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March 7, 2006

The Honorable Edward Whitfield, Chair  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Bart Stupak, Ranking Member  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Whitfield and Representative Stupak:

I am writing to you regarding hearings that your Subcommittee will hold tomorrow on "The Silicosis Story: Mass Tort Screening and the Public Health." In recent years, the American Bar Association (ABA) has offered a wide range of policy recommendations relating to asbestos litigation, including a model case management order standards for mass screening, a model statute of limitations, medical criteria for filing claims and principles the ABA believes should be followed if an administrative process, such as a trust fund, is established to deal with asbestos cases.

We have identified three resolutions that we believe would be of particular interest to your Subcommittee as it studies the silicosis situation because they are designed to either claim filings or manage the asbestos claims that are filed, and silica claims present largely the same problems as asbestos claims for the courts. However, we would be pleased to provide to you, upon your request, any of our additional resolutions that address asbestos litigation. These three resolutions were adopted by the ABA's House of Delegates upon recommendation of its Tort Trial and Insurance Practice Section's Task Force on Asbestos Litigation. That Task Force was composed of both plaintiffs' and defendants' lawyers and representatives of business, insurers, and organized labor.

The first resolution was adopted by our House of Delegates in February 2005 and provides:

*RESOLVED, That the American Bar Association recommends that states and territories establish by statute or regulation, standards for the operation of*

*screening vans or other forms of mass screening for asbestos-related conditions. These standards should be enforced, as appropriate, by federal, state and territorial governmental agencies and judicial bodies; by the investigation and enforcement of bar professional ethics; and by the investigation and enforcement of medical societies' ethical standards. The objective of screening standards should be to prevent medical screenings from being conducted inaccurately and being misused, but not to prevent legitimate monitoring of health.*

*1. Such standards should require compliance with:*

*a. Federal Food and Drug Administration and other local, territorial, state, and federal governmental laws and regulations governing the use of medical equipment and testing devices.*

*b. Local, territorial, state, and federal laws and regulations.*

*c. Professional standards for physicians and other qualified medical professionals concerning the conduct of medical examinations, screening tests (including x-rays and pulmonary function tests) and medical diagnoses such as those promulgated by the American Medical Association and the American Thoracic Society.*

*d. Such standards should be technology-neutral and based on current medical technological advancements.*

*2. The reading, evaluation and reporting of such tests should be performed by a physician or other medical professional qualified under professional and state licensing standards, recognizing that there may be multiple medical professionals carrying out certain functions in the chain from screening through diagnosis.*

*3. The physician or other qualified and legally authorized medical professional rendering the diagnosis shall have examined the screened individual, either in person or through medically accepted telemedicine or electronic practices, following a complete history of all occupational exposures that might be relevant; and has considered the results of all diagnostic tests performed during the medical examination or screening, including but not limited to pulmonary function tests and x-rays; and has considered all other medical information concerning the patient relevant to the diagnosis that is available to such physician or qualified and legally authorized medical professional.*

*4. All pulmonary function test reports shall conform with any guidelines or standards adopted by such state or territory pursuant to paragraph 1.c above, and shall be accompanied by the original tracings, and all x-ray reports shall be accompanied by the original x-ray or x-rays, either in original form or as transmitted digitally or in a manner judged to be reliable by qualified medical technology experts.*

*5. All medical diagnoses shall be made in accordance with the applicable standard of diagnostic care, and such diagnoses must be communicated to the screened individual within*

*a reasonable period of time by the physician or other qualified and legally authorized medical professional rendering the diagnosis.*

The second resolution was adopted by our House of Delegates in August 2005 and recommends a case management order. I have attached the model case management order to this letter. The resolution provides:

*RESOLVED, That the American Bar Association recommends that federal, state, and territorial courts without any existing Case Management Order governing asbestos litigation, or with an existing Case Management Order that has proven unworkable, utilize the Model Case Management Order, with referenced exhibits, dated August 2005.*

