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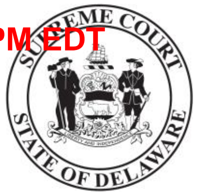

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VIKING PUMP, INC. AND WARREN PUMPS, LLC INSURANCE APPEALS	) No. 518, 2014) No. 523, 2014) No. 525, 2014) No. 528, 2014)) CASES BELOW:)) SUPERIOR COURT OF) THE STATE OF DELAWARE IN) AND FOR NEW CASTLE COUNTY,) Consolidated C.A. No. N10C-06-141 FSS) [CCLD]) -and-) COURT OF CHANCERY OF THE) STATE OF DELAWARE, Civil) Action No. 1465-VCS

APPELLANT WARREN PUMPS LLC'S
SUPPLEMENTAL BRIEF ON TRIGGER ISSUES

OF COUNSEL:

Robin L. Cohen
McKOOL SMITH
One Bryant Park, 47th Fl.
New York, NY 10036
Telephone: (212) 402-9400

POTTER ANDERSON & CORROON LLP
Jennifer C. Wasson (No. 4933)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Telephone: (302) 984-6000

Attorneys for Warren Pumps LLC

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Appellant Warren[1] respectfully submits this supplemental brief regarding the trigger issues in accordance with the Court's June 14, 2016 letter.

PRELIMINARY STATEMENT

For the last ten years, the primary focus of this litigation has been on which Excess Policies are triggered by, and must respond to, the Asbestos Claims. Throughout that time, the parties have always agreed that, under the controlling New York law, a policy is triggered if the claimant suffered some "injury in fact" during the policy period. And throughout that time, the excess insurer defendants ("Insurers") never denied the medical reality, recognized by Plaintiffs' and Insurers' experts alike, that *a person who develops an asbestos-related disease* suffers injury in every policy period from the time the injury process begins until the time the disease becomes manifest, regardless of when that person stopped inhaling additional asbestos. Indeed, for twenty-three years, Liberty Mutual, the umbrella insurer to whose policies the Excess Policies follow form, paid more than $160 million toward the Asbestos Claims under each of its policies from the claimants' first injury until 1986, when it adopted asbestos exclusions.

The only aspect of the trigger paradigm that the Insurers ever contested (and then only when it came time for them to pay) was what constituted the "first"

[1] All capitalized terms used herein have the same meaning as those identified in Appellant Warren Pumps LLC's Opening Brief (Trans ID 56754375) ("Warren Br.") and Appellant Warren Pumps LLC's Reply Brief (Trans ID 56509843) ("Warren Reply").

asbestos injury beginning this continuous process. Plaintiffs argued that cellular and molecular damage caused by the first significant exposure resulted in the first injury. Insurers, in contrast, urged the jury to conclude that injury does not begin until the claimant suffers detectable bodily impairment from his or inhalation of asbestos years earlier – at a time, not coincidentally, after the Excess Policy periods had ended. After a full trial on the merits, the jury found for Plaintiffs on that issue, and the Insurers did not appeal from that verdict.

Despite this, Insurers have now seized upon the Superior Court's *sua sponte*, unprecedented post-trial ruling that *only* those policies in place while the claimant was actually exposed to asbestos are triggered. Insurers use that ruling as an excuse to avoid coverage in a manner that they did not advance previously and which, in fact, is directly contrary to the jury verdict and Insurers' own trigger theory throughout the proceedings below. Thus, where they once argued that claimants did not suffer injury until years *after* the Excess Policy periods, Insurers now argue that all of the events necessary to trigger their coverage ended years *before* the first Excess Policy incepted.

For example, under the Superior Court's mistaken ruling, the claim of a hypothetical US naval officer exposed to Warren asbestos products while aboard a ship from 1954 to 1972, and diagnosed with full-blown cancer in 2011, triggers only those policies in place from 1954 to 1972, when the claimant was externally

exposed to asbestos. To affirm the Superior Court's ruling, the Court would have to conclude that the officer suffered no injury even in 2011, when he was diagnosed with cancer, or in any year after 1972, when cancer cells were forming and proliferating in his body. That is irreconcilable with New York law, the *uncontroverted* evidence at trial, and the jury's verdict recognizing that such cellular damage constitutes an injury in fact under the Excess Policies.

