Ct.) (assigned to Judge Dorothy Kirie Kinnaird) (App. 256-282); *Cont'l Cas. Co. v. BorgWarner, Inc.*, No. 04 CH 1708 (Ill. Cir. Ct.) (Judge Peter Flynn) (App. 283-293); *TH Ag'c. & Nutrition L.L.C. v. Employers Mut. Cas. Co.*, No. 02 CH 19037 (Ill. Cir. Ct.)(Judge Richard Billick) (App. 294-320).

All New York City asbestos personal-injury cases have been assigned to Justice Helen Freedman for pre-trial management. *See* Hon. Helen E. Freedman, *Product Liability Issues in*

Mass Torts - View From the Bench, 15 Touro L. Rev. 685 (1999), and (App. 171-217). Insurance coverage actions for asbestos liabilities, however, are not assigned to her. For example, a recent insurance coverage action involving coverage for asbestos liability claims made against Keasbey Company, *Continental Cas. Co. v. Employers Ins. Co. of Wausau,* Index No. 601037/03 Supreme Court of the State of New York, venued in New York County, was handled by Judge Richard F. Braun (App. 218-248).

All asbestos cases in Texas are assigned to Judge Mark Davidson in the 11th Judicial District, Harris County, in Houston, Texas. *See Union Carbide v. Adams*, No. 03-0895 (Tex. M.D.L. Panel, Nov. 29, 2005). (App. 249.) Insurance coverage actions involving coverage for asbestos are not assigned to Judge Davidson, however. *See, e.g., In re TIG Ins. Co.*, 172 S.W.3d 160 (Tex. App. 2005) (Judge Gary Sanderson).

Similarly, all asbestos personal-injury cases filed in the nation's federal district courts have been assigned to the Eastern District of Pennsylvania since 1991. Judge Charles Weiner originally handled the federal asbestos docket and Judge James T. Giles succeeded him. (App. 250-252.) Notably, several insurance coverage actions involving coverage for asbestos claims have not been transferred to the federal asbestos judge for handling. *See, e.g., Ace Property & Cas. Ins. Co. v. Superior Boiler Works, Inc.*, - - - F.Supp.2d - - -, No. 05-1301-JTM, 2007 WL 2421804 (D. Kan. Aug. 27, 2007); *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239 (5th Cir. 2000).

E. If This Court Concludes That *In re Asbestos,* As Currently Written, Can Be Interpreted To Require Transfer Of This Action To The Asbestos Judge, This Court Should Amend The Order

To the extent this Court finds that its Asbestos Order, as currently written, can plausibly be read to require the transfer of an insurance coverage declaratory judgment action to the

asbestos judge, this Court should amend its Order to clarify that *In re Asbestos* is limited to asbestos personal-injury and property-damage tort actions.

This Court has the authority, of course, to provide greater definition to its Order and announce that insurance coverage declaratory actions do not fall within its scope.[8] If such a clarification is deemed necessary, this Court should do so.

III. THE DISTRICT COURT AND COURT OF APPEALS COMMITTED LEGAL ERROR IN CONCLUDING THAT A TRANSFER OF VENUE WAS WARRANTED FOR THE CONVENIENCE OF THE PARTIES AND IN THE INTERESTS OF JUSTICE.

As a threshold matter, the court of appeals erred by characterizing the district court's ruling as an exercise of discretion. The interpretation of a Supreme Court Order presents a pure question of law. A district court's decision based upon an interpretation of law is subject to a *de novo* standard of review. *See State v. Robb*, 605 N.W.2d 96, 99 (Minn. 2000). The court of appeals' use of the "abuse of discretion" standard to review the district court's decision in this case was erroneous.

A. Neither the Interests of Justice Nor the Convenience of the Witnesses Warrant a Transfer of Venue Under Minn. Stat. § 542.11(4).

The district court's conclusion that a transfer of venue is warranted under Minn. Stat. 542.11(4) is completely unsupported by the record in this case. Minn. Stat. § 542.11(4) (2006) states:

> The venue of any civil action may be changed by order of the court in the following cases:
>
> ***

[8] Under both this Court's inherent power as well as Minn. Stat. §§ 480.16 and 2.724, this Court has authority to assign multiples cases in different districts to a single judge when the interests of justice dictate.

> (4) When the convenience of witnesses and the ends of justice would be promoted by the change.

As the proponent of a change of venue under this provision, 3M had the burden of establishing that *both* the convenience of witnesses and the ends of justice would be promoted by a change of venue. *State ex rel. Austin Mut. Ins. Co. v. Dist. Court of Brown County*, 194 Minn. 595, 261 N.W. 701 (1935). 3M did not meet either burden.

