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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 ISSUES

1. **Where the Ramsey County District Court is uniquely positioned to handle the case efficiently and economically and all of the Minnesota parties are domiciled in Ramsey County, did the Hennepin County District Court abuse its discretion in deciding that transfer of venue to Ramsey County will promote the convenience of witnesses and the ends of justice?**

The Hennepin County District Court transferred venue to Ramsey County under Minn. Stat. § 542.11(4) because the transfer will promote the convenience of witnesses and the ends of justice. The Court of Appeals held the District Court acted well within its discretion and denied the petition for writ of mandamus.

**Apposite authorities:**

Minn. Stat. § 542.11(4) (2006)

*Thies v. Midland Co-op. Wholesale, Inc*, 254 Minn. 369, 95 N.W.2d 307 (1959)

*Thon v. Erickson,* 232 Minn. 323, 45 N.W.2d 560 (1950)

2. **Did the Hennepin County District Court abuse its discretion in transferring this particular case to Ramsey County when it found the case is within the terms and purposes of the Supreme Court's asbestos assignment order and that following the assignment order will promote the ends of justice?**

Based on the allegations in the Complaint, the District Court determined that this action is within the terms and purposes of the assignment order and that transfer to Ramsey County, where the designated asbestos judges serve, will promote the ends of justice. The Court of Appeals held the District Court acted within its discretion.

**Apposite authorities:**

Minn. Stat. § 542.11(4) (2006)

*In re Minnesota Personal Injury Asbestos Cases v. Keene Corp.*, 481 N.W.2d 24 (Minn. 1992)

## STATEMENT OF THE CASE

Appellants Continental Casualty Company and Continental Insurance Company (collectively "CNA") commenced this action in Hennepin County District Court, seeking a declaratory judgment with respect to insurance coverage for bodily injury claims against Respondent 3M Company ("3M") arising out of alleged exposure to asbestos-containing products, asbestos and other dusts, perfluoronated chemicals and benzene. RA 3-4, 15-16.[1] Only two of the 67 named parties are domiciled in Minnesota; both have their corporate headquarters in Ramsey County.

3M filed a timely Demand for Change of Venue to Ramsey County. A 12. CNA moved to quash the Demand. A 15. The District Court, the Honorable Robert A. Blaeser, denied CNA's motion, finding under Minn. Stat. § 542.11(4) (2006) that the convenience of witnesses and the ends of justice would be promoted by changing venue to Ramsey County where the two judges assigned by the Chief Justice to handle asbestos-related cases are located. RA 121-24.

Upon transfer of the case to Ramsey County, it was assigned to the Honorable John T. Finley, one of the two designated asbestos judges. RA 125. Respondent Transamerica Premier Insurance Company ("TIG") filed a notice to remove Judge Finley. RA 126. Judge Finley determined that the case is subject to the asbestos assignment order and therefore denied the removal. RA 129.

CNA petitioned the Court of Appeals for a writ of mandamus to compel the Hennepin County District Court to retain venue in Hennepin County. A 149. TIG

[1] References to "RA *" are to the Appendix to 3M's Brief, and references to "A *" are to the Appendix to CNA's Brief.

contemporaneously sought a writ of prohibition, challenging Judge Finley's denial of the removal notice. RA 160. CNA supported TIG's petition. RA 171. The Court of Appeals denied both petitions by separate orders dated May 15, 2007. RA 173, 178.

This Court granted CNA's petition for review of the Court of Appeals' denial of the mandamus petition challenging the venue transfer under § 542.11(4). A 167. Neither TIG nor CNA sought review by this Court of the denial of the writ of prohibition. Judge Finley's decision that this case is subject to the asbestos assignment order is therefore no longer in dispute.

## STATEMENT OF FACTS

### A. The underlying claims against 3M

CNA's Complaint disputes coverage and seeks trigger and allocation rulings for claims against 3M alleging injurious exposure to asbestos-containing products ("ACPs"), asbestos and other dusts resulting from the alleged use of 3M's respirator masks ("Masks"), perfluoronated chemicals and benzene. RA 3-4, 15-29.

More than 40,000 individuals have asserted ACP claims against 3M. RA 49. Mask claimants number in excess of 385,000. RA 48. Approximately 346,000 of the Mask claimants allege exposure to asbestos. RA 48. 3M's defense and settlement costs to date for the ACP claims and the Mask claims alleging asbestos exposure total approximately $537 million. RA 49.

Ten percent of the Mask claimants (*i.e.* 38,000 claimants) do not allege exposure to asbestos (although their claims involve the same 3M mask products). These Mask claims have cost 3M approximately $110 million. RA 48. Approximately 100 benzene claims have cost about $7 million. RA 49. Less than half a dozen suits relating to perfluoronated chemicals have generated costs of approximately $65 million, but almost all of these costs have been incurred in the defense of three putative class actions arising primarily out of alleged contamination at sites in Alabama and Minnesota. RA 49.

### B. Allegations in the CNA Complaint

CNA seeks declarations concerning the obligations of CNA and other insurers to provide insurance coverage for "Toxic Exposure Claims" against 3M. CNA names 3M and 64 insurers as defendants and, by reference to "John Does," names all other insurers

"that issued liability insurance policies to 3M potentially covering Toxic Exposure Claims." RA 5. The Complaint identifies two of the parties, 3M and St. Paul Surplus Lines Insurance Company, as having their principal offices in Minnesota. RA 4, 13.

The Complaint defines the Toxic Exposure Claims at issue as being "claims against 3M throughout the United States alleging bodily injury from exposure to toxic substances caused by products which 3M designed, manufactured, marketed and/or sold." RA 3-4. It categorizes the claims as those relating to: (1) Masks 3M allegedly designed, manufactured and sold from the early 1960s until 2001; (2) asbestos-containing products; and (3) products containing formulations of perfluoronated chemicals and benzene. RA 15-16.

Many of the Complaint's allegations relate specifically to the Mask claims. One of the counts alleges that the injuries allegedly associated with 3M's Mask products were not fortuitous and that coverage is barred by the "known loss doctrine." RA 18-20. Another count alleges that "3M expected and/or intended the injuries giving rise to the mask claims," and another that asbestos exclusions in the insurance policies preclude coverage for the Mask and ACP claims. RA 23-24.

