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DISTRICT OF DELAWARE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-1139 (JJF)
	.	Chapter 11
W.R. GRACE, et al.,	.	
	.	Bankruptcy Courtroom No. 2
	.	824 Market Street
Debtors.	.	Wilmington, Delaware 19801
	.	
	.	
	.	March 18, 2002
. . . . .	.	1:07 P.M.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE HONORABLE JUDITH H. WIZMUR
UNITED STATES BANKRUPTCY JUDGE

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THE COURT: Good afternoon. Please be seated. This is the matter of W.R. Grace, Bankruptcy Number 01-1139. There is a long agenda this afternoon. Those of the parties are aware with respect to the uncontested matters that were on the agenda, Items 5 through 8, those orders have been entered as reflected.

Mr. Bernick?

MR. BERNICK: Yes, Your Honor?

THE COURT: Go ahead.

MR. BERNICK: I think actually the first matter is a status conference on an issue that I cannot speak to, Mr. Carickhoff will.

THE COURT: All right. Mr. Carickhoff.

MR. CARICKHOFF: Good morning, Your Honor. David Carickhoff of Pachulski Stang Ziehl Young and Jones on behalf of the debtors.

As Your Honor may recall, we had a telephonic TRO hearing with respect to a request by the debtors to stay certain tobacco litigation pending in the Mississippi State Court. Your Honor, we have prepared a draft of a motion to stay that action in the Mississippi Court, have circulated a draft of that motion to the counsel for the tobacco defendants and are essentially waiting for their response to see whether or not they will oppose such motion.

Once we have a response from them, hopefully it will

be an indication that they will not oppose it. We'd like to incorporate that in the pleading itself that is to be filed with the Court.

THE COURT: All right.

MR. CARICKHOFF: The deposition that we were trying to stay by our TRO motion is currently set forth to go forward on March 22nd. Obviously the debtors would like to have the tobacco defendants agree to continue that out until such time as a Mississippi State Court can rule on the motion that we will be filing there. And we have not heard back from tobacco counsel in that regard. And I believe that is Kurt Weaver is on the phone on behalf of R.J. Reynolds.

THE COURT: All right. Mr. Weaver?

MR. WEAVER: Yes, Your Honor. Kurt Weaver, along with Bonnie Fatell, who I believe is in the courtroom for R.J. Reynolds.

MS. FATELL: Actually I'm on the phone.

MR. WEAVER: Okay. Your Honor, we received a copy of the draft pleading in the Mississippi Court Friday at about 4:30. I have not personally had a chance to talk to my client about it or confer with our industry on whether or not the approach that Grace is suggesting now is acceptable. I don't believe that it should take very long for us to do that and we would be more than willing to, again, extend the time for the deposition in an effort to resolve this.

I would ask sort of a reciprocal promise from Grace, however. Our answer date or response date for the complaint for injunctive relief, I believe, is either the 22nd or 25th. If we could just simply move that to April 19th, that, I think, would take the pressure off everyone.

THE COURT: Mr. Carickhoff?

MR. CARICKHOFF: We'd be willing to accommodate them and extend the answer date, provided that they're willing to extend the time after the deposition.

THE COURT: Sounds like you have a deal, gentlemen. I -- April 19th is the date for both the deposition and the answer?

MR. WEAVER: That's fine from our perspective, Your Honor.

THE COURT: Mr. Carickhoff?

MR. CARICKHOFF: That's fine from the debtors' perspective, Your Honor.

THE COURT: All right. Do you need an order to this effect from me or --

MR. CARICKHOFF: No, I believe it's a State Court matter at this point, Your Honor.

THE COURT: Okay. So, what do you -- what about the hearing -- I'm sorry. The deposition -- no, that's the deposition. I don't know what you need -- more you need from me.

MR. CARICKHOFF: Well, to the extent that things don't work out in State Court, Your Honor, we would look to proceed with our preliminary injunction papers with this Court.

So, at this point, all we'd be doing is continuing this to another hearing date until such time as we have a better understanding of what is going to happen in the State Court.

THE COURT: Well, I don't think you want a hearing much before my May calendar, do you? If the answer's not due until April 19th, and you're going to need to present a motion to the State Court Judge.

MR. CARICKHOFF: Sure. The May hearing -- the May omnibus should be --

THE COURT: Mr. Weaver, is that all right with you? To continue this status conference on the adversary until May 20th at ten A.M.

MR. WEAVER: That's fine, Your Honor. And I just assume, for purposes of our response date, that the transcript would be as ordered. So, we won't need a separate order extending our response date.

THE COURT: I think -- Mr. Carickhoff has been presenting me with orders that memorialize all the rulings I've been making on the record anyway, so it can be either way.

MR. WEAVER: Okay.

THE COURT: Mr. Carickhoff?

MR. CARICKHOFF: It's up to Your Honor. If Your Honor would prefer a scheduling order, I'd be happy to submit one to the Court within --

THE COURT: Well, I would. Only because there are so many of these cases and I sometimes tend to get jumbled with the date. So, I would actually rather have one just so I don't forget what I'm waiting for or when. But -- so, if you're willing to present one, Mr. Carickhoff, I'd prefer that.

MR. CARICKHOFF: Certainly. And I'd circulate it to Mr. Weaver and his colleagues, as well, and have them sign off on it before submitting it to Your Honor.

THE COURT: Okay. So, I'll get that order in within a week, Mr. Weaver, and essentially it will say that your time to answer is extended until April 19 and the pretrial is extended until May 20 at ten o'clock.

MR. WEAVER: That's fine. And just so -- well, that's fine, Your Honor.

THE COURT: Do you need something else?

MR. WEAVER: No, Your Honor.

THE COURT: Okay. Anything more on the preliminary injunction issue then?

MR. CARICKHOFF: No, Your Honor.

THE COURT: All right. If you wish to stay on the phone, those of you who are involved in the adversary, you may. If you wish to hang-up, you may also do that.

MS. FATELL: Your Honor, this is Bonnie Fatell. I will hang-up. Thank you.

THE COURT: All right.

MR. WEAVER: Kurt Weaver will hang-up.

THE COURT: All right.

MR. HOWELL: And Lee Howell for Liggett (phonetic) will hang-up also.

THE COURT: All right.

MR. BROWN: Richard Brown for Grace will hang-up.

THE COURT: Anybody left?

MR. SMITH: Yes, Your Honor, Warren Smith.

THE COURT: Mr. Smith.

MR. SMITH: But I wasn't involved with the tobacco litigation, Your Honor.

THE COURT: All right. Anything else in that litigation, the adversary, Mr. Carickhoff?

MR. CARICKHOFF: No, Your Honor.

THE COURT: Okay.

MR. CARICKHOFF: I'd just like to address a couple of points on the uncontested matters. Your Honor had indicated that you had entered those orders?

THE COURT: Yes.

MR. CARICKHOFF: With respect to Agenda Item 5, which was the order authorizing the debtors to acquire the business of Addiment.

THE COURT: Yes.

MR. CARICKHOFF: The debtors had since revised that order after they filed their certification of counsel. The Creditors' Committee had raised some concerns with some language in the order with respect to the purchase price. And to accommodate that, we have a revised form of order that we'd like to present to the Court.

THE COURT: How am I suppose to know these things in advance so that I don't sign orders and then have to vacate them?

MR. CARICKHOFF: Certainly. In the amended agenda, which I apologize, Your Honor got on Friday or at some point thereafter --

THE COURT: I haven't gotten one yet.

MR. CARICKHOFF: Okay. Did Your Honor receive a package at the Brandywine Suites?

THE COURT: I did get -- is that the amended one?

MR. CARICKHOFF: Yes, Your Honor.

THE COURT: Okay. I'm sorry, I did get that, I apologize.

MR. CARICKHOFF: That's fine. In the status on that, we tried to indicate that the debtors intend to present a further revised order to the Court at the hearing.

THE COURT: Okay. Then what I did incorrectly was looked at this agenda notice, which was in the binders that I

was looking at here today and signed it. So -- okay. I'll take your revised order, but please you folks can do this a little more promptly than the day before the hearing. So, from now on, I'm going to have you file a motion to vacate or amend those orders unless you get them to me on time. I'm not doing this anymore.

MR. CARICKHOFF: I --

THE COURT: I'll take your -- I'll take your order now.

MR. CARICKHOFF: I understand. I apologize for that, Your Honor.

And then with respect to Item Number 9 --

THE COURT: No, wait. No, let me do one at a time, please.

MR. CARICKHOFF: Sure.

THE COURT: Let me have Number 5.

(Pause)

THE COURT: I don't know -- I doubt that the order I signed this morning has been docketed yet, MR. Carickhoff. If it hasn't, I'll simply use this one instead. If it has, then a separate order will be entered to vacate the earlier one and docket this one.

MR. CARICKHOFF: Thank you, Your Honor. Again, I apologize.

THE COURT: All right. Now, 9?

MR. CARICKHOFF: Yes. If I could just address Number 7.

THE COURT: Okay.

MR. CARICKHOFF: Your Honor indicated you entered that order. Did you -- there was an order that was attached to the certification of counsel.

THE COURT: That's the one I signed.

MR. CARICKHOFF: Okay. With respect to Item Number 9, which is the order appointing a fee auditor. That order has changed with respect to comments we received from Mr. Smith and the Creditors' Committee.

THE COURT: All right.

MR. CARICKHOFF: And if I could present the Court with the revised order on that.

THE COURT: Okay. Thank you.

(Pause)

THE COURT: Okay. That order is entered, as well.

Now, I understand Mr. Smith had some issues he wanted to raise.

MR. CARICKHOFF: Yes, Your Honor.

THE COURT: Is this the appropriate --

MR. CARICKHOFF: Sure. As Your Honor may recall, we also had pending before the Courts an amended administrative order that dealt with revised interim compensation procedures. In conversations with Mr. Smith and the Creditors' Committee,

Mr. Smith has come up with certain procedures that would effectively streamline the fee application process. Essentially instead of the parties filing a monthly fee application, they would submit essentially a summary which they current do anyway under the current procedures and simply the invoice itself as the -- as the monthly fee application. And that would be served electronically upon the various noticed parties and it would be served upon -- hard copy upon the U.S. Trustee and Mr. Smith himself.

MR. SMITH: As well as the debtor, Your Honor.

MR. CARICKHOFF: And the debtors. And Mr. Smith is on the phone and I guess he can speak to the procedures himself and address any questions that Your Honor may have.

One of the things that has come up, too, is with respect to the 2001 quarterly fee applications. Because Your Honor was not really appointed in these cases until late December, it was our understanding that Mr. Smith would be reviewing those fee applications, as well, for the Court.

THE COURT: That's what I thought, too, yes. I have not entered any orders, I believe, on any of those fee applications. So, that's one reason I wanted to get Mr. Smith up and moving so that, in fact, your fee orders can be addressed.

MR. SMITH: Okay, Your Honor. I just want to say a couple of things regarding the procedures that I'm proposing

here, and that is that they are only proposals. That my job is essentially to assist the Court. So, I'm, of course, willing to go along with any procedures that the Court desires.

THE COURT: Mr. Smith, I'm happy to try anything you want that you think is going to work that will expedite your review. If I find after I get your reports that I need something, then I think that would be the appropriate time for me to address any issues that I'm finding. I expect that the laboring work for this review is now on your shoulders.

And so whatever makes the project easier for you, I'm willing to try. And only if I see some problem with the reports I'm getting back do I think I would have to undertake some changes. And at that point, I'd simply ask that you either call in or come here to a hearing where we could address this with all counsel.

MR. SMITH: And that would be fine, Your Honor. I'm essentially anticipating that in the -- for the fee applications themselves, which would be on a quarterly basis, that I would be undergoing this process of doing an initial report that goes solely to the applications, we would discuss it. And then I would be filing a final report with the Court.

The final report -- we try to aim the final report in conjunction with the fee application, but not the fee detail in the sense that we are assuming that the Court will be reading the written narrative of the fee application, but not the fee

detail. And so that's how we kind of aimed the final report.

THE COURT: All right. Well, I probably will review it all, but I will probably take my lead from problems that you point out to me, Mr. Smith. You know, how much time I have to spend actually looking at this is getting, I guess, less and less as the cases get larger and larger. And so that's one reason I want a fee auditor in place.

MR. SMITH: I understand.

THE COURT: Has the U.S. Trustee agreed with this process of not submitting the monthly fee applications, but only the summary.

MR. SMITH: Yes, Your Honor. We've talked to Frank Perch, I don't know if he's in court now?

THE COURT: Yes, he is.

MR. SMITH: Okay. And we've talked about it. And, as a matter of fact, the indications from him were that as far as filing the monthly invoices and serving them electronically on all parties, except for the fee auditor, the debtor and the U.S. Trustee's Office, that was a procedure that was acceptable to him, my recollection is anyway.

THE COURT: All right. Mr. Perch?

MR. PERCH: Your Honor, good afternoon. Frank Perch for the U.S. Trustee.

I'm a little bit uncomfortable with the situation that I'm placed in because there was really nothing on the

amended agenda that indicated that this aspect of the discussion would be up for today. And I don't want to contradict Mr. Smith, but I did want to remind Mr. Smith that I had a conversation with him which was part a conversation and part an e-mail exchange in which I did indicate some concerns about going to less notice rather than more regarding fee applications.

One of the things I'm concerned about, Your Honor, is that the administrative compensation order that we started out with on this case that Your Honor made some small modifications consistent with Your Honor's regular procedures is something that was negotiated with a lot of members of the bar in order to settle an appeal and in order to avoid a lot of repeat litigation over the form of this order. It's been a procedure that has been somewhat routinized in this jurisdiction. And what I'm concerned about is that the relaxations of it that might be implemented here might suddenly start appearing in other cases.

THE COURT: Well, I know two other cases that it will appear in.

MR. PERCH: Other than what occurs in these cases where Mr. Smith is appointed as serving as kind of a -- and he can serve as a backstop of it, I understand that. But I'm concerned about those finding their way into other cases. And so I really am reluctant to endorse something that waters down

what we have spent a lot of time working out and has been a workable procedure and acceptable procedure for other cases.

THE COURT: Well --

MR. PERCH: I'm trying to be accommodating to Mr. Smith's needs and the Court's needs at the same time.

THE COURT: Well, I think as long as the quarterly fee applications are actually filed with the detail so that parties can see them in advance of a hearing with notice, then that should provide all the parties with an opportunity to raise any objections that they might have to the actual allowance of the fee.

Producing the invoice and -- I take it that the order that -- the part of the order that says that the lesser of the approved 80 percent of the approved -- not by the Court but by the parties fees -- or the uncontested, I guess that's what I should say. The uncontested portions of those fees, plus 100 percent of the expenses is what would govern on a monthly basis. So, that part of the order, I take it, will stay in place.

MR. PERCH: I believe that that's correct. What I'm a little bit unclear on -- what I remain a little bit unclear on is when we're talking about, quote, "an invoice" on a monthly basis. Does that include billing detail or is that a one-pager that says for services rendered?

MR. SMITH: Oh, no, that includes the fee detail.

MR. PERCH: That's $100,000 --

MR. SMITH: Frank -- Your Honor, if I could address that?

THE COURT: Yes, sir.

MR. SMITH: Essentially it has pretty much a one-page cover sheet which indicates any prior monthly invoices and how much has been paid. But then the -- what I call the fee detail, which is the day-by-day, line-by-line entry of the time entries is all a part of the monthly invoice. And, quite frankly, Your Honor, we need that every month because we review that as that comes in. And that's the only way we can prepare for the onslaught of getting of getting the fee applications with all that detail -- monthly detail or fee detail.

THE COURT: So, what is missing between the invoice process and the billing is just a categorizations?

MR. SMITH: Well, no. It's essentially the narrative with a fee application. You have this, you know, 20-page narrative.

THE COURT: I don't see why we need the narrative on a monthly basis. We do need a quarterly, provided that the details go with the invoice.

MR. SMITH: Exactly, Your Honor. And it's been our experience in the U.S.G. case that when they were doing -- when the monthly invoices were being photocopied, mailed around by Fed Ex to everyone, that was an expense of about $6,000 a

month. And I asked all the parties and no one was reading that fee detail that I could find, except for Frank Perch's office and myself.

And it seemed to me that Fed Ex'ing that around seemed to be -- I have no objection to spending money when it's useful, but it seemed to be a useless expense and that's why I proposed the e-mailing of that in the PDF format, which is the format that is filed with the Court. It seems to me it saves money and it's a lot more efficient.

THE COURT: I can tell you, Mr. Smith, my process -- my practice since probably about six months ago has been I don't review these until I get the quarterly and know that a fee hearing is coming up anyway. So, for my purposes, these monthlies are being filed for some notice, but it doesn't help me one way or the other. I'd be perfectly comfortable as I was before the problem arose to have them filed quarterly. So, if you need them monthly, that's fine. I don't see that there is anything wrong with that, it's good notice to parties.

But in terms of my own review, I'm going to review them quarterly when the fee hearings are coming up and not before. So, if the narrative is essentially for my benefit, having it quarterly is fine.

MR. SMITH: I understand, Your Honor. Thank you.

MR. PERCH: This is Frank Perch speaking. Just by way of comment on that, to the extent that what's being

proposed is meant to be similar to what's being done in U.S.G., I probably don't have a problem with it. It sounded to me, and perhaps that's just my misunderstanding of it, that it was, in a certain sense, a mirror image of what's being done in U.S.G. Because in U.S.G., there is monthly billing detail, but we've either curtailed or eliminated the monthly narrative.

I at first thought I heard sort of the opposite here, which was that there would be a narrative monthly but less detail. So, I'm perhaps a little -- perhaps simply a little confused. I think what's been done in U.S.G. has been ordered by Judge Newsome in that case and I wouldn't object to something of that nature being done here.

THE COURT: Well, as I understand it, you're implementing essentially the same provision here that you're using in U.S.G., correct, Mr. Smith?

MR. SMITH: Yes, Your Honor. But we are also proposing in U.S.G., as we are proposing here, that the monthly invoices, while they are filed and hard copies are sent to Mr. Perch, myself and the debtor, the only other service is by e-mail to the noticed parties.

THE COURT: That's fine, as long as the parties have agreed to that, and we're getting everything else by e-mail in this case or by -- in PDF format one way or another anyway. Does anybody have an objection to e-mail notification on the monthly? There's no one in court indicating that they have an

objection to that process, Mr. Smith.

MR. SMITH: Thank you, Your Honor.

MR. PERCH: Thank you, Your Honor.

THE COURT: Okay. All right. So, if I simply sign this order that I've been presented now with respect to Mr. Smith, does that lay out the details that you need or do you need a revised administrative order, as well?

MR. CARICKHOFF: We need a revised administrative order, as well, that we'll present to the Court within ten days. We'll circulate it amongst the various committee counsel and Mr. Perch, as well, the U.S. Trustee and then upon everybody consent and approval, we'll submit it to Your Honor.

THE COURT: Okay, that's fine. I have passed out to most of you by my law clerk as you were coming in the order that I just entered last week on Owens Corning. It does not deal with fee, it deals, however, with preparation of the hearing binders and some other things that I had hoped to get in on the record with you folks last month, and simply we ran out of time so I didn't.

Please take a look at that. I would like a similar order entered in this case. The one problem I have this month with getting the inserts for the binders is they were not labeled by agenda item. And it took me forever to go through looking for the docket number entries, which fortunately are on the agenda, but that's how I knew where the inserts had to go.

Please, have somebody put in for me what agenda items they have to go in.

Now, the stuff that came to the hotel had that, but the stuff that came to Pittsburgh did not and that's where I was reviewing this was at my home over the weekend before I got here. So, it took a long time. Please have somebody indicate where in those agenda binders the inserts are to go, it will save me massive amounts of time.

MR. CARICKHOFF: Certainly, Your Honor.

THE COURT: Okay. Mr. Smith, do you have anything else you want to address on the record, sir?

MR. SMITH: No, I have nothing further, Your Honor.

THE COURT: Does anyone have any questions or comments to Mr. Smith?

Okay. You're also free to disconnect or to stay on, as you prefer, Mr. Smith.

MR. SMITH: I would prefer to save some time and disconnect, Your Honor.

THE COURT: All right. Thank you.

MR. SMITH: Thank you.

THE COURT: Is anyone else on the line? All right. Mr. Carickhoff?

MR. CARICKHOFF: Thank you, Your Honor. Mr. Bernick will address the remaining items.

THE COURT: Okay. Mr. Bernick?

MR. BERNICK: Good afternoon, Your Honor. There are three items, 10, 11 and 12, that pertain to the preliminary injunction and the stay.

The first are brought by a Carol Gerard, and Item 12 is from Edythe Kellogg, and then we get on to, I think, probably the -- the matters that will take the bulk of the afternoon, which is Item 13 relating to the bar dates and the case management. I don't know if counsel for Ms. Gerard is here.

THE COURT: Good afternoon.

MR. HUGGETT: Good afternoon, Your Honor. Jim Huggett from the Klehr Harrison firm in Wilmington. With me is Brian Parker of Parker Dumler and Kiely in Baltimore. A motion for his admission has been submitted to the Court, I don't know if an order has been entered yet.

THE COURT: I believe I signed that order this morning. If you don't get it promptly, call my office and let me know, but I believe I approved it this morning.

MR. HUGGETT: If I might yield the podium to Mr. Parker.

THE COURT: Yes, thank you.

MR. PARKER: Thank you very much, Your Honor. Brian Parker on behalf of Carol Gerard. We appreciate your taking time to consider this matter.

In order for me to help you understand the issues

before you with respect to this matter, I'd like to give you some brief background regarding the development of and the genesis of Ms. Gerard's case.

Ms. Gerard is represented by my firm, as well as by the firm of McGarvey Heberling, which is a Montana law firm. That firm has represented a number of plaintiffs in connection with cases against W.R. Grace that arose out of its Libby Mining Operation. But the cases which the McGarvey Heberling firm brought alleged, among other things, that W.R. Grace had been negligent in its failure to develop a proper dust control system and to address various other industrial hygiene concerns at the Libby Mining Operation.

And when it brought those suits, it believed, understandably, that W.R. Grace was the entity that was responsible for developing the dust control system and for addressing those industrial hygiene concerns.

What it learned in the course of discovery, however, was that that assumption was incorrect. In 1963, Maryland Casualty Company became both the workman's compensation insurance carrier for W.R. Grace, as well as a general liability insurance carrier. And it continued to provide those types of insurance coverage from 1963 until 1973.

And what they learned in the course of discovery was that Maryland Casualty had a medical department, it had an engineering department, it had a loss control department and it

believed that because of its expertise that it could address the issues of dust control and industrial hygiene better than W.R. Grace. And that it assumed the responsibility to develop a plan to protect the workers at Libby and to protect the community members.

There are letters that we have obtained in the course of discovery that indicate, for example, that a letter from W.R. Grace saying that they were applying to the letters of September 8th and September 14th, this is a letter from Marcia McClennan (phonetic), the agent, saying that the dust problem has been referred to our engineering division and they, in conjunction with our medical division, are presently formulating a program for control and prevention.

Another letter they say -- this is in reference to your letters relating to our dust problem at this location. Our accident prevention department is well aware of this condition, not only in Libby but in other locations. We are presenting engaging in drafting an overall program for the entire Zonolite operation and all phases of prevention and control of dust conditions.