In this case, it is not merely an academic difference. The first Excess Policy in this case incepted in 1972, but the vast majority of Warren Asbestos Claims involve exposures that ended before that date. The Superior Court's limitation thus effectively eviscerates Warren's coverage and provides Insurers with the escape from their coverage obligations that the jury's verdict denied them. In fact, to date, despite having sold $400 million in indisputable excess coverage and despite the Superior Court's refusal to stay enforcement of Insurers' payment obligations under the Final Judgment, Insurers have refused to pay Warren any more than $2.1 million towards $76 million[2] in unreimbursed costs, based upon this error.

I. THE TRIAL COURT'S APPLICATION OF AN "EXPOSURE" TRIGGER TO THIS CASE IS CONTRARY TO CONTROLLING NEW YORK LAW

The Superior Court's ruling is wrong as a matter of law. Courts applying New York law, including this Court, have uniformly recognized that the injury-in-

[2] At the time of the original appellate briefing in November 2014, the Insurers owed Warren $43 million. Warren Br. at 31.

fact test triggers coverage in every policy period in which injury takes place – even if "the exposure that caused [the injury] preceded that period."[3] *Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's, London*, 673 A.2d 164, 170 n.11 (Del. 1996) (quoting *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 764 (2d Cir. 1984)).

That conclusion holds true for asbestos as for other continuous injury claims. For example, in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1199-1200 (2d Cir. 1995), the Second Circuit vacated the trial court's ruling that the asbestos injuries leading to cancer occurred only during exposure. On remand, the district court reversed its earlier ruling, and held that the overwhelming scientific evidence – *identical to that presented in this case* – established that "[e]ach replication of a damaged cell constitutes a new injury." 1998 WL405047, at *3 (S.D.N.Y. July 17, 1998).[4]

Insurers have not attempted to justify the Superior Court's legal analysis, nor have they cited to a single case applying an injury-in-fact trigger that limits

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[3] *See also, e.g., Labate v. Liberty Mut. Fire Ins. Co.*, 799 N.Y.S.2d 71, 73 (App. Div. 2005) ("It is immaterial whether the causative event happened during or before the policy period."); *E.R. Squibb & Sons Inc. v. Lloyds & Cos.,* 241 F.3d 154, 168 (2d Cir. 2001) (medical product liability claims).

[4] *See also, e.g., Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 704 (Cal. App. 1996) (asbestos injuries "slowly and continuously impair new portions of lung tissue throughout one's life, even after exposure to asbestos ceases"); *J. H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993) (injuries occur "even after exposure ends during the progression of the disease right up until . . . manifestation as a recognizable disease").

coverage solely to periods when the claimant was externally exposed to asbestos.[5] To the contrary, in a New York case decided after the completion of briefing and argument in this appeal, an affiliate of certain Insurers here took precisely the opposite position. In *Pacific Employers Insurance Co. v. Troy Belting & Supply Co.,* 2015 WL 5708360 (N.D.N.Y. Sept. 29, 2015), the court quoted from the brief of Pacific Employers (a member of the ACE insurance group) that "[i]n asbestos-related cases, [New York] courts have concluded that injury-in-fact 'begins upon initial exposure to asbestos *and continues through manifestation of disease.*'" *Id.* at *4 (citing *Stonewall*) (emphasis added). As that admission indicates, the ruling of the Superior Court is inconsistent with the unanimous conclusions of cases addressing this question under New York law.

II. THE SUPERIOR COURT'S ERRONEOUS TRIGGER RULING WAS NOT A RULE 49(A) FINDING OF FACT

The Insurers try to justify the Superior Court's legal ruling by suggesting

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[5] Insurers have never even tried to argue that the New York cases to which the Superior Court cited in the relevant opinions (JA1878, 1733) provide any actual support for the "exposure" trigger. *Continental Casualty Co. v. Employers Insurance Co. of Wausau*, 871 N.Y.S.2d 48, 60 (App. Div. 2008), for example, held that the policies there were triggered not by "exposure[s] to asbestos" but only by "an injury therefrom" during the policy period. *In Re Liquidation of Midland Insurance Co.*, 709 N.Y.S.2d 24, 32 (App. Div. 2000), involved unique policy language not at issue here that specifically tied trigger to the causative occurrence, not injury during the policy period. *See* Warren Br. at 36 n.17. And the court in *In Re Prudential Lines Inc*., 158 F.3d 65, 83-84 (2d Cir. 1998), merely noted that the lower court's trigger ruling – which preceded the Second Circuit's decision in *Stonewall* by several years – was "unchallenged on this appeal." *See* Warren Br. at 35 n.16. Finally, the Superior Court's reliance on *dicta* in an earlier ruling of the Court of Chancery (JA1733 n.217) ignores that the trigger issue was never briefed before the Court of Chancery and that discovery on that issue did not begin until the case was transferred to the Superior Court. WA003; XA72.