CNA's most detailed count relates to "trigger and allocation." It includes factual allegations about how and when asbestos- and other dust-related injuries take place. CNA asserts that non-malignant conditions are dose-related, cumulative, and require ten or more years of exposure, while advances in medical science allegedly make it possible to pinpoint more precisely the onset of malignant conditions. CNA therefore advocates

different trigger analyses for ACP and Mask claims alleging malignancies and those that do not involve malignancies. RA 25-27.[2]

### C. The asbestos assignment orders

Since 1987, the Chief Justice has directed that all actions relating to personal injury that arise from the manufacture, distribution, use of or exposure to asbestos or asbestos-containing products are to be assigned to a specific judge. *In re Minnesota Asbestos Litigation,* C4-87-2406, December 14, 1987. RA 55. This assignment order, the terms of which all subsequent orders incorporate,[3] applies to "all such asbestos cases, wherever venued." RA 56.

The asbestos assignment was established due to the Court's determination that it was "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." RA 55. The operative language, which has remained the same for 20 years, provides that the designated asbestos judge(s) is assigned:

> . . . to hear and decide all matters, including all pretrial and trial proceedings, in all presently pending and future actions before Minnesota state district courts, whether relating to personal injury, death or property damage, that arise from or seek recovery for the

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[2] CNA recites in its Statement of the Case and Facts, as though it were fact as opposed to allegations, that for nearly three decades 3M defended, settled and paid the toxic exposure claims without giving insurers timely notice, opportunity to associate in the defense of the claims, or opportunity to evaluate settlements as required by the insurance policies. Br. at 2. These allegations are, however, just that – allegations in the Complaint that 3M will deny. *See* RA 17-18.

[3] *See* Orders dated October 27, 1988, February 15, 1989, November 10, 1993, November 16, 2001, and October 5, 2006. RA 57-62.

> manufacture, distribution, use or exposure to asbestos and asbestos-containing products. . .

RA 55.

The Chief Justice has periodically transferred the assignment to a different judge. The first asbestos judge (or consolidation judge) was Judge Jack A. Mitchell of the First Judicial District. RA 55. Judge Thomas H. Carey of the Hennepin County District Court followed Judge Mitchell in 1988. RA 57. Since 1994, the assignment has been to a succession of judges of the Ramsey County District Court: Judge J. Thomas Mott in 1994, Judge Michael T. De Courcy in 2001, and, as of January 2, 2007, jointly to Judge John T. Finley and Judge Dale B. Lindman. RA 59-62. This joint assignment did not add to the total judicial time devoted to the asbestos-related caseload. Rather, it reflects a division of a single complement between the two judges. RA 61-62.[4]

Despite the breadth of the assignment orders and of the managerial authority vested in the asbestos judge, Judge De Courcy concluded in 2004 that the practice of filing asbestos cases in other districts was compromising the consolidation judge's ability to effectively manage the asbestos docket. Judge De Courcy specifically noted difficulties with scheduling, case management, and access to important file documents and stated he was unable to determine basic information such as "the number of asbestos cases pending, the names of all defendants remaining in various cases, and the length of time the cases have been on a court docket in other counties." RA 98. By order dated

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[4] CNA contended in the Court of Appeals that the addition of a second asbestos judge was necessitated by a growing caseload. A 160. CNA's own submission to this Court indicates this is not true. A 146.

November 22, 2004, Judge De Courcy ordered parties to file new cases in Ramsey County and that previously filed cases be transferred to Ramsey County by later orders. RA 97-99. The asbestos judges have followed this procedure.[5]

### D. Proceedings before the Hennepin County District Court

In its motion to quash 3M's Demand for Change of Venue, CNA asserted that in a previous asbestos-related insurance coverage case, *St. Paul Fire and Marine Ins. Co. v. API, Inc.*, No. C9-02-8084 ("*API*"), Judge De Courcy had honored a removal notice despite his designation as the asbestos judge. A 27. In fact, Judge De Courcy had explicitly *rejected* the insurer's notice to remove, ruling that he could not be removed because the case was subject to the asbestos assignment order. RA 63. *See* MINN. R. CIV. P. 63.03.[6]

CNA also cited below the pendency of an asbestos insurance coverage case in Mower County, *United Fire & Casualty Ins. Co. v. Scheid Plumbing & Heating Co.*, No. 50-C9-05-1276 ("*Scheid Plumbing*"), for the proposition that the asbestos assignment order does not apply to coverage cases. A 27. After filing its motion, however, CNA advised the District Court by letter that the district court in Mower County had, in fact,

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[5] *See, e.g.*, the order issued on January 16, 2007, in *Crawford v. Burlington Northern & Santa Fe Railway Co.*, No. PI-03-002482, transferring venue from Hennepin County. RA 100.

[6] As it did before the lower courts, CNA again omits from its Appendix the order in which Judge De Courcy denied the insurer's notice to remove based on the asbestos assignment order. Four months after denying the removal, Judge De Courcy recused himself because of "possible interest pursuant to Rule 63.02," A 77, and the case was reassigned to Ramsey County District Court Judge John T. Finley (now one of the two designated asbestos judges) pursuant to Rule 113.03(c) of the General Rules of Practice for the District Courts. A 78.

already transferred *Scheid Plumbing* to Ramsey County in reliance on the asbestos assignment order. RA 41.

In opposing CNA's motion, 3M cited the broad scope of the asbestos assignment order and the allegations in CNA's own Complaint that demonstrate the commonality of issues in this case and the underlying asbestos tort claims. 3M also submitted evidence that for many years the Ramsey County District Court had handled the insurance coverage litigation related to 3M's silicone gel implant claims. *First State Ins. Co., et al. v. 3M Company, et al.,* Court File No. C3-00-1644 ("*First State*"). RA 34, 35-36, 52-53. The parties in *First State* included CNA and more than 100 of 3M's other insurers, all of which are named defendants or John Does in this action. RA 36. The trigger and allocation issues in *First State*, which are also a focal point in CNA's Complaint in this action, reached this Court and were resolved as to the silicone gel implant claims in *In re Silicone Implant Insurance Coverage Litigation*, 667 N.W.2d 405 (Minn. 2003) ("*In re Silicone*").

### E. The Hennepin County District Court's determination under Minn. Stat. § 542.11(4)

With findings and conclusions that focus on the allegations and circumstances of this particular case, the District Court[7] determined that "[t]ransfer of this case to Ramsey County is appropriate under Minnesota Statutes section 542.11(4)." RA 121-24.

