

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN RE: NEW YORK CITY
ASBESTOS LITIGATION
-----X

NYCAL

THIS DOCUMENT APPLIES TO:

Hon. Sherry Klein Heitler
I.A.S. Part 30

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**AMICI BRIEF OPPOSING
JOINT NYCAL PLAINTIFFS'
MOTION SEEKING ORDER
VACATING CMO § XVII**

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**AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC.,
LAWSUIT REFORM ALLIANCE OF NEW YORK, NORTHEASTERN RETAIL
LUMBER ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS,
NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM
ASSOCIATION, WASHINGTON LEGAL FOUNDATION, AMERICAN INSURANCE
ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE
COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA,
AMERICAN CHEMISTRY COUNCIL, AND AMERICAN COATINGS ASSOCIATION
IN SUPPORT OF DEFENDANTS AND OPPOSING JOINT NYCAL
PLAINTIFFS' MOTION SEEKING ORDER VACATING CMO § XVII**

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ISSUE PRESENTED

Whether this Court should abandon CMO § XVII (“Counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing.”), which has governed New York City Asbestos Litigation (NYCAL) for nearly twenty years, and adopt a position that will threaten recoveries for future plaintiffs, frustrate settlements, result in longer and more complex trials, spawn appeals that will further delay recoveries for *in extremis* trial plaintiffs, serve no legitimate policy purpose, and jeopardize the very existence of the CMO.

STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in New York, their insurers, and civil justice reform groups. *Amici* have a substantial interest in ensuring that NYCAL case management continues to balance the demands of justice and reflects sound public policy. *Amici* will show that allowing punitive damage claims in NYCAL cases will disrupt the operation of the Court, jeopardize the availability of resources to compensate future plaintiffs, and fail to achieve the policy goals that punitive damages typically serve.

STATEMENT OF THE CASE

Amici adopt Defendants’ Statement of the Case as relevant to this Brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As this Court is aware, punitive damages have been deferred in NYCAL cases since 1996. This longstanding practice was instituted by Your Honor’s predecessor, Justice Helen Freedman, because it was the “fair thing to do for a number of reasons.” Helen S. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U.L. Rev. 511, 527 (2008). Justice Freedman, now on the appellate bench, summarized some of those reasons as follows:

First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong.

Id. at 527-28.

The considerations which led to CMO § XVII continue in today's asbestos litigation environment. See Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J. L. & Pub. Pol'y 50, 72 (2011) ("The reasoning supporting deferral of punitive damages in asbestos cases remains sound both to help ensure timely and adequate compensation for sick claimants and to provide fundamental fairness for defendants given that the purposes of punitive damages no longer serve a legitimate purpose in the litigation.").

"If earlier-filing claimants are able to obtain windfall punitive damages awards, then assets are depleted and may become exhausted due to the length and enormity of asbestos litigation, jeopardizing tort recoveries for later-filing claimants with mesothelioma, asbestos-related lung cancer, or debilitating asbestosis." *Id.* at 51.

Additionally, allowing punitive damages would frustrate settlements, slow the processing of cases, lengthen trials, lead to appeals that will delay recoveries for *in extremis* plaintiffs, encourage more NYCAL claim filings, and threaten to undo the entire CMO (with all of its provisions that benefit plaintiffs).

For these reasons, the Court should not upset the apple cart after nearly two decades, but should continue to apply CMO § XVII as written.

ARGUMENT

I. AWARDING PUNITIVE DAMAGES WILL JEOPARDIZE COMPENSATORY RECOVERIES FOR FUTURE PLAINTIFFS

Now entering its fourth decade,¹ asbestos litigation has led over 100 companies with asbestos-related liabilities to file bankruptcy.² With a finite pool of resources available for plaintiffs, opening the floodgates of punitive damages would exhaust funds that are needed to provide future asbestos plaintiffs with compensation. To help preserve depleting resources for future plaintiffs and their families, the well-established practice of deferring punitive damages claims in NYCAL cases must continue.

As the U.S. Court of Appeals for the Third Circuit noted, punitive damages in asbestos cases represent a “continued hemorrhaging of available funds [that] deprives current and future victims of rightful compensation.” *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000). Multiple recoveries of punitive damages can deplete a defendant’s limited resources, endangering the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering. See Mark A. Behrens & Barry Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. of L. & Pol. 137 (2001).