that Plaintiffs affirmatively chose not to seek a jury determination on whether the injury was continuous, leaving the door open for the Court to impose a *sua sponte* exposure requirement as a "factual finding" under Rule 49(a). *See* Excess Insurers' Answering Brief ("EI Ans. Br.") (Trans ID 56455968) at 32-34. Insurers' arguments do not survive even minimal scrutiny.

First, a court will not be deemed to have intended to make a Rule 49(a) factual finding absent a clear indication of that intent. *See* Warren Reply at 17-18. There is no such indication here. *See id.* at 18-20. Rather, the Superior Court made a legal finding and "drafted its own [trigger] provision" to conform to the Court's understanding of New York trigger law: "As a matter of New York law . . . New York accepts dates of substantial exposure as an 'injury in fact' trigger." JA1878, 1733.

Second, even if the Superior Court could be deemed to have made a "factual finding" that asbestos injury takes place only during periods of external exposure, that finding would have to be reversed even under the most deferential standard. *See* Warren Reply at 20-26. No party presented *any* evidence that bodily injury ceased once external exposure to asbestos ended. *See id.* Indeed, Insurers argued exactly to the contrary at trial, claiming that the injury only occurred years after exposure, when the cellular damage caused by asbestos progressed to the point where a claimant suffered detectible bodily impairment. *See* Warren Br. at 17-23.

The jury soundly rejected that argument. JA1482-83 ¶¶ 11, 12.

In short, after losing the issue before the jury, the Insurers now seek to take advantage of the Superior Court's error to change their trigger theory (using the hypothetical sailor as an example)

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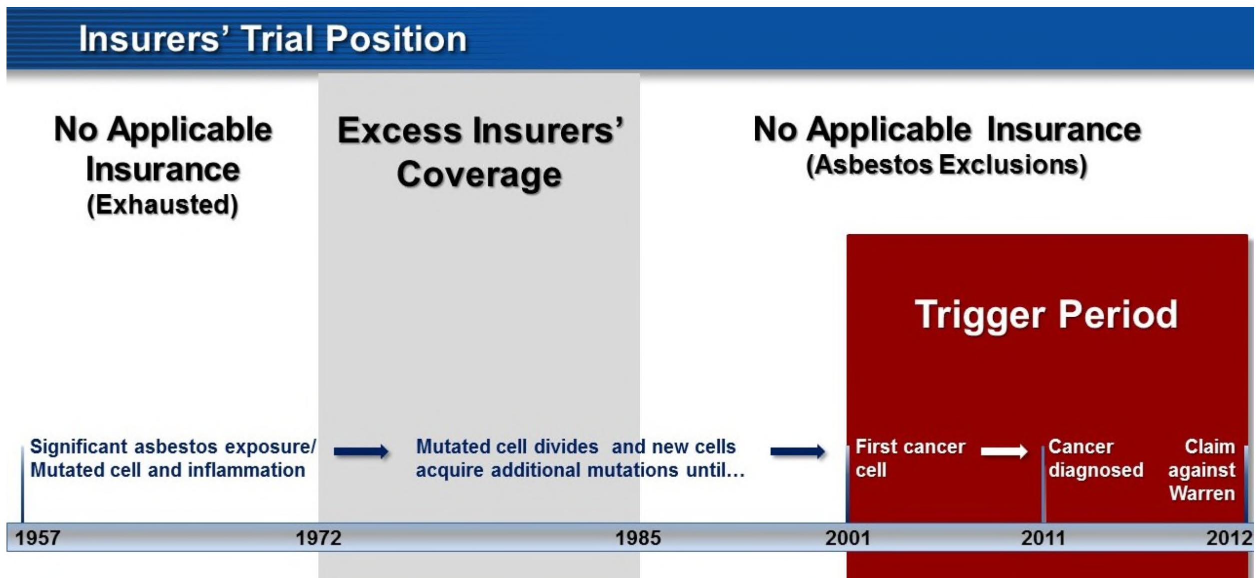