And they go on to say that that's going to address -- it's going to be a comprehensive program covering all phrases of accident prevention, as well as industrial hygiene.

And as a result of that information, when Mrs. Gerard developed mesothelioma, we brought suit in Maryland against not

only W.R. Grace but against Maryland Casualty. And we assumed Maryland Casualty, not because it was an insurance provider, but because it had decided to do more than provide insurance. It had decided to assume this obligation to develop the dust control and to address the industrial hygiene concerns at the Libby operation. And we sued them because they had assumed that operation and then had failed to discharge it properly.

That suit was brought long before this bankruptcy was initiated. And when the bankruptcy was initiated, we understood that the automatic stay barred the continuation of that suit as it related to W.R. Grace.

But we did not believe, and still do not believe, that the stay has any effect against the independent claims that we brought against Maryland Casualty that arise out of its failure to properly discharge the obligations that it assumed.

And curiously, Maryland Casualty doesn't believe that this bankruptcy stays those allegations. It understands that it is not being sued as an insurer. It is not being sued because of any coverage obligations that it may have for Grace's wrongdoing. But that it is being sued for its own independent wrongdoing and has never suggested either in this Court or in the Maryland litigation that the claims against it are stayed. And, in fact, last week, both Maryland Casualty's outside counsel and inside counsel were in my offices participating in depositions related to this case.

And the issue of the stay as it relates to the Maryland Casualty claims didn't arise until I issued a subpoena to W.R. Grace requesting that it make available to me its Boston document depository so that we could obtain documents that Grace might have in its possession relating to our claims against Maryland Casualty. And then for the first time, Maryland Casualty -- W.R. Grace suggested that the case was stayed and/or subject to the preliminary injunction. And I want to briefly address why we think that that is not true. And I would suggest to you that what has happened here is that they are attempting to expand the scope of the language that is in the preliminary injunction, and then they are attempting to recast the claims that Mrs. Gerard has asserted and, frankly, mischaracterize those claims in an effort to establish that they are derivative claims of Grace's conduct when, in fact, that that is not true.

With respect to the preliminary injunction, Your Honor, their -- Grace's position on this has changed throughout the briefing of this matter and they have asserted at various different points in time that different provisions of the preliminary injunction bar this claim. But I'd like to address the three that I think that they have asserted at some point during their briefing.

Essentially what they argue is that this -- the preliminary injunction stays all actions and that this somehow

is an action as defined in that order. If you look at Paragraph 10 of the preliminary injunction, it defines what an action is. And there are three categories or subcategories in Paragraph 10 that they assert apply to Ms. Gerard's claim. The first is they say that this is an action against affiliated entities that arises from exposure to asbestos directly or indirectly alleged to be caused by the debtors. And there's a reason why that -- two reasons why that provision doesn't apply:

The term affiliated entities is a defined term in the order. The term affiliated entities includes insurance carriers, but insurance carriers, in turn, is a defined term. An insurance carrier is defined as an insurer who has been sued under an insurance policy in a direct action state, including Maryland Casualty, among other insurance carriers.

But this is not a claim under an insurance policy because the insurance -- term insurance policy, again a defined term, is a policy that provides coverage for the debtor. We're not suing Maryland Casualty because it provided coverage for the debtor. Again, we're suing Maryland Casualty because of what it did and what it failed to do, unrelated to any insurance coverage it provided.

THE COURT: So, you're saying you're not attempting to access any of the debtor's insurance proceeds -- policy proceeds as a result of this suit?

MR. BERNICK: Absolutely not, Your Honor.

THE COURT: And Maryland Casualty understands that it is subject to -- that a judgment in your client's favor, that any judgment would be -- have to be satisfied from some other source, other than proceeds of this insurance policy.

MR. BERNICK: Absolutely. It will come from the -- it will come from the assets of Maryland Casualty Company. Because, once again, they have committed the tort and they're responsible for the tort.

So, there is absolutely no way that they will be able to access the insurance policy -- any of the insurance policies or coverage under those insurance policies.

The other reason why it doesn't fall under 10A is that, once again, this is not a claim for asbestos exposure caused by the debtor. Once again, we're not suing Maryland Casualty because of anything the debtor did. We're suing them because of what Maryland Casualty did.

10B and C are other definitions of the term action but, once again, 10B relates to actions for which there may be coverage under the insurance policies --

THE COURT: Wait, I'm sorry. My head's still on 10A.

MR. BERNICK: Okay.

THE COURT: Pardon me a moment.

MR. BERNICK: Certainly.

THE COURT: On 10A, I don't think they're asserting

that the Maryland Casualty ran the operation and, therefore, discharged into the air the asbestos fibers. You're simply saying that they undertook come duty -- I'll call it remediation, on behalf of the debtor and negligently carried out that duty.

MR. BERNICK: That --

THE COURT: The fiber exposure, you're certainly not alleging came from the insurance company. There's not an allegation, is there, that the insurance company --

MR. BERNICK: No. No. We're not suggesting that. But what we are suggesting is, once again, they said that we will take responsibility for making sure the dust control is adequate. That it's not discharged into the air. We'll develop the dust control program. We will address all of the industrial hygiene issues. And then failed to do that. And that they're responsible for that assumption of the duty and the failure to discharge the duty.

And, once again, we're not -- that conduct, as I'll discuss with you in a moment, is not derivative of anything that Grace did or did not do.

The other two items under 10B and D, which are the other bases for their contention that this is an action, are clearly not applicable. Because, once again, B relates to actions for which there may be coverage under insurance policies. And, as I've already explained to you, this is not a

claim -- is certainly not a coverage claim and not a claim that might be covered by an insurance policy. And D is -- says an action is any action against the insurance carriers alleging coverage for asbestos related liabilities. And, once again, we are not asserting -- this is not a coverage action in which we are asserting that there is coverage because of the issuance of insurance policies.

The other argument that they have raised in this case is that the -- this is a derivative action. And if you look at the surreply, which they have filed in connection with this case, they have tried to explain their position, and let me just read it to you. It says, "In her reply, Mrs. Gerard alleges that certain industrial hygiene actions taken by Maryland were the proximate cause of her illness."

And they go on and say, "In fact, to the extent such actions were taken, they would have been performed at Grace's direction with Grace determining and controlling the scope of Maryland Casualty's work."

That's their attempt to recast our case. That is not what we are alleging. And, in fact, what we are alleging is the precise opposite. Not that Maryland Casualty acted at the direction of Grace, but rather that they put Grace to the side and said we can do this better than you and we will assume the responsibility to develop the dust control system. We will assume the responsibility to develop the industrial -- to take

care of the industrial hygiene concerns and then didn't do it.

And the position taken by Grace in this case, I would submit to you is somewhat curious. Rather than opposing us, you would think that Grace would be cheering us on. That they'd be giving us bullets to load our gun. Because if, in fact, we are correct in what we are alleging, the responsibility for much of the disaster in Libby rests not on the shoulders of Grace, but rests on the shoulders of Maryland Casualty. If we are successful in pursuing this case, and I believe we will be if we're given access to the Grace documents, we will not be filing a claim in this Bankruptcy because we will be successful in laying that liability at the footstep of Maryland Casualty and we will be fully compensated in connection with the Maryland Casualty case.

So, this is not going to have a detrimental effect on this bankruptcy, it will have a very positive one. And that goes to the final issue which they raise, which is that there is somehow an indemnification obligation that will arise if we are successful in pursuing Maryland Casualty. And I would assert that as a matter of common law that certainly is not the case.

If Maryland Casualty assumed the obligation to undertake dust control and industrial hygiene and didn't do it, how can they then turn around when they are held liable for not doing that and say, Grace is responsible for it? If they

assumed the obligation and didn't do it, they can't blame Grace for their own failure to act.

So, the only way that they could possibly be held liable is if they have some contractual obligation to indemnify, which Grace has also asserted.

And what they said initially in their papers is that there are two written contracts under which we may have an indemnification obligation. In their surreply, they say, well, maybe there's actually one. And then they give us Pages 24 through 27 of that agreement. They don't give us the entire agreement, including the portion of it that defines terms. So, it's almost impossible to make sense of what they've given us and what obligations it imposes or doesn't impose.

But if you look at the provisions, once again, it is clear that the contractual identification obligation involves, once again, claims that arise under the insurance policies. It includes claims that involve liability on the part of Grace Connecticut subject to the aggregate products limits. It talks about asbestos related claims that are covered or may have been covered by any of the primary policies.

Again, those are not the types of claims that are being asserted here, so I think it is clear that there is no indemnification obligation that arises contractually or by common law. And that brings us, I guess, full circle to what brought us here, which was the subpoena that I issued to obtain

documents from W.R. Grace and whether or not that type of discovery is somehow stayed by 363 because Grace is in Bankruptcy. And we have cited a number of cases for Your Honor in the briefing and I will candidly acknowledge that there are courts which -- either under 363 or 105 have stayed discovery against entities that are in Bankruptcy. The vast majority of courts have not, however. And the way that I think you can easily harmonize the cases that have and the cases that have not is that it focuses on the extent to which the discovery will be disrupted.

For example, in the Manville bankruptcy, the discovery was stayed where the discovery sought to depose top officers of the corporation at a critical time in their reorganization and sought to depose the about issues central to the bankruptcy, such as what they knew or didn't know about the dangers of asbestos at various times.

That's not what we're seeking here. Grace has a depository of documents in Boston. They have made it available to hundreds of people over a long period of time. All we have asked for is that we be given access to that depository. They have a firm that controls that depository. We have told them that they we will pay for reasonable paralegal time to make it available to us. That's all we need at this point in the litigation.

I can't think of any discovery that will be less

disruptive to W.R. Grace.

Mrs. Gerard strongly believes that she has an independent claim against an entity that is not in bankruptcy. She believes that she can be fully compensated by that entity for the injuries that she has unfortunately suffered. And I would request that this Court not stay that action. That it not expand the injunction that currently exists to cover the action, that you permit it to go forward, permit us to get the limited discovery so that, once again, Mrs. Gerard can be compensated.

Thank you very much.

THE COURT: All right. Mr. Bernick?

MR. BERNICK: Your Honor, Ms. Gerard originally sued Grace. And the reason that Ms. Gerard sued Grace is that Ms. Gerard alleged an injury from asbestos from the Grace mine. That injury has still been alleged, it's being pursued yet today, along with many, many other claims of people similarly situated. There are lots of claims that arise from the operation of Libby Mine.

The only difference between the theory or case that we're talking about here and the theory or case that has been brought by many, many other people is that they've chosen to name what they believe is a joint tort feasor. Otherwise, this case is exactly like many, many other cases. It arises from the operation of Libby Mine.

This situation that is where a new theory or a new claim is developed on the basis of the same underlying tort, this situation was specifically contemplated by the preliminary injunction, it was contemplated as far back as the TRO. We were very, very mindful of a variety of different claims being brought against others who really were joint tort feasors, allegedly joint tort feasors, along with Grace, and as to whom Grace still had a continuing relationship and then the net effect was that if they're not picked up by the stay or the preliminary injunction, effectively is the continuation of massive litigation against Grace. This is something that was very much on our minds.

And I believe ever since the very first orders that were tendered up on the first day of the case there has been language and there had been provisions that have been designed to shut down these efforts to, in a sense, plead around what's essentially a case against Grace or arises out of an exposure that involves Grace's product.

As has been pointed out, the operative language is from 10A. 10A deals with actions and defines actions to mean pending actions and actions that have not been filed or are not pending as of the date of the entry of the order as follows. Sub A, against affiliated entities that arise from alleged exposure to asbestos indirectly or directly allegedly caused by the debtors.

So, the operative term is what is the exposure, what's the source of the injury that's being claimed. And obviously as counsel has recognized, affiliated entities is defined to include insurance carriers and this particular insurance carrier.

The only gloss that's been offered up to the Court about why 10A is not absolutely crystal clear is that he points out that insurance carriers means -- and there's a list of different carriers -- and any other carrier of the debtors under the insurance policies as outlined in Exhibit B. So, he says, well, the idea was to pick-up the direct action situation. But that gloss is not picked up by 10A. 10A deals not with whether the claim might be covered by the insurance policy or whether the action is one that's brought predicated upon a direct action statute, 10A picks up what is the underlying source of the injury. If the underlying source of the injury is Grace asbestos, 10A is triggered.

And, again, the whole purpose of this exercise was we didn't want people who had a claim arising from an alleged exposure to Grace asbestos in turn going around and suing certain other identified entities, one of them being Maryland Casualty.

So, the language of 10A is very clear, there's no other way to construe it. Indeed, it was specifically designed to handle exactly this kind of situation.

Now, is there a reason? Was there a reason why Grace had a continuing interest? And the answer is obviously, yes. First of all, any time you have any kind of case that's being brought against an alleged joint tort feasor, you not only have the prospect of discovery, but you have the development of a record. And you have the pursuit of new theories, new evidence. It is impossible to separate out the development of a new theory against a Maryland Casualty from the development effects that could ultimately also be used against Grace, that's number one.

Number two, you obviously have insurance policies that can be at issue. But even beyond that, you have indemnity relationships. And there is an indemnity relationship that's been -- that could be alleged here. The indemnification agreement, we've attached the relevant portion to the agreement. If counsel wants the rest of the agreement, we can certainly furnish it.

But the whole idea was that Grace reached a settlement agreement with Maryland Casualty. And under that settlement agreement, any claim that could have been -- could have been, as well as had been, asserted under that policy was then picked up. Basically Maryland Casualty agreed to offer the insurance, but in turn, it wanted an indemnity so if it continued to be sued based upon those same underlying claims, they would be indemnified. And we don't have any assurance

that this indemnity would not, in fact, be picked up and applied to us.

Third, obviously if you have a claim against a joint tort feasor, there is the possibility of ultimately third party claims and contribution claims. So, this is not an area where the preliminary injunction is superfluous. It meets an actual real problem that poses an actual real threat with regard to Grace.

I guess the best and simplest way to put it is that this is not an issue of what would constitute Grace's best strategy. We do not look at this strategic matter. We look at this as basic protection in Chapter 11 so that people can't use imaginative pleading to go after entities with respect to which Grace has got an ongoing relationship. It's not a strategic issue for us, it's a matter of pure protection.

The key issue is what is going to be the strategy of Maryland Casualty. Once Maryland Casualty gets sued and if this lawsuit is successful, ultimately has to pay. What assurance does Grace have that there will not be a claim made in the bankruptcy, not by Ms. Gerard, but by Maryland Casualty. It was precisely to avoid the prospect of being any such threat or any such involvement that this preliminary injunction was entered.

If this door is opened up, anybody who was exposed to asbestos from the Grace Mine under even remotely similar

circumstances to that of Ms. Gerard could well plead the same theory, will have a lot of discovery coming out of the depository and the threat against Grace will grow.

MR. LOCKWOOD: Your Honor, could I --

THE COURT: Yes, sir?

MR. LOCKWOOD: I had not planned on --

THE COURT: Enter your appearance.

MR. LOCKWOOD: Peter Lockwood for the Official Committee of Asbestos, Personal Injury Claims.

I had not planned on speaking to this motion, but after listening to Mr. Bernick characterize the circumstances around which this injunction came into existence, which I was personally involved in negotiating and discussing with him and Judge Farnin the terms of this, I feel I'm obligated to say that he is not accurately describing the understanding, at least of my Committee, when we were negotiating this.

The purpose of this injunction, for one thing, had nothing to do with codefendant joint tort feasors. Nothing. There's millions of codefnedants -- well, millions is an exaggeration. There's hundreds of potential codefendant joint tort feasors out there to Grace in the world. And this injunction doesn't protect any of them.

Maryland Casualty was identified and we insisted, we, my Committee, insisted that the policies be identified on this injunction precisely because we did not want a situation in

which some unrelated insurance company was being protected against lawsuits on the ground it's an affiliated of W.R. Grace because it wrote some insurance.

If the plaintiff is correct, and it certainly sounds to me like they are, that this suit against Maryland Casualty is as a tort feasor and not as an insurer of Grace, then that provision relating to affiliates in the injunction has nothing whatsoever to do with staying that action.

And the further argument that, oh, well, they might have a contribution claim or indemnity claim, every codefendant in the world might have a contribution claim and an indemnity claim and my Committee is adamant in this case, and every other case that equivalent committees exist that we represent, that there will be no injunctive protection of codefendants. There's -- as Your Honor has been furnished with briefs in other circumstances, the case law is quite clear that with the exception of some idiosyncratic occurrence in the Dow Corning case, which Mr. Bernick is fond of trotting early and often, there has been no case by any court involving asbestos in this country were codefendants have been protected against merely because they might have contribution or indemnity claims.

So, if Mr. Bernick wants to persuade this Court that because of the peculiarities of the Gerard case it should somehow be enjoined, he's at liberty to attempt to do that. But the notion that somehow or another the injunction that's

already been entered in this case was intended or should be read to accomplish that is simply not right, Your Honor.

THE COURT: Okay. Anyone else? Any closing comments on behalf of Ms. Gerard?

MR. PARKER: Your Honor, I think that counsel has spoken more eloquently than I could have to those issues. So, I have no further comment.

THE COURT: Okay. I'm going to take this under advisement, I'll take a look at it when I get back to the office and have a chance to look at it specification in conjunction to the three orders. So, this is under advisement and you'll be hearing from me promptly.

MR. PARKER: Thank you very much, Your Honor.

THE COURT: Excuse me, this takes care of both Number 10 on the motion to intervene and Number 11 on your request for clarification, is that correct?

MR. PARKER: That is correct.

THE COURT: All right. And the debtors' position is that neither the intervention nor the merits of the motion are appropriate?

MR. BERNICK: That's correct. Well, I suppose for purposes of making the request, you could do it on either ground. But for purposes of making a request, I think that the operative one that the request on the merit should be under --

THE COURT: Eleven, okay.

MR. PARKER: Thank you.

THE COURT: All right, thank you. Yes, it seems to me with respect to the intervention, that to the extent that the request is to clarify the order, I'm not sure why the intervention on that purpose is inappropriate. I guess that's where I'm having some difficulty with what the debtor is seeking or the debtor's position on intervention.

MR. BERNICK: I don't think that we really debate that somebody could come in, a potentially interested claimant and raise the question about the scope of the preliminary injunction or the scope of the stay.

THE COURT: Okay.

MR. BERNICK: Our position's been predicated upon the substance of the request.

THE COURT: All right, thank you.

(Pause)

THE COURT: Okay. Mr. Scanlon, you're representing Ms. Kellogg?

MR. SCANLON: I am, Your Honor. This is an automobile negligence case. Ms. Kellogg is an 82-year-old widow who entered an intersection in California and was t-boned by a pick-up truck driven by an employee of the Grace Company in a Grace truck.

She was in a coma for 33 days and has spent all but 40 days is approximately 440 days since the accident in the

hospital or in a nursing home. Her medical bills already exceed $500,000. And she's had to spend $40,000 out of pocket already.

There is an insurance policy, we are led to believe, though we don't have the policy because they haven't given it to us, for $5 million which the -- I believe a $250,000 retention. It's not clear how the $250,000 retention works, again, because the debtor hasn't provided us with that information.

But either it will result in a unsecured claim filed by Ms. Kellogg at the end of the case or perhaps the insurance company will have to pay the entire claim and then be entitled to either a general claim or a secured claim, as suggested by the answer.

In any event, this is the case in which the legal maxim justice delayed is justice denied has particular poignancy. This woman has to proceed with her case while she's still alive.

In California, because of her age, she has docketing preference and can get to trial in rather short order.

The debtor in this case basically says that this will be too much of a burden to be bothered with the trial. What is that burden, Your Honor? We have the driver of a '98 GMC pick-up truck who we don't even know whether he's still employed by the debtor. Certainly have no indication that he's a high

level employee. What he knows about the case is what happened -- that's relevant is what happened in the three seconds before he drove the truck into the side of Ms. Kellogg's vehicle. It's my understanding that he has admitted liability, but even if he doesn't, the amount of testimony that is required by him is negligible. The -- there is the issue of whether he was in the scope of his employment. Only, again, the driver knows what he was doing that day.

If his testimony is believed to be false, perhaps there's the testimony of his immediate superior, again, not a very burdensome thing.

And also, these questions were undoubtedly asked and investigated by the insurance company at the time that this accident happened about three months before the bankruptcy was filed. The Grace truck was substantially damaged or possibly destroyed in this, there must have been an insurance investigation at that time in which the driver was interviewed, the employer was interviewed.

What's significant about this case and what makes it a substantial trial is what happened to the defendant (sic), what is her medical condition, what was her medical condition before. All of these things will be covered by the insurance counsel.

W.R. Grace has virtually nothing to do with this case but to call the insurance carrier and say defend this.

THE COURT: Except possibly to pay $250,000.

MR. SCANLON: Yes, Your Honor. But that has to be litigated anyway. And the insurance company has a very strong incentive to protect that interest as they would if they were not bankruptcy. It's my understanding there's a $5 million policy. We've filed a claim -- an unliquidated claim estimated to be $2.5 million for Mrs. Kellogg.

So, the insurance company adequately will protect that if it's the first $250,000 that's here, that's going to wind up as a claim one way or the other. And the sooner that it's litigated, as soon as it's reduced to a hard number, to better for all concerned. And it can be done with virtually no bother on the part of the debtor. And the response, I submit, is extremely hard-nosed in this situation. The detriment to the debtor is insignificant. The detriment to Mrs. Kellogg is life altering.

THE COURT: Okay. Mr. Bernick?

MR. BERNICK: I'll be very brief, Your Honor. We don't, by any means, minimize Ms. Kellogg's injury and her situation. But at the same time, I would venture to say, at the risk of provoking Mr. Lockwood's ire again, that so, too, for many of his clients, they face very difficult situations involving their own injuries. And I don't believe that any position has been stated that would make the situation of Ms. Kellogg any more compelling than the situation of many, many

other claimants who are also making claims against Grace.

And as Your Honor points out, this is not a situation where the assets of Grace are not exposed. They are exposed.

THE COURT: Well, are they? Because Mr. Scanlon says he doesn't have the insurance policy, and I don't know what the exposure is.

MR. BERNICK: I believe that there's a $250,000 deductible, but we could certainly supply that to the Court and inform the Court about what the exposure is.

THE COURT: Well, I guess the question is if there is -- is the insurance policy that's in place the same insurance policy as to which asbestos or other plaintiffs are going to be looking for relief? Because if they are, then I don't know that it's appropriate to let this one go through any more than letting anybody else liquidate their claim. If it isn't, if it's a different type of policy, then there may be reason to let this go through.

MR. BERNICK: I'm not sure about that, I believe that it is a different policy. I'd have to confirm that and tie it down.

But I also believe by the same token that there is a deductible that is not an insignificant amount of money.

THE COURT: All right. And what's the responsibility of the insurance company to pay? I mean does the debtor have to satisfy the deductible first?

MR. BERNICK: I don't -- I just don't know the answer to that, Your Honor.

THE COURT: I --

MR. BERNICK: We can find that out.

THE COURT: Yes, I think you need to give both Mr. Scanlon and me some additional facts. It would seem that if there is a separate insurance policy that other tort claimants are not going to be able to lay claim to, for purposes of this proceeding, that possibly should go forward with Ms. Kellogg limited to recoveries against the insurer and not to making claims for the deductible. As to that, either she or the insurance company, whoever is appropriate, would have to, again, file a claim here.