The third resolution was adopted by the ABA House of Delegates in February 2005 and provides a model statute of limitations for asbestos cases. I have attached the Model Statute of Limitations for Asbestos to this letter. The resolution provides:

*RESOLVED, That the American Bar Association recommends that the states and territories adopt the Model Statute of Limitations for Asbestos dated February 2005, governing the accrual of actions for injury, illness or wrongful death based upon exposure to asbestos.*

*FURTHER RESOLVED, That the Model Statute of Limitations for Asbestos is a resource designed by representatives of the plaintiff and defense bar and company defendants to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.*

We request that this letter and attachments be made a part of the record of your hearings. Please let me know if you have any questions or if the ABA can be of help to your Subcommittee.

Sincerely yours,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

Attachments

**AMERICAN BAR ASSOCIATION**  
**TORT TRIAL & INSURANCE PRACTICE SECTION**

**MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER**

**AUGUST 2005**

## **MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER**

This Asbestos Pre-Trial Case Management Order is entered in conjunction with this Court's Asbestos Inactive Docket Order dated \_\_\_\_\_. This Order sets forth the procedures to be followed when a plaintiff files an asbestos-related Complaint, whether or not said plaintiff previously has been registered on the Registry. This Order also governs certain aspects of discovery and pre-trial motions.

This Order applies to all pending asbestos Complaints and to all asbestos Complaints filed after the date of this Order.

As used herein, the term "plaintiff" also refers to plaintiff's decedent, if applicable.

IT IS HEREBY ORDERED as follows:

1. Any Complaint alleging an asbestos-related injury must attach the following:
  - A. A Preliminary Fact Sheet in the form attached hereto as [Exhibit A](http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf), <http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf> completed in full.
  - B. A Physician's Report signed by a pulmonologist, internist, occupational health physician, or pathologist which diagnoses one or more asbestos-related disease(s). Said physician must be actively licensed to practice medicine and certified by the appropriate subspecialty board in his or her applicable subspecialty. The Physician's Report must:

- i. Verify that the diagnosing doctor, or a medical professional employed by and under the direct supervision and control of the diagnosing doctor, has performed all examinations or tests referenced in the Report and conducted any referenced interviews of plaintiff or plaintiff's representative.
- ii. Set forth a reliable history of exposure, as described in the "Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos" by the American Thoracic Society, Am. J. Respir. Crit. Care Med., Vol. 170, pp. 691-715, 2004.
- iii. Set forth a medical and smoking history that includes a review of the plaintiff's relevant past and present medical problems.
- iv. Set forth all findings revealed by any hands-on physical examination of the plaintiff.
- v. Verify that an adequate latency has elapsed between plaintiff's first exposure to asbestos and the time of diagnosis.
- vi. Verify that the doctor has diagnosed an asbestos-related disease to a reasonable degree of medical probability. A diagnosis of findings "consistent with" an asbestos-related disease is not sufficient under this Order.

- vii. Verify that any x-rays, CTs and/or Pulmonary Function Tests were administered in accordance with all applicable state health regulations and that any Pulmonary Function Tests were performed using equipment, methods of calibration and techniques that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5<sup>th</sup> Ed.) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A), §3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled “Lung Function Testing: Selection of Reference Values And Interpretative Strategies” as published in Am. Rev. Resp. Dis. 1991:144:1202-1218.
  - viii. Attach copies of all reports interpreting Pulmonary Function Tests that have been administered (including flow volume loops), and all reports of X-ray and CT Scan reports, including B-reading forms when available.
- C. Authorizations in the form attached hereto as [Exhibit B](#), <http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf> executed by plaintiff or plaintiff’s representative, authorizing release of plaintiff’s social security, military, veterans, employment and medical records.

D. Be accompanied by the current regular filing fee for each named plaintiff (after crediting any fee previously paid with plaintiff's application to the Inactive Docket).