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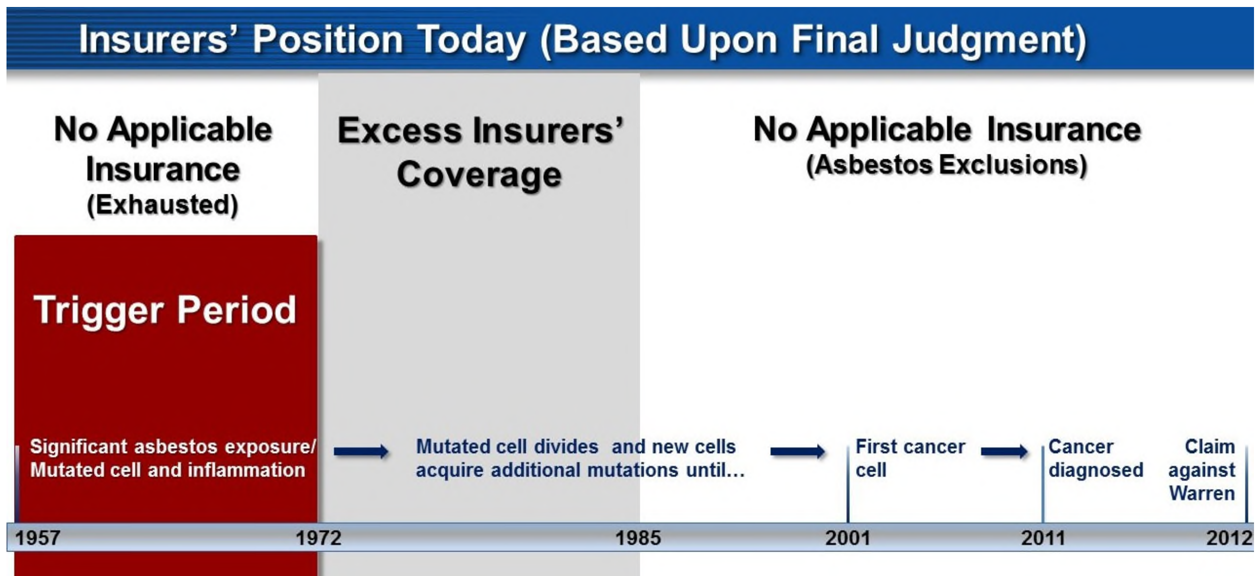

Further, the only evidence presented at trial with respect to the development of asbestos-related cancers, which account for 98% of Warren's past costs, was the extensive uncontroverted testimony of Plaintiffs' expert, Dr. Edward Gabrielson. Dr. Gabrielson testified that the cellular mutations which cause cancer cells to form occur continuously, including during post-inhalation time periods. Warren Br. at 18-20.[6] Insurers never disputed Dr. Gabrielson's testimony that cancer is the end product of a decades-long process of mutated cells dividing and replicating from the date of significant exposure to the date the disease manifests itself. *See* WA376:20-394:18. To the contrary, Insurers – who previously submitted a counterstatement of material facts which stated that "[t]he experts . . . agree about how cancers develop" (WA119 ¶ 37.2) – chose not to proffer any expert testimony on the etiology of asbestos-related cancers.[7] Nor did Insurers question Dr. Gabrielson's explanation of the continuous bodily processes that cause cancer; their cross-examination focused solely on what events in those processes constitute "injuries." *See* Warren Br. at 19-20; WA439:19-457:15, 467:1-471:9.

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[6] For this reason, the Superior Court's recollection that "the trial focused almost exclusively on when bodily injury first occurs, rather than on the illness's course" (JA1880) is incorrect. *See* Warren Br. at 18-22, 39-40. The Insurers do not even try to justify the Superior Court's mistaken recollection, but simply urge the Court to disregard that statement, suggesting that "the correctness of this comment" should not matter. EI Ans. Br. at 36.

[7] The Insurers had originally proffered an expert to respond to Dr. Gabrielson's testimony regarding the development of asbestos-related cancers, but ultimately decided not to call him at trial. That expert agreed that the processes that lead to cancer occur continuously in the body from inception. Warren Reply at 23 n.12; WA108-116; WA110 ¶ 8 ("The necessary mutations do not occur all at once, but instead accumulate one at a time, usually over many years . . . .").