But to the extent that that's what happens, I'm not sure there is reason to prohibit this one from going through. If it is the same insurance policy that other tort feasors or, I guess, other asbestos claimants specifically may be able to look to or other property damage claimants may be able to look to, then I don't think Ms. Kellogg should be in any different position from the rest of the unsecured creditors in this case.

So, I think I need some additional information and I think Mr. Scanlon does, as well.

MR. BERNICK: We'll provide that information.

THE COURT: Mr. Lockwood, has your ire been raised? Do you want to comment on this?

MR. LOCKWOOD: No, but I would love to hear from the debtor that it has late 1990's insurance that provides coverage for an asbestos PI/PD claimants as I'm sure my fellows at the table --

THE COURT: There, I just gave you the opportunity, Mr. Bernick, to make it up to Mr. Lockwood.

MR. BERNICK: Oh, I see.

THE COURT: He won't be ired any longer. All right. How much time is it going to take to get the insurance policy to Mr. Scanlon, and I guess file whatever supplemental pleadings you want?

MR. BERNICK: I think we can certainly get the policy to Mr. Scanlon within a week. And then if he wants to -- I guess we'll probably -- maybe the best idea is for both sides to provide a supplemental memo to the Court and we'll address the question of whether the $250,000, if that's what it is, is a deductible and is somehow we wouldn't have to be pay --

THE COURT: Okay. It seems to me that if it is the type of deductible that will simply require Ms. Kellogg to file a claim here to recover on that $250,000, that relief from stay should be granted to pursue this action for the reasons I've expressed.

Otherwise then, I think I need something supplemental. So, that would be, based on what I've heard and what I've seen so far, my preliminary view.

MR. BERNICK: So, if we actually have to pay the deductible out --

THE COURT: Before she can collect.

MR. BERNICK: -- before she gets -- before she gets money, then you would want to have an additional submission to the Court or --

THE COURT: Well, yes. I think if that's the case, then I -- if it's that type of policy, and I have seen a couple like that, then I'm not sure I can grant relief from the stay because I think assets of this estate could well be adversely impacted, unless she has to waive her claim to the first 250,000. If she wants to do that, then that's a different issue.

So, I guess what I'm trying to do is raise the parameters for all of you to sit down and talk. See if you can work it out, and if you can't, then, yes, I need something supplemental.

So, you'll get the insurance policy within a week and you're going to file a copy of that here, too.

MR. BERNICK: Sure.

THE COURT: And then what would you like by way of a supplemental submission other that the insurance policy?

MR. BERNICK: Well, it seems to me that we'll furnish the policy, we'll then sit down and talk with counsel about where this is going. And I suppose that if there are going to

be supplemental submissions, maybe ten days after that.

THE COURT: All right. Supplemental submissions or -- I'll call it an agreed order. I'm not expecting either of you to consent to the order that I propose to enter. But agreed in the sense that there isn't anything further to be done, other than what I've -- the rulings that I've articulated on the record today.

So, let's say an agreed order or supplemental submissions will be due by -- that the policy is due by March 25th. How about by April 12th, that's two weeks after?

MR. SCANLON: That would be fine, Your Honor.

MR. BERNICK: That's fine.

THE COURT: Okay. Do you want this calendared again for the April hearing for some reason? Or shall I simply take it -- I think I understand the issues, I just don't know the facts.

MR. BERNICK: Right. We don't see, frankly, a necessity for reraising it with Your Honor. I don't know what counsel's preference is, but we would simply prefer to have it submitted, then Your Honor can make a determination.

MR. SCANLON: I would agree to that, Your Honor.

THE COURT: All right. Then I'll take it under advisement.

MR. SCANLON: Thank you, Your Honor.

THE COURT: Okay. What's next, Mr. Bernick?

MR. BERNICK: I think that what's next is the case management order and the claim forms. And I guess I'd like, if I could, to ask the Court for a little bit of clarification on how you would like to proceed this afternoon, mindful of the fact that we started the last time and had to spill over. And as I read the order that you entered scheduling today's hearing, you set out some directions for counsel.

There are a series of matters that have basically arisen since that time, and are also the subject of further correspondence with the Court. There is an effort by an expert for the Property Damage Committee to submit now a notice program of their own through Mr. Hilsee. We'd move to strike that submission on the grounds that it's grossly untimely.

There's also a motion for permission to file a class proof of claim. And that was filed, I think, just at the end of last week. We obviously have not had a chance to respond to that, but obviously feel very strongly that that motion should not get in the way of the bar date motion and case management order motion that we've made already and that we're now in the second day of hearing on. So, that's another matter.

We had an opportunity when we were last here to also talk with the Court about the overall notice, the content of the notice itself. And I don't know if that's something as to which the Court wants to have further argument today.

So, I guess the real question is as I took the

scheduling order that Your Honor entered, it seemed to focus almost exclusively on the actual proof of claim forms. And if that's what we're to handle this afternoon, that's clear. And I think we can proceed seriatim, as Your Honor had indicated. And I can certainly tell the Court what our preference would be in the way of argument.

But if there are these other matters that Your Honor is inclined to take up, I'd like to know that now so that we can --

THE COURT: Well, actually I have same question myself to ask all of you, frankly. Because I have received the motion for permission to file the class proof of claim, but I haven't really had the chance to really focus on it either. It was just filed, and I did get a letter from someone, and I apologize, I don't even remember who, but someone indicating that -- I think maybe you, Mr. Bernick, you had just received it and had some opposition that you wanted to prepare or at least some comments that you wanted to prepare and, of course, haven't had the chance to do that.

I guess with respect to the Zonolite issues as a whole, that both case management, proof of claim and class action, it seems to me that we almost got to decide whether the class of proof claim concept is viable before we get to the issue about the content of the proof of claim form. Because it seems to me that if there is a class proof of claim that is

authorized, maybe the debtors' suggestion in a slightly different context for how to proceed on the Zonolite issues might work better. And, again, this is kind of a gut instinct, so I don't want -- I'm not sure I want to be bound by this by way of making findings. But I'd like to have some discussion about it.

Let's assume for a moment that aside -- just putting aside the debtors' objection to the fact that there can be a class proof of claim, let's just assume for the moment that there is authorized a class proof of claim and before the bar date is set for any other Zonolite individual claims that come in, that may have -- particularly if it can be one without a opt out, that may be the best way to get to the debtors' scientific issue on liability because then I think we may not need the Rule 42 trial, as the debtor proposes. Instead, we could have the debtor or anybody, but in my hypothetical the debtor, file an objection to that class proof of claim raising the common issues, do the scientific evidence trial, find out whether there is or is not liability.

If there is not liability, we never need to worry about notice to the Zonolite plaintiffs or a proof of claim to the Zonolite plaintiffs at all because there won't be any liability, there's been a finding to that effect and they won't be involved in a class because there's no liability.

On the other hand, if there is some scientific basis

for showing that Zonolite has caused property damage that would, at some point, have to be remediated, then I think we do need to worry about the content of approving a claim and what type of notice would go out to potential class members. Because then the debtor, particularly for estimating liability under the plan, has to know the kinds of things that the debtor, I think, is suggesting that it needs to know.

Now, that's without getting into all the detail on the proof of claim, and I don't mean that. But you do need to know whether your product is involved, whether there is a person who has had exposure in the home or school or whatever. So, it may make more sense if you folks could, I guess, agree to a process to have a class proof of claim filed on behalf of all Zonolite plaintiffs, where they are, whoever they may be. Litigate the common issues, the scientific, particularly liability issues, and see how that comes out.

Then when you know how it comes out, if the debtor wins on the liability, I think that's the end of the ball game. If the debtor loses, then we're right back where we are now with what we need on the proof of claim form and the type of notice that needs to go out.

MR. BERNICK: Your Honor, if I could address that, and maybe -- we've been kind of nibbling around the edges of this for a while.

THE COURT: Yes.

MR. BERNICK: Maybe I'll use some of my time this afternoon to talk about this because what Your Honor is describing would have huge ramifications for this case.

THE COURT: Oh, sure.

MR. BERNICK: It's not a question simply of, you know, difference in framing the notice. It is a whole dynamic that comes into the case.

Let me get into a little bit of a time line. Because I think that there is another way to accommodate and, indeed, achieve what Your Honor has described as a fast way to get to the common issues without creating some of the ramifications that I'm talking about. What we're proposing is that essentially we have the bar date and then people would file their individual claims.

THE COURT: I know, but we don't need to get that far if there's no scientific liability.

MR. BERNICK: I understand that. But the difficulty is -- the difficulty is either way it's going to go, we're going to have to have the scientific liability determined.

THE COURT: Right. That's right.

MR. BERNICK: Either way you go. And this -- to have the class proof of claim issue, you can't have a class proof of claim issue that has the consequence that Your Honor has described, which is that nobody can opt out and everybody is there, you can't have it unless you certify the class.

THE COURT: Oh, I agree. I'm assuming for the moment that we're passed those issues in discussing this. As I said, I'm not attempting to adjudicate all the issues, I'm just trying to see whether there is a framework that essentially accommodates what the creditors say they need and what the debtor says it needs. And I think it's in there, it's just a matter of ferreting it out.

MR. BERNICK: But the consequences of certifying that class don't disappear. They're there for ever.

THE COURT: Sure.

MR. BERNICK: They not only effect the notice process, they create an enormous economic dynamic to the case. You create the possibility -- no one really knows what the size of the debt class is. Maybe it's a million people, maybe it's ten million people. And the process of finding out may take a very, very long time.

So, while this becomes one means of solving the notice problem or addressing notice, it goes way beyond that. And it's not necessary to get to where we have to go to. The fastest way to get to where we have to go to is to establish that bar date, have the claims come in -- including what I'll describe here as the class proof of claim. We're not --

THE COURT: I don't think that eliminates the expense, Mr. Bernick, because in order to do it the way you were suggesting and get the individual claim in first, I think

you have to have some sort of a notice program out there.

MR. BERNICK: We're going to have to have a notice program, I believe, Your Honor, no matter which way you -- you can't take the rights of these people and say guess what, because I'm certifying a non-opt out class, I'm not going to provide notice to anybody and they'll just simply be bound by the opt out. You're talking about people who may have individual claims. It would be an extraordinary class for people to have individual damage claims and be handled on a mandatory non-opt out basis.

THE COURT: But while it could be -- or it may or it may not be, but the fact that is that in bankruptcy, you've essentially got a non-opt out class because either they opt out and file an individual claim or else their claim is discharged.

MR. BERNICK: True enough. There are still other ramifications. If you certify this class under B2, as opposed to B3, A, I don't understand, Your Honor, how you would ever do it. This is a damage case, it's a B3 class. Right there, you've got a lot of complicated questions that come in that are not simply a question of bringing people into court.

For example, if these people had a right to opt out as they do under B3, even if it's in Bankruptcy, they have a right to their own determination.

THE COURT: Okay.

MR. BERNICK: Okay. You then get to the question of

because of the huge size of this class and the impact that it has on the case, the debtor would have absolutely no choice but to seek interlocutory review under 23(f) about whether that was an appropriate certification or not. Just the process of seeking interlocutory review, first to Judge Wolin and then potentially to the Third Circuit, which we would have the right to do under 23(f), you're talking about a huge period of time elapsing.

THE COURT: You're going to have that period of time no matter what.

MR. BERNICK: Well, not really. Because if we set a bar date, and it's a relatively prompt bar date, and we go forward and we get the individual claim forms in and the class proof of claim form in, at that point, you can go forward and, first of all, determine whether certification is really necessary given the number of claims that you've got. And second of all, regardless of whether the certification takes place, you can have that common issue trial right there. You don't have to wait for anything else.

The only bite, Your Honor, I think that you're trying to identify is that somehow if you were to certify a mandatory non-opt out class right here, you would save the expense of a notice program before you got to the science trial. And all that I'm suggesting is that, number one, I think that that may well be illusory because I think that there's going to have to

be notice to the claimants in any event because it is a B3 class. Whatever the differences might be between being an opt out and not being an opt out, people are going to have to get notice of that.

THE COURT: Well --

MR. BERNICK: B3 means notice.

THE COURT: All right. Let me ask this, at least -- there have been at least two class actions served by -- so far, correct? The one in the Libby Mine on the Zonolite issues and the one -- I'm sorry. In the State of Washington, I apologize.

MR. BERNICK: State of Washington.

THE COURT: State of Washington, and the other in South Carolina.

MR. BERNICK: Yeah, the one in South Carolina was actually certified -- it was certified on an ex parte basis. It went through a long briefing process. It was then certified on an ex parte basis in the weeks just before we filed for Chapter 11.

There was then a show cause order, and I believe the show cause order was still pending at the time that the company went into Chapter 11.

THE COURT: Okay. It deals with Zonolite issues.

MR. BERNICK: Yes. It deals actually with property damage issues generally and may include Zonolite. The Barbanti (phonetic) class was a Zonolite class, State of Washington

only.

THE COURT: All right.

MR. BERNICK: Notice did not go out on that. There had not been any notice issued at the time the Chapter 11 was filed. We had a non-notice statewide certified class. That's all that you had.

THE COURT: Okay. Well, because what I was thinking is that it's possible that at least as a preliminary matter to try to get to these issues, because I truly think that the issue that's going to drive this part of the plan is the scientific side. We need to get to the scientific side.

MR. BERNICK: Absolutely.

THE COURT: So, if there is a class or there are classes that have already been certified in State Courts, which could file, in quotes, a class proof of claim, they could, at least, stand to, I guess, be the Rule 42 type trial you're talking about on a scientific side.

MR. BERNICK: You could certainly try to -- you could certainly do that. But, again, by the time that you get down to that road, we're not talking about very long before we have these claims here. The question of time to get to trial is --

THE COURT: But you may never need those claims. Why do you want to go out with a notice program to potentially -- well, somewhere in these materials I saw something that said that these homes have perhaps turned over as many as three

times. And if you say -- if you assume that at least three people are living in a home that's turned over at least three times and there are 15 million of them, we're looking potentially at 45 million, roughly, potential claimants. Now, why do we want to send out a notice that's going to get potentially 45 million plaintiffs when it may not be necessary if the debtor is successful on the scientific side?

MR. BERNICK: I would love to be able to tee-up the issue of the science without any notice, you know. Anybody will provide a class --

THE COURT: Well, you can't --

(Laughter)

MR. BERNICK: You can't do that. The problem is that if the sole purpose of the class really is to provide that notice, it has a lot of other ramifications. If these people represent 45 million claimants and they say we now have the judgment on the science in favor of 45 million claims, they don't know how many of these people are actual. But they will certainly assert the full scope of that claim in connection with this case.

Your Honor is continually telling us that we ought to be focused on the ultimate resolution of the case. How do you negotiate a resolution with people who are sitting on top of the class that's got 45 million people? We'll have disagreements. We'll say, oh, well, gee, only three percent of

them or four percent of them or two percent or a half a percent will actually be claimants. They'll say, no, it would be far more than that.

THE COURT: Well, you'll know -- but the thing is, you will know that because at some point in time, if a class is certified, then you will have people who will have to do something, either with the class or with the bar date one way or another, to join the class.

MR. BERNICK: That's my whole point is that if we're going to have to do that, if we're going to have to find out who is a claimant at some point in this process, let's find out now.

THE COURT: But the question is why do that when you may never need to know?

MR. BERNICK: Well, --

THE COURT: If you're successful on the scientific side --

MR. BERNICK: Sure.

THE COURT: -- it doesn't matter how many potential people are out there, they're not going to be a class. They're not going to have claims. And you don't need to worry about them anymore.

MR. BERNICK: That's absolutely correct.

THE COURT: Okay.

MR. BERNICK: But again, Your Honor assumes in that

process that, number one, we don't have to provide these people with notice before we certify the class or after we certify the class. And I really grabble with whether that is so because they still do have different rights if they have the right to opt out.

And, second, we would like to believe and we believe it is the case, if science favors our position, then we will be successful. But as long as there is any prospect that this class is certified even if we were to win, you can be assured that given the magnitude of this potential claim, this case is going to become extraordinarily difficult to resolve.

Whereas if we go forward with the individual claims and then we win on the science, what committee or what group of lawyers is ultimately going to believe I still want to pursue this and still want to pursue class certification because ultimately I hope to get both. I hope to get this turned around, get the class certified and then use my economic leverage against these people. There's no need for it.

Much simpler if you keep tee-up the issue with respect to these claims and, at the same time, find out what is the size of the real claimants' class.

THE COURT: I don't think on terms of the scientific side that it makes much sense to have the individual claims go to litigation. I mean there has to be a class, I think, certified, or should be. I don't know that it has to be, but

it seems to me to make more sense, to certify some sort of class to do the common issue trials, you can bind everyone that way.

I don't know the outcome in a bankruptcy context of a Rule 42 trial in terms of the rest of the people who aren't involved in those common issue trials. Now, you could certainly say that the rulings, to the extent that the evidence is going to be similar, might have some collateral estoppel consequence, but it won't have a res judicata consequence if all those claimants aren't there. And I don't know about you, Mr. Bernick, but even if we only have a class of 15 million homes, and we look at the home as the claimant instead of the people in the home, for purposes of winnowing this down some, I don't really want to do 15 million trials.

MR. BERNICK: That's exactly why we ought not to go forward to certify a class for purposes of suiting what's essentially a notice or a procedural problem. We've got to find out who the real claimants are, bring them in and Rule 42 is not a question of the res judicata or collateral estoppel effect. They are there. These people come in, however many are here, they are all physically and judicially present before the Court.

All that Rule 42 does -- this is the problem with getting your mind around the concept -- all that Rule 42 does is says with respect to whatever that group is, they are

treated as the same for purposes of a common issue, which is is Zonolite unreasonably dangerous. It's not a question -- we don't have to look for collateral estoppel or res judicata or anything in order to get that judgment to be binding.

THE COURT: Well --

MR. BERNICK: It is binding because they are there.

THE COURT: They're there, but they're there represented by 15 million different lawyers potentially. Not by the same group. It doesn't -- it makes no sense to do it that way.

MR. BERNICK: This is exactly what the -- Your Honor, this is actually fairly well established. It's exactly what happened in Benbecton (phonetic). Benbecton, there were 11 hundred plaintiffs, all consolidated under Rule 42 for a common issues trial before Judge Rubin in Cincinnati. And they didn't have each and every one of them be represented by a separate lawyer who stood up there and cross-examined the experts and the like. They had a trial team of lawyers that represented them all. And they were all there for purposes of one single common issue, which is did Benbecton cause birth defects. It went up and was affirmed by the Sixth Circuit after a Rule 42 trial.

THE COURT: But there isn't any reason to disenfranchise a particular individual plaintiff from using his or her own lawyer when you can certify a class and have the

lawyers appointed for that purpose.

MR. BERNICK: Your Honor, with due respect, you just accomplished exactly the same thing when you said certify the class. Unless you make that a mandatory class --

THE COURT: Well, sure.

MR. BERNICK: Well, that's a big problem to have a case that involves damages be certified as a mandatory class. You either have to have a limited fund certification in the context of Chapter 11, which I don't believe has ever been done before, maybe it has. Or you have to characterize the nature of the relief that's being offered as injunctive, which would be very difficult to do because these people -- each and every one of these individuals could say, gee, my home is worth less then will cost me actual dollars to remediate it.

THE COURT: Well, I'm not --

MR. BERNICK: There is -- I'm sorry.

THE COURT: Why --

MR. BERNICK: If it's a B3 class, if I am right, it's going to have to be a B3 class at the end of the day. And the problem that you identified with common counsel representation is every bit as much fair, indeed, it's worse because you don't have Rule 42. These people are going to be entitled to bring in their own lawyers for purposes of litigating this issue. They have the right to opt out, even though you would all say that their opt out is still in the context of a Chapter 11

proceeding.

THE COURT: An opt out in that context makes very little sense. I mean there may be a few people who will want to opt out, maybe. But to what end?

MR. BERNICK: Well, I would ask exactly the same question. They would say I want to opt out because I want to have my own lawyer. They could say that. Well, same thing over here, these people say why is it they want their own lawyer? They would be so ably represented by counsel here, why should they want their own lawyer? So, they may still want their own lawyer.

THE COURT: If the estimates for remediation are correct, that it's going to cost between 1,000 and $7,000 per home to remediate this, it's going to be very difficult to understand how any individual is going to want to opt out and have his or her own lawyer appear in a case in which the maximum amount of damage that they could seek would be $7,000.

MR. BERNICK: Well, you know why it will happen, and this is the way the word in mass tort, it won't be just one -- it won't be driven by the individual claimants. It will be driven by the lawyers. You will get lawyers who will come in and say I will represent all kinds of people who are opting out, the opt out lawyers. One lawyer will represent, not ten, 20, 30, but could be a hundred or 200 people. In which case, they get a lawyer of their own choice, somebody who will

negotiate for them, maybe do better than the relief that's offered with respect to the class. None of this happens. This is the way the class actions work is that people come into business on the strength of the opt out claims.

But however you look at that, A, you've got to provide them with notice.

THE COURT: You have to give them notice.

MR. BERNICK: You have to give them notice.

THE COURT: I'm not challenging that.

MR. BERNICK: We're going to have the notice program. B, if I'm correct, because B3 rather than B2, you have to give them the opportunity to opt out. And what would be absolutely for sure is that -- I have to talk to my client who is sitting right there, but I don't think that the debtor could stand by and watch this class get created, as strongly as we felt about the science, this is the very dynamic that was describe in the wrongful -- the case that we cited to the Court where there was a nationwide hemophiliacs case that was certified, went up to the Seventh Circuit and it was decertified. And Judge Posner (phonetic) described in graphic terms the economic leverage that is exerted by virtue of a class. Bear in mind that before this case was filed -- this Chapter 11 case was filed, there was not a single, not one property damage Zonolite case that had ever even been pursued. And now we're going to create 45 million claims?

I will have an obligation -- Grace will have an obligation to take this matter up for as long as it goes because we would have to unwind this class before we would ever have the individual science trial. So, the net effect would be that rather than getting what I think the Court would like to see and we would dearly like to see, which is the science trial promptly, we now go down the rabbit whole in trying to get rid of what will be then described aptly by Mr. Lockwood as he described it before, the 800 pound gorilla in this case.

So, it is -- it's tempting to say, gee, why worry about the notice that's associated with the bar date because if it's class, isn't it much easier? And I would like to do anything we can possibly do to alleviate the burden of the notice to do it promptly, to do it less expensively, we'd like to do it.

But the fact of the matter is that if the price of doing that is to create this dynamic, we have taken -- we've taken a huge step backwards. This would be a major, major development in this case. I don't see this size trial taking place any time soon. And that's just being candid with the Court, this is an enormous dynamic --

THE COURT: Well --

MR. BERNICK: -- as well as everything else in the case.

THE COURT: It may be an enormous dynamic, I don't

know, I mean it's difficult as I sit here now to know. I don't know how many entities are going to end up in that class. It may turn out that perhaps nine-tenths of the homes that have Zonolite in it at one point in time have already been destroyed and there may be nobody in the class. I mean at the moment, I don't know. I don't know what we're looking at.