2. Within thirty (30) days of the service of any Complaint hereunder, any Defendant may file an Objection to Complaint, which states any objections Defendant has as to whether the above requirements for filing an asbestos-related complaint have been met. Plaintiff shall have the right to file a written response to the Objection within twenty (20) days after the date of the Objection. The Court may decide the issue on the papers so submitted, or schedule a hearing, in its discretion, and/or impose sanctions in accordance with applicable law if either side has filed a document under this paragraph without substantial justification.

3. The Clerk shall create and maintain a public file, which shall contain Master Complaints and Master Answers ("Master Pleadings"). Attorneys representing parties in asbestos litigation may file a Master Complaint or Master Answer, and copies of such pleadings shall be served on all counsel who previously filed a Master Pleading. Thereafter, any party represented by counsel who has filed a Master Complaint or Master Answer may file and serve on any adverse party a Summary Pleading, and such Summary Pleading shall have the same force and effect as if the Master Pleading had been filed and served on the adverse party. A Summary Pleading filed pursuant to this General Order shall contain the following:

i. The case caption, which shall include the names of the parties to the action, the case number, and the name(s) of

- the party(ies) on whose behalf the Summary Pleading is filed and against whom the Summary Pleading is asserted;
- ii. Notice that the Master Pleading is on file with the Clerk of the Superior Court and the date on which it was filed, that a copy of the Master Pleading and of this General Order may be obtained upon request from counsel filing the Summary Pleading, and that designated portions of the Master Pleading are incorporated by reference in the Summary Pleading. The Summary Pleading shall specify those claims or affirmative defenses contained in the Master Pleading, which are being asserted against the party being served.
  - iii. Such case-specific information as may be necessary to satisfy applicable statutes, pleading requirements, and this Order.

An amended Master Pleading shall not be deemed incorporated by reference into any previously filed Summary Pleading without further order of the court. This provision shall not limit the substantive rights of any party, nor limit the right of any party to challenge the sufficiency of any Master Pleading or Summary Pleading.

4. Within sixty (60) days after filing a Complaint hereunder, plaintiff(s) shall
  - A. Answer the Standard Interrogatories and Request for Documents attached to [Exhibit C http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf](http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf) (sub-parts A (1-5) and B) hereto. Said answers

shall be full and complete, and must be verified under penalty of perjury.

B. Using the form attached hereto as [Exhibit D](#), <http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf> agree to deliver pathology in the parties' possession (including attorneys and consultants) to Defendants' Representative (defined below) within ten (10) days after said Representative is designated pursuant to paragraph 6, below, and noting whether plaintiff objects to destructive testing of said pathology. Any dispute over destructive testing of pathology will be resolved by the Court upon noticed motion. In the event there is no dispute, Defendants' Representative shall return the pathology to plaintiff's counsel within sixty (60) days of receipt.

C. Using the form attached hereto as [Exhibit E](#), <http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf> offer plaintiff(s) for discovery depositions indicating each deponent's availability on no less than three (3) dates (at least 30 and no more than ninety (90) days after the date of the offer).

5. The court hereby adopts standard plaintiff interrogatories to defendants, attached to [Exhibit C](#) <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>(subparts C (1-4)), to be answered by defendant under oath without objection except for the assertion of a claim of privilege or as provided below.

- A. Upon motion by any defendant made within seventy-five (75) days of the effective date of this order, the Court shall determine on a one-time basis the propriety of an objection by such defendant that providing answers to specific question(s) in the standard plaintiff interrogatories to defendants would impose on such defendant a particular burden which is not justified by the likelihood that such answers will provide or lead to the discovery of relevant and material evidence. When a new defendant is served in the litigation in this jurisdiction for the first time after the effective date of this order, that defendant shall have ninety (90) days following service of the complaint to move the court to review any claim of burden it may have on the same basis.
- B. Within one-hundred twenty (120) days of the effective date of this order, each defendant in any pending action served with a copy of this order shall serve upon all counsel who previously filed a Master Pleading its answers to the standard plaintiff interrogatories to defendants. These answers shall be deemed served in all pending cases, and thereafter it shall be deemed that the defendant has served the same answers in all other subsequently served cases. If at any time a defendant amends or provides further answers, in whole or in part, to the standard plaintiff interrogatories to defendants, it shall serve said amended and/or further answers on

all counsel and said amended and/or further answers shall apply to all cases.