With respect to the non-malignant claims, which represent two percent of Warren's losses, Insurers did put an expert on the stand – who agreed with Dr. Gabrielson that those diseases also result from continuous cellular damage that occurs each year. *See* Warren Br. at 21-22.[8] As the Superior Court noted, both experts "testified to substantially the same physical reactions that occur in the lung when fibers enter" and, thus, "tacitly agreed when cellular injury occurs, but differed as to when the body's reaction to the fibers causes an actual 'injury.'"[9] JA1710-11, 1734. In other words, for those individuals who developed asbestos-related diseases, the parties were in fundamental agreement as to the etiology of the disease process, but disagreed only as to which events in this continuous process constituted the first "injuries." *See* WA526:22-527:20 (confirming that "people who are diagnosed with asbestosis don't magically in the blink of an eye go from completely healthy, normal lungs to diseased lungs"); WA530:5-533:22.

Thus, Plaintiffs submitted precisely the type of well-established scientific evidence that courts have consistently held proves that injury continues after

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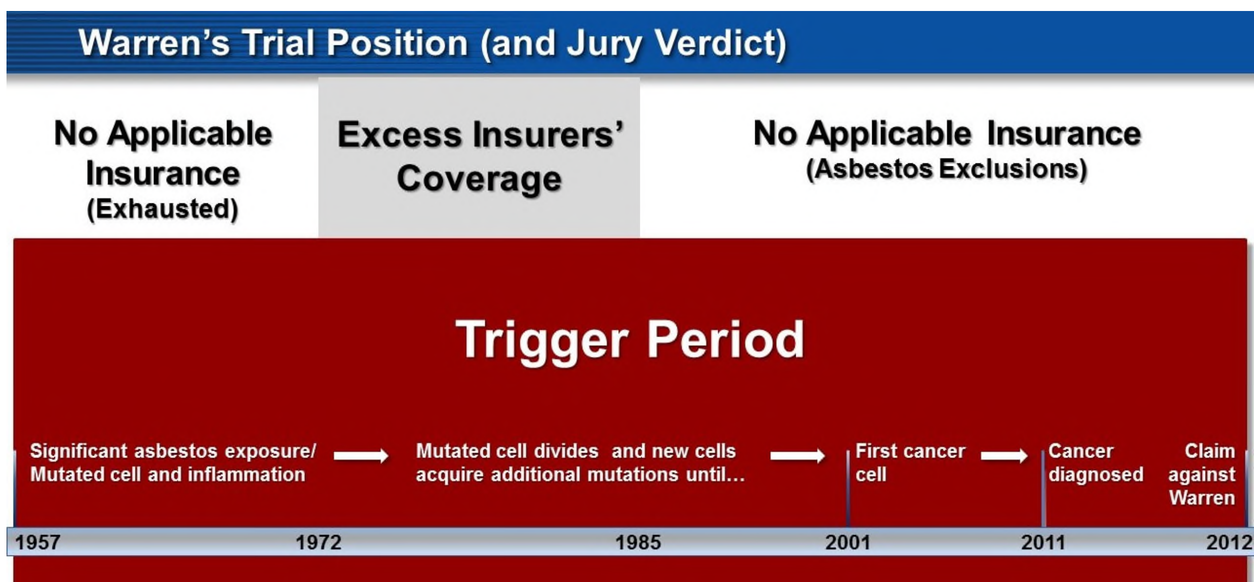
[8] *See also* WA337:10-376:19, 482:7-483:18, 486:2-487:18, 495:17-23, 501:8-502:1, 506:13-509:18, 511:5-513:4, 526:22-531:19, 541:15-543:16.