The District Court found, as fact, that this action relates to insurance coverage with respect to claims alleging injury from exposure to certain substances allegedly

[7] Unless indicated otherwise, "District Court" refers to the Hennepin County District Court.

caused by 3M products, and that the majority of the claims at issue and of the costs 3M incurred in the underlying tort actions "relate to personal injury allegedly arising from the manufacture, distribution, use of or exposure to asbestos and asbestos-containing products." RA 121. It also found that all but two of the parties (3M and St. Paul Surplus Lines Insurance Company) are domiciled outside Minnesota. RA 122.

Among the District Court's conclusions were the following: (1) the assignment order "is not limited to cases that relate exclusively to asbestos"; (2) "[t]he Supreme Court's assignment orders *can include* insurance coverage lawsuits" (emphasis added); (3) the asbestos judge "directed in 2004 that venue of asbestos cases be transferred to Ramsey County" and determined in *API* "that the assignment order applied to that asbestos-related insurance coverage case"; (4) "[t]his case has numerous issues in common with those that arise in the underlying bodily injury cases that are assigned to the asbestos judges" (citing this Court's identification of some of those issues in *In re Minnesota Personal Injury Asbestos Cases v. Keene,* 481 N.W.2d 24 (Minn. 1992) ("*In re Asbestos Cases*")); (5) "[t]his case is within both the terms and purposes of the Supreme Court's assignment orders"; (6) "[t]ransfer of this case to Ramsey County, where the asbestos judges are located, will assist in achieving a consistent, efficient and economical system for the management of asbestos litigation including the proper allocation of limited court facilities and judicial personnel as contemplated by the Supreme Court's assignment orders"; (7) "[b]y following the Supreme Court's assignment orders, transfer of this case to Ramsey County will promote the ends of justice"; and (8) "[f]or 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)." RA 122-24.

### F. Rejection by the asbestos judge of the removal notice in reliance on the assignment order

Upon its transfer to Ramsey County, the case was assigned to one of the two asbestos judges, John T. Finley. RA 125. Defendant TIG filed a notice to remove, to which 3M objected. RA 126-27. Judge Finley denied the removal, stating:

> By Order of Chief Justice Russell A. Anderson, Judge Finley is to "hear and decide" "all" matters that relate to the "use or exposure to asbestos & asbestos-containing products." See Order of Oct. 5, 2006 attached hereto.

RA 129. The asbestos judge himself has therefore decided that this case is subject to the asbestos assignment order and that he may not be removed absent an affirmative showing of prejudice.

### G. Decisions by the Court of Appeals

Before the Court of Appeals, 3M opposed CNA's petition for writ of mandamus and also moved to strike CNA's reply brief on the grounds it was unauthorized and sought to introduce purported evidence that was not presented to the District Court. RA 130, 151. Specifically, 3M objected to CNA's references to inaccurate newspaper articles and to excerpts from SEC filings regarding perfluoronated chemicals, all of which were published after the District Court issued its order. 3M also pointed out that its recent SEC filing announcing an increase in reserves for future costs regarding perfluoronated chemicals related to environmental remediation costs that are not the

subject of this action. RA 155, 157-59. The Court of Appeals allowed the reply brief but granted 3M's motion to strike the material not in the record below. RA 173.[8]

CNA formally supported TIG's petition for a writ of prohibition to require Judge Finley to honor the notice to remove. RA 171. TIG and CNA acknowledged that this petition rested solely on whether this case is subject to the asbestos assignment order. RA 169, 171.

The Court of Appeals denied both petitions. RA 173, 178. With respect to mandamus, it reviewed the venue transfer under Minn. Stat. § 542.11(4) for abuse of discretion dependent on the facts of the particular case and held the decision by the District Court "was well within its discretion." RA 174-76. On the removal issue, the Court of Appeals stated that whether a case is subject to the asbestos assignment order "is an issue of administration that involves the discretion of the district court," RA 180, citing *In re Asbestos Cases,* 481 N.W.2d at 27, and determined Judge Finley had the authority to exercise and properly exercised his discretion in finding that this case is subject to the asbestos assignment order and that removal was prohibited by MINN. R. CIV. P. 63.03. RA 180-81.

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[8] Despite that order, CNA includes this material again in its brief to this Court, alleging not only that 3M "underrepresented to the district court" the extent of its "PFC exposure," but also that the District Court's findings were based on an incomplete record and therefore should be given no deference. Br. at 11. CNA's motion was necessarily decided, however, on the Complaint and the evidence submitted to the District Court in support of and in opposition to CNA's motion. Furthermore, the Form 8-K CNA cites was filed by 3M in the ordinary course, several weeks after the District Court issued its order, and it relates to reserves for future anticipated costs, not to costs already paid by 3M. The evidence before the District Court on all of the claims related only to costs already paid by 3M to date in the defense and settlement of the various types of claims. RA 33, 48-50. There was no evidence or "representation" about potential future costs.

## SUMMARY OF ARGUMENT

At its core, this case presents the question of which insurance policies are responsible to pay defense and settlement costs incurred in connection with 386,000 claims for injuries allegedly caused by asbestos. CNA alleges at length that the answer to this question will turn in large part on a determination of how and when the alleged injuries occur – just as it did for the silicone gel implant claims in the coverage litigation handled by the implant judge. The Complaint itself poses these and other factual issues common to the injury claims in the asbestos tort actions and demonstrates that this action relates to personal injury that arises from the manufacture, distribution, use of or exposure to asbestos or asbestos-containing products. This coverage action represents one of the phases of the asbestos litigation, all of which fall within the broad managerial and substantive authority of the asbestos judge.

The issue before this Court, however, is a narrow one. It is not, as CNA argues, whether as a matter of law the asbestos assignment order requires that this case be assigned to the asbestos judge. The District Court did not decide that the assignment order *required* the transfer or that the order applies to all asbestos-related insurance coverage actions. Here the issue is, rather, whether the District Court clearly abused its discretion in deciding, under Minn. Stat. § 542.11(4) and the singular circumstances of this case, including the terms and purpose of the assignment order, that changing venue to Ramsey County would promote the convenience of witnesses and the ends of justice. The Court of Appeals appropriately denied the extraordinary remedy of mandamus because the District Court acted well within its discretion.