MR. BERNICK: But we -- and that's what the difficulty is that that is, under class procedure, that's the last thing that you find out. You find out about that way down the road, look what they want to do, they'll want to do a deal that pays in a fund as part of a plan and then whoever claims, claims.

What we want to do is we want to find out that answer up front so that we can then say, okay, we now understand what the dimensions of this claim -- this litigation really is. We can afford to litigate the settlements. Whatever Your Honor decides with respect to Rule 42 certainly could carry tremendous weight. And all that we've paid as a price for getting there -- the price for getting this very important information and getting it promptly, the only price that we've paid is that we've spent the time necessary to prove a claim form and we got a notice program that goes out to the other with the property damage notice program, all at the same time to get the whole thing done. This is what I'm responding with is why Your Honor believes that somehow this notice here is so

much more costly and onerous than what we're already going to need with respect to --

THE COURT: Because you may never need it in the Zonolite issue. The fact is you may never need it. You might actually win on the science side. And if you do, you've done all this work for nothing.

MR. BERNICK: Again --

THE COURT: And you've put these individuals through a lot of work which, if they have a claim, they very well need to do. But if they don't have a claim, because the science doesn't support it, then it's been very costly for them to go through this for nothing.

MR. BERNICK: But --

THE COURT: Because they're not going to recover.

MR. BERNICK: I would -- you could probably also -- another possibility, I'll put this out, it's something to think about, another possibility is to get some group of individuals.

THE COURT: Well, that's what I was just saying, that it's --

MR. BERNICK: Yeah, is that this -- we don't certify a class, we get some group of individual claims. Your Honor then can deal with what the scientific evidence is. And on the basis of that, we go forward. We could probably live with something along those lines.

But the whole thrust of what we're saying is let's

get the individual claimants in. If it's not necessary to go to an elaborate notice process and the time and expense and energy, you know, we'd certainly be flexible with that.

If you take the named representatives from the Park Andy (phonetic) case, maybe some of the other people who are named representatives in the other purported class action, bring them in, we'll put on the science, we'll litigate the issue. You've given something up, a little bit, which is that you've now decided the science on the basis where you can't say that it's res judicata. At the same time, I think most lawyers looking in would probably be very much influenced by whatever it is that Your Honor decided with respect to those claims.

But almost guaranteed for sure we go down this road, we've got notice, we've got a huge problem that we are going to spend a very, very long period of time unwinding it, and I believe completely unnecessarily.

Why do they want to do it? Because they want that influence in the case. They want that influence in the case.

THE COURT: Well --

MR. BERNICK: And they'll get it.

THE COURT: Well, I'm not sure I agree that the -- that as long as the scientific evidence is not determined that either side has influence in the case for that kind of bargaining. Once the scientific side is determined then I think, yes, that that is the situation. Then you do need to

know who the members of the class are. And if the debtor loses on the scientific side, and it turns out to be that big a class, the debtor faces that whether it's in through individual liability claims or whether it's in through a class.

MR. BERNICK: Oh, we won't -- that's the problem with this. Ultimately -- let's assume that we went forward. We would never -- we would never go through the process of finding out exhaustively how many of these people there are, it won't happen. We couldn't conclude the case.

Instead, what will happen is that Your Honor and Judge Wolin and everybody else will want to figure out some way to resolve this claim on the basis of the creation of the fund. And at that point, it is purely a question of who's got the leverage, and that's what -- that is what they want. That is why we are here, is that they would like to go forward, create that class and have it -- that's exactly what the Seventh Circuit decided, just sitting out there and say, come and do business with me.

And what really sticks in our craw about that, frankly, is that not only do we think the science is good, and I think Your Honor appreciates that, but you're operating in the context of a Chapter 11 that was filed where the history was that there were zero of those claims. And effectively in one stroke, we've now taken a Chapter 11 where there was no litigation history in this area, a tremendous amount of

litigation history courtesy of Mr. Lockwood, and you've now created a totally different situation where he's no longer the big guy in town because there's an even bigger guy in town.

THE COURT: Ain't it grand what bankruptcy does for you.

(Laughter)

MR. BAENA: Your Honor, if I can make a couple of --

MR. BERNICK: I certainly --

MR. BAENA: If I can make a couple of observations?

THE COURT: Yes.

MR. BAENA: May it please the Court, Scott Baena on behalf of the Property Damage Committee.

Your Honor, since September 1, we filed our response to the proposed case management schedule and activities. We have been saying exactly what Your Honor articulated today, we think the process is upside down as described by the debtor. And I think he's come very close to explaining why it's upside down in their view of the bankruptcy scheme of things. He calls it leverage, but what I would prefer to characterize their strategy to be is to create a process which is doomed from the outset such that people fail to file proofs of claims and so we minimize the effect of an adverse ruling on science, which is what we fully expect will happen.

THE COURT: Well, I think -- Mr. Baena, I mean I guess I'm playing devil's advocate. But, frankly, I think it's

an issue that's capable of resolution of any number of ways and that's only one.

It seems to me that with respect to the debtors' proposal, to do the notice, not necessarily of the proofs of claim, but the notice of the fact that there is an issue as to whether or not Zonolite does create some property damage and puts people to the task of discovery, whether they do or don't have Zonolite so that they can file a proof of claim has merit, too because at some point, this estate needs to know whether, A, there are such people. And, B, how many of them there are. And, C, what the class is going to be.

And despite everything, you and Mr. Lockwood continue argue to me, and you continue to lose this argument, and you're not going to fare any better today, there will be proofs of claim filed in this case somewhere, somehow by somebody. It's not going to be an issue that's going to be left to a trust to resolve. We're going to know how many claims there are before this case gets to plan confirmation.

MR. BAENA: We've resigned ourselves to that fact, Judge. And we're working on that basis.

But if I may react, I think that, first of all, there is an entirely different outcome when you have a notice program in the context of a class action and when the notice is directed at allowing claimants to opt out of a class as opposed to a notice program that is intended to facilitate a proof of

claim regimen, the effect of which is if you fail to file the proof of claim by the bar date, you're out of the program altogether, as opposed to you just didn't opt out if you didn't comply with whatever it is you're required to do in the context of the class action.

So, they are absolutely diametrically opposed notice programs. What you seek to accomplish in the proof of claim notice program is to eliminate claimants, and that's what they're trying to do. They're trying to eliminate claimants.

In the event that their science position is wrong, which, again, we suspect is wrong, this is their second bite at the apple. This is their belt and suspenders. This is how they're going to minimize the effect of that 800-pound gorilla, so to speak.

So, it's not simply because we have to get there anyway, Judge. It's not simply because we're going to spend the money anyway, Judge. It's a very different purpose which they attempt to serve by getting you to push that notice program on this side of the bar date line.

And I think it's also worth observing that the problems we have with the existing notice program, in large part, relate to the Zonolite issues. The fact is there is the threshold issue of whether you can ever devise a program for a proof of claim purpose that will sufficiently satisfy minimal motions of due process, get the notice to people who are unwary

of the situation that they're confronted by both in respect of the product being in their property and, secondly, that because it is, they have to file a proof of claim.

So, we have this initial concern that you're not going to be able to develop a notice program that we're all going to necessarily feel real good about when we're finished. And if we move that notice program to the more conventional point in time in the context of a class action, it's an entirely different exercise and we can feel better about that program.

In addition, the notification program forces -- in the proof of claim context, forces claimants to do something that some people say they shouldn't be forced to do, and that is to determine whether or not they have this product. And that determination of itself can cause a dangerous situation to occur. You saw the objection that was filed by the EPA, I'm sure, which focuses on that one issue. We'd better tell people that if you go looking to see if you ought to be included in this bankruptcy, you might hurt yourself. You might cause the product become friable.

So, I think the approach that the Court is looking at is a much more logical way to approach this. It eliminates all the problems we have about the notice program or the context of the proof of claim.

THE COURT: Well, what about the concept of doing it

on, I guess, a limited basis. Rather than setting the bar date for all Zonolite plaintiffs now, to essentially set it for a group of Zonolite claimants now, but not everybody, so that we have -- I'll use the word test case. So, we have a couple of test cases.

So, for example, we set it for the whole State of Washington and, therefore, we already have a class that's been certified, although no notice has gone out, and we use those folks to file a proof of claim as the test case for the scientific issues.

Now, I agree, that outcome would not be binding on those entities who have not yet filed proof of claim. But the fact is that unless the science changes significantly in those couple of months between when some order is issued deciding whether there is or isn't liability and when the next bar date notice would go out for everybody else, the likelihood is that the next outcome is going to be very similar, it's not likely to be changed. And that probably would be pretty good evidence for everybody else.

MR. BAENA: That might be a sensible approach. I would suggest that whoever's had a certified class action --

THE COURT: Right.

MR. BAENA: -- in respect to Zonolite ought to be involved in that process so that they can't complain later on.

THE COURT: Well, that makes sense. Maybe a -- I'll

use the word committee loosely, I don't mean an official committee, but maybe a committee put together to decide who the named representatives of -- again, I hate to use the word class, but that entity, that class.

MR. BERNICK: That's the problem is --

MR. BAENA: The litigants.

MR. BERNICK: -- as soon as you would recognize that class in this bankruptcy, it really is no different from what's up on the board.

My proposal is that we simply use whoever it is that's filed the claim, i.e. the class representatives, to be our group of individuals who would then fee-up the common issue. I just want to be clear to the Court that as soon as you go make it a class litigation, you know, it may be only the State of Washington or -- I don't know, I think the South Carolina class actually is nationwide. But whatever it is, you're now talking about something, that 45 million. We would be required to preserve our rights, to seek to be certified in that class right away.

THE COURT: But you just made this proposal.

MR. BERNICK: No, I made -- the proposal -- that's what I was going to say. The proposal that I made was that rather than send out a notice and get all of the individuals to file --

THE COURT: Right.

MR. BERNICK: -- that we would use the individuals who already have filed claims, i.e. in the context of class litigation. They would be the individuals who would be in court --

THE COURT: You're using the word claim, and I'm thinking of bankruptcy proofs of claim, and you're not talking about bankruptcy claims.

MR. BERNICK: I'm -- I understand. So, we can take what is their existing lawsuit and use those as the claim. In point of fact, we would actually have the power under Section 147 to actually remove and transfer those claims here. So, the individual claims, even without a notice, to be brought before the Court as claims and, therefore, used for purposes of this proceeding, the proposal is to use a pre-certified class and bring it in to this case, then we're back into the same world. We don't believe that Rule 23, A, belongs here. And, B, certainly doesn't belong in the same set of circumstances and that's very clear under American Reserve. So, we have to go down the road and, again, litigate this -- so, my proposal is avoiding this altogether, proceeding with individual claims, but using the people who already had stepped forward as being the test claimants.

THE COURT: Well, if you use them as individual claims or use them in the limited class, I don't think it's going to make much difference in terms of -- the certification

issue is different. But in terms of getting the scientific trial, I don't think it's going to make much difference.

MR. BERNICK: It makes a difference only if you say that that limited class is not confined just to them, but it's the State of Washington. That's a pretty significant difference.

MR. BAENA: Judge, it doesn't make any sense for us to find a date within the next week where during this period of time we can confer, see if we can come up with an agreement this way we can contact the class counsel that are out there. And, you know, within the next week. I'm not trying to postpone this indefinitely.

And then come back to the Court with a proposal or counter proposals.

MR. BERNICK: I'm not sure -- I mean I would be happy to take proposals from counsel. But, frankly, this I think is now the third argument that we've had. And there is a very bright line, the bright line is are you talking about a class trial, a certified class or not?

Because it's not something that we've got any discretion, it is just a huge difference --

THE COURT: Well, I think what Mr. Baena is saying is he needs some time perhaps to see whether they can agree to looking at what you're now calling individual claims, i.e. the people who are members -- who are class representatives in the

State of Washington, and use them as the test case for the scientific side, correct?

MR. BAENA: Correct. I'm in no position to speak for Anderson or those folks, and I'm not trying to delay anything, Judge. I want to --

THE COURT: It seems to me that we ought to get to the scientific side of this promptly. Because, number one, I'm not sure it makes a lot of sense to notify people who may have Zonolite in their homes that they may be exposed to significant risk if, in fact, they're not. Because that could be creating a panic of some sort that's not really justified if the scientific evidence doesn't warrant it. So, I've got that to decide.

By the same token, if the scientific evidence does warrant it and they do need to be made aware of the problems should they disturb the Zonolite in their attics, then we probably ought to know that. And do that form of notice before we require people to file proofs of claim.

So, no matter how you look at it, it makes more sense to litigate the science of this first.

MR. BAENA: Are you going to treat that, Your Honor, just to put a little definition on this, are you going to treat that as a bifurcated issue in the estimation process as opposed to the litigation of the respective claims? I mean there's all sorts of jury trial issues, I'm sure, that are implicated.

MR. BERNICK: Personal injury cases, there's no jury trial.

THE COURT: Well, the jury trial issue is for people who will file claims here for property damage.

MR. BERNICK: I think that that's a very important --

MR. BAENA: They haven't filed a claim yet.

THE COURT: Well --

MR. BAENA: That -- we haven't gotten to that point yet.

THE COURT: Right. They haven't filed a claim here, but the debtor can file the claim for them.

MR. BAENA: Okay. I'm just --

THE COURT: Because the meet's well passed --

MR. BAENA: Is the notion, though, that this is part of an estimation process or is this part of a class certification process or --

THE COURT: I think it would be used for both purposes frankly because I think in order to get the class certified, and we have to know that there is likely to be a class that could sustain damage. So, I think it would stand for both of those --

MR. BAENA: There is a hearing pending before Your Honor on the 22nd of April, you know that, on the motion to certify the class in Zonolite in the adversary proceeding.

MR. BERNICK: No, it's just a motion to dismiss.

UNIDENTIFIED ATTORNEY: Just a motion to dismiss.

MR. BAENA: No -- well --

THE COURT: I think it's the motion to dismiss, not the motion to certify.

MR. BAENA: I apologize.

MR. BERNICK: Which I -- just on this business of estimation, because it's a property claim, not a personal injury claim, Your Honor is fully empowered to rule on the merits of the claim. So --

THE COURT: Oh, sure.

MR. BERNICK: So, I don't know what -- for purposes if we have claims that are brought in here, we try those claims. And I don't know whether -- I suppose you can say maybe, you know, it has some potential use, either on class certification considerations down the line or on estimations. But the process itself liquidates those claims.

THE COURT: Well, the process liquidates the claims. But at this point in time, I wasn't thinking of getting to the damage issue.

MR. BAENA: Right.

THE COURT: Which is something that would both liquidate the claim and go to the estimation. I'm only looking at the liability side to see whether the debtor is liable at all.

I think you've raised, Mr. Bernick, and I think it's

quite correct, in this issue where there has been no test of the scientific side by way of an adjudication before this bankruptcy was filed, the debtor should know whether it is subject to liability on that score, and so should the creditor. And I think that piece ought to be determined before we alarm a lot of potential people who have Zonolite in their attics that there may or may not be some detriment as it turns out. I don't know what the answer will be, but either way, it doesn't make much sense to alarm them until we know that there is reason to do it. And right now, as I sit here, there seems to be a big challenge as to whether there is reason to alarm them. So, we ought to figure that piece out.

And then if there is, we ought to structure a notice program that makes sense to advise people about what the potential risks are and how they can minimize the risk and what they need to do in order to finish filing a claim here.

At that point, I think we can determine whether it's necessary to do a lot of individual claims or look at a class certification. But I think we need to get to that science first. I think to do everything else is putting sort of the cart before the horse and --

MR. BAENA: So, we are not determining individual versus class proof of claims --

THE COURT: Right.

MR. BAENA: -- at this point in time.

THE COURT: No, I would think we would not need to do that until the science is decided. Once the science is decided, then we're right back in the seat that we're in today.

MR. BAENA: Do you think you need a class proof of claim though to bring on the scientific issue?

THE COURT: Well, that's what I was suggesting earlier. I'm not sure we do, though, to the extent that either -- for example, the named plaintiffs in the Washington suit that Barbanti plaintiffs, for example, if we would simply get them to file the proofs of claim and litigate the issue in that context, or have the debtor file the proof of claim for them and then litigate the issue in that context, I think we could get to it in sort of a mini trial.

MR. BAENA: Again, as a class proof of claim?

MR. BERNICK: No --

THE COURT: Well, it's not really a class proof of claim. It's the consolidated trial as to any of those plaintiffs who have filed proofs of claim.

MR. BERNICK: It is --

MR. BAENA: As to the class representatives then.

THE COURT: Yes.

MR. BAENA: Their proof of claims.

THE COURT: Yes.

MR. BERNICK: But in this practical matter, the only thing that we would really have to do to bring those claims

before the Court, as Your Honor has indicated is that those lawsuits have been pending against Grace. We can simply import to this Court those underlying lawsuits. There doesn't even have to be a proof of claim.

THE COURT: That's true, too. And that eliminates somewhat with your issue and Mr. Lockwood's issue at the moment about filing the proofs of claim.

MR. LOCKWOOD: Your Honor, could I interject something here? I hate to sound like a technical nitpicker, but I'm getting a little bit concerned about the interplay between the bar dates to the class determinations. First, you've got a motion to dismiss an adversary proceeding, adversary proceedings technically are not the way to present claims. I think that's probably right.

We also have something called a motion for permission to file a class proof of claim. I don't think we need --

FEMALE SPEAKER: Mr. Lockwood, would you step up to the microphone?

MR. LOCKWOOD: I don't think you need permission to file a proof of claim. You can file -- anybody can file a proof of claim. It may get objected to, and it may get thrown out on any one of a number of grounds, but people come in, they file proofs of claims.

And, indeed, that's what Judge Newsome determined in connection with the class proof of claim issue in the Armstrong

case.

THE COURT: Well, I don't know about in Armstrong, I mean one of these cases, though, he had had a bar date that already passed.

MR. LOCKWOOD: I understand that. But I think -- but you can file a claim in advance of a bar date and that's one of the things I want to focus on here. People could file a proof of -- a class proof of claim on a national class, on a state class, whatever here. The debtors could object to that proof of claim. The people could file individual proofs of claims.

The problem that we've got here is the interplay between the bar date --

THE COURT: Right.

MR. LOCKWOOD: -- and the class proof of claim. Frankly, it seems to me one of the things we might want to consider is whether or not we should essentially suspend the idea of having a bar date on the Zonolite proofs of claim for the time being. Let somebody file a class proof of claim.

The first thing you need to do, by way of an objection, is determine whether or not a class proof of claim is maintainable in a bankruptcy case, if so, what would the class be, that's the certification, if you will, of the class proof of claim. There's a multiplicity of potential classes that we're talking about here.

Mr. Bernick is right, I hate to agree with him about

anything, but he's right. Once one determines that there's a class here, you have to determine which subsection of 7023(b) it's under. And that determination will have consequences.

THE COURT: Oh, sure.

MR. LOCKWOOD: We can't just sort of say, well, gee, we'll have a class for purposes of assignments trial. But if we don't like the outcome, we won't have a class anymore.

THE COURT: That's right, which is why the concept of taking a look at -- well, I guess a Rule 42 common issues at trial with respect to a limited number of claimants probably makes sense. Because to the extent that the science doesn't support it, there's no need to go through that.

MR. LOCKWOOD: Well, I understand, Your Honor. But then that gets me back to my comment about technical. Let's assume somehow or another we get some -- we'll call them a test case because that's really what we're talking about here, somehow or another, we identify some group of plaintiffs whether they be putative class representatives in Barbanti or the Boston or South Carolina, whatever, and we have a litigation involving the science and those lawyers. Certainly from a technical point of view, the results of that litigation are not going to be binding on anybody but those plaintiffs, and that's true of collateral estoppel as well because you couldn't use non-mutual collateral estoppel for a defense win against plaintiffs.

So, what we're really betting on if we go that route is that the people who lost that case who presumably are going to want to appeal the loss will be ultimately satisfied that the loss will be definitive and they won't want to come in and demand the opportunity to re-litigate the loss, having seen what happened to them the first time and saying with a group of plaintiffs and a different group of lawyers, well, you know, Mr. Sobol had a bad expert or he didn't have enough experts or --

THE COURT: But that's irrelevant I think because if there is some scientific evidence that shows that Zonolite really is creating some sort of a problem, it's only the liability that will lead to massive numbers of claims. The real purpose for looking at this is to see, A, what type of notice we're going to bring and, B, what type of class.

So, if we get the science decided first, then we know whether either or both of those makes sense and we have a whole lot more information in which to determine the type of certification.

MR. LOCKWOOD: Your Honor, the science is going to be a battle of experts.

THE COURT: Sure.

MR. LOCKWOOD: And the -- who wins and who loses in that battle may depend on who the experts are and who selected the experts and how well they prepared the experts and a

different group --

THE COURT: That's always the case.

MR. LOCKWOOD: Yeah, but a different group of plaintiffs or defendants with -- well, not defendants, we always got the same defendant. But a different group of plaintiffs as they lose the first go around might decide they can come up with a better group of experts.

THE COURT: They may very well do that.

MR. LOCKWOOD: And how can this Court tell them that they can't do that?

THE COURT: Because in that context, what I may be able to do is say, you might very well be right and we're going to certify a class and we'll do it one more time, but this time we're going to do it with a class-appointed expert, and then we bind everybody.

But at least we have an idea as to whether or not it's necessary to go that step. Because if there is no scientific basis for it, there's no need to, A, do the notices or, B, certify a class.

If there is scientific support, then at that point, I think you've got a whole lot more information to determine what the potential scope of that liability is, what kind of scientific damage -- scientific evidence will support what type of damage and what type of class, if any, is appropriate.

MR. LOCKWOOD: Well, remember, it's not just

scientific evidence, it's scientific evidence proving by a preponderance that there's a cause of action for --

THE COURT: Well, of course.

MR. LOCKWOOD: -- for property damage which would include whether it needs to be abated or whether it needs to be remediated or whether it needs to be covered up. That's not just damage, that's part of the underlying determination of whether there's a property damage claim at all, whether there's an injury, if you will.

THE COURT: Well, that may be. And it may also be -- it may also lead to the conclusion -- a hypothetical. Let's assume we get 500 individual claims that are filed, no class, just 500 individual proofs of claim. And 250 of them say my damages are $1,000 because I want to put some sort of seal in, and that's what it's going to cost me to seal the Zonolite. And the other 250 say I want $7,000 because I'm going to do renovations to my house and I -- and since this stuff has to be taken out, and that's what it's going to cost. It may well be that those two shouldn't be in the same either class, for purposes of Rule 23 class, or class for purposes of plan confirmation.

MR. BERNICK: And it could -- just to pick-up on that, and I think the general opinion remains that information will come out of this process that certainly will better inform the proper disposition and procedures surrounding these claims.

We may find out that the exposure conditions to begin with were very, very different, depending upon the nature of the application, that the risks are very different. And that could obviously effect any effort to certify the class.

There's also another word that I know will get Mr. Lockwood's goat, at a certain point there's also a Dalbert issue here. And Dalbert is not confined to any individual claims.

MR. LOCKWOOD: Well, Your Honor, I'm going to turn things over to Mr. Scott, but I just -- the one thing I want to say from my perspective is that before we have any determination by this Court, either that a class proof of claim should be allowed on a class basis and/or that a class should be certified, I do think we need to have a full fledged briefing of that issue, as well as discovery, et cetera.