¹ See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (asbestos manufacturers found strictly liable for injuries to industrial insulation workers exposed to their products), *cert. denied*, 419 U.S. 869 (1974).

² See Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010); Mark D. Plevin et al., *Where Are they Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11:7 Mealey’s Asbestos Bankr. Rep. 1, Chart 1 (Feb. 2012).

The *in terrorem* effect of punitive damages in cases that settle also threatens the availability of funds needed to compensate sick claimants. “[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.” *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *see also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 353 (2002) (punitive damages threaten compensation for future asbestos plaintiffs “even in cases that are settled out of court, because of the leveraging effect punitive damages have at the settlement table.”).

Furthermore, the influx of asbestos claims shows no signs of abating. A 2012 review of asbestos-related liabilities reported to the Securities and Exchange Commission by over 150 publicly traded companies showed that “[s]ince 2007, filings have been fairly stable.” Mary Elizabeth C. Stern & Lucy P. Allen, NERA Economic Consulting, *Asbestos Payments per Resolved Claim Increased 75% in the Past Year—Is This as Dramatic as it Sounds?*, 7 (Aug. 2012); *see also* Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have “remained near peak levels since 2000.”). “Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.” Biggs et al., *supra*, at 5. Industry analysts predict that “28,000 mesothelioma claims will be filed in 2013 and subsequent years.” *Id.* at 1.

If the Court chooses to permit punitive damages to be awarded in NYCAL cases, it will be forcing “later victims, not the enterprise, [to] effectively bear the punishment.” Behrens & Silverman, 8 Rutgers J. L. & Pub. Pol’y at 68 (citation omitted). Others who could be negatively impacted include the defendants’ employees, who may lose their jobs; other businesses that rely on the defendants or their employees for income; shareholders, such as union pension funds and ordinary citizens’ retirement funds, and other investors. *See Dunn*, 1 F.3d at 1403 (Weis, J., dissenting) (“Payment of [punitive damages] awards not only jeopardizes the ability to provide compensation for future plaintiffs, but also, by forcing companies into bankruptcy, injures employees, customers, and trade creditors who had no part in, and had no knowledge of, the wrongdoing.”); *see also* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

II. ALLOWING PUNITIVE DAMAGES WOULD FRUSTRATE SETTLEMENTS, WORSEN THE BACKLOG OF CASES ON THE NYCAL DOCKET, AND THREATEN THE CMO’S EXISTENCE

If CMO § XVII is abandoned, settlements will be frustrated, the processing of cases will slow, trials will take longer and be more complex, recoveries for *in extremis* plaintiffs will be delayed by inevitable appeals of punitive damages judgments, more plaintiffs will be drawn to the NYCAL, and the entire CMO, including other provisions that protect plaintiffs’ interests, may unravel.

Imposition of punitive damages in asbestos cases poses a significant obstacle to settlement negotiations and blocks the ability of claimants to recovery quickly for their injury or the loss of a loved one. As one federal district judge wrote, “Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage

claims of many thousands of injured plaintiffs.” William M. Schwarzer, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (Oct. 1991).

CMO § XVII fosters settlements because it removes the “wild card” element of punitive damages. This allows plaintiffs and defendants to more easily value claims. In contrast, allowing punitive damages awards would inject tremendous uncertainty into NYCAL cases. Plaintiff and defense counsel may be oceans apart in terms of estimating both the likelihood and potential amount of any particular defendant’s liability for punitive damages. The uncertainty of how much, if any, punitive element should factor into settlements will mean that plaintiff and defense counsel will likely start their negotiations much farther apart than has been the case historically in NYCAL cases and it will be harder for the parties to come together.

Additionally, punitive damages trials would be longer and more complex than current NYCAL trials, also slowing the processing of NYCAL cases. Plaintiffs’ counsel would need to put on the additional evidence required to satisfy their heightened burden of proof for punitive damages. Defendants may request bifurcated trials that would require fact finders to resolve compensatory liability and damages issues prior to considering evidence relevant only to punitive damages. Some plaintiffs’ counsel may even be more likely to take cases to trial to hold out for the possibility of hitting the punitive damages “jackpot.”