## ARGUMENT

### I. Review of the District Court's decision is for clear abuse of discretion.

Venue may be transferred under Minn. Stat. § 542.11(4) "merely because it Promotes the convenience of witnesses and the ends of justice, and it is not necessary to show that the change is Required for these purposes." *Thon v. Erickson,* 232 Minn. 323, 325, 45 N.W.2d 560, 561 (1950) (emphasis in original). It is "well settled" that a district court's decision to transfer venue under these criteria "rests within the sound discretion of the trial court and its action will not be disturbed except for a clear abuse of discretion." *Thies v. Midland Co-op. Wholesale, Inc.,* 254 Minn. 369, 370, 95 N.W.2d 307, 309 (1959). Whether discretion has been abused depends on the particular facts of each case. *Thon,* 232 Minn. at 325, 45 N.W.2d at 561. In determining whether the district court acted within its discretion, this Court considers only the evidence that was presented to the district court. *Thies*, 254 Minn. at 370, 95 N.W.2d at 309.

The extraordinary remedy of mandamus "cannot control judicial discretion." Minn. Stat. § 586.01 (2006). Mandamus review of a matter within a district court's discretion requires the petitioner to establish that the district court's action "was so arbitrary and capricious as to constitute a clear abuse of discretion." *Baker v. Connolly Cartage Corp.*, 239 Minn. 72, 74, 57 N.W.2d 657, 658 (1953).

CNA advocates *de novo* review on the premise that the District Court's decision "presents a pure question of law" and was "based upon an interpretation of law." Br. at 6. It cites *State v. Robb*, 605 N.W.2d 96, 99 (Minn. 2000), in which this Court reviewed an order suppressing evidence in a criminal case on Fourth Amendment grounds. *Robb* and

the rule relied upon are inapposite. Here the District Court did not decide an issue of law or interpret the law. It applied the discretionary venue-transfer criteria established in Minn. Stat. § 542.11(4) to the circumstances presented by this case.

The District Court's order is replete with references to CNA's specific allegations, the specific parties and circumstances, commonality of factual issues, and case management criteria. The District Court considered the terms and purposes of the assignment order, orders previously issued by the asbestos judge and this Court's pronouncements regarding the broad managerial authority of the asbestos judge. But the District Court made no determination, as CNA suggests, that the assignment order applies to every asbestos-related insurance coverage case, let alone every "commercial dispute" that may involve asbestos in some way. It concluded that "[t]he Supreme Court's assignment orders *can include* insurance coverage lawsuits." RA 123 (emphasis added).

Nor did the District Court decide that the asbestos assignment order mandates this particular change of venue. Rather, citing numerous factors specific to this case that affect the convenience of witnesses and the ends of justice, it concluded that, "[b]y following the Supreme Court's assignment orders, transfer of this case to Ramsey County will promote the ends of justice," and it exercised its discretion by determining that "[t]ransfer of this case to Ramsey County is appropriate under Minnesota Statutes section 542.11(4)." RA 123-24. The question for this Court is whether that determination was a clear abuse of discretion. The Court of Appeals appropriately applied this standard of review.

The issue CNA argues – which it claims is an issue of law – is a different one. CNA's piecemeal path to this Court finds CNA arguing here the issue Judge Finley decided that CNA chose *not* to appeal to this Court. Because Rule 63.03 bars a removal notice "against a judge . . . who is assigned by the Chief Justice of the Minnesota Supreme Court," the removal notice filed by TIG and supported by CNA posed to Judge Finley the direct question whether he had been assigned to this case by the Chief Justice. He concluded that he had been so assigned and therefore denied the removal. RA 129.

In denying prohibition, the Court of Appeals noted this Court's description in *In re Asbestos Cases* of the asbestos judge's "considerable managerial authority over all phases of the litigation," 481 N.W.2d at 26, and held there was no showing that Judge Finley had abused his discretion in deciding this case had been assigned to the asbestos judge by the Chief Justice. RA 180-81. In making that decision, Judge Finley exercised the very managerial authority given him by the assignment order.

By choosing not to seek further review of Judge Finley's ruling that this case is subject to the assignment order, CNA accepts it as the law of the case. *See Minnesota Vikings Football Club, Inc. v. Metro. Council*, 289 N.W.2d 426, 431 (Minn. 1979) (district court decision became law of the case because it was not appealed). CNA may not dispute that ruling in this Court under the guise of arguing the change of venue. By attempting to do so, CNA in effect asks this Court to reverse the decision – made by the very judge it assigned to manage all phases of the asbestos litigation – that it chose not to appeal.

## II. The District Court acted within its discretion in deciding that, with the particular allegations and circumstances presented, a venue transfer will promote the convenience of witnesses and the ends of justice.

Even if an action is filed in a venue that is appropriate under Minn. Stat. § 542.09 (2006), the district court is authorized by Minn. Stat. § 542.11(4) to change the venue "when the convenience of witnesses and the ends of justice would be promoted by the change." The District Court examined both factors and decided on a substantial record, and within its discretion, that convenience of witnesses and the ends of justice would be promoted by transfer to Ramsey County.

### A. The transfer promotes the convenience of witnesses.

CNA cites no apposite authority for its assertion that affidavit evidence is required in order for a court to make a convenience determination. In *Schultz v. Land O'Lakes Creameries, Inc.*, 238 Minn. 554, 54 N.W.2d 781 (1952), the only case CNA cites, this Court denied mandamus where the district court had exercised its discretion in declining to order a change of venue. This Court stated the affidavit Land O'Lakes submitted was "mere hearsay" and thus insufficient to support a venue change. *Id.* at 555, 782. But it did not hold that affidavit evidence is required or that the plaintiff's own complaint cannot be sufficient to support a decision that a change of venue will promote the convenience of witnesses.[9]

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[9] *See also In re LaSalle Bank/Twin Cities Avanti Stores Liquidation*, 654 N.W.2d 103 (Minn. 2002) ("*LaSalle Bank*"), where this Court appointed a single judge to preside over 17 actions pending in six districts. The Court concluded that convenience of witnesses and the ends of justice would be served by having all of the cases venued in the same court, citing Minn. Stat. § 542.11(4). The proceedings before this Court included no affidavit that addressed the convenience of witnesses.

Here, the Complaint itself supports the District Court's exercise of its discretion. CNA alleges that two of the 67 named parties have their principal place of business in Minnesota. RA 4-15. They are 3M and St. Paul Surplus Lines Insurance Company, both of which have their corporate headquarters in Ramsey County. No party – plaintiff or defendant – is alleged to be domiciled in Hennepin County.