THE COURT: Oh, yes.

MR. LOCKWOOD: Right now, I mean the way the papers have been teed-up, we're sitting here talking about whether there should be a class claim or not. And, frankly, we're not ready to have you decide that.

THE COURT: And I'm not ready to decide it by a longshot. I tried to tell you that this afternoon that I just wanted to have a discussion as to whether or not this actually was a vehicle which got you all to where you need to be, at least, and if it does, you ought to take advantage of that

opportunity. That's how I thought I started this discussions.

MR. SCOTT: That is how you started it, Your Honor. My name is Darrell Scott, I am class counsel in the Washington Zonolite Attic Insulation case, which is Barbanti.

I don't have any arguments, I actually just have some information I think might be helpful to the Court, and then I could answer any questions.

The Barbanti case, despite the comments made by Mr. Bernick, is a 23(b)(2) class action. So, not only is there precedent with regard to this process, there is with regard to the very points you're talking about Zonolite. The comment was made notice hasn't gone out. 23(b)(2) doesn't require notice.

The Court in Barbanti elected to have a voluntary notice to alert class members that she had certified a non-opt out class that put class members in the position of monitoring the process and she thought that was helpful.

So, they are correct that about eight days before the Court was to pen the final order that would have resulted in a comprehensive notice to class members, including the EPA web sites and the special 1-800 number, about a week or two weeks before the Court penned that order, they filed bankruptcy.

I think the Court is correct that it is the certified classes provide a vehicle for expediting resolution of the issue of the science. And that putting the court in a position where it is making actual determinations of that sort is going

to assist the Court and then understanding whether there are legitimate claims out there, what their character is, what the notice needs to be to that community. So, the question is how did we get there.

I heard Mr. Bernick say three times in sort of subtle way that this is fine as long as the only people who show-up are the representatives. So -- and I -- that simply cannot work as a device.

Mr. Barbanti has a claim that's worth a few thousand dollars. The only way he can economically have me here even for this hearing is because he has been empowered to represent a class. And I think it is important that that certified class -- and what it means, which has been fully argued by Grace, needs to be present at any determination of the science. It cannot be Mr. Barbanti on his own because that simply eviscerates the ability of that person to even proceed.

I'd also say -- I only make this remark because it might be helpful to the Court, Barbanti's a certified class action. The Court has entered orders that have -- continue the time period for removal of actions. A filed claim -- there is an automatic right of removal to the Bankruptcy Court. And when that happens, it's an adversary proceeding which brings to bear all of the 7000 rules, including certification, which is already done in this case, and the plenary civil rules by which cases are litigated.

So, among the devices to actually have meaningful parties before this Court, one potential device is a removal of the Barbanti case or lifting of the stay so that it could be tried in Washington, which would have been done this spring had there not been a bankruptcy, would get us there. But I -- but only to the extent that it is Mr. Barbanti as the designated representative of homeowners in Washington designated by the Court, empowered in a meaningful way to participate. If it is just --

THE COURT: Well --

MR. SCOTT: The comment about -- you know, if you go this way we're going to appeal and it will go on forever and you'll never get where you want to be, you know, it's not helpful to make threats, but the reality is if the certified class is not recognized, plaintiff really is in the same position of having to challenge the lack of there being a class.

THE COURT: Well, that could be, but that won't be as deadly as the prosecution of the case and assert as a challenge to the class certification. That really would stop the plan process in its tracks, I think. I don't think --

MR. SCOTT: Well, that's --

THE COURT: However, I'm not sure that at least if this process works for the whole Barbanti concept that it's inappropriate necessarily to do that piece of it on a class

basis just for that group of people or maybe for the South Carolina, whoever --

MR. SCOTT: Sure.

THE COURT: Whoever the appropriate groups that are already recognized as class groups may be. I don't know, I don't have a view about it one way or the other. I'm not trying to make decisions about certifying the class, truly I'm not. And I don't want this record to sound like I am because I'm not. I'm not there yet.

But it seems to me that if we need more than one individual in order to make this trial feasible, then we ought to have enough people here to make it feasible, and that takes --

MR. SCOTT: Class does that.

THE COURT: -- a class, i.e. the people who are in the Barbanti class to do it, then maybe that's the way that I'll allow it.

MR. SCOTT: And it's B(2), it's non-opt out, no notice is required. And it puts together a reasonable community of individuals who were actually prepared to try this issue before they filed bankruptcy.

MR. BERNICK: Your Honor, it is not a threat, it's a reality. If that class proceeds here, that class is incorporated here. We would have to appeal that.

Your Honor could not bring that class in and simply

incorporate the certification, we have to approve that certification. Under Rule 9014, you then have to apply Rule 23, Seventh Circuit, American Reserve case specifically says if there's a discretionary analysis that has to be done or Rule 23 can be used, you have to determine what the impact on the bankruptcy is going to be. The impact on that bankruptcy would be unmistakable if we would have to take on that class, and we believe we're perfectly entitled to and that we'd be correct in doing so.

THE COURT: Well, but if you remove the action here --

MR. BERNICK: Let me address that because there are three points to be made that I think are somewhat technical, but let me respond to them.

First of all, he says it's a B2 class, I had thought that they sought certification under both B2 and B3, I'll take his representation it's B2. It's a State Court B2 class. And I believe that in point of fact in Washington State, and I think it goes back to a Boeing case that was prosecuted, they're tended to be somewhat broader certifications under B2 on the theory that medical monitoring is injunctive relief and things of that nature than I think what you'd find in the federal jurisprudence.

The federal jurisprudence has consistently been very clear, you do not get B2 unless you are talking about flat out

injunctive relief, that's number one.

Number two, removals do not have to be of cases or whole proceedings. They can be of claims. And, in fact, we went through this process at some length in connection with my representation of the car companies and their motion to remove and transfer just those claims predicated on friction products before Judge Wolin. So, we could certainly remove and transfer the claims of the individuals.

Number three, with respect to getting a critical mass, there are a series of purported class actions that have been filed in different parts of the country. And I'm fairly confident that we can find among those class representatives a sufficiently large number of people that, together with what I believe will be the abiding interest of all the lawyers sitting at this table who have an economic interest in winning that trial because they'll then want to argue for you that there's a class. I don't think we'll have a problem finding counsel who will adequately represent those people.

And, you know, the line in the sand really is class. And I say that again, not by saying, oh, we're going to just mess up the sandbox. It's just -- it's the economic reality of the ramifications of that class certification.

So, for all those reasons, I think that there's probably -- no I will agree with Mr. Baena here, some merit in perhaps devoting a little bit of time to thinking about it, but

I think that our thoughts would certainly be in the direction of that group of people, and we can figure out some way to try to pick them. And maybe the appropriate thing to do is to allot some time to that and then to make some proposals for Your Honor.

THE COURT: I think that's not a bad idea. I think meanwhile, however, the responses to the motion for approval to file the class proof of claim and the arguments on the motion to dismiss the adversary and so forth ought to go through. Because if you're not able to come to some resolution, I have to decide it and I don't want to delay it too long.

MR. BERNICK: Sure.

THE COURT: It seems to me that this is a pretty crucial issue and you should just get to it. So, I would like a briefing schedule. All right, that was along the way of --

MR. BERNICK: One -- one docketing issue on that. We have dates for the motions to dismiss. I don't believe that there was any date for the class certification briefing and argument. And while I don't -- I'm not anxious that there be one, I just heard Your Honor say that you want to keep this process rolling. Do you want to set dates for that or --

THE COURT: I thought that under your local rules, when you filed a motion there was automatically a response date that kicked in. But I saw on that announcement that it was a to be determined, both for responses and a hearing date, I was

confused as to why that was --

MR. BERNICK: Because it came up for original discussion when we first were before you about what the sequence should be. And the sequence that Your Honor determined we were going to follow was going to follow the -- you know, first the motions to dismiss before you got to the class certification issues, they were deferred. And I think there's actually colloquy that I remember pursuing with Your Honor bringing home that distinction.

And then somewhere along the line, because of all the discussion that we had about a class proof of claim, Your Honor then asked for some briefs to be filed that were kind of bench memos, not really a response or further briefs in support of class certification, but just discussions such as we've had here today.

So, at this point in time, we do not actually have a response date. And as Mr. Lockwood maybe is now rising to his feet to indicate, it may be that there will be -- if we have to go down this road, there would have to be some discovery that would be associated with it, as well.

THE COURT: Well, there probably needs to be some discovery. But I think I need to get the pleadings closed first.

MR. LOCKWOOD: Well, Your Honor, the problem that I was going to address is that right now, to the extent things

are teed up, it's teed up in the context of the adversary action filed and the motion to dismiss.

My own personal view is that fighting about the motion to dismiss the adversary proceeding is a waste of everybody's time. They're going to file a class proof of claim, the debtor will object to it, they move for certification and approval of litigating or processing or allowing or disallowing the class proof of claim on a class basis. There's whatever discovery the Court decides is necessary to determine whether that should go forward on a class basis. And then you have a hearing on what amounts to certification of a class proof of claim.

Because otherwise, frankly, I think what's going to happen is you're going to waste two months litigating over whether an adversary proceeding is the right way to present property damage claims in a bankruptcy, and it's something I think they're going to lose.

MR. BERNICK: The adversary proceedings were brought to raise a question as to what the appropriate device was for a resolving the claims, whether it was a proof of claim process or an adversary proceeding. And there is some truth to the remark that that -- as long as we're getting to the merit of the claim, it's not so important, I suspect -- I'm thinking out loud, but I think it's not so important to resolve the theoretical question about whether that device is a proof of

claim process or an adversary proceeding. Because, in fact, we'll have an adversary proceeding, I think, we will have a trial.

THE COURT: Well, if you file a proof of claim and they object and somebody has a counterclaim maybe, but I'm not sure that it would necessarily end up in an adversary unless they remove the proof of claims --

MR. BERNICK: Correct. We wouldn't --

MR. LOCKWOOD: Your Honor, all of the Rule 7000 rules that matter for adversary proceedings apply to contested matters and it will certainly be a contested matter.

THE COURT: Yes, it --

MR. BERNICK: Yes.

THE COURT: -- will that.

MR. LOCKWOOD: And the only thing that doesn't apply is Rule 7023 and Rule 9014 gives the Court discretion to apply other rules if it wants to --

MR. BERNICK: At any stage. But, again, just so we're clear --

THE COURT: Thank you for the --

MR. BERNICK: He left out just one little bit, which is that that whole idea that is 7023 is available at a -- at any stage on the language no matter what --

THE COURT: Yes.

MR. BERNICK: It has not yet been adopted by the

Third Circuit, which is all the more reason why ultimately -- well, and particularly in this kind of context, ultimately it might have to go up. But I think that if they were to file a proof of claim, they're always entitled to -- safe to file a proof of claim, we can't stop them from doing it. I think that Peter is, in fact, right about that.

By the same token, I would suppose that if we can't reach agreement on our -- what is our alternative proposal, we can simultaneously go down the road of dealing with that request for class proof of claim and certification, but then also it's then, I suppose, up to us to decide how to tee-up the alternative that we've explored here today, which we'd be happy to do. And maybe we just ought to put them on parallel tracks, although my own feeling is that I take Your Honor being anxious, desirous of moving forward to that science trial, so would we. And from that point of view, if we -- if there's any way we can reach agreement on something to tee-up promptly, that ought to be the priority.

THE COURT: All right. Well, let me ask two questions first then. I guess of you, Mr. Bernick, and Mr. Scott, primarily. Number one, Mr. Scott, I think that the appropriate way to pursue the claims in the case is going to be through a proof of claim process. I think you're going to have more difficulty in substantiating that it should be through the adversary simply because the Bankruptcy Rules provide for a

proof of claim process that works. Would you consider withdrawing that adversary without prejudice so that we can get passed it for purposes of trying to tee up something on the property damage proof of claim side? And it is without prejudice, you could always refile that very adversary because there's not Statute of Limitations issue in the event that this process does not resolve itself in terms of protecting your clients' right to your satisfaction.

MR. SCOTT: Certainly, Your Honor. The adversary proceeding is also broaching the issue of the appropriateness of tackling the Zonolite claims on a class basis. And the recognition of certified Zonolite classes is a thing that can't be --

THE COURT: Well, that, though, you've now got -- somebody filed a motion, I'm not even sure who did that, but filed a class proof of claim, was that you?

MR. SCOTT: We filed that.

THE COURT: Okay. So, you've got that teed up in that context anyway.

MR. SCOTT: Sure.

THE COURT: It's now there.

MR. SCOTT: I understand.

MR. BAENA: Your Honor, we apprized the Court last week that it has been withdrawn. We sent a -- to the Court's Clerk when there was some confusion about scheduling --

THE COURT: Oh, I haven't -- I didn't -- the motion to --

MR. SCOTT: I got that same e-mail, but I never saw anything go to the Court that withdrew it.

THE COURT: I haven't seen anything that withdraws that motion.

MR. BAENA: We wrote to the Court's Clerk to apprize the Court that it's being withdrawn last week.

THE COURT: Okay. Well, I haven't seen that letter then.

MR. BAENA: I mean it could be refiled and --

MR. SCOTT: It was admittedly a procedural matter. We were told that the Court wanted to address the class group of claim question at ten o'clock today. We filed a pro forma motion so that the Court had something in front of it to rule on.

And then when it turned out the Court wasn't going to have a hearing starting at ten o'clock on that issue, it was functionally withdrawn. The issue I think is still before the Court and the motion is, as well, it's just not being heard as a result --

THE COURT: For today.

MR. SCOTT: That's correct.

THE COURT: Okay.

MR. LOCKWOOD: At the risk of sounding like a broken

record, why can't they just file a class proof of claim and then move to have it certified? That's the way that we normally do things in the world. You file a complaint and you move to have it certified. This idea that I need permission of the Court to file a proof of claim that's called class --

THE COURT: I think --

MR. LOCKWOOD: -- it has not --

THE COURT: That came up, Mr. Lockwood, I think because that's my understanding of that Interregional Trucking Company case that Judge Gambardella had. That's how the issue came up. And I think I suggested on the record that that was the appropriate way to go about this so that we teed the issue up in a contested matter and had an opportunity for the parties to respond to it, I think that's why it's --

MR. BAENA: That's exactly how it came up, Judge. You said repeatedly last time we had a -- I don't have a motion in front of me --

THE COURT: Right.

MR. BAENA: -- I'm not going to hear this. And so we responded that way.

THE COURT: And gave me a motion.

MR. BAENA: Judge, just one more word on the motion that was filed. It's sort of generic, it was filed by the Zonolite claimants, but it generically talks about filing class proof of claims that anybody and that was what the committee

had --

MR. BERNICK: Just to be clear, the Property Damage Committee is seeking to file a class proof of claim with respect to all property claims?

MR. BAENA: No, no, no. What I said was the Zonolite claimants filed a motion for leave to file class proofs of claim, and the relief they sought were as to all classes, Zonolite or otherwise.

THE COURT: And we're not talking all classes.

MR. BAENA: No, we're just talking about Zonolite.

THE COURT: Zonolite.

MR. BAENA: Correct.

THE COURT: I'm having enough trouble with Zonolite, I won't be needing anything else. Yes, sir?

MR. SOBOL: Good afternoon, Your Honor. Tom Sobol for the Price case in Boston. I just wanted to make two comments. And as Mr. Scott also indicated, they're informational only.

First, I obviously agree wholeheartedly with the notion of trying some kind of test process, whether it's on a class base or some other basis, that makes an awful lot of sense.

One of the main reasons for that, frankly, is I found when reading the papers for today when we were doing the claim form that this Court, frankly, is at a -- very much put in an

awkward position. You have on the one hand the debtors saying that there's absolutely no scientific basis whatsoever for having anything to do with Zonolite.

And on the other hand, you have the United States Department of Justice, the Environmental Protection Agency and the United States Attorney for the District of Delaware saying that you've got to notify people of the dangers of Zonolite. And you've got no affidavit on either side of that fence. And so just recognizing that before this Court can make any kind of an intelligent decision, you obviously have to have an awful lot more behind you in connection with that.

If there is to be any type of a test basis, any kind of a trial, that kind of thing, again, which I endorse, what I would, again, suggest to the Court or at least be mindful of is this, that nothing focuses the mind any better than a trial date. And that the dates upon which that the parties have to do certain things when they have their mind focused for that trial date, obviously bear attention of getting certain things done, and those obviously include discovery.

Because one of the things that the Zonolite claimants have as an issue is that there were massive amounts of documents that were right about to be produced to us at the time that the Chapter 11 was filed last April, and that we had depositions that we were getting ready to take, as well. And that that whole trial had to stop. So, I'm more than happy to

do anything on any kind of an expedited basis.

And I would simply suggest that one of the things the Court might consider when sending the parties away to figure out who the claimants might be is also what the trial date is and what the events are that go before the trial date.

THE COURT: Okay. All right. I'm not sure, Mr. Bernick, whether -- what position -- because the debtor hasn't had a chance to respond to the motion to -- or to file the class proof of claim. I thought that was an appropriate way to tee the issue up because it put everybody on the notice of what the effort was and I thought it got you to the point where it could become a contested matter.

I'm not necessarily married to that process. If you simply would prefer that somebody file the class proof of claim and then the issues come up, I think it's okay. I think you're going to get to those issues one way or another.

If the adversary action is going to be temporarily withdrawn and there's a way to get to the issue of the test cases and I think after that determine the propriety of what kind of bankruptcy classes we're going to have, if any, then that, I think, makes a lot more logical sense and I think gets you to the end of the case quicker.

The problem may be trying to figure out who these -- I'm going to adopt that test plaintiff concept for now -- should be if there isn't going to be a class as a Rule 23 class

for purposes of that trial.

MR. BERNICK: That's something that I think that we may actually be in the position to solve because we've got the cases.

THE COURT: Okay. Then it seems to me that perhaps that's where the debtors' focus should go for now. We ought to figure out how to get those cases either here or -- that was my second question, I'm sorry, I never asked it. Do you prefer to do this trial in State Court somewhere? Do you want relief from stay to go back to the State Court and try the case?

MR. BERNICK: I --

THE COURT: Because if you do, I want to get that order to get you moving.

MR. SCOTT: We prefer that, Your Honor. And I know Gaffney O'Connor (phonetic) is prepared to try the case.

THE COURT: Okay.

MR. BERNICK: That is not what we prefer. In fact, we are talking about getting a unified, single -- this is the record, isn't it? The unified, single determination under the Federal Rules which I know now that Mr. Lockwood will agree because it's another 9000 Rule --

(Laughter)

MR. BERNICK: -- 9017 says Federal Rules of Evidence apply.

THE COURT: All right.

MR. BERNICK: So, that is something that we would be seeking to litigate before Your Honor and we are prepared to move forward and set up a schedule for that. Although, obviously we have to, first of all, figure out who the plaintiffs are going to be. But we will, commencing tomorrow, move forward to try to identify with greater specificity exactly what we can do to bring that process forward before Your Honor.

THE COURT: All right. Do you want a short recess to talk about this for a few minutes now so that you can give me a date by which you're going to take the actions that you think are appropriate? For example, I'm just guessing, let's assume the debtor is going to remove at least some of the claims issues here, I know you won't know which ones today, but you're going to want to talk to people to find out which ones are coming in. So, let's say you pick 50 claims that you're going to remove here and you need time to get them in, then you need time, I think, to get the pleadings closed. Because as far as I know, the pleadings are not closed as to any of those claims in any of the State Courts, correct?

MR. BERNICK: Yes, that's true. But I don't know that we have to get -- when you say the pleadings are closed?

THE COURT: Well, if there is -- if a debtor is going to file an objection to that claim, it needs to be filed and I need to get a response to it filed and then I need to set a

discovery schedule, right?

MR. BERNICK: Right. I think that, number one, if we were to take a break now and actually have a concrete discussion about that, it would end up being too complicated to be able to report back to you in a simple fashion.

What I would propose is that we initiate whatever contacts are going to take place and that really the burden, I suppose, is really on the debtor to communicate with the Court before the next omnibus hearing with a proposal for what the schedule should be, and then you can take up that matter in connection with the -- that is -- I take it what you're asking about is really scheduling.

THE COURT: Yes.

MR. BERNICK: I think we can take up scheduling at the next omnibus hearing.

THE COURT: Okay. I would prefer, if I can, to get an order in advance of the next hearing so that at the next hearing, we can discuss a trial date. I'd like you to get an order that will set the dates by which all of the preliminary actions are to be put together and then we will talk trial.

MR. BERNICK: That's what I'm suggesting is that between now and then, we would be making a submission to the Court and they obviously would have the opportunity to respond that would be a proposed schedule. So that at the time of the next hearing, we can take up the question of that schedule

before Your Honor.

THE COURT: Okay. The other --

MR. BERNICK: That's what I'm -- that's --

THE COURT: All right, that's fine.

MR. BERNICK: Yeah.

THE COURT: The other -- the only issue, I think, that I don't know in terms of scheduling a trial right now is until I know how many of these claims you're going to be bringing in and how many witnesses you think you'll need, then I'm not sure I know how much time we're going to need to reserve. And I don't know if you're going to be prepared to address that even at the next hearing. You may need to get proofs on the discovery first.

MR. BERNICK: Maybe. But we'll certainly -- one thing is for sure, but by the time of the next hearing, we'll be in a better position to explore those matters with Your Honor.

THE COURT: All right. Is this process acceptable to everyone? That Mr. Bernick's office will take the lead in getting all of you together to put together a proposed schedule for how the test cases are going to get before this Court. I will try them here since we make use, I think, of the Federal Rules for that purpose.

Meanwhile, the adversary that was set for a motion to dismiss argument in April will be withdrawn without prejudice.

What do you want to do about the motion to file the class proof of claim? Let's just get the answers to it in and start the briefing with respect to that? I think we ought to do the test cases first, or do you want to withdraw that without prejudice, too, for now?

MR. SCOTT: It's unclear to me how the test cases are before the Court, whether that's through a proof of claim process --

MR. BERNICK: It's called removal and transfer.

MR. SCOTT: Okay. Removal and transfer.

MR. BERNICK: You remove the case, transfer it physically to be before this Court.

MR. SCOTT: Sure. Then the class proof of claim wouldn't be a necessary --

THE COURT: Not right now.

MR. BERNICK: It would be withdrawn.

THE COURT: Not right now.

MR. BERNICK: It would be withdrawn at this time.

THE COURT: Okay. So, the motion to file a class proof of claim and the adversary will be withdrawn without prejudice to this test case process that we're going to implement instead.

MR. SOBOL: Correct. And just so the record is clear on all those motions, we're also not moving forward on the class certification motion --

MR. BERNICK: Right.

MR. SOBOL: -- at this time, as well. All those issues make sense to defer until we've gone through this other process, or at least until we decide otherwise.

THE COURT: Well, the motion to certify the class is part of the adversary, is it not?

MR. BERNICK: Yes.

MR. SOBOL: Yes.

THE COURT: So, if the adversary is withdrawn --

MR. SOBOL: Yes.

THE COURT: -- that's being withdrawn for now, too.

MR. SOBOL: Yes.

THE COURT: Okay.

MR. BERNICK: You know -- go ahead. Well, Mr. Baena raises the issue of medical monitoring.

MR. BAENA: Right.