- C. The court hereby adopts plaintiffs' standard case-specific interrogatories to defendants (attached to [Exhibit C](http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf) <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>) and a notice of service of plaintiffs' standard case-specific interrogatories to defendants (also attached to [Exhibit C](http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf) <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>).

Plaintiffs' counsel may serve such Notice at any time after commencement of the action. Thereupon, unless excused from the obligation to answer by order of the Court, the defendant designated in the Notice shall be required to answer such interrogatories within sixty (60) days after service of the Notice, but no sooner than one-hundred twenty (120) days after service of the complaint upon that defendant.

- D. Nothing herein shall preclude any party from propounding additional non-duplicative discovery.
- E. On the annual anniversary of the date upon which it served its initial answers to Standard Plaintiff Interrogatories to Defendants, each defendant shall either (1) supplement its answers with information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory responses, or (2) serve a verified statement from defendant's most knowledgeable

agent(s), officer(s) or employee(s) stating that such individual(s) has reviewed defendant's answers to such interrogatories and that the answers are still true and complete."

6. Defendants are required to cooperate with each other and with plaintiff's counsel in order to coordinate the scheduling of depositions, testing of pathology materials, and scheduling of Defense Medical Examinations. Within fifteen (15) days after service of the materials specified in subpart 4, above, defendants shall notify plaintiffs' counsel of the defense firm which shall act as Defendants' Representative in said case, and plaintiffs' counsel shall work with said Defendants' Representative firm thereafter in connection with discovery, scheduling and pathology issues. If Defendants' Representative's firm subsequently ceases to represent any defendants in said case, the remaining defendants shall notify plaintiffs' counsel within fifteen (15) days of a replacement firm as the Defendants' Representative. The Court hereby recognizes the applicability of the joint defense privilege to work performed by Defendants' Representative in this regard, and to communications among defendants concerning matters, which are the subject of this Order.

7. Plaintiff's depositions shall proceed as follows:

- A. The plaintiff's deposition may be noticed only by the Defendants' Representative or by the plaintiff.
- B. If the deposition is noticed by the Defendants' Representative, defendants shall have 7 hours to depose the witness on the record, absent agreement of the parties or court order.

- C. If the plaintiff notices the deposition, the plaintiff may complete his or her direct testimony before cross-examination is conducted by defendants. If this procedure is used, the time for defendants' cross-examination shall be either 7 hours on the record or three times the amount of time used by plaintiff to complete the direct examination, whichever is longer. Defendants are expected to allocate the available time among themselves and, in the event of inability to agree, shall make a timely motion for protective order before expiration of the time limit.
- D. In the event any defendant is served after completion of plaintiff's deposition, such late-served defendant(s) may request that the Defendants' Representative schedule and notice a further deposition of the plaintiff. Said deposition shall be limited to those matters not adequately covered in the initial deposition including liability issues pertaining to the newly served defendant.

8. Cases governed by this Order may be challenged by expedited summary judgment motions, as follows:

- A. A motion for summary judgment on the ground that there is no evidence tending to show that the plaintiff was exposed to asbestos for which the defendant is responsible shall be deemed filed if a defendant timely files and serves a Notice of Intent to Request Expedited Summary Judgment. This procedure may be used solely with respect to product, site and contractor identification issues.

The Notice of Intent to Request Expedited Summary Judgment need not be accompanied by any supporting papers except as required herein.