In addition, 3M submitted four affidavits that included information about the *First State* silicone implant insurance coverage litigation in Ramsey County District Court. RA 33, 35, 48, 52. These affidavits support the convenience determination, because they establish that the same insurers litigated 3M's insurance coverage in Ramsey County for more than ten years, in a case that included a four-month jury trial. Convenience of witnesses was never an issue in that case, and CNA does not allege inconvenience in this case.

Proceeding with this case in Ramsey County will be more efficient, less costly and more convenient for the parties and all witnesses, particularly in light of the asbestos judge's familiarity with the issues. The District Court's conclusion that Ramsey County "is more convenient and in any event at least as convenient as Hennepin County" has ample record support and is unassailable.

*Chellico v. Martire*, 227 Minn. 74, 34 N.W.2d 155 (1948) does not hold, as CNA implies, that venue may not be changed when the transferee court would be only 10, 20 or 30 miles closer for most of the witnesses. The district court in *Chellico* had denied a requested transfer. This Court denied mandamus after reviewing the specific circumstances relating to both convenience of witnesses and ends of justice for abuse of

discretion. As to convenience, this Court simply found that "[t]his aspect of the case discloses no abuse of discretion on the part of the trial court." *Id.* at 76, 156.

CNA does not even argue that Hennepin County is more convenient for witnesses. It contends only that Hennepin County and Ramsey County are "equally convenient." Br. at 21. As was the case in *In re Asbestos Cases*, 481 N.W.2d at 27, the petitioner here makes no showing of prejudice resulting from the transfer to Ramsey County. Its argument that 3M and four insurers have a business place in Hennepin County misses the point.[10] CNA does not suggest that these offices or any other factors make Hennepin County a more convenient venue for any witness. Instead, CNA argues that Hennepin County was a proper venue choice for it to make because of the alleged residency of certain defendants there. That is not the issue before this Court. The issue is whether, despite the plaintiffs' choice of venue, which may or may not have been proper under § 542.09 in the first instance, the District Court acted within its discretion in changing venue pursuant to § 542.11(4).

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[10] Moreover, CNA is wrong on the facts. The Eden Prairie facility is that of a separate subsidiary corporation, acquired by 3M in 2004, that does not manufacture, distribute or sell any of the products that are the subject of the underlying lawsuits by claimants. RA 51. The allegation that four insurers have offices in Hennepin County is of no consequence, for several reasons. Allstate and the Zurich companies that insured 3M have already entered into settlement agreements in *First State* that include the asbestos and other claims at issue in this lawsuit and are therefore candidates for immediate dismissal. RA 50. "Zurich North America" is not a named defendant and is not one of 3M's insurers. RA 50. And none of these insurers is actually adverse to CNA and thus a defendant in the true sense. As was the case in *First State*, the insurers will promptly align themselves with each other against 3M in their collective efforts to avoid or minimize the coverage provided by their policies. *See In re Silicone*, 667 N.W.2d at 410.

### B. The transfer promotes the ends of justice.

Whether a venue change serves the "ends of justice" depends largely on matters affecting judicial efficiency, economy and consistency. *LaSalle Bank,* 654 N.W.2d at 103; *Thies,* 254 Minn. at 311, 95 N.W.2d at 372. In *LaSalle Bank,* for example, this Court relied on the fact that the cases presented common questions of law and fact and that the interests of the parties and the judiciary would be furthered by a uniform and coordinated system of litigation management to conserve resources, eliminate duplicative discovery and prevent inconsistent rulings. *Id.*

Likewise here, the commonality of issues and the other considerations underlying the asbestos assignment order demonstrate the ends of justice are promoted by changing venue to Ramsey County. CNA correctly asserts this case is complex and will place significant demands on the courts. But venue in Ramsey County promotes the ends of justice for this very reason. Because the asbestos judges are already handling the types of cases for which insurance coverage is disputed, Ramsey County provides greater, not less efficiency, economy and consistency. CNA argues that *no* efficiency or economy will be achieved and, in effect, that it would be *more* efficient and economical to have this case handled by a judge *without* asbestos-case experience or authority. That cannot be true. The District Court's determination that a venue change will promote the ends of justice is not only within its broad discretion, but absolutely correct.

## III. The District Court properly relied on the asbestos assignment order when it determined in its discretion that transfer to the district in which the asbestos judges sit will promote the ends of justice.

While the District Court did not conclude that the asbestos assignment order compelled the change of venue, its determination regarding promotion of the ends of justice included a careful assessment of the assignment order. That its discretion with respect to the ends of justice was properly exercised in that regard is further demonstrated by a more detailed discussion of that order and of the District Court's conclusions about the order.

### A. This case relates to injuries that arise from the manufacture, distribution, use of or exposure to asbestos.

This Court ordered in 1987 that "all asbestos related claims brought in the Minnesota State Courts" be assigned to a single judge. *In re Asbestos Cases,* 481 N.W.2d at 25-26. The original order cited the necessity, "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." *Id.* at 26; RA 55 (emphasis added).

If, as CNA contends, the order applied only to tort claims and to the tort-action phase of the litigation, it would be limited to actions that "seek recovery for" asbestos-related injuries. Instead, this Court used more expansive language, to include "all" actions "relating to" personal injury that "*arise from or* seek recovery for the manufacture, distribution, use or exposure to asbestos and asbestos-containing products." (Emphasis added.) CNA's suit disputing coverage and seeking trigger and allocation

determinations for asbestos personal injury claims is an action relating to injury that arises from the manufacture, distribution, use of or exposure to asbestos.

The breadth of the assignment language is commensurate with what this Court has described as the "broad managerial and substantive authority" the asbestos judge exercises over asbestos-related cases. *In re Asbestos Cases*, 481 N.W.2d at 27. The District Court properly considered the allegations of the Complaint and the other record evidence, as well as the asbestos judge's 2004 venue directive, in deciding to transfer this case to Ramsey County. It had no authority to assign this case to a specific judge in a different judicial district, but it utilized the venue transfer as the appropriate procedural mechanism to assist in implementing both the assignment order and the asbestos judge's 2004 order requiring transfer of new cases to Ramsey County, which itself comprised an exercise by the asbestos judge of his "broad managerial and substantive authority."