MR. BERNICK: And we have a -- there is a medical monitoring class, medical monitoring adversary and motions to dismiss the medical monitoring adversary which I think would probably also be recognized to be meritorious.

MR. BAENA: That's correct.

MR. BERNICK: And then the question, I suppose, is do you -- do you -- well, I guess I'd want to think a little bit about medical monitoring. Medical monitoring will overlap, in some degree, what you have with respect to the property claims.

In connection with the property claims, the claim will be that the presence of material in the house creates an unreasonable risk of harm.

Medical monitoring also is predicated upon a showing of risk. So, there is some substantive overlap. And I guess what I would suggest is that we get the same agreement to withdraw that adversary and that motion, and that we take up that issue, as well, after Your Honor has had the benefit of hearing the science.

The same people -- there's -- there are two classes of -- there are two classes of -- actually three groups of medical monitoring claimants that were proposed:

One were people who lived in Libby.

Second is people who worked in connection with the expansion class -- classes.

And then third, what I was just referring to, which is people who were allegedly installers of the Zonolite. So, there's some potential overlap on that last issue.

With respect to the first two categories, although there's some differences, too. With respect to the first two categories, the exposure situations are different. And, therefore, in that respect, the trial would be somewhat different.

I don't know what to say other than that I suppose you could think about what we contemplated with respect to

medical monitoring, and that's why we submitted a form was that, again, the medical monitoring people would make individual claims and would come before the Court and we can then, in connection with Rule 42, determine whether these three groups of people really had a claim in all of them, rather than doing the preclass certification.

I don't think that -- Your Honor was focused on a question of whether what you tell people on the property side about the lists of family, you don't have that with respect to these other people. These are all people who occupationally were exposed, and not necessarily just to Zonolite, but to other material. So, I don't think that you have this problem of trying to figure out how to instruct people to determine whether their house falls within the scope of the class. People will know whether they were commercial installers. People will know whether they lived at Libby and believed that they were subject to contamination from the asbestos. And people will know whether they worked at the expansion plants.

So, I would propose that we stay status quo with respect to medical monitoring. We would oppose -- we would move to dismiss if they don't withdraw the medical monitoring adversary. We would propose the imposition of the bar date. They submit the claim form that we used and that we then -- when we get to the science, which could be at a subsequent trial, we would work with the individual claims.

I'll add also that in this context, I believe that there are B3 problems here. The B3 problems for people alleging personal exposure are overwhelming. This is the classic kinds of factual variables that have led to all of the de-certifications that took place in the '90's in the Supreme Court decision --

THE COURT: Well, is the debtor challenging the medical monitoring request for the people who worked in either the expansion plants or at the Libby Mine?

MR. BERNICK: Well --

THE COURT: Or only to people who have Zonolite insulation in their homes and that's their only level --

MR. BERNICK: Yeah, we would be challenging all of those. Obviously there are some people who worked at Libby and were heavily exposed, and we understand that. And there may be some claims in connection with that process -- well, there are claims where people actually had sustained personal injury. So, the exposures were high enough.

But the group of people that's described is much broader than that. It's anybody, I think, whoever lived or worked in Libby. And we are not in agreement that that entire group ought to have medical monitoring. It's a very diverse group and the exposures there, we believe, for the overwhelming number of people who are there, are not anywhere close to the kind of levels that would be requiring medical monitoring.

That's the problem with the class is that it's so variable, it describes people who have had greater exposure and people who have lesser exposures.

So, in direct answer to your question, we don't believe the class certification would be appropriate. We believe with respect to many, if not most of the people who would comprise the class, that they're not entitled to relief.

On the expansion plans, you're talking about a very small number of people. And, again, with very significant job differences. Both -- and differences in exposure. People at the expansion plants were working with a different kind of material. So, their exposures would have been different from the people who are working in Libby. And we do contest the medical monitoring claims there.

With respect to the people who were working with Zonolite for a period of six months, I'm not sure how many of those people there actually were. I guess we have a class representative who says that he's one, but it's kind of hard to deal with that because we have a difficulty understanding what this occupation is. For the most part, this was put in by people on their own and I don't know that there are many people that would actually fit the class description.

So, that's all the more reason why you send out the individual claims and you get exactly that kind of information, who are these people who are going to file claims, what are

their job exposures, et cetera, et cetera, et cetera. You'll then have an awful -- and how many of them are there. You have an awful lot more information on the basis of which we can chart a course. And, indeed, in our first CMO, Your Honor.

THE COURT: How many people live in Libby or the immediate area? Whatever it is.

MR. BERNICK: It's the low thousands of people, I guess about 45 hundred people, 6,000 people.

MR. SCOTT: Something like that. And it's like, you know, ten, 15,000 people who had lived in that County --

MR. BERNICK: Over the time.

MR. SCOTT: Yeah, since 1937. It's a -- you know, migratory group of people.

MR. BERNICK: The expansion plant population, these were operations that were very low personnel requirement operations, very small numbers of people. But whatever it is, when this issue was first raised -- medical monitoring was first raised, in our very first CMO, what we said was, gee, the EPA and others are gathering data from Libby that will show us where some of the contamination was. It's impossible to even figure out what to do with a claim like medical monitoring, which will always be driven by exposure until we have more data. There's so much variability.

They then filed their medical monitoring class action in the sense -- in a sense, forced our hand. And our response

to that really is okay, well, let's find out who the people are and what their conditions are and then we can make a more sound proposal for how to deal with their claim. Right now, all we know is that there's a lot of variability.

So, we would stand by the request that people -- those are people who are more like the straight personal injury claimants --

THE COURT: Okay.

MR. BERNICK: -- they should file a proof of claim.

THE COURT: Well, in a case of this size with several hundred thousand asbestos claimants, having 15,000 doesn't seem out of line, I mean to require individual claims doesn't seem to be so much of a problem.

So, I'm not so sure in this instance I have a problem with doing whatever appropriate notice should be giving, getting individual claims in and then if it's appropriate to certify a class action, those claims come in, if we look at that issue. But it seems to me that getting individual claims in should not be that much of a problem. The Zonolite's a whole horse of a different color because you don't even -- you can't get your arms around what you're dealing with. But you can with this and 15,000 doesn't seem to be a large number.

MR. BERNICK: Can we get agreement? I mean would counsel be willing to withdraw the adversary and the motion to certify that class so that we can have that out of the way?

THE COURT: What we could do, I think, is work on the proof of claim form and the kind of notice that needs to go out to the individuals who have those medical monitoring claims, let's get them out, get the claims in, and then see whether a class should be certified.

MR. SCOTT: Well, we would -- we would -- if we were not moving through an adversary process -- because medical monitoring in many states is inherently an equitable claim, we don't -- equitable. It's not a, we think, claim under bankruptcy nor can be transformed into a monetary claim.

THE COURT: Why not? I mean all that we're monitoring is we're sending somebody to the doctor. So, that incurs a medical bill, that's a classic equitable claim that can be turned into a money damage claim.

MR. BERNICK: The Third Circuit decided this very issue in the Barnes case. Barnes was medical monitoring for people who were smokers. Actually an --

MR. SCOTT: I'm familiar. The -- if we go through a proof of claim process, we'll be filing a class proof of claim. And that can be disputed --

MR. BERNICK: Well, I think what we're contemplated, if all that this discussion meant was there was one claim for the class, it wouldn't do anything. What we're asking for is for individuals to file proofs of claim.

MR. SCOTT: Sure.

MR. BERNICK: The same thing as Mr. Lockwood said, I suppose if you want, you can file also a class proof of claim, it would then be objected --

MR. SCOTT: Of course.

MR. BERNICK: -- to and at an appropriate time, the Court can decide to take-up the question --

MR. SCOTT: Correct.

MR. BERNICK: -- whether there ought to be a certification.

MR. SCOTT: That's exactly right.

MR. SOBOL: If we just stayed proceedings in that adversary and took no action and Mr. Bernick wouldn't have to file any responses at this time and -- I'm not sure whether people are ready to agree right now or even, you know, have resolved whether there's an equitable claim or a legal claim or something like that.

THE COURT: But does it really matter? If the concept is to get out the appropriate notice so that --

MR. SOBOL: Right.

THE COURT: -- the appropriate group of people know they can make a claim for medical monitoring.

MR. SOBOL: Right.

THE COURT: And then to send the same group the notices to get the proofs of claim filed so that we have them, we know how many people there are, what kind of medical

monitoring, what kind of exposure they have. The debtor may or may not object to some of those proofs of claim.

At the same time, if a class proof of claim is filed, we can withhold any certification until we get the individual claims in and see if it's appropriate to have a class. It may be after those claims come in, but it doesn't seem so improbable to get 15,000 or however many individual claims in from people and then see. Because it may be that maybe more than one class would make sense in that kind of a context. These people may want leave for relief or be entitled to different relief.

MR. SOBOL: I just thought that if one of the objections to that class group of claim in that context was that it wasn't a legal claim, it's the kind of claim that should be brought in some other fashion, you would want to be able to have that and that's one of the reasons we filed it.

And the other reason we filed it at the time, but it sounds like this is also obviated by that process, is that there might be some discovery that would be had on behalf of the medical monitoring claimants, if you will, during the process, as well, too. And that's another reason for filing our case. But I think both of those are obviated by the process that we're talking about.

THE COURT: Yes, I think we can do the same thing in the proof of claim context as opposed to the adversary context,

it's a little less formal perhaps than in the context of the proof of claim and hopefully it will get you where you need to be sooner rather than later. So --

MR. BERNICK: That also would have the virtue that we could do the notice program at once together with the property damage rather than separately and save ourselves some money.

THE COURT: Okay. So, at the moment, the debtor is contemplating with respect to notice, doing the property damage notice and doing the medical monitoring notice.

MR. BERNICK: Correct.

THE COURT: And doing the other bar date non-administrative notice.

MR. BERNICK: Yes, not on the non-asbestos.

THE COURT: Right.

MR. BERNICK: Yes.

THE COURT: So, you'll deal with the asbestos personal injury actions with Judge Wolin. And if we can get these orders in sync, you'll do it all once, but that's between you and Judge Wolin.

MR. BERNICK: Right.

THE COURT: And with respect that Zonolite would defer any issue at all about a proof of claim and the notice of Zonolite until we get the scientific issues decided.

MR. BERNICK: That's correct. Which would then leave us with the proof of claim form for the traditional property

claim. I know that Your Honor's received objections and our responses in the -- I think our response tried to repeat, to the extent that we could --

THE COURT: Yes.

MR. BERNICK: -- what their objections were. And then this issue of the new Hilsee affidavit, which we would like to take up with the Court so that we know what to do about that. But in order to kind of tell you where I'm going, the hour is drawing a little bit late, and --

THE COURT: Gentlemen, I told you to bring your toothbrushes. We're here today until we're done.

(Laughter)

MR. BERNICK: Okay. I was going to suggest that when it came to the proof of claim, if Your Honor had reactions to the arguments as they've already been made, then maybe you could tell us where you're going, that might expedite that process and maybe the other thing we ought to get out of the way, though, is what to do with this -- the Hilsee affidavit because that goes to the notice program.

THE COURT: Okay. Well, let's back-up for a moment to the adversary on the medical monitoring. Is that going to be withdrawn without prejudice to them?

MR. BERNICK: Yes.

THE COURT: Okay. All right. Mr. Scott, are you going to file appropriate notices of withdrawals without

prejudice of those?

MR. SCOTT: Yes.

THE COURT: Okay. Okay. Before we move to the other issues, would you folks like a brief recess? Maybe take a 15-minute recess, and then we'll come back and deal with this. Okay. Thank you.

(Recess)

THE COURT: Everybody back? Please be seated. Okay. Mr. Bernick, what issue would you like to address next?

MR. BERNICK: Well, there's -- I think that there would be two matters that may overlap, and we've just been having a discussion here to see if we can't expedite this. We obviously, I think, all recognize that there's going to be a bar date of the traditional property damage claims. And, therefore, issue one is the proof of claim form. Issue two is the disputes that remain between the parties on the notice program.

And we're prepared to address all those this afternoon, go though it line-by-line if there's a need for that. The discussion we were having is whether there might be an effort to sit down between the parties to see if we can't reach agreement on those.

THE COURT: Where's Mr. Lockwood? He's not here, huh?

MR. BAENA: Can the record reflect my suggestion?

People who are mulling that over right now --

MR. BERNICK: Well, yes, for the following reasons, is that we have now -- this is kind of struggling through yet another round before we get to be before Your Honor where something is a final resolution. We are really prepared to do it today.

So, I have said that we would sit down and talk about it, but I really wanted a deadline for further report to the Court on where we were because we wanted to get the thing done.

MR. BAENA: If I may. Here's the issue on notification, Judge. With what just transpired in respect to Zonolite, I think that eliminates a lot of the concerns we have with the program. We want more publications here and some more frequency there. And that's something that I think once the experts put their own private authorship aside, we'll be able to resolve.

Mr. Bernick's colleague who is heading up this matter suggested that by the end of the week they can prepare and present to us revised notices, excising that which is no longer going out. And that we could meet the following week, subject to her availability because of other plans. And we're prepared to do that. I don't know how we can be any more reasonable.

THE COURT: I can do it either way, Mr. Bernick. You asked for some advice with respect to the accusation that was filed by the Property Damage Committee. I didn't even have a

chance to finish reading all of the documents of the notice program that were included with that affidavit. I think that the burden is the debtors' to figure out a notice program that works.

So, to the extent that you're looking for guidance or an order in terms of who's going to do it, the debtor is going to do it, at this stage.

In terms of some of the suggestions that are here, some of them, I think, make sense. For instance, looking at television ads that attempt to essentially restate what's in print, I think you probably want to breakdown by type of claim that you're looking for as opposed to doing all of them together. Something like that, just seems to me, to make logical sense. Now, I don't watch much television, I confess, but nonetheless, when I do and I look up, I'm much more visually struck by a brief description of something than I am if I actually read bankruptcy notice. I remember the appliance store, for example, appliance store going out of business and it was a yellow screen with red letters, that's what I remember about it, and it went on and on and on and on, and at the end of it all it was like what I got out of it was that the appliance store was going out of business.

MR. BERNICK: Well, it's interesting because Mr. -- we retained Mr. Hilsee in connection with the Dow Corning bankruptcy and also in connection with the Babcock and Wilcox

bankruptcy, those are exactly how the TV ads, in fact, ended up reading. But be that as it may, it may be that there's not really the same need for TV when we come to the property damage claims --

THE COURT: Yes.

MR. BERNICK: -- and the medical monitoring claims to begin with.

THE COURT: That's right.

MR. BERNICK: That's what gives me some hope that maybe we can reach resolution. And all that I'm saying is that I'd like to get -- you know, we're just very, very focused on getting this thing done. And I'd like to be able to create a date certain for reporting back to the Court in the sense of getting the Court to finally approve what it is that we've come up with.

THE COURT: Okay.

MR. BERNICK: So --

THE COURT: I'm prepared to do it today. If you want to stay and go through these line-by-line today, seriously, I'm here until eight o'clock tomorrow morning when I start my next proceeding and all of you can join me doing this today as long as it takes. You're here until you're ready to go home today.

MR. BERNICK: There is one issue that I know -- I don't know what the -- whether there's any movement on this, but there's one issue on which we -- if we have to present to

Your Honor, we will, it's been our consistent position all along, we do not believe the notice is the appropriate context in which it recite contentions or positions.

THE COURT: And I agree with that. It should be a -- if a different type of notice needs to go out to alert people to the fact that they have to file a proof of claim, it should not be on a proof of claim form, I agree with that.

To the extent -- now, this is going back to the Zonolite one that --

MR. BAENA: That's correct.

THE COURT: -- I know we're not address right now, but for example, someone said that some description of what Zonolite looked like should be on the proof of claim form. I disagree with that. I don't think you need to do that on the proof of claim form. But what you could do is say if you don't know what Zonolite is, look at this web site address where you can see a picture or something, and that's a -- and it can be solved. I don't think we're that far apart on a major issue --

MR. BERNICK: Okay. And --

MR. BAENA: That identification issue was strictly limited to Zonolite.

THE COURT: Yes.

MR. BAENA: And I'm not concerned about that right now because we have a process that we're going to employ. If I could just say briefly why did we give you the Hilsee revised

affidavit? We gave it, Judge, to be forward going. We gave it because we expected you would do the same thing with notice that you did with the proof of claim form: Show me where you disagree. And so we have Hilsee compare their program to what we thought was a better program, it wasn't to ambush anybody. It certainly wasn't to delay anything . It was just to facilitate the conversation we wanted to have.

So, my apologies, that's -- if they're necessary. We were trying to be forward going.

MR. BERNICK: We will turn --

THE COURT: Okay.

MR. BERNICK: We'll turn over to them our proposal for how to create something that now reflects their last round of input, we'll do that by Friday.

THE COURT: All right.

MR. BERNICK: If they would then, by the following Friday, be in a position to sit down and talk about any remaining differences with the view then to reporting to the Court by the following Friday, that is two weeks from this Friday, what we hope would be an agreement on what the notice program and proof of claim forms would be.

MR. BAENA: I will undertake this end.

THE COURT: All right. So, you're going to hopefully get me consensual notice programs and proof of claim forms for which, the property damage?

MR. BERNICK: And medical monitoring.

THE COURT: And the traditional other --

MR. BERNICK: Traditional --

MR. BAENA: Traditional PD.

MR. BERNICK: Traditional --

MR. BAENA: I do not represent medical monitoring.

MR. BERNICK: Well, we've got to get the medical monitoring because we want it to be part of the same notice program. Otherwise we're wasting --

THE COURT: Which I think makes sense. I mean we ought to try to do at least a couple of notices --

MR. BERNICK: And we have not --

MR. BAENA: I don't disagree. I just don't represent them.

THE COURT: Yes.

MR. BERNICK: Yeah. We have not received any comments on the proof of claim at all.

THE COURT: No, that's -- I was going to ask that because none have been filed that I'm aware of. I had the docket searched this morning and I'm not aware of any on the medical monitoring.

MR. BERNICK: Okay. So, I guess what it is is that we'll go forward with a program that includes both. We will circulate that program to counsel for the traditional property damage claims, as well as counsel for the medical monitoring

claims. Anybody who's got comments, got to get back by a week from Friday. And then we'll undertake to meet and see if we can't report out a consensual resolution on all those matters by two weeks from Friday.

THE COURT: All right. Now, you want this issue back on the April 22nd agenda in the event that there are still any disputes.

MR. BERNICK: Yeah, although I --

THE COURT: So --

MR. BERNICK: I really -- I really hope we're going through an exercise that's designed not to be on that omnibus agenda.

THE COURT: I honestly don't think you're that far apart on these other issues.

MR. BAENA: I don't either.

THE COURT: There's only like -- the major one.

MR. BAENA: I agree, Judge. There is only one other issue, I think, just to put it on the table. Assuming we get through, as I am very hopeful we will, the proof of claim form and the notification program, the last issue becomes what is the bar date. And just to preview what we've already described elsewhere, our biggest concern is -- and this became evident when we took their expert's deposition, that there was no accommodation made for the completion of the proof of claim form at the end of the notification program.

There is a certain reach that they seek to obtain in order to give -- the number is actually 135 million people, five, six opportunities to see this, advising them of the fact of the bar date. And you have to run out the whole program until the last person has had that opportunity. And that happens to be almost coterminous with the date the proof of claim form is due under their bar date proposal. That doesn't work.

The problem we have is if you work from the end of the program, which keeps getting contracted, by the way, as we go forward, if you work from the end of the program, you have to give a period of time for somebody to react to what they've learned.

And as we have repeatedly said, Judge, this is an arduous process, depending upon how much information is required and, in addition, mandatory in terms of the proof of claim.

So, we will have to address the bar date as a separate issue.

THE COURT: I think --

MR. BERNICK: Well, --

THE COURT: -- you can address it as part of the same issue. When is the notice program -- when are you contemplating starting it, regardless of what it is? When is it going to start and when is it going to end?

MR. BAENA: Second -- it contemplated a second quarter run.

MR. BERNICK: Well, whatever, we can go and pin that down. I hear what Mr. Baena's concern is. We can make that an item of discussion and we'll see if we can't reach agreement on it.

THE COURT: Right.

MR. BERNICK: The point's the point.

THE COURT: Yes, we do need to address it. And, yes, there should be some period of time after the last notice is published to allow people to file the claim. But it doesn't have to be as much time as when the first notice was published either, you know, 30 days or something.

MR. BAENA: Now, Judge, when we met outside of your presence, we were talking about sitting down and having this conversation about the notice program.

In your remarks, you expanded it a bit to include proof of claim, and I'm delighted to do that. But I suspect that there's going to be a series of questions that they have asked that we're never going to agree.

THE COURT: Then let's just go through them.

MR. BAENA: We might as well go through those.

MR. BERNICK: Okay.

THE COURT: Which one do you want to focus on, the non-asbestos proof of claim form?

MR. BAENA: Well, you know, Judge, they did a very useful thing by -- as Mr. Bernick described. If we go to his response, the debtors' reply to objections to property damage proof of claim form and related matters -- I don't know that I have the --

THE COURT: I have it.

MR. BAENA: I could probably describe where we depart company, using that. If you go to Page 2, Judge, of their reply, Roman Numeral IIB, they're still insisting on the provision of a social security number. They refer to that being the requirement in three other cases. But that was a requirement in respect to personal injury claims. We thought you --

THE COURT: Well, let me ask --

MR. BAENA: -- solved that.

THE COURT: I thought I did, too. But if four digits isn't enough, what about six digits? You certainly don't need a full social security number. You're going to have name, address, age, other identifying information that shouldn't require a whole social security number. A lot of people are very concerned about providing social security information. In fact, even the Bankruptcy Courts are moving to rules to delete that except for the last four digits in published information.

MR. BERNICK: Whatever it is that we need to be able to cross reference some of the other trusts.

THE COURT: Can't you do it with six digits?

MR. BERNICK: I just don't know.

MR. BAENA: That may be a false start anyway, Judge, because I'm not sure that any of the other trusts -- I know none of the other trusts that I'm involved in use social security numbers or Federal ID numbers for purposes of processing the claims. They do not do it that way.

THE COURT: You already have names and addresses and birth dates from what you're asking here. And I don't -- everybody knows their own birth date.

MR. BERNICK: Birth date. Do you agree to birth date?

MR. BAENA: Well, I guess I'll agree to birth date. But, of course, if it's owned by a corporation, there is none.

THE COURT: Well, we're talking individuals.

MR. BAENA: Okay.

THE COURT: And an F.E.I.N. for a corporation should be fine, you're not objecting to the F.E.I.N. for --

MR. BAENA: No.

THE COURT: -- the corporation?

MR. BAENA: No.

THE COURT: So, how about last four digits of the social security number plus birth date for individuals, and F.E.I.N. for a corporation.

MR. BAENA: That's fine.

THE COURT: And if you still can't figure it out, you can file an objection to the claim based on the fact that you can't identify the claim.

MR. BAENA: Or they could call the phone number on the proof of claim form --

THE COURT: That, too.

MR. BAENA: -- and ask the claimant, who are you?

THE COURT: All right. What's next?

MR. BAENA: The next one is on Page 3, 8. In Number 8, Judge, they're asking when the property was built. They say that that's because after 1973, they didn't sell the product. That's only half true, Judge. That product -- their products continued to be sold even after they stopped manufacturing them because they were in the hands of contractors, distributors, they were on shelves and they were used.

