SCHIFF HARDIN LLP

6600 Sears Tower
Chicago, Illinois 60606
t 312.258.5500
f 312.258.5600
www.schiffhardin.com

Robert H. Riley
(312) 258-5664
Email: rriley@schiffhardin.com

May 31, 2006

Sally LaCross
ADM Docket Coordinator
Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, Michigan 48909

Re: Inactive Docket for Asbestos Cases

Dear Ms. LaCross:

I write to express the strong support of my client, Owens-Illinois, Inc., for the Michigan Supreme Court's effort to bring order to the Michigan asbestos litigation and to stop the misallocation of scarce judicial and party resources to claims by unimpaired plaintiffs. More specifically, Owens-Illinois supports the adoption of proposed administrative order Alternative A.

Michigan, like many other jurisdictions across the country, has become a dumping ground for thousands of asbestos claims systematically generated by for-profit litigation screening companies. It has now been established in courtrooms and legislative hearings across the country that litigation screening claims are not supported by valid, reliable medical diagnoses of asbestos-related disease. X-rays are commonly administered without individual orders from a treating physician and the "reports" that are mass-produced by the litigation screening companies are sent to lawyers, not to the people who were screened. In most cases, no treating doctor even claims to have diagnosed an impairing asbestos-related disease pursuant to the established standard of diagnostic care. Instead, litigation doctors -- who disavow any doctor-patient relationship with the people who are the subject of their reports -- simply declare that the x-rays are "consistent with" asbestos-related changes. A published scientific study and court-ordered independent audits reveal systematic over-reading of these x-rays by a small group of litigation screening doctors who have together generated hundreds of thousands of non-impairment claims nationwide. The plaintiffs are not sick, by any common sense definition of the word, and the litigation reports upon which the claims are based do not bear scientific scrutiny.

The trial courts that must manage dockets overflowing with litigation screening cases and the companies who must defend themselves in those cases are not the only parties prejudiced by this scandal. The claims of plaintiffs alleging asbestos-related mesothelioma are often swamped in the flood of litigation screening claims. In the meantime, more than seventy asbestos defendants have been driven into bankruptcy -- not because they could not afford to resolve the small fraction of claims involving mesothelioma on reasonable terms, but rather because they could not afford to pay compensation to a seemingly endless stream of non-impairment claims prematurely filed because the litigation screening companies took actions that arguably started the running of the statute of limitations. These bankruptcies have done serious harm to Michigan workers and retirees, who have lost jobs and benefits.

The alternative versions of the proposed administrative order circulated by the Court appear to differ in only one material respect. Alternative A makes placement of claims on the active or inactive docket a mandatory first step in the litigation. Either the plaintiff demonstrates at the outset that his or her case belongs on the active docket (by meeting the ABA medical criteria) or the case goes on an inactive docket. Alternative B makes the placement of non-qualifying cases on the inactive docket purely voluntary, which means that even a non-impairment claim that is not supported by a valid, reliable medical diagnosis of asbestos-related disease would have a place on the active litigation dockets of this state, if the plaintiff's counsel so chose. Alternative B would merely delay proceedings in the "Tier II" cases until all properly documented claims are resolved.

The problem with Alternative B is that the defendants would almost surely continue to be subjected to demands that they resolve Tier II active docket cases in order to resolve Tier I cases. In essence, the resolution of properly supported claims of real asbestos-related disease could still be held hostage to the resolution of a large volume of claims that are unsupported by a valid medical diagnosis of impairing asbestos-related disease. In addition, defendants and their carriers might feel compelled to treat the active docket "Tier II" claims as if they were valid claims for reserve purposes, despite the fact that the court and the parties know that the plaintiffs, if required to do so, could not present valid evidence satisfying the ABA medical criteria.

There is no scientific or legal reason to leave placement of non-impairment cases on the inactive docket to the whim of plaintiffs' counsel. There is no material prejudice to unimpaired claimants stemming from mandatory placement on the inactive

docket. The running of the statute of limitations is tolled. Discovery (and the costs attendant thereto) can be postponed, but the order also provides that voluntary discovery can take place when circumstances warrant.

At the May 24, 2006 hearing before the Court, an objection was made to the use of a "bright line" test for normal or abnormal pulmonary function. Owens-Illinois would like to point out that the test contained in the Court's proposals is based upon the American Thoracic Society and the AMA Guidelines for the Evaluation of Permanent Impairment. The definition of abnormal adopted by those organizations is based upon a statistical methodology that results in the *over-diagnosis of abnormality.* As stated in *Lung Function Testing: Selection Of Reference Values And Interpretative Strategies*, American Review Of Respiratory Disease, 1991: 144: 1202-1218 at 1206,

> One statistically acceptable approach for establishing lower limits for any spirometric measure is to define the lowest 5% of the reference population as below the lower limit of normal (see section on Distributions And Lower Limits Of Normal). This implies a 5% false positive misclassification, a rate generally considered acceptable.

This which means that a small portion of the plaintiffs who are, in reality, functionally normal will qualify for placement on the active docket. The standard errs on the side of inclusion, not exclusion.

As this Court is aware, asbestosis is a restrictive lung disease. The ATS defines restriction as follows:

DEFINITION OF A RESTRICTIVE DEFECT

> A restrictive ventilatory defect is characterized physiologically by a reduction in TLC. One may infer the presence of a restrictive ventilatory defect when VC is reduced and FEV/FVC is normal or increased. Severe airflow limitation is another common cause of reduced VC either because airflow is so slow the subject cannot continue to exhale long enough to complete emptying or because airways collapse. Occasionally, patients will have a small VC, a normal FEV/FVC, and a normal TLC. If there is a contradiction

> between VC and TLC in defining restriction the classification should be based on TLC.

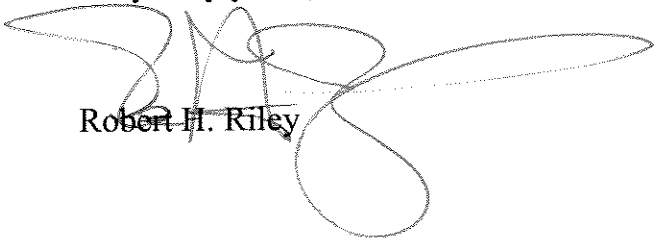
Id. at 1210.

Nevertheless, the ABA proposed standards, on which the Court's proposal is based, allow the inference of restriction on the basis of a reduced vital capacity with a normal ratio of FEV1/FVC. This also results in substantial over-diagnosis of restrictive impairment. As reported in *"How Accurate is Spirometry at Predicting Restrictive Pulmonary Impairment?"*, Aaron, S.D., *et al*, Chest, Mar. 1999, 115(3):869-873, fewer than 60% of the patients with a reduced FVC and a normal or elevated FEV1/FVC ratio have actual restrictive disease when the TLC measurement is performed. In other words, the medical criteria in the Court's proposed administrative order err on the side of inclusion, not exclusion.

There is simply no merit to the suggestion that the standards incorporated in the proposed administrative order would result in under-diagnosis of impairment from non-malignant asbestos-related disease.

Owens-Illinois supports Alternative A of the administrative order circulated by the Court. It is time – with all due respect, it is past time -- for Michigan to join the growing number of states that have acted to end the litigation abuse arising from the activities of the for-profit litigation screening companies.

Very truly yours,



Robert H. Riley

RHR/ts

CHI\ 4572619.1