The transfer also enabled the current asbestos judge to exercise that authority, which is precisely what Judge Finley did when he denied the notice to remove. With full knowledge of the nature of the asbestos litigation and of this coverage litigation as well as the state of the asbestos docket, Judge Finley determined the case falls within the broad scope of the assignment order. The Court of Appeals properly denied mandamus and prohibition because the District Court and the asbestos judge had both honored the purpose of the assignment order and, in doing so, had properly exercised their discretion.

### B. The assignment order may apply to an insurance coverage action that comprises a phase of the asbestos litigation.

This is not the first time the asbestos judge has been called upon to handle an asbestos-related insurance coverage action. In *Independent Sch. Dist. No. 197 v.*

*Accident & Cas. Ins. of Winterthur*, 525 N.W.2d 600 (Minn. Ct. App. 1995), Hennepin County District Judge Thomas H. Carey, then the asbestos judge, presided over a garnishment action against insurers of a manufacturer of asbestos-containing products that was venued in Dakota County. In 2002, Judge De Courcy refused to honor a notice to remove in the *API* coverage case, in reliance on the Chief Justice's assignment order. RA 63. Earlier this year, Mower County District Judge Wellman transferred the *Scheid Plumbing* asbestos-related insurance coverage case to Ramsey County Judge because of the assignment order. RA 41.

Here the District Court did not decide, however, that every asbestos-related coverage case is subject to the assignment order, or that the order mandates transfer of this case, or, as CNA argues, that the order "mandates consolidation of *any* case 'related,' however tangentially, to asbestos." Br. at 5 (emphasis in original). Rather, the District Court concluded that "[t]he Supreme Court's assignment orders *can include* insurance coverage lawsuits." RA 123 (emphasis added). It then determined, on the basis of the allegations in CNA's Complaint and the specific circumstances presented here, that this particular case is "within both the terms and the purposes" of the assignment order and that "[b]y following the Supreme Court's assignment orders, transfer of this case to Ramsey County will promote the ends of justice." RA 123-24.

That the assignment order can encompass a coverage case is further supported by this Court's intent, stated in the 1987 order, that a "system be fashioned to manage all phases of this litigation." RA 55. CNA declines to mention this aspect of the order and

appears determined not to acknowledge the extent to which insurance coverage litigation can be, and in this instance is, a phase of the asbestos litigation.

Liability insurance has long been an important aspect of the asbestos litigation phenomenon. As asbestos-related diseases spawned massive tort litigation, so has the tort litigation generated asbestos coverage litigation, beginning more than 25 years ago with the seminal decisions on trigger and allocation in *Forty-Eight Insulations* and *Keene*.[11] The well-known Wellington Agreement between asbestos defendants and insurers established the Asbestos Claims Facility in 1985.[12] Courts and commentators have described the importance of insurance funding to the compensation of asbestos victims, whether the insured remains a viable company or is among the many driven by asbestos claims into bankruptcy, where insurance may be the principal source of compensation.[13] A legislative solution, such as the FAIR Act long debated in Congress, depends in large part on obtaining sufficient funding commitments from two principal sources: the asbestos defendants and the insurance industry.[14]

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[11] *Ins. Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981).

[12] *See N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194 (3rd Cir. 1995) (describing history and terms of the Wellington Agreement).

[13] *See, e.g., In re Johns-Manville Corp. v. The Asbestos Litigation Group*, 40 B.R. 219, 229-30 (Bankr. S.D.N.Y. 1984) (noting that insurance "may be the most important single asset of [the] estate"); Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 416-40 (2006) (discussing asbestos bankruptcies and insurance).

[14] *See* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 580-92 (2007) ("Hanlon").

When insurers choose to dispute their asbestos coverage obligations in court, they do indeed impose additional burdens on the judicial system, but their lawsuits comprise a phase of the asbestos litigation. It is a phase that has existed since before this Court issued the initial assignment order. CNA offers nothing to indicate that the initial order and subsequent orders, with their broad delegation to the asbestos judges, cannot apply to this important phase of the asbestos litigation.

### C. The assignment order is not limited to actions that deal exclusively with asbestos.

As noted by the District Court, the assignment order "is not limited to cases that relate exclusively to asbestos." RA 122. No district or appellate court decision states or implies that an action must relate exclusively to asbestos to be subject to the assignment order. Common sense dictates otherwise.

It is common knowledge, for instance, that asbestos plaintiffs often allege many years of exposure to various injurious substances while working for different employers and at different sites. It would defeat the purpose of the assignment order if the asbestos judges were to handle some but not all asbestos cases, or send a plaintiff to one court for the claim alleging exposure to asbestos and to another for the claim alleging exposure to silica or coal dust.

This is evident in the current Ramsey County asbestos docket. *Behrend v. The Burlington Northern Santa Fe Railway Company*, for example, is an action by the next of kin of a railroad employee diagnosed with occupational lung cancer. RA 81. The Complaint alleges the cancer resulted from exposure to "toxic substances and dusts including dust from asbestos-containing products and materials, silicates and silica-

containing products, diesel fumes, diesel exhaust, welding fumes, cleaning solvents, and others." RA 82. Likewise, in *Flatten v. Soo Line Railroad Company* the plaintiff alleges injury based on alleged exposure to "toxic substances . . . including but not limited to asbestos fibers and/or dust, and/or silica dust and/or coal dust." RA 89, 91.

CNA's characterization of this case as being only "tangentially related" to asbestos ignores the obvious and borders on the absurd. The Complaint itself and 3M's uncontested evidence show this action is primarily about coverage for claims alleging exposure to asbestos.

### D. CNA's Complaint presents issues of fact common to the underlying tort actions and thereby implicates the important purposes of the asbestos assignment order.

The District Court correctly considered some of the common fact issues in the underlying cases that this Court previously identified in *In re Asbestos Cases*. RA 123. As this Court stated, they include issues relating to:

> . . . the connection between exposure to asbestos and disease; the varieties of diseases that occur subsequent to asbestos exposure; the amount of asbestos exposure that provokes disease; the manufacturer's knowledge regarding the dangers of asbestos exposure; and the admissibility of evidence relating to the authenticity of materials that may indicate manufacturer knowledge.

481 N.W.2d at 26. While this commonality exists in the underlying personal injury asbestos cases, it can also exist in asbestos insurance coverage litigation. The District Court explicitly found such commonality in this case:

> These issues are among those raised in the Complaint in this action and relate to trigger and allocation. This case has numerous issues in common with those that arise in the underlying bodily injury cases that are assigned to the asbestos judges.