We believe that the real reason that they're seeking this information is not so terribly difficult to discern, and that is not for product identification purposes but for Statute of Limitation purposes. And this really is the beginning of a series of objections we have, Judge, that crystalize a material difference of opinion about what we're doing here.

As I understood it from the last hearing, and I reread that transcript several times before today, you made a profound impression upon us, Judge, that what you were seeking to do is to formulate a proof of claim form that permits you to

estimate and facilitate confirmation of a plan, that's what you asked. And our position is we're prepared to ensure that you get that information, but we need to talk about what information is it that that really engenders.

And our position is that the only information that is required for you to make that determination is where's your building, what was your building, and what product did you install in the building and how big is that building.

THE COURT: And when did you install the product.

MR. BAENA: Judge, under the law, that's immaterial.

THE COURT: It may or may not be.

MR. BAENA: It's immaterial. And, again, I don't have a problem with that requirement either if you don't disallow a claim simply because a building owner is unable to tell you that with iterations of owners, with numerous jobs being done in seriatim in some buildings. Who knows sometimes? And it's not a dispositive fact in any jurisdiction that I'm aware of --

THE COURT: Well, the debtor has agree, though, to add to most of these questions, I don't know about this one specifically, something like to the best of your knowledge --

MR. BAENA: No, they haven't, Judge. They've objected to wherever we have said to your best of your knowledge. They've basically objected to all of that.

MR. BERNICK: Very simple, you're talking about, for

the most part, people who will be in the business of owning a building for whatever purpose. And they are not individuals, they are not devoid of resources. They ought to make a reasonable inquiry to make a determination. If at the end of reasonable inquiry they can't answer the question, they can't answer the question. We'll deal with the consequences of that.

But they ought to be able to put down whatever it is that they can reasonably make inquiry into --

MR. BAENA: Judge --

THE COURT: While I disagree with that, I'm not sure, however, that particularly -- well, again, this is not Zonolite, I was thinking for a moment with respect to Zonolite. But, you know, people may not know if there is a fourth and fifth owner of a home when it was built.

MR. BERNICK: Sure.

MR. BAENA: Or a building, Judge. I mean we have passive investors in buildings that have claims. Not everybody is a building operator in the sense that that's their only business.

THE COURT: Well, it seems to me that the more relevant question is what -- which of the debtors' products are you claiming caused your injury and when was it installed in the building, when were renovations to the building done that may have impacted or disturbed the product --

MR. BERNICK: Well, that's --

THE COURT: -- seems to me to be more relevant.

MR. BERNICK: That -- it's also -- this helps us that when the property was built, it does help in the question of what product actually is there. And it also helps us on the question of notice for Statute of Limitation purposes. Explicit about that, it's not some secret.

THE COURT: Well, I don't see that the question of when was the property built is that damaging. People will either know or they won't. I mean they're only going to fill out on this form what they know.

MR. BAENA: Judge, if your position is and if you don't know it and you don't put it down, the claim is still allowable, that's fine.

MR. BERNICK: Well, that --

THE COURT: Well, it may be subject to an objection because it's not filled in. But whether that objection is sustainable or not is --

MR. BAENA: But the relevance of that question and the basis for that being a reason for disallowing a claim --

THE COURT: That's what I'm saying. I can't prohibit people from filing objections to it, but the relevance has to be determined in the context of the objection. Would I disallow a claim simply because any specific question isn't filled in? Probably not. Would I ask people to supplement it if somebody shows me that there's relevance? Yes, I would.

MR. BAENA: Well, they've already made their prima facie showing to you today, Judge, of what they deemed the relevance to be. They've said, that's relevant to us because we didn't sell our products after 1973 and if they didn't tell us the age of the building, we have no way of determining whether it's our product.

Well, Judge, product ID is going to be another issue in another context. We're not talking about that in the context of estimating claims.

THE COURT: Well, I guess the question is -- and just because the building is built, for example, in 1920 doesn't mean it doesn't have Zonolite, for example, in it.

MR. BAENA: Right.

THE COURT: Or some other of the debtors' product.

MR. BERNICK: No, it's --

MR. BAENA: And --

MR. BERNICK: I'm sorry, Scott. It's the other way -- clearly the other way around. And let me say I disagree that somehow their vision of what the information gets used for governs the process that we're trying to --

THE COURT: No, I'm not sure it does.

MR. BERNICK: But with respect to this question, it's very simple. If the product -- if the building was built after 1973, we didn't make an asbestos containing product --

THE COURT: Then ask that, was the building built

before 1973, check here. After 1973, check here. If that's what we need to know, then make it that way. That's a lot easier than identifying when specifically a building was built.

MR. BERNICK: But then the second prong really is buildings -- the asbestos -- coverage of the asbestos controversy just escalated from the 1960's and early 1970's. Regulations were actually promulgated beginning in 1971 on emergency basis by OSHA.

If the building was built during that period, that is late '60's, early 1970's, there is clearly a stronger constructive notice case to be made.

THE COURT: Then do it within the ranges. If that's the case, do three ranges. Was your built before 1969, between 1969 and 1973 and after 1973. That still makes it easier for them.

MR. BERNICK: We'll do that.

MR. BAENA: I agree that that's somewhat easier, Judge. I just want to say, again, though that all that does is facilitate a defense to a particular claim.

THE COURT: Well, it provides relevant information, as well, in assessing whether or not to file an objection to a claim at all. And it's -- because it seems to me that if the building is built at a time after which the debtor has nothing to do with that insulation or production of the product, the debtor may have grounds to file an objection to claim, and they

ought to know that. I think it's relevant to that extent.

It's not harmful. Most people are going to have a decade within which their building was built.

All right. Restructure question 8.

MR. BERNICK: Yes.

MR. BAENA: Number 10 on Page 4. We asked that the question regarding interior renovations be modified so that it -- consistent with what you said earlier, relate specifically to renovations that involve the removal or disturbance or installation of asbestos.

Their question asks, has there been any interior renovations for the property. Well, that's not relevant.

THE COURT: Well, I asked that question, I thought, at the last hearing. And I was told that, for example, even if you move a wall, that would have no interior insulation and it disturbs the ceiling above it, it could be a problem. And, therefore, they want to know about any renovations.

MR. BAENA: Well, that renovation respectfully would have affected their product.

THE COURT: Yes.

MR. BAENA: And that's what I'm saying. We'll put that down, but to say well, did you move the light switches from that wall to that wall. A renovation is not clearly defined. You and I might not agree on what a renovation is. I know that my wife and I never agreed on the budget for them.

It's just too broad and it's just too difficult.

THE COURT: It is pretty broad. What are you trying to get to?

MR. BERNICK: What I'm trying to get at is that it's not just -- it's not just the Grace asbestos product. It's not just a question of ascertaining the -- in terms of Grace asbestos. You could have a building that has other asbestos and gets renovated and there is the need to remove asbestos. The owner's clearly on notice of the regulations and the importance of doing that. And the renovation did not cover Grace asbestos.

THE COURT: All right. What about something -- renovations been completed in the property that affected any of the insulation in the property.

MR. BERNICK: Or any of the asbestos on the property.

THE COURT: Fine, whichever you want to get to.

MR. BAENA: To your knowledge.

THE COURT: No, it can't be --

MR. BAENA: During the period that you owned or operated.

THE COURT: During the period you owned or operated the --

MR. BAENA: That's fine.

MR. BERNICK: Well, no, no, but then you have somebody who --

THE COURT: Break it into two questions because I think you're entitled to know under penalty of perjury whether the person filing the complaint made that renovation. But otherwise, it's going to be hearsay. They may have some knowledge and it's before they owned the renovation, but they may not have been aware of it at the time. So, break it into the second question, and any other period of time to your knowledge.

MR. BERNICK: Okay.

MR. BAENA: I move to Page 5, Judge, Number 14. This is a question where they asked when was the product installed in the property. I know you think that that's relevant. We accede to your view. And we merely ask that it be conditioned by the language to the extent you know.

THE COURT: Well, I think we should do this the same way I just did the last one. When did you or somebody on your behalf put this in, otherwise when was it installed to the best of your knowledge. It seems to me that you're entitled under penalty of perjury if the current claimant did something to that information. Otherwise, I'm not sure it's fair to expect that a person would specify a date that they may not know. So, I think if you ask all of these questions in two parts, you get what you need and it solves the problem of making -- creating an inadvertent perjury that somebody would really not want.

MR. BAENA: Right. And I think it's also fair to

say, Judge, that nobody makes an installation of that sort in one day on a particular moment in time. That you could say, oh, on July 4th I did that. It's a period of time during which installation occurs with regard to many products.

THE COURT: Well, that's probably true, too, Mr. Bernick. I'm not sure -- I mean to the extent that the owner did it, probably they know the date or the dates, plural. But otherwise, they may have a time frame which might be something like 1970.

MR. BAENA: Right.

MR. BERNICK: But then they can just specify that.

MR. BAENA: Well, the way this is written, though, Judge, it leads the reader to believe that they have to give a month, day and year.

MR. BERNICK: Well, if --

THE COURT: Why don't you just put a blank space?

MR. BAENA: That's fine.

THE COURT: And let them figure in what information they --

MR. BERNICK: Or the blank space for the not --

THE COURT: Actually for both.

MR. BAENA: Both.

THE COURT: Because if the installation started, for example, on January 1st and ended February 25th, you've only got one month, day and year.

MR. BERNICK: How about we just say -- how about we just specify year?

THE COURT: Fine.

MR. BAENA: Yes. I'm on Number 19, Judge.

MR. BERNICK: Yes, we agree to withdraw 15 through 18, based on the --

THE COURT: All right.

MR. BAENA: 19, Judge, is illustrative of a recurring problem. They require, in numerous instances, that documentation be attached.

THE COURT: Well --

MR. BAENA: We have asked that there be summaries of the documentation allowed.

THE COURT: It seems to me if they have the documents, they should attach them. If they're voluminous, they can attach a summary and tell the debtor where they can get the rest. It seems to me either one of those is all right. If they don't have them, then they ought to state that they don't have them and why.

I don't think there's an issue about the documentation.

MR. BAENA: That's fine. We really wanted to be in a position to say, okay, here's a summary of what we have because it is a room full of documentation.

THE COURT: That's --

MR. BERNICK: But then we would want to have the access to the documents themselves.

MR. BAENA: They always have that right.

THE COURT: I think that's fine.

MR. BAENA: They always have a right.

THE COURT: Yes, I think that's fine. I mean, you know, a homeowner may have an invoice or something, it's a one-page document. A contractor who has done renovations for years in buildings could have literally a room full. So, I think summaries are okay at the option of the claimants, but with the debtors' right to get to access of the documents.

So, I think this should be modified to say yes, attach all such documentation in your possession or summaries with a consent to release the documents to the debtor upon request and where they can be obtained.

MR. BAENA: And if documents aren't available, why?

THE COURT: Why?

MR. BERNICK: Well, if the documents aren't available, we're assuming this is now a third case where there's no summary --

THE COURT: Yes, it's possible that if you bought a home in 1960 that somebody told you've got insulation in there, but you don't know when it was installed and you don't have any documents. So, there should be an option if you don't have documents and you can't get them, fill that in.

MR. BAENA: Questions 21 to 23 on Page 7, Judge, all go to when somebody learned of the presence of the Grace product, how they learned it and, you know, related issues. They're asking specifically dates that you learned that you had the Grace product.

These are more tedious and, in some cases, impossible questions for claimants to answer. I've heard anecdotally stories of Grace itself taking 80 depositions at a time in order to find out that very same information in respect of certain claimants in pre-petition litigation.

The most important point, though, is how they learned of the presence of it, also doesn't advance even their Statute of Limitations defense.

THE COURT: No, but it may advance the nature of the injury and level of exposure. If somebody learned about it because they went up in the attic and crawled around, that's a whole different thing than somebody learning about it --

MR. BAENA: These are not exposure claims, Judge. These are property damage claims.

THE COURT: That's true. All right. So, if somebody learns about it because they're tearing out their retaining wall and finds it in that process, that may be different from somebody who goes up to the attic as a result of getting a proof of claim form to find out if, in fact, there is some insulation there.

MR. BAENA: I don't know what the difference could be as a matter of law.

THE COURT: Oh, I think it just could be a difference, but --

MR. BAENA: I mean it's interesting, but --

THE COURT: No, it could fix the damages. In some cases, the damages might actually be fixed and some, they might be contingent and some they may not exist. I think it's calculated to relevant information --

MR. BAENA: Just for what it is worth, and I know we're innovating in this case, Judge, it has never been a question that's even been asked in a facility --

THE COURT: That doesn't make it wrong.

MR. BAENA: No, it doesn't make it wrong, but you got to sit back and say well, what case does it advance? It doesn't advance the damage claim, it doesn't advance the Statute of Limitation claim. And so it ends up becoming a barrier to somebody participating in the claims process.

THE COURT: I'm not sure why the fact that somebody learns that they have insulation somewhere or other property damage as a result of asbestos and stating how they learned of it doesn't advance the claims process. They have a basis for the claim because they're filing a claim. They must have some reason how they learned that they have the basis for the claim. I don't think that that should be --

MR. BAENA: Well, because at the end of the day, they're still going to have to make product identification.

THE COURT: Yes, they are.

MR. BAENA: So --

THE COURT: In fact, they're going to have to do it in this proof of claim form somewhere.

MR. BAENA: Minimally.

THE COURT: They're --

MR. BAENA: Minimally.

THE COURT: They're going to have to substantiate in this proof of claim form that it's the debtors' product, yes. And --

MR. BAENA: They're going to have to say they have the debtors' product.

THE COURT: That's right.

MR. BAENA: That's exactly right.

THE COURT: Yes.

MR. BAENA: We agree. But how they learned it was the debtors' product? I mean who cares? If it isn't the debtors' product, they don't have a claim. Who cares? It's just more information. More tedious work.

MR. BERNICK: You know, we're spending about 20 times as long as it will take for each one of these people to answer these three questions.

THE COURT: That's probably true.

MR. BAENA: I challenge Mr. Bernick to do this claims form in respect of any particular building on the planet in one-twentieth of the time that we've had this conversation, which is about 30 minutes.

MR. BERNICK: With respect to my home. I've learned in my home when I moved to 874 Bloss Street (phonetic) there was asbestos on the piping, went down, looked at it, saw it there, that's exactly what I have was June of 1986.

MR. BAENA: Yeah, well, what about the State of California that just filed -- the State of California that just filed a $300 million proof of claim form in the Armstrong case and they have thousands of buildings? We've got to remember that these are multi building owners and --

THE COURT: That's what I think may be the issue, whether or not the same claim form really should be used for the commercial property as opposed to be --

MR. BERNICK: Just because an individual claimant, like a university has a number of buildings, doesn't mean that the information is any less probative.

THE COURT: No.

MR. BERNICK: It just means that they should be filling out -- what we've said is that they should fill out a separate form for each --

MR. BAENA: It took --

THE COURT: And I agree with that.

MR. BAENA: It took two years, Judge, it took two years in other cases to get this information together. I'm just saying I think this is an inclusive process because you want to know what the universe of the claims are. You don't want to know what a particular claim is. You want to know what a particular claimant says it is. From the proof of claim form, that's all you can tell is what they think their claim is.

MR. BERNICK: I don't know --

THE COURT: Yes, their -- their proof of claim entitles them to a prima facie determination that it is what they say it is. So, they should at least have to come forward with sufficient evidence in the proof of claim form, including their own testimony under the penalty of perjury, to what the claim is.

MR. BAENA: Let's not be naive, though, Judge. They're going to object to every one of these proof of claims. Whether these people put it in or not, they've given us a road map, they're going to object to everything. So, we're going to -- excuse me. We're going to provide this information which doesn't advance the claim. It doesn't advance a defense. And these people are going to have a claims objection anyway. And it's going to take them months to complete this.

MR. BERNICK: I thought about 25 minutes ago there was this gracious recognition that we are going to have a bar

date and we are going to have claim forms.

THE COURT: Yes.

MR. BERNICK: And if this is a claim form that was designed so people could fill it out, supply the prima facie evidence without too much trouble, that's now being debated is well, gee, what they're going to do with this and it's so burdensome and all the rest of that --

THE COURT: I do not find this question asking how they found out about the presence of asbestos to be too burdensome. I don't find the question about when they found out about it within a year to be too burdensome.

MR. BAENA: The month, the day and the year.

THE COURT: No, it was just the year. They've taken out everything but the year.

MR. BERNICK: We've taken out month and date.

MR. BAENA: Judge, it's an evolutionary process.

THE COURT: Well, then they'll say that.

MR. BAENA: How do you find that out?

THE COURT: Then they'll say that. I first heard about it in 1970, but I didn't go down to my basement and look at the pipes until 1986, that's what they'll tell us.

MR. BAENA: How did you first learn that the product contained asbestos? I mean how?

THE COURT: They may --

MR. BAENA: How? How did you first learn that? I

mean --

THE COURT: Wait, I'm looking at --

MR. BAENA: 21, 22 and 23.

THE COURT: Oh, I'm sorry.

MR. BAENA: How did you first learn of the presence in the property of the Grace product for which you are making this claim.

THE COURT: Okay.

MR. BAENA: That could be for a commercial property owner at the risk of filing the proof of claim under the pains and penalties of perjury, a very difficult question to answer. You know, I had -- they could have had 20 different property managers over the last five years.

THE COURT: It says how did you first learn.

MR. BAENA: How did you first learn?

THE COURT: Yes.

MR. BAENA: How did you first learn?

THE COURT: The person filling this out, how did you first learn.

MR. BAENA: Well, did the person -- is it just the person filling it out?

THE COURT: That's who's signing the document.

MR. BAENA: is the person that fills it out if they are a commercial company responsible for knowing whether a janitor chipped the thing and said, you know, this looks like

Monocle 3?

THE COURT: Well, Mr. Baena, I'm sorry, this question does not admit of that wide range. It's a very simple question, how did you first learn. If I'm the person filling it out and I never learned about it, that's what I say. If I'm an agent for someone, I say my client says he first learned because the janitor told him that it looked like asbestos on the pipe in 1987.

MR. BAENA: That's fine, Judge. If that's the limitation on the answers to these questions, that's perfectly fine.

THE COURT: That's the limitation on the answer to the question. They're going to state what they know.

MR. BAENA: Can we make it clear that when the form refers to you, it's referring to the person who's completing this form?

MR. BERNICK: Well, no, no, this is -- Mr. Baena --

THE COURT: Do we need to define what yes means?

MR. BAENA: No.

MR. BERNICK: When any company has to answer questions in the course of litigation, you've got to look at the information to answer it appropriately, that's all that's involved here.

THE COURT: Number 21 is fine. I'm overruling the objection. It's all right.

22 is changed to a year.

23 is how did you first learn that the Grace products which you're making the claim contained asbestos, okay, that's the same -- that's just a corollary to 21. That's fine.

The objection to 21, two and three, except to the extent month and day are eliminated, are overruled.

What's next?

MR. BAENA: 24 is another instance where there's a requirement that all documents be attached. We just want the ability to do a summary, it's regarding abatement activities.

THE COURT: That's fine. I think the same thing -- all questions related to the documents be amended as I've already stated.

MR. BERNICK: Yes, the -- I think the procedure that Your Honor indicated is appropriate. I -- my only concern is that we don't get into a situation where it's go see our warehouse in Bethlehem, it's somewhere in a box. I mean the access has got to be a meaningful access to these particular documents.

THE COURT: I think you can even ask specifically where are the documents located, how are they categorized. If that's what you need --

MR. BERNICK: Yes.

THE COURT: -- I think you can ask some limitation like that if the documents are not attached. You can ask

specifically who has possession of them, where they're located, what they consist of. It seems to me that the summary should state what the documents are.

MR. BAENA: We're all accustomed to the use of summaries of proof of claim forms. I mean I'm not asking for any more.

THE COURT: Okay. What's next?

MR. BAENA: On testing and sampling, as well as -- which is in Question 26 and 27 on Pages 9 and 10 of their response. We wanted, again, to your knowledge, to the extent that any of that was done before they owned the building. It's the same sort of thing.

THE COURT: 26 could be broken into the same type, have you ever or anybody on your behalf ever done any testing, sampling, and when and otherwise a second question, has anybody else ever done it. I mean we're making the claim form longer by doing this, but I think it's more accurate.

MR. BERNICK: That's fine. On this one, we would like to have them an attached the test document, some voluminous set of construction materials, this is very discrete documentation --

MR. BAENA: There's only one issue I would raise in respect of that, and that is it may be work product if there were pending litigation.

MR. BERNICK: Well, but if it's work product and

there's pending litigation, it should be discoverable, you can make the claim of work product if you talk about the document. I guess I'm a little bit unclear how testing data with respect to a building would be work product.

MR. BAENA: Well, the problem with the test data in 27, the dates that are required, it's not related to the Grace products. This is any test sampling.

MR. BERNICK: Then it doesn't make a difference.

MR. BAENA: Well, it could be before your products were even installed. Why is that relevant?

THE COURT: Well, I think the -- isn't the issue with respect to Grace only testing during the years in which Grace says that it either manufactured or distributed the product?

MR. BERNICK: Well, first of all, the problem is that it's more difficult to try to frame a set of questions when we pick-up all the permutations just to ask for the testing data. But we would want to have testing data that enabled us to determine whether the presence of Grace product made any difference to the ambient concentrations of fibers in the building. So, we want before and we want after the product was actually --

THE COURT: Well, I don't see a problem with these, I think the issue about the summary -- I know -- I understand why the debtor would the complete test or sample data, but it depends, I think, on whether the existing owner has that

information.

So, to the extent that the existing owner performed the test and the information is there, I think you're entitled to the document.

To the extent, though, that the owner knew about it and could say that it doesn't have the document, you're not going to get the document.

MR. BERNICK: That then asks for -- in 27 to have the identification, and we can take, again, the month and the year out because if they don't have the documents anymore, we might be able to get them from a third party.

THE COURT: Yes, I don't have a problem with 27 with respect to who did the testing. I think they're -- you know, that information, if they know, they can put it in. And if they own the building, they should know.

And 26, with respect to the document, I think you're entitled to that information from the claimant, but the claimant may not have the information. If they don't, I think you're entitled to know where it is. So, it seems to me that if they have it, they should attach it. If they don't, they should tell you were you can get it.

Okay. And this will just be the year in 27.

MR. BAENA: Page 12, Number 31.

THE COURT: All right.

MR. BAENA: It asks does or did anyone living in the

household work for the Grace operation against which you are making a claim.

THE COURT: Yes, what does -- what does that -- what relevance is that when it's a property damage claim?

MR. BAENA: And what operation are they making a claim against? I mean what does that mean?

MR. BERNICK: Well, because this is designed specifically to deal with people who have asbestos in their homes because they worked in the Libby Mine or perhaps in the processing plant who brought material back to their homes.

MR. BAENA: Well, you have a separate proof of claim form for Libby, for Libby residents.

MR. BERNICK: Yeah, we have a separate proof of claim form for Libby residents, but that deals with the personal injury.

MR. BAENA: Well --

MR. BERNICK: This picks up property.