[9] Insurers have suggested, including at oral argument on this appeal that, because the continuous nature of asbestos injury was not listed as one of the "stipulated facts" prior to trial, it was necessarily a matter of dispute. EI Ans. Br. at 7. Insurers' conduct at trial belies this notion; the trial was *only* for disputed issues, and Insurers never submitted any evidence or expert testimony to contest the evidence (and well-known fact) that the injurious processes that result in asbestos-related diseases are continuous. Moreover, Insurers expressly conceded before the trial that the parties' experts fully "agreed" on the processes that lead to asbestos diseases. WA117-122.

inhalation until the manifestation of the asbestos disease.[10] Indeed, to Warren's knowledge, in every case in which the policyholder submitted proof of cellular injury at or near the time of exposure, the jury or court has found that asbestos injuries continue from that exposure to manifestation.[11] Insurers did not contest in the court below that this is the injurious process for claimants who ultimately develop asbestos-related diseases, and should not be permitted to contest it now. That process, combined with the unchallenged verdict of the jury, makes this the proper trigger period:



In fact, in order to accept the Superior Court's contrary ruling that only injury during periods of exposure can constitute "injury-in-fact," the Court would

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[10] *Stonewall*, 73 F.3d at 1197-1200; *see also, e.g., Armstrong*, 52 Cal. Rptr. at 704; *J.H. France,* 626 A.2d at 507.

[11] Indeed, for all the faults that Insurers found before and during the trial with Liberty's payment decisions, Insurers never criticized Liberty for paying under its consecutive policies once it determined that the disease process had begun. *See* WA200:19-202:1; WB695:12-697:7.

have to accept the untenable fiction that an asbestos claimant (1) suffers a series of cellular injuries while being exposed to asbestos; (2) then enters a latency period after external exposure ends during which he or she suffers no further injury; and then (3) magically develops cancer after Insurers' policy periods end. Nothing in the law or the record supports that fiction.[12]

III. <u>INSURERS' EXCUSES DO NOT SUPPORT AFFIRMANCE</u>

Insurers attempt to gloss over the fact that the Superior Court's trigger results in such an untenable fiction by means of three excuses for affirmance, none of which has any merit. First, they assert that Plaintiffs seek to impose a "continuous" trigger of coverage on the Asbestos Claims. EI Ans. Br. at 29-32. To the contrary, as the Insurers have conceded, a "continuous" trigger *assumes* injury during the policy period; an "injury-in-fact" trigger requires the policyholder to submit evidence at trial showing when injury occurred. Warren Br. at 37-38. Courts have long recognized that, although continuous or gradual injuries will implicate the same policies under either of these trigger approaches, that result

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[12] At oral argument on this appeal, the Insurers suggested, for the first time, that Warren had failed to prove that people who ultimately develop asbestos diseases suffered injury beyond the exposure period specifically as a result of exposure to *Warren's* products. Insurers never previously mentioned that topic, whether during the trial or in their pre- or post-trial motion papers. Aside from the impropriety of raising that argument for the first time on appeal – and, indeed, at oral argument on appeal – it is irrelevant to the trigger argument. In any event, Warren requires that each claimant provide Warren with proof that he or she was exposed to a Warren product as a condition of settlement, which is why approximately ninety-eight percent of Warren Asbestos Claims have been dismissed without payment. WA181:2-185:2.

does not convert an injury-in-fact trigger into a "continuous" trigger.[13]

In this case, Plaintiffs did not rely on a *presumption* that asbestos-related injuries take place from exposure through manifestation. Rather, they submitted expert medical testimony proving that the cellular and molecular damage which leads to asbestos disease is a continuous process that continues even after the external exposure has ceased. *In fact, that was the primary purpose of the trial*, during which Plaintiffs met their burden of proof under an injury-in-fact trigger.

Second, Insurers argue that, because not every exposure leads to an asbestos disease, the jury's verdict that injury begins with the first significant exposure does not prove that the claimants' injuries continued, since some would be "cured" after that initial injury. *See* EI Ans. Br. at 7-11, 35-36. That is a red herring. Every Asbestos Claim involves a claimant who ultimately developed an asbestos disease – someone whose body did not successfully defend against the cellular changes that the jury found constituted the "first injury." *See* Warren Reply at 7, 22-26.