RA 123. The common issues relate primarily to (1) 3M's allegedly tortious conduct as asserted in the tort actions and by CNA, and (2) the nature and effects of diseases caused by asbestos as they affect both tort claims and the trigger and allocation of insurance coverage.

With respect to tortious conduct, CNA alleges at length in its First Cause of Action that the claimants' injuries were not fortuitous, and are therefore not covered by the policies, because 3M consciously marketed its masks to end users it knew would have asbestos exposures, did not attempt to design the masks to prevent injury from such exposures, and did not sufficiently warn potential users of risks and likely injuries. RA 18-20. Its Fifth Cause of Action repeats these allegations and asserts that 3M has no insurance coverage because "3M expected and/or intended the injuries giving rise to the Mask claims." RA 23. The allegations are repeated again in the Seventh Cause of Action, which asserts that coverage is excluded because the exposure to asbestos suffered by the claimants was not sudden, accidental, unexpected or unintended. RA 23-24.

These allegations about 3M's conduct essentially incorporate those that, as noted by this Court in *In re Asbestos Cases*, are typically made by plaintiffs in the underlying cases when they accuse the asbestos defendants of tortious conduct. CNA argues that in a tort action, "all that has to be established is that injury resulted because of a defendant's tortious conduct." Br. at 10. It is precisely that alleged conduct that is the basis for several counts in CNA's own Complaint. CNA seizes on the allegations and evidence in the underlying cases and essentially allies itself with the tort plaintiffs in the course of

attempting to avoid coverage for the very claims against which it agreed to indemnify 3M.

Additional commonality is found in CNA's Eighth Cause of Action, which relates to "trigger and allocation." There CNA makes extensive factual and medical allegations about how and when asbestos-related injuries take place. CNA includes allegations that asbestos-related injuries are dose-related, that "intense exposure of short duration, or a less intense exposure of several months or years, is likely insufficient to result in injury," and that it is possible to determine the year in which an asbestos-related cancer developed. CNA even makes one set of medical allegations for "non-malignant conditions" and another for "malignant conditions." RA 25-27. These allegations directly implicate the very issues this Court identified in *In re Asbestos Cases* as being among the common issues in the personal injury suits.[15]

Coupled with its allegations about 3M's tortious conduct, CNA's trigger and allocation arguments are the driving force of this action. In coverage litigation involving numerous insurers and latent injuries that progress over many years, trigger and allocation arguments are what create the wide potential swings in the overall amount of insurance reimbursement obtained by the policyholder and in the relative liabilities of the various insurers. CNA hopes to establish either that the alleged injuries did not occur

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[15] In other jurisdictions as well, asbestos coverage cases typically include trigger and allocation issues that are closely linked to the underlying personal injury claims. *See, e.g., Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 155-61 (Ill. 1987) (reviewing medical evidence on cause and progression of asbestos-related diseases in determining whether an occurrence policy has been triggered by an underlying claim); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1197-1200 (2nd Cir. 1995) (discussing detailed medical evidence that defines and shapes the insurance issues of trigger and allocation).

during CNA's policy periods and therefore did not trigger CNA's policies, or that they triggered the policies of multiple insurers and must be allocated among many insurers that insured 3M over a period of many years.

CNA contends its other coverage issues will proceed first and that the "subsequent" issues of trigger and allocation may never be reached. Br. at 9-10. This assertion is refuted by the very fact that CNA joined dozens of other insurers as parties. The case has so many parties only because CNA named other insurers "for the purpose of binding those Defendant Insurers to the relief sought herein." RA 5. No other insurer needs to be a party in order for CNA merely to establish its own obligations to 3M. Trigger and allocation issues are the ones driving CNA's litigation strategy.

Further evidence of the nature and importance of CNA's trigger and allocation arguments is found in the previous case brought by 3M's insurers to contest coverage for 3M's silicone gel implant claims. The district court (the designated state-wide implant judge) and ultimately this Court were called upon to decide trigger and allocation issues by making determinations about the diseases and disease processes allegedly associated with silicone gel implants. The district court held a week-long trial (the first, as opposed to the last of several trial phases) on medical causation and the disease theories alleged by plaintiffs in the underlying cases. RA 53. As this Court noted, the district court relied upon medical expert testimony and considered "competing theories" including the disease hypothesis "espoused by the underlying tort plaintiffs," and its findings of fact on these matters were reviewed for abuse of discretion. *In re Silicone,* 667 N.W.2d at 413-22.

The District Court cited *In re Silicone* and *Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994) when it concluded:

> Other cases suggest it is relatively common in insurance coverage actions, especially those dealing with trigger and allocation issues, that the coverage issues overlap substantially with those in the underlying cases insofar as they relate to the bodily injury or property damage that allegedly results from exposure to injurious substances, the manner in which and therefore the time at which bodily injury or property damage occurs, and the insured's knowledge and conduct with respect to the risks allegedly associated with its products or activities.

RA 123. The District Court appropriately rejected CNA's argument that issues relating to the timing of injury do not overlap with issues in the underlying cases. As is evident from this Court's discussion of trigger issues in *In re Silicone*, the disease process by which injury allegedly occurs – a central issue in the tort cases – very much affects the timing of injury for insurance coverage purposes.

The judge presiding over this case will have to adjudicate the import of facts and allegations in the underlying cases, including how and when the inhalation of asbestos fibers causes injury, the correlation between asbestos exposure and disease, and disease progression. These are issues common to the personal injury claims that this Court has directed be submitted to a designated judge. Having the asbestos judge handle this case will therefore enable determination of these issues in a manner that promotes consistency and efficiency in the judicial system.

### E. The silicone gel implant litigation exemplifies the efficiencies achieved when the assigned judge manages the coverage litigation.

Ramsey County District Court Judge Gordon W. Shumaker, the first implant judge, was appointed "to hear and decide all matters, including pretrial and trial

proceedings, in any pending or future actions arising from so-called 'silicone implant' procedures – the manufacture, distribution or use of the products." *In re Minnesota Silicone Implant Litigation*, 503 N.W.2d 472 (Minn. 1993). When the coverage action brought by insurers was filed in 1994, it was assigned to Judge Shumaker, who presided until his appointment to the Court of Appeals at the beginning of 1998. At that point the bodily injury cases and the insurance coverage case were transferred to Ramsey County District Court Judge M. Michael Monahan. RA 36.