- B. A Notice of Intent to Request Expedited Summary Judgment may be served at any time after a trial date is set, or six months have elapsed since the commencement of the action, whichever occurs first, and no later than forty-five (45) days before the date set for Expedited Summary Judgment Hearing. Such Notice of Intent shall contain a certification by defendant's counsel that:
- i. Such attorney has reviewed, or caused to be reviewed by another attorney or legal assistant working under the supervision of such attorney, all of the discovery, which has been exchanged between the plaintiff and the moving defendant in the action;
  - ii. The moving defendant has provided plaintiff with all information in its possession, custody or control (other than expert discovery), which it is required to produce to plaintiff pursuant to proper discovery demand or court order in the action; and
  - iii. Plaintiff's responses to discovery in the action have not identified any competent evidence tending to show exposure to asbestos for which the defendant is responsible.

- C. Not later than fifteen (15) days before the hearing date, plaintiff shall file and serve a Response establishing that there is a triable issue of fact as to whether the plaintiff was exposed to asbestos for which the defendant is responsible. In the event that plaintiff fails timely to file a Response to a defendant's Notice of Intent to Request Expedited Summary Judgment, the action shall be dismissed without prejudice.
- D. Not less than five (5) days before the hearing date, the moving defendant may file and serve a Reply to the plaintiff's Response to Notice of Intent to Request Expedited Summary Judgment.
- E. The Court shall have the discretion to make a ruling based upon the submitted papers and without the need of a hearing, and in its discretion, impose sanctions in accordance with applicable law if either side has filed a document under this section without substantial justification.
- F. Nothing herein shall preclude any party from bringing a motion for summary judgment on any ground, in full compliance with the procedures and time limitations generally applicable to civil actions.

The second approved Recommendation offered a Model Statute of Limitations governing the accrual of actions for injury, illness or wrongful death based upon exposure to asbestos, to address the fear and uncertainty surrounding the running of a statute of limitations that may or may not have been triggered by the information communicated to

a person, typically after an examination in a screening van, where there is no clinical finding other than an x-ray "consistent with" an asbestos related disease.

## ***Case Management Orders***

In an effort to address the large number of asbestos cases filed in their respective jurisdictions, many courts have issued case management orders (“CMO”) setting out detailed schedules and procedures for handling such matters as docketing, discovery, motions, case priorities, trial settings, settlement negotiations, and trial or disposition of asbestos cases. Many of these CMOs have led to the efficient and fair handling of asbestos litigation. On the other hand, there exist jurisdictions in which there are no CMOs, competing CMOs within a jurisdiction, outdated CMOs, or simply CMOs that for one reason or another no longer function as originally intended. The Asbestos Task Force of the Tort Trial & Insurance Practice Section (“TIPS”) believes that the existing litigation system can be made more efficient and fairer by the promulgation of and adherence to a comprehensive model CMO.

The TIPS Asbestos Task Force examined a large number of pre-trial orders and CMOs, from both federal and state courts and has attempted to distill the best features of these orders into a model CMO. The TIPS Asbestos Task Force does not intend this to be a replacement for existing CMOs that have been developed in various jurisdictions through the input of the courts and counsel, and which have proven effective. Rather, the goal is to adopt a model CMO that can be used to more effectively and fairly administer asbestos litigation in those jurisdictions that have not developed a CMO or in those jurisdictions in which an existing CMO no longer appears to be effective. TIPS submits this model CMO as suggested guidance in such jurisdictions. It is a resource designed by representatives of the plaintiff and defense bar and company defendants and their insurers to facilitate the management of asbestos litigation with the best practices drawn from various jurisdictions across the country.