MR. BAENA: Well, how could the property damage be caused by somebody having worked somewhere in Grace? I mean that's -- it's so remote as to be ridiculous, Judge, and I don't know what operations of the debtor --

MR. BERNICK: And people won't fill it out, but that's exactly what it is that we're worried about, is that people brought materials home to their homes, now -- and their homes are contaminated and they're worth less money, they have

to be remediated. I don't know that you've got those claims or not, but that's exactly what it is that we're trying to get at.

THE COURT: You're suggesting that somebody might have gotten -- I'll call them free samples from the Libby plant and taken them home and installed them without --

MR. BERNICK: No --

MR. BAENA: No, I think they're worried about somebody carrying fibers on their clothing.

THE COURT: On their clothes?

MR. BERNICK: Yes, or any number of other ways. Again, when you have a situation that's as emotionally charged now as Libby is, you have the EPA going around to everybody's home, taking samples and taking measurements, you may have people say that, gee, I've got some fibers in my home, I believe that diminishes the value of the home and ought to be remediated, ought to be cleaned, and they make a claim.

MR. BAENA: There's a product ID requirement, Judge.

THE COURT: Well, there is one affidavit of record that I've seen in this case by some woman who owns a couch and is afraid to have people sit on it because it may be contaminated, Mr. Baena, so it's not as far out as it sounds.

MR. BAENA: Because somebody in the house worked at Grace and they were making a property damage claim?

THE COURT: All the affidavit says is that the person is concerned and is part of a named class because there is need

for remediation because, among other things, their couch, and I think carpets or something, may be contaminated. It's not as far out as it sounds. There are affidavits of record in this already --

MR. BAENA: Well, there's an affidavit, Judge. I don't think that the prototypical property damage claimant is complaining about a couch.

THE COURT: Probably not, but you never know. And to the extent that the debtor is entitled to discharge all the claims against it, this is probably relevant.

But I do agree about the question of Grace operations. I'm not sure --

MR. BERNICK: Well, it enables us really to -- it's pretty simple. You've got somebody who's in Libby and they say that they got contamination of Grace asbestos in their homes. And this is a way of finding out is the real contention that they're making there that they brought the material home with them from the mine.

THE COURT: Why don't you ask that question?

MR. BAENA: Judge, now you're asking lay people to decide whether they have property damage claims or personal injury claims.

THE COURT: Yes.

MR. BAENA: But, Judge, at some point -- but at some point in time, you're asking too much of some people.

THE COURT: It seems to me that if they're going to make the claim that their couch is contaminated, they ought to be able to say why. I mean apparently there are people out there who may be making those claims.

MR. BAENA: All right. Now --

THE COURT: So, perhaps what you want is some allegation other than --

MR. BAENA: Can't you put a period after Grace?

THE COURT: Fine.

MR. BAENA: Does anyone living in the household work for Grace? I mean, period.

THE COURT: Well, I think it has to be the Grace entities maybe because there's more than just Grace, correct?

MR. BAENA: Well, they use Grace everywhere else, and I don't know what Grace is anymore.

MR. BERNICK: Say no more, we'll put a period after Grace.

THE COURT: Great, all right. I have --

MR. BAENA: And that's only for household members, it's not for commercial building owners.

THE COURT: And I think that probably should be -- if that's what you're trying to get --

MR. BERNICK: I guess that's true, except that the simple answer -- Mr. Baena is flummoxed with the prospect that these claims might be there, the worst that could happen is

that they don't fill out the claim form. You've got somebody who's commercial, you've got somebody who's individual, doesn't make a difference. If they don't have a claim, they don't fill it out.

THE COURT: Well, but Number 31 says specifically anyone living in your household. And the question is what happens if this is a commercial enterprise that's filling out the proof of claim?

MR. BERNICK: Then the question --

MR. BAENA: You know, I --

MR. BERNICK: -- they'll have a hard time answering.

THE COURT: Yes.

MR. BAENA: Well, Judge, you know I think we're being -- you know, we're about to spend about five or $6 million to get these things out. Why are we being so flip about this? If it's not an important task to undertake, let's save the money and let's forget about the proof of claim forms.

THE COURT: I don't think anybody is being flip. The question is does anyone living in the household work for Grace, but this form is designed for others in addition to household entities.

So, that's the question. I think it has to be limited to the property that's involve in the damage claim. That's the issue. I'm not sure of the question.

MR. BERNICK: If the claim -- if the claim relates to

a residence, does or did anybody living in the household work at Grace.

THE COURT: That's fine.

MR. BAENA: Okay. And I would submit, Judge, that Questions 33 and 34 are already answered elsewhere on the form, when did you first learn of the presence, how did you first learn of the presence --

THE COURT: Yes.

MR. BAENA: -- we've already covered that.

THE COURT: I think there is --

MR. BERNICK: Well, it's a separate category of claims.

MR. BAENA: Well --

THE COURT: You're not expecting people to fill out category one if they fill out category two?

MR. BAENA: Is that clear from the form? Because I don't think it's clear from the form.

MR. BERNICK: See it says category -- go back to 12.

MR. BAENA: No, no, go back to A.

THE COURT: Actually just go to D.

MR. BAENA: Does everybody have to fill out Part A?

MR. BERNICK: Yes.

MR. BAENA: Does everybody have to fill out Part B?

MR. BERNICK: For whatever category that -- category one and category two.

MR. BAENA: Okay.

MR. BERNICK: Category one is picked up by C, category two is picked up by D.

THE COURT: Where is Question 19 -- where are Questions 21 through 23, which category?

MR. BERNICK: 21 through 23 are part of category C.

THE COURT: Okay.

MR. BERNICK: Which is a category one claim.

THE COURT: And 33 and 34?

MR. BERNICK: Are part of category two, section two, which is category two claims.

THE COURT: All right. That is fine. Just amend them to be the same as the ruling is already made with respect to category one.

MR. BAENA: Page 15, Questions 39 and 40, Judge, were you aware of the presence of asbestos when you sold your property? It's hard to even understand what the application of this is.

THE COURT: Does Question -- do Questions 33 and 34, are they in the same category as 39 and 40?

MR. BERNICK: Yes. It doesn't help. I mean the basic reason for asking 39 and 40 is to find out if the presence of asbestos was material to the commercial transaction, which would be their only source of real loss. They sold the property, they don't have a loss to sustain any

more. The question would be did they sell it for less money? If they weren't aware of the asbestos, then presumably they didn't sell it for less money.

Likewise if they bought knowing that there was asbestos there, they paid whatever they thought the property was worth.

THE COURT: All right, they're allowed, they go to damages.

MR. BAENA: 16, Part F, which I believe relates to all claimants.

THE COURT: Question what?

MR. BAENA: Part F.

THE COURT: Part F?

MR. BAENA: On -- starts on Page 16. F is asbestos litigation claims, I believe that applies to all claims.

MR. BERNICK: Part 4, you must have a typo.

MR. BAENA: It's Subsection F, Part 4. Right here.

MR. BERNICK: Oh, that.

MR. BAENA: Part 4.

MR. BERNICK: Okay, yeah.

MR. BAENA: That applies to everybody.

MR. BERNICK: Right.

MR. BAENA: Okay. We've objected to Question 1, Judge, as firstly being much too broad. It inquires whether they have ever contacted a lawyer about a possible asbestos

related property damage lawsuit or claim. It has nothing to do with this particular property. It doesn't have anything necessarily to do with their product. And it doesn't have any relationship in time to anything that we seem to be concerned about here.

As such, it's purely invasive of the attorney/client privilege.

THE COURT: I honestly -- well, I don't know that it invades the attorney/client privilege. But I have some difficulty understanding the relevance. If they have a claim they made, whether they contacted a lawyer or not is irrelevant.

MR. BERNICK: Well, let's say that they contacted the attorney about suing Celotex in connection with the asbestos in their buildings. They knew all about asbestos, knew about their ability to bring a claim and they didn't bring a claim against Grace, even though they knew Grace product was in their building.

MR. BAENA: Well, suppose --

THE COURT: I don't think it's relevant. If they have a claim, they have it. And it seems to me that's just the way it is. If you need discovery because you discovered that a particular claimant filed a claim against a different asbestos producer at a certain point in time, then in that discovery, I think you're entitled to it. But I don't see the need for this

on a proof of claim.

MR. BERNICK: Your Honor, on the point about the Statute of Limitations is the fact that we believe it goes to show that they had knowledge of their ability to prosecute asbestos claims even though it was not a claim against Grace.

THE COURT: I understand. But I don't think that that's -- I think that's going too far afield with the proof of claim.

So, Question 1 under Part F is stricken.

MR. BAENA: Question 2, again without relating it to their product or the building that's subject to the claim, they ask if the claimant has ever brought an asbestos related property damage lawsuit.

THE COURT: And what's the relevance?

MR. BERNICK: It is the same -- it is the same basic point, which is as they, in fact, brought a lawsuit, if they had, it would indicate that they're knowledgeable about their ability to claim against asbestos.

The other thing is that this now picks up also claims that would include claims against Grace, as well as others. So, this is really any kind of asbestos related property damage suit. And there is a theme that runs through these questions here, what we want to know is if somebody has prosecuted asbestos property damage claim in some other context, and they're now prosecuting the claim with respect to the same

building here, we want to know if they've settled because it relates to both the Statute of Limitations and to -- and the consistency of what they're now saying in this case. They go sue Celotex and they say, Celotex is the source of all of our problems, they win or lose, and they say now with respect to the same building, we're doing the same thing to Grace, the only problem is it's 15 years later.

MR. BAENA: Here's the problem, Judge, it doesn't relate to this building. It doesn't relate to the same product.

MR. BERNICK: We don't know that.

MR. BAENA: But the question doesn't.

THE COURT: Well, the question probably should be related to the specific property in question because that's the basis of the property damage claim. You're asking for the damages as to a particular property, so I think that's --

MR. BERNICK: That's correct. We'll -- I think that's fair. Same structure, same building.

THE COURT: Right.

MR. BAENA: And same product. Same installation.

THE COURT: Well, it may not be the same installation, I don't know because it's -- it may or may not be the same installation.

MR. BAENA: All right.

THE COURT: It can still be the same product. It

seems to me that it's a fair question provided that it's restricted to the property that serves as the basis of the claim.

MR. BERNICK: Right.

MR. BAENA: Okay. And, of course, we have also raised in the third check box below that question, Judge, it says non-lawsuit claim. I'm not sure that that's very descriptive.

THE COURT: I didn't -- actually I don't know what that means.

MR. BAENA: I mean if you call up your landlord and say --

MR. BERNICK: How about --

MR. BAENA: -- what's the problem --

MR. BERNICK: -- out of court claims?

MR. BAENA: No, but, Judge, what does that mean? I mean you can raise a claim in so many different contexts by so many different actions on your part, verbally and otherwise.

THE COURT: How about doing it this way, make it no or yes and if yes, was the lawsuit filed, and if so, state the relevance, the caption and the location of the suit? That's really what you want to know.

MR. BERNICK: I mean if the person a makes the claim, for example, against Celotex, never filed a lawsuit, made the claim against Celotex for the same building --

THE COURT: Right.

MR. BERNICK: -- basically complaining about the same condition, we want to look at that claim.

THE COURT: Right. So, you want to say, either, no, they've never done it or yes, they have. And under yes, if yes, and a lawsuit was filed, give the caption and the location of the suit.

MR. BERNICK: Um --

THE COURT: I mean they could have filed an arbitration action. They could have filed -- there could be other ways that an issue could be resolved, whether we're ever going to get all that, I don't know.

But what you really need to know is whether a lawsuit was filed in --

MR. BERNICK: Well, the problem here is, you know, again, if they pursued it out of court and exchanging information, got compensation, blamed it all on somebody else, we want to know about it.

THE COURT: Well, you get that because it would say -- you've got either no or yes.

MR. BERNICK: Right.

THE COURT: And if yes, and a lawsuit was filed, give the particulars.

MR. BERNICK: We would then get the -- if they never filed a lawsuit because it was resolved --

MR. BAENA: Judge, you know --

THE COURT: Then the block yes will have been checked.

MR. BERNICK: Right. But then we still need to follow through on it, that it's -- I guess it picks up Tab C or Section C. This explains the claim -- parties admitted claim, including --

THE COURT: I don't have Section C right here, I'm sorry. What it says is --

MR. BERNICK: There's an introduction, and then there's the lawsuit, and then --

THE COURT: The claim.

MR. BAENA: Yeah, but this goes to Grace in C. C1 talks about a claim against Grace.

Question 2 in A is talking about any claim against anybody that ever --

MR. BERNICK: No, that's not -- Scott, come on, it's not confined to Grace. That's one. Then you turn to Page 2, that's 2, all other claims.

MR. BAENA: Judge, you know, we've heard from the beginning of this case that there really aren't a lot of property damage claims. And, you know, we're creating a form that they're, nonetheless, going to take discovery about. Anything that anybody files, they're going to take discovery about, and we're creating this massive proof of claim form that

already exceeds anything ever done in any other cases, even those that Mr. Bernick was involved in.

MR. BERNICK: I don't think it's very arduous for people to specify that they made a claim -- a non-lawsuit claim without a lawsuit.

THE COURT: Actually I think all you're trying to do is find out whether these folks sued Grace or sued someone else or both, right? Why don't you just ask that question directly? Did you ever file a claim against a party other than Grace for the same building?

MR. BERNICK: Building, yes.

MR. BAENA: That's where we started this.

THE COURT: Which is where we started. Just ask that question, did you ever do it, against Grace and against somebody other than Grace. I think those are proper questions.

MR. BAENA: Right.

MR. BERNICK: Okay.

MR. BAENA: Right, and --

THE COURT: But I'm not sure you need all those details. Because if you get a yes, then you're entitled to discovery. If you --

MR. BERNICK: Well, that's true. But this way, we get to know -- again, the whole idea is not to have to go take all the discovery, just get some basic information about what happened.

THE COURT: But the -- but the proof of claim form is supposed to be neutral. It's not a discovery device in all it particulars for the debtor or for other creditors who may not contest it.

MR. BERNICK: All that we will need -- all that we'll need is that we will then get a piece of information that's of more limited value.

THE COURT: Yes, it will be of more limited value, but it may also mean that more people will fill out the proof of claim form because they will not have to take so much time to go back and restructure the --

MR. BAENA: Our point, Judge.

MR. BERNICK: With due respect, Your Honor --

MR. BAENA: That's our point.

MR. BERNICK: With all due respect, Your Honor, again, we're not talking about individuals here. We're talking about businesses. They've got the ability to do this, they believe their claims are --

THE COURT: Well --

MR. BAENA: Excuse me --

THE COURT: -- except this applies to everyone.

MR. BAENA: -- this applies to individuals, too, you said that. I asked you specifically.

MR. BERNICK: And you asked me specifically, you did. And it is true that there are some individuals who could be

picked up on this, maybe we can specify with respect to people who are making claims for commercial property.

THE COURT: Fine. You want to do it with respect to commercial property, that's fine.

MR. BERNICK: Okay.

MR. BAENA: Now, you'll see, Judge, in -- if you follow down on Page 17, now if there's a lawsuit, the claimant is supposed to make copies of this page and then start answering all these questions in respect of each lawsuit. They're supposed to make as many copies of this page as there are lawsuits. It's too much, Judge. It's just too much information.

And then they're going to say when we get to that bar date issue, they're going to say, well, give them a couple weeks.

THE COURT: I think when we -- I think with respect to the suit, just asking for the description of the caption and where it was filed should be sufficient. And I think that you can just attach it like these people can fill it in, I don't think they need to recopy this. I'm not going to make them attach copies of the complaint. It seems to me if Grace wants them, they can go get them. But you are entitled to a description to know where to go.

MR. BERNICK: The description is here.

THE COURT: The description that says, you know, the

name of the case and where it's filed. X versus Y at --

MR. BAENA: Style, court and case number.

THE COURT: Right, case number.

MR. BAENA: I believe that's all we had, Judge.

THE COURT: All right. And if it's a non-lawsuit, you're entitled to the same information.

MR. BERNICK: We will revise this and submit a form on the same basis schedule so that we will get it done by the end of the week.

THE COURT: All right.

MR. BERNICK: And then --

MR. BAENA: We have one last item, I'm sorry, Judge, on the signature page. I think they've tried this before with no success, Judge, but on the signature page, they have the claimant agree that to consent to release of records and information. And it says, "I hereby authorize and request that all of the parties with custody of any documents or information concerning my property damage or the information contained in this form to disclose any and all records to Grace or to Grace's representative. I hereby authorize the release of my social security number for use in comparing information provided separately to other asbestos trusts or asbestos claims facilities to verify the completeness and accuracy of the information contained in this form."

THE COURT: Well, with respect to the release of the

social security numbers, we have stricken all but four digits, that's somewhat irrelevant. That can come out.

MR. BAENA: So, that part can come out.

THE COURT: With respect to the consent of the release of records, I don't think it's proper as part of the proof of claim form. If you want to attach a separate release document, a separate one, along with the proof of claim when it's mailed out, I think you can ask people to submit that information, but not as part of the proof of claim.

MR. BERNICK: All right.

MR. BAENA: And they've got to make it very clear, Judge, that you're not required to give that release.

THE COURT: Yes, I think you can --

MR. BERNICK: Well, but -- first of all, with respect to the -- with respect to the documents that we keep on referring to, the documents are located X, Y or Z --

THE COURT: Right.

MR. BERNICK: -- we will certainly do one at least with respect to those.

THE COURT: And I think in those specific questions -- well, I think you're entitled to that information --

MR. BERNICK: Yes.

THE COURT: -- with or without a release. I mean if they don't attach the documents that substantiate the proofs of claim, you're entitled to discovery to get them. So --

MR. BERNICK: What we want to do is avoid having to initiate that discovery. So, how about if we get a release at the end that applies specifically to those questions where they have identified a specific damage claim.

MR. BAENA: No --

THE COURT: But have them attach it.

MR. BERNICK: Have it attached.

MR. BAENA: Why don't we just provide in the instructions that if you refer to documents in the possession of somebody else as opposed to providing the documents or a summary of the documents, then the debtor may seek to obtain those documents from the person that you --

THE COURT: No, they need to provide a summary. I'm not waiving the requirement of the summary. They've got to substantiate the basis upon which the proof of claim and the property damage by documents. So, I'm not waiving the requirement for at least the summary.

But a consent to release, I think, as to those documents, if you choose to do it that way in the instructions, that's fine. I think that's fine.

MR. BERNICK: But with respect to all documents that exist that fall within the scope of those questions, again, we need access to those documents. And we need the consent for that access.

THE COURT: I think --

MR. BERNICK: In other words, even if they supplied the summary, there's still a question of getting access to the document.

THE COURT: I am not opposed in the instruction to say that if you attach a summary of documents, that your attachment of the summary constitutes a release to get the documents you have summarized, and that -- you can put that above it -- above the signature. That seems to be fine.

But a blanket release of all information? I do not think is appropriate in the proof of claims form.

MR. BERNICK: We'll tailor it to those claims.

MR. BAENA: Judge, before this is submitted back to the Court as a final agreed upon proof of claim form, we'd like to see the revised form.

THE COURT: Oh, sure.

MR. BERNICK: That's what I just said, we will get it to you this Friday, and if you've got comments, you can get back to us by the following Friday, and we can submit it to the Court the next week.

THE COURT: That's fine. Anyone else want to be heard on the property damage? Okay. You want to go through -- I have not received any objections on the medical monitoring proof of claim order, did anybody raise any that I didn't get?

MR. BERNICK: I'm not aware of any.

MR. SOBOL: Your Honor, we've been handling the

medical monitoring claim form. I have to confess, I was not aware that there was a separate claim form for medical monitoring. I'm not saying that I didn't get it, but I just know that I personally was not aware that there was such a claim form that was out there. It may have been either a miscommunication or something with respect to that.

MR. BERNICK: Well --

MR. SOBOL: I'm not saying there isn't one, I'm just saying that, you know, one of the issues that there occasionally has been is that the non-like claimants, the medical monitoring claimants, aren't counsel to the committee and sometimes we get something, sometimes we don't.

What I'd simply suggest is if I could get an opportunity to review that. I'm going to be speaking with Mr. Bernick anyway about other medical monitoring things, I'm going to be speaking with him about Zonolite matters, too. I'd just simply see it as a way of taking care of that.

THE COURT: All right, that's fine. The medical monitoring, I think, you can address. Zonolite, at this point in time, I don't think you need to address --

MR. SOBOL: Right.

THE COURT: -- because there is no point until we find out what requirements we need in the proofs of claim.

MR. SOBOL: Right.

THE COURT: Okay. So, that takes care of the three

that I need to address.

MR. BERNICK: I think that's it. The non-asbestos is agreed to.

THE COURT: Yes, the proof of claim form, I have not received any objections to that either. Are there any? All right, so that one's okay.

All right. What's next?

MR. BERNICK: The last item is Item 14, Item 14 really is a carry over from the argument in connection with the motion to dismiss. We understand that Your Honor denied the motion to dismiss, but there were a number of comments that were made in court concerning various factual matters and various people from my client were sitting back in the courtroom saying, no, that's not what happened. So, what we've done is simply -- I simply had asked Mr. Segal, who is Vice President, General Counsel, to respond to those different matters and that is the last item, with a letter to Your Honor, to simply make --

THE COURT: I have received it already.

MR. BERNICK: Okay, that's fine.

THE COURT: Yes, it wasn't a request for me to do anything.

MR. BERNICK: No.

THE COURT: It was just a letter. That's fine, it's docketed.

MR. SOBOL: Your Honor, on behalf of the Zonolite movants, obviously we object from a technical point of view. I mean it's not a document that's been submitted to you either by way of an affidavit or a declaration. It's statements of fact, that kind of thing.

But if Your Honor wishes to docket it, then I'll simply hand to you a responsive document which indicates that we think that the statements we made were true and were generally accurate.

THE COURT: I think it was docketed because it was filed.

MR. SOBOL: Right.

THE COURT: I don't have anything to do with docketing. Things get filed and they get docketed. So, I believe it was docketed.

MR. SOBOL: Okay. Well, then just so that we can make sure that the record is completely full in terms of what the parties' positions are --

THE COURT: Fine. I'm not considering his letter and I'm not considering your supplement. Go file it electronically, I'm not take it now.

MR. SOBOL: Okay.

THE COURT: I should explain. I deal with evidence, evidentiary matters, I do not address letters. I will generally read them because I need to know whether they require

some action on my part. That didn't. I did read it. I'm not considering it for any purpose. I will read yours when it's docketed, and I won't consider it for any purpose.

I had a record. I made my rulings. That's the end. They're appealable. If you don't like them, go file an appeal. That's all I can tell you. Okay.

What else, Mr. Bernick?

MR. BERNICK: Nothing, Your Honor. I appreciate your patience here this afternoon.

THE COURT: Anything else from this side? Mr. Baena, no?

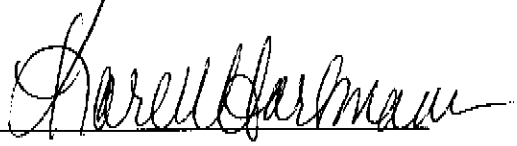
MR. BAENA: No, ma'am.

THE COURT: Okay. I'll see you in April then. Thank you.

(Conclusion)

CERTIFICATION

I, Karen Hartmann, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.



Date: March 25, 2002

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