As with the asbestos cases, the number of implant cases against 3M that were filed in Minnesota was small compared to the national case volume and the filings in certain other states, because Minnesota is not a forum favored by mass tort plaintiffs. The overlap between the tort phase and the coverage phase of the implant litigation was nevertheless substantial, just as it is here with asbestos. The implant assignment order enabled the designated judges to develop and apply the expertise to handle all phases of the implant litigation, thereby promoting consistency, efficiency and economy in the administration of justice for the parties and the courts. The District Court correctly recognized the same benefits will accrue here by transferring this case to Ramsey County.

### F. Management of the asbestos docket and of the burdens imposed by it has been assigned to the asbestos judge.

The judges in the best position to evaluate and manage the burden of the asbestos docket – and who have the responsibility of doing so – are the asbestos judges themselves. This Court's decision in *In re Asbestos Cases* reflects the scope of the authority delegated to the asbestos judges. Indeed, the Court's decision to accept

interlocutory review in that case "was prompted by our desire to clarify the broad managerial and substantive authority" of the asbestos judge. 481 N.W.2d at 27.

Judge Finley is familiar with asbestos insurance coverage issues by having presided in the *API* coverage case. When TIG sought removal, Judge Finley was therefore perfectly positioned to evaluate not only the commonality of issues and application of the asbestos assignment order, but the extent of any burden arguably placed on the asbestos judges by having this case assigned to one of them. Furthermore, in presiding over this case, he will have at his disposal not only all of the case management devices available to the district courts generally, but the even broader managerial authority conferred by the assignment order. CNA chose not to present to this Court a challenge to Judge Finley's determination that this case is subject to the assignment order. CNA therefore gave up any argument regarding the impact of this case on other pending asbestos cases or the asbestos docket generally.

Even if this Court considers the alleged burden this case may place on the asbestos case load, CNA's argument fails. The asbestos judge's broad authority includes the utilization of judges in other districts. In his 2004 order, Judge De Courcy acknowledged that, despite the venue changes he was directing in order to promote greater efficiency and enhance case management, and as stated in this Court's assignment order of November 16, 2001, the judges in other districts continue to be available to try cases designated for trial by the asbestos judge. RA 98-99. When this Court subsequently transferred the assignment to Judges Finley and Lindman, it reiterated the availability of the designated judges in other districts should the asbestos judges choose to utilize them,

stating that the asbestos judge "*may determine* that trial of some or all of the asbestos cases should take place before a judge of the district in which the cases are venued." RA 61 (emphasis added).

At the same time, however, the asbestos judge must implement the directive by this Court in the same order, that "[t]o maintain the efficiencies intended by this order and its predecessors, Judges Finley and Lindman shall implement procedures (1) to facilitate submission of issues common to all cases covered by this order to a single judge. . . ." RA 62. The asbestos judges are therefore directed to facilitate submission of all common issues to a single judge, but are otherwise permitted in their discretion to utilize the judges in other districts for trial.[16]

CNA's collection of news articles, orders and decisions from Texas, New York, Illinois and the federal asbestos MDL shed no light on the docket management criteria or the process for assigning insurance cases even in those jurisdictions, let alone Minnesota. 3M respectfully submits that this Court is not likely to be guided in its review of the District Court's venue transfer, in the application of its own orders or in the administration of Minnesota's asbestos litigation by such anecdotal information from other states – particularly the three states cited by CNA, which are among the most

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[16] CNA references the "enormity" of this case, noting among other things that 3M "recently disclosed" the names of 167 insurers. Br. at 2, n.2. 3M provided that list to CNA without waiting for any interrogatory or other discovery on the topic. Most of the insurers 3M listed had been parties in the *First State* implant coverage case. RA 49-50. Even though CNA was a party in *First State* through 2005, it did not include several dozen of the other *First State* parties as defendants when drafting its Complaint. CNA also has been advised that several insurers are candidates for immediate dismissal because they settled with 3M in *First State* on terms that include all of the products liability claims that are the subject of this action. RA 50, 105.

heavily burdened with asbestos litigation. The most recent RAND study indicates that Texas alone had 44% of the country's new asbestos-case filings during the mid-1990s, and that in the most recent period studied, Texas and New York accounted for 31% of new claims filed. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 61-63 (RAND Institute for Civil Justice 2005). Because Minnesota did not have even as much as two percent of the new filings in any of the study periods, it did not even make the RAND list. *Id.*

The RAND study also notes that varying judicial management schedules and practices are among the factors affecting plaintiffs' forum selections, and that as certain states amend statutes or modify practices in ways that make them less attractive to plaintiffs as a forum of choice, the plaintiffs' bar looks for other jurisdictions. *Id.* at 59-63. *See also* Hanlon, *supra* note 14, at 597-600. By addressing the asbestos situation in 1987, however, this Court was ahead of the national judicial management curve. Minnesota has not fallen victim to the litigation crisis described years later in the Judicial Conference report cited by CNA. Br. at 14. Minnesota has never been one of the "jurisdictions du jour," Hanlon, *supra* note 14, at 593, and CNA does not suggest it is about to become one.

In any event, this case is not before this Court on the broad question of how best to manage the asbestos litigation in any of its phases. The question is whether the District Court, having taken the assignment order into consideration, clearly abused its discretion in changing venue under Minn. Stat. § 542.11(4). The answer to that question is a resounding "no."

Tacitly recognizing the heavy burden imposed on it by such a deferential standard of review, CNA argues that if the District Court acted properly, this Court should change the assignment order. Br. at 18-19. While the Court of course has the prerogative to change the litigation management process it established in 1987 or modify the existing order, to do so as a means of resolving this matter would not accord with the proper scope of review or decide the issue that is before the Court.

## CONCLUSION

The extraordinary writ of mandamus does not lie where a district court acts within its discretion. The Court need look no further than the allegations in the Complaint to conclude that the District Court properly exercised its discretion in determining that transfer to Ramsey County promotes the convenience of witnesses and the ends of justice. Its conclusion that this case is within the terms and purposes of the assignment order is sound. The District Court properly fulfilled its role in assisting this Court and the asbestos judges in achieving the intended efficiency, consistency and judicial economy. Mandamus should be denied.

Dated: October 9, 2007

Respectfully submitted,

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## CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing memorandum of law in Times New Roman, a proportional 13-point font, on 8½ by 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The resulting principal brief contains 9,853 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

Dated: October 9, 2007

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