Finally, Insurers suggest that Plaintiffs chose not to have the jury decide the full trigger issue, and thus left unresolved the "question" of whether injury continues after external exposure ceases. EI Ans. Br. at 11-12, 34. That argument

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[13] *See Stonewall,* 73 F.3d at 1195 ("triggering by successive injuries, proven to have occurred" is not the same as a continuous trigger); *Montrose Chem. Corp. v. Admiral Ins. Co.,* 913 P.2d 878, 894 (Cal. 1995) ("the injury-in-fact trigger, like the continuous injury trigger, affords coverage for continuing or progressive injuries occurring during successive policy periods" after the first injury); *GenCorp, Inc. v. AIU Ins. Co*., 104 F. Supp. 2d 740, 748 (N.D. Ohio 2000) ("the continuous trigger closely tracks the injury-in-fact trigger").

ignores, first, that no one disputed the medical reality that asbestos diseases result from gradual and continuous injurious processes – a fact so established that some courts take judicial notice of it.[14] *See* Warren Br. at 15-26. The only dispute was when those processes began. *See id.* Under Judge Silverman's express pretrial rulings, only issues actually in dispute could be argued to or considered by the jury. WA124, 126, 128.

Further, Insurers' current assertion that the questions submitted to the jury were somehow lacking or incomplete is particularly inappropriate, given that, over Plaintiffs' objections, the Superior Court decided to use the Insurers' draft jury interrogatories as the template for the jury verdict form. WA586-87. The two forms had taken different approaches to the trigger issue, but both were consistent with the Superior Court's directive and indisputably designed to establish when the injury began. Plaintiffs' proposed interrogatories did not ask what constituted "injury" but rather when "injury" occurred, whatever form it took. Warren Reply at 8-10; WA136, 579. In other words, Plaintiffs proposed that the jury be asked to find that the bodily injury "takes place at or soon after" significant exposure to asbestos and "continues thereafter." *Id.* In contrast, the Insurers' proposed interrogatories provided the jury with choices about which events in the continuum from exposure to manifestation constituted the first "injury." WA143–144, 672.

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[14] *See, e.g., Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 982-83 (N.J. 1994).

Insurers never once suggested that any disputed facet of the trigger issue would remain "unresolved" under their verdict form. Indeed, Insurers' proposed jury instructions, which the Court ultimately adopted, reflected their understanding that the determination of what event "first" constituted injury *would resolve the trigger issue for all Excess Policies.* Thus, they proposed that the jury be instructed that the ultimate issue for determination was whether "the claimant suffered 'bodily injury' during the policy period of an Excess Policy," and that this issue would be resolved "[s]pecifically" by "decid[ing] whether . . . 'bodily injury' first occurs . . . upon cellular or molecular damage caused by asbestos inhalation" or "when the *first* cancer cell is created." *See* Warren Br. at 25-26, 42 and Reply at 9-10; JA1462 (emphasis added). Further, the Superior Court removed all doubt on the intended application of the jury's findings by correctly noting at the charging conference that the "first occurs" language in the verdict form supplied the "temporal" element for defining when the claimants' injuries took place. Warren Br. at 23-25; WA622:22-623:10, 629:8–631:15.[15] In short, after convincing the Court to adopt their verdict form and jury instructions as proper statements of the

[15] Insurers' suggestion that Plaintiffs resisted adding a temporal component to the trigger interrogatories is false. To the contrary, Plaintiffs noted at the conference that "initial" was unnecessary because the "first occurs" language already provided the necessary temporal component. Warren Br. at 24–25; Warren Reply at 10-11; WA620:1–623:13, 629:8–631:15. More notably, Insurers' suggestion that the inclusion of the word "initial" in the verdict form would have put the continuing injury issue "squarely before the jury" (EI Ans. Br. at 12) assumes precisely what the Insurers now seek to deny: that all parties understood that the timing of injury would be established by determining when the injurious bodily processes began.

disputed issues to be decided, Insurers are now trying to make the trial a meaningless exercise that failed to resolve one of the fundamental factual issues in the case: the timing of the injuries which determines which policies are triggered.

If upheld, the mistaken trigger ruling would largely extinguish $400 million of Excess Policy limits that cover Warren's asbestos liabilities – even though Warren prevailed before the jury on the timing of injury and before the New York Court of Appeals on the issue of allocation. Warren respectfully submits that reversal of the trigger ruling therefore is not only warranted, but necessary.

CONCLUSION

For the reasons set forth herein, Warren respectfully requests that this Court reverse the Superior Court's rulings on Paragraph 9 of the Final Judgment and issue an Order directing that the Final Judgment Order be amended to provide that all Excess Policies in effect during or after a claimant's first significant exposure to external asbestos are triggered and must respond to the resulting Asbestos Claim.