Furthermore, the TIPS Asbestos Task Force also encourages the use of standard discovery requests by both plaintiffs and defendants, as envisioned in the model CMO, to expedite the timely discovery of the basic and necessary information for the assessment and handling of the asbestos case. Proposed standard discovery requests are referenced in the model CMO (see [http://www.abanet.org/tips/atf/cmo/cmo\\_home.htm](http://www.abanet.org/tips/atf/cmo/cmo_home.htm)). While the TIPS Asbestos Task Force believes that these discovery requests will be effective, it is anticipated that individual jurisdictions may modify the requests based upon the jurisdiction’s statutes, rules, procedures, and practices. The Exhibits to the CMO and the standard discovery requests are voluminous (almost 200 pages):

[Case Specific Interrogatories to All Defendants -  
http://www.abanet.org/tips/atf/cmo/Case Specific Interrogatories to All Defendants.pdf](http://www.abanet.org/tips/atf/cmo/Case%20Specific%20Interrogatories%20to%20All%20Defendants.pdf)

[Case Specific Interrogatories to Friction Defendants -  
http://www.abanet.org/tips/atf/cmo/Case Specific Interrogatories to Friction  
Defendants.pdf](http://www.abanet.org/tips/atf/cmo/Case%20Specific%20Interrogatories%20to%20Friction%20Defendants.pdf)

Friction Interrogatories - <http://www.abanet.org/tips/atf/cmo/Friction Interrogatories.pdf>

Heir, Legal Rep Interrogatories - <http://www.abanet.org/tips/atf/cmo/Heir, Legal Rep Interrogatories.pdf>

Loss of Consortium Interrogatories - <http://www.abanet.org/tips/atf/cmo/Loss of Consortium Interrogatories.pdf>

Notice of Service - <http://www.abanet.org/tips/atf/cmo/Notice of Service.pdf>

Personal Injury Interrogatory - <http://www.abanet.org/tips/atf/cmo/Personal Injury Interrogatory.pdf>

Request for Production of Documents - <http://www.abanet.org/tips/atf/cmo/Request for Production of Documents.pdf>

Standard Interrogatories to All Defendants - <http://www.abanet.org/tips/atf/cmo/Standard Interrogatories to All Defendants.pdf>

Standard Interrogatories to Friction Defendants - <http://www.abanet.org/tips/atf/cmo/Standard Interrogatories to Friction Defendants.pdf>

Wrongful Death Interrogatories - <http://www.abanet.org/tips/atf/cmo/Wrongful Death Interrogatories.pdf>

Exhibit A to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit A to CMO.pdf>

Exhibit B to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit B to CMO.pdf>

Exhibit C to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit C to CMO.pdf>

Exhibit D to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit D to CMO.pdf>

Exhibit E to CMO - <http://www.abanet.org/tips/atf/cmo/Exhibit E to CMO.pdf>

and can be reviewed on the ABA website at:

[http://www.abanet.org/tips/atf/cmo/cmo\\_home.htm](http://www.abanet.org/tips/atf/cmo/cmo_home.htm)

**AMERICAN BAR ASSOCIATION**

**TORT TRIAL & INSURANCE PRACTICE SECTION**

**MODEL STATUTE OF LIMITATIONS**

**FOR ASBESTOS**

**(FEBRUARY 2005)**

**Exposure to Asbestos; Actions for injury, illness or wrongful death**

(a) In any civil action for injury or illness based upon exposure to asbestos, the time for the commencement of the action shall be the later of the following:

(1) Within two years after the date the plaintiff first suffered disability.

(2) Within two years after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure.

(b) "Disability" as used in subdivision (a) means the loss of time from work, as a result of such exposure, which precludes the performance of the employee's regular occupation, or if the plaintiff is not working, meeting the medical standards in the "ABA Standards for Non-Malignant Asbestos-Related Disease Claims" (dated February 2003).

(c) In an action for the wrongful death of any plaintiff's decedent, based upon exposure to asbestos, the time for commencement of an action shall be the later of the following:

(1) Within two years from the date of the death of the plaintiff's decedent.

(2) Within two years from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by such exposure.