First, the district court concluded that this case was subject to *In Re Asbestos* and therefore the interests of justice would be served by transfer the case to the asbestos judge. (App. 8.) As demonstrated above, however, the district court's conclusion that *In Re Asbestos* applies here was erroneous. Consequently, the district court's conclusion that transfer of venue would serve the ends of justice is similarly flawed.

Second, the district court's conclusion that the convenience of the witnesses would be served by a transfer of venue is completely unsupported in the record. 3M did not introduce any evidence regarding the convenience of the witnesses in this matter. The sole mention of the "convenience of the parties" is made on page three of 3M's Demand for Change of Venue wherein 3M perfunctorily asserted: "[t]ransfer of the case to Ramsey County District Court will therefore serve the convenience of witnesses and promote the ends of justice." (App. 14.) Neither affidavit submitted by 3M in support of its Demand for Change of Venue even mentions the convenience of the witnesses, much less attests to facts demonstrating that transfer to Ramsey County would promote the convenience of the witnesses. 3M's failure to provide affidavit testimony addressing the convenience of the witnesses is fatal to its claim under § 542.11(4). *See Schultz v. Land O'Lakes Creameries, Inc.*, 238 Minn. 554, 555, 54 N.W.2d 781, 782 (1952).

In light of the close proximity of Hennepin and Ramsey Counties, transfer on the basis of convenience of the witnesses is nonsensical. The Hennepin County courthouse is less than ten miles from the Ramsey County courthouse. Any additional mileage, expense, and time expended by witnesses coming from Ramsey County would be minimal. In a case involving three times this distance at a time when travel was more onerous, this Court concluded that change of venue was unwarranted for the convenience of the witnesses. *Chellico v. Martire*, 227 Minn. 74, 34 N.W.2d 155 (1948) (moving the venue 30 miles closer to the majority of witnesses was insufficient to warrant transfer). Furthermore, the vast majority of parties in this action are domiciled outside of Minnesota. Hennepin County and Ramsey County are equally convenient for witnesses.

Moreover, the district court plainly utilized the wrong test when addressing Minn. Stat.§ 542.11(4). The district court stated: "for purposes of the convenience of witnesses Ramsey County is more convenient and in any event at least as convenient as Hennepin County under Minnesota Statutes section 542.11(4)." Justice does not compel even a discretionary transfer of venue when the two proposed forums are "in any event at least as convenient" as one another. *See Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 589 (Minn. Ct. App. 2003) (quoting *Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir. 1994) (abuse of discretion shown when district court's ruling based on erroneous view of law)).

B. Venue Is Proper In Hennepin County.

Minnesota's venue statute is clear: a plaintiff has the right to venue a lawsuit in any county in which any defendant resides. Minn. Stat. § 542.09. Under the statute, a corporation is considered to reside "in any county wherein it has an office, resident agent, or business place." *Id.*

On its website, 3M lists twelve geographic locations in Minnesota as its own "offices," including a sales office for its "Industrial and Transportation Business" located at 6455 City West Parkway in Eden Prairie which is in Hennepin County. (App. 66; 100.) In addition to its website, 3M advertises its presence at 6455 City West Parkway in Eden Prairie on a large white sign outside the building which reads, in part, "A 3M Company." A bold 3M insignia is prominently displayed on the sign. (App. 103.) Because 3M advertises to the world on its website and at the location itself that it has both an office and a place of business in Hennepin County, there can be no dispute that 3M resides there for purposes of applying Minn. Stat. § 542.09. This fact alone conclusively establishes that venue was proper in Hennepin County.

Even if 3M did not have an office in Hennepin County, venue nonetheless would be proper there because *other* named defendants also reside in Hennepin County. Allstate Insurance Company has a claim office at 3601 Minnesota Drive in Bloomington, Minnesota. (App. 34; 71-72.) Zurich North America has a claim department located at 3600 Minnesota Drive, in Edina, Minnesota. (App. 34; 73-74.) Twin City Fire Insurance Company has an underwriting office located in Eden Prairie, Minnesota, and AIG has a regional office located at 45 South 7th Street in Minneapolis, Minnesota. (App. 127-133.)

Minnesota law requires that only one defendant reside in the plaintiff's chosen forum. In this case, at least five defendants reside in Hennepin County. Venue is therefore appropriate in Hennepin County, and the district court's conclusion that transfer was warranted under Minn. Stat. § 542.11(4) should be reversed.

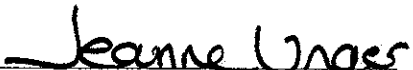
CONCLUSION

The district court's decision undermined the fair and efficient administration of justice by erroneously foisting this complex commercial dispute upon a court already burdened with 1,500 asbestos injury claims. Plaintiffs respectfully request that this Court correct this error and reinstate their proper choice of venue in Hennepin County.

Respectfully submitted,

Dated: September 6, 2007

BASSFORD REMELE

By: 

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