POTTER ANDERSON & CORROON LLP

By: *___/s/ Jennifer C. Wasson___*
Jennifer C. Wasson (No. 4933)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Telephone: (302) 984-6000

Attorneys for Warren Pumps LLC

OF COUNSEL:

Robin L. Cohen
McKOOL SMITH
One Bryant Park, 47th Fl.
New York, NY 10036
Telephone: (212) 402-9400

Dated: June 23, 2016
[1227247 / 29510]

CERTIFICATE OF ELECTRONIC SERVICE

Jennifer C. Wasson hereby certifies that, on the 23rd day of June 2016, she caused to be filed, via File and Serve*Xpress*, an electronic version of the within document, and to be served, via File and Serve*Xpress*, upon the Delaware counsel of record identified below:

Lisa A. Schmidt, Esquire
Travis S. Hunter, Esquire
Richards, Layton & Finger
One Rodney Square
920 North King Street
Wilmington, DE 19801

Attorneys for Viking Pump, Inc.

James W. Semple
Cooch and Taylor, P.A.
The Brandywine Building
1000 West Street, 10th Floor
Wilmington, DE 19801

Attorneys for Westport Insurance Corporation, as successor to Puritan Insurance Company

Paul Cottrell
Melissa L. Rhoads
Tighe & Cottrell, PA
704 N. King Street, Suite 500
Wilmington, DE 19801

Attorneys for Continental Insurance Company as Successor to Fidelity and Casualty Company of New York; Granite State Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Certain Underwriters At Lloyd's, London and Certain London Market Insurance Companies

Neal J. Levitsky, Esquire
Seth A. Niederman, Esquire
Fox Rothschild LLP
919 North Market Street, Suite 1300
Wilmington, DE 19801

Attorneys for Travelers Casualty & Surety Company, as Successor to Aetna Casualty & Surety Company

Thaddeus J. Weaver
Dilworth Paxson LLP
One Customs House
704 King Street, Suite 500
Wilmington, DE 19801

Attorneys for OneBeacon America Insurance Company, as successor to Commercial Union Insurance Company; Republic Insurance Company; XL Insurance America, Inc., as successor to Vanguard Insurance Company

Robert M. Greenberg
Tybout, Redfearn & Pell
750 Shipyard Drive, Suite 400
P.O. Box 2092
Wilmington, DE 19899

Attorneys for Old Republic Insurance Company

Timothy Jay Houseal
Jennifer M. Kinkus
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801

Attorneys for Defendants-Below Appellants Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, Pa.; and Continental Insurance Company, as successor to Fidelity and Casualty Company of New York; and Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies; and OneBeacon America Insurance Company, as successor to Commercial Union Insurance Company, XL Insurance America, Inc., as successor to Vanguard Insurance Company, and Republic Insurance Company, n/k/a Starr Indemnity & Liability Company

Robert J. Katzenstein
Smith, Katzenstein & Jenkins LLP
800 Delaware Avenue, 10th Floor
P.O. Box 410
Wilmington, DE 19899

Attorneys for TIG Insurance Company, as Successor by Merger to International Insurance Company, as Successor by Merger to International Surplus Lines Insurance Company

Garrett B. Moritz
Nicholas D. Mozal
Ross Aronstam & Moritz LLP
100 S. West Street, Suite 400
Wilmington, DE 19801

-and-

John D. Balaguer
Timothy Martin
White & Williams, LLP
824 N. Market Street - Suite 902
P.O. Box 709
Wilmington, DE 19899

-and-

Kenneth L. Nachbar
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Attorneys for Defendant, Appellee TIG Insurance Company, f/k/a International Insurance Company, with respect to policies numbered 5220113076 and 5220282357, and Westchester Fire Insurance Company, with respect to policy numbered 5220489339, by operation of novation; ACE Property & Casualty Insurance Company (f/k/a CIGNA Property & Casualty Insurance Company), as successor-in-interest to Central National Insurance Company of Omaha, but only as respects policies issued through Cravens, Dargan & Company, Pacific Coast (improperly named as The Central National Insurance Company of Omaha); and Century Indemnity Company, as successor to CCI Insurance Company, as successor to

Insurance Company of North America and Century Indemnity Company as successor to CIGNA Specialty Insurance Company (f/k/a California Union Insurance Company)

/s/ Jennifer C. Wasson
Jennifer C. Wasson (#4933)

[1158751 / 29510]