Punitive damages verdicts in NYCAL cases also would raise the specter of lengthy appeals that would delay recoveries for *in extremis* plaintiffs. Because New York does not have a statutory punitive damages cap, an excessive and disproportionate punitive damages award is a real possibility. Defendants will pursue constitutional challenges to address this problem. As this Court is likely aware, punitive damages have been a fertile field for appellate litigation. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Res.*

Corp., 509 U.S. 443 (1993); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).³

Forum-shopping by plaintiffs that are now filing their cases elsewhere may add to the backlog of cases on the NYCAL docket if the Court opens the door to punitive damages. See Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 La. L. Rev. 529, 536 (2010) (“If a plaintiff has a large number of states from which to choose, the plaintiff and his counsel would be foolish—indeed, might be committing malpractice in the latter’s case—not to base the choice upon obtaining plaintiff-friendly legal rules, including the availability of punitive damages.”). To the extent such claims involve nonresidents, they could slow recoveries for New Yorkers because of the competition for trial settings that would occur.

Indeed, the longstanding practice in the federal multi-district asbestos litigation has been “to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages for trial.” David C. Landin et al., *Lessons Learned From the Frontlines: A Trial Court’s Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol’y 589, 653 (2008). This practice was affirmed by the Third Circuit in *In re Collins*, 233 F.3d at 812, which concluded that it was “responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls.” *Id.* The Third Circuit strongly urged state courts to sever or stay punitive damages claims in asbestos cases to preserve assets for sick claimants. See *id.*

³ “Federal and state courts have also expressed strong concerns that multiple punitive damages awards, such as those in asbestos cases, may violate constitutionally protected due process rights.” Behrens & Parsons, 6 Tex. Rev. L. & Pol. at 145.

In addition, “trial courts in Baltimore City, Northhampton County (Bethlehem and Easton), Pennsylvania; [and] Philadelphia” do not permit punitive damages in asbestos cases. Landin et al., 16 Brook. J.L. & Pol’y at 654. Importantly, Philadelphia Court of Common Pleas Judge John Herron recently issued new protocol governing mass torts cases in the court’s Complex Litigation Center (CLC); that protocol continues the CLC’s longstanding practice of deferring punitive damage claims in asbestos cases. *See* Court of Com. Pl. Phila. County, Pa., *General Court Regulation No. 2013-01*, Order at ¶ 3 (Feb. 7, 2013) (“All punitive damage claims in asbestos claims shall be deferred.”). Similarly, Florida enacted a law banning punitive damages “in any civil action alleging an asbestos or silica claim.” Fla. Stat. Ann. § 774.207(1). “Some states...simply do not permit punitive damages in tort cases.” Freedman, 37 Sw. U. L. Rev. at 527,⁴ and many other states cap punitive damages by statute.⁵ In comparison to all of these jurisdictions, New York would become a magnet for asbestos filings.

⁴ “A few States award [punitive damages] rarely, or not at all. Nebraska bars punitive damages entirely, on state constitutional grounds.... Four others permit punitive damages only when authorized by statute: Louisiana, Massachusetts, and Washington as a matter of common law, and New Hampshire by statute codifying common law tradition.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008). “Michigan courts recognize only exemplary damages supportable as compensatory, rather than truly punitive, while Connecticut courts have limited what they call punitive recovery to the “expenses of bringing the legal action, including attorney’s fees, less taxable costs.” *Id.*

⁵ *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102; Conn. Gen. Stat. Ann. § 52-240b; Fla. Stat. Ann. § 768.73; Fla. Stat. § 774.207; Ga. Code Ann. § 51-12-5.1; Idaho code ann. § 6-1604; Ind. Code Ann. § 34-51-3-4,-5; Kan. Stat. Ann. § 60-3702; Me. Rev. Stat. Ann. tit.18-A § 2-804; Miss. Code Ann. § 11-1-65; Mo. Rev. Stat. § 510.265.1; Mont. Code Ann. § 27-1-220; Nev. Rev. Stat. Ann. § 42.005; N.H. Rev. Stat. § 507:16; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11; Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1 ; S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1; Wis. Stat. Ann. § 895.043. “The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1.” *Exxon Shipping*, 554 U.S. at 496.

Finally, abandonment of CMO § XVII may lead defendants to move to vacate the entire CMO. *See* Behrens & Silverman, 8 Rutgers J. L. & Pub. Pol’y at 71 (“[T]he reintroduction of punitive damages into the settlement equation could post a major obstacle to the prompt resolution of legitimate claims, particularly with respect to New York City claims since this approach could unravel a negotiated and agreed-upon CMO that has governed the litigation for many years.”). As written, the NYCAL CMO reflects a balanced approach to “bring about the fair, expeditious, and inexpensive resolution of these cases.” *In re New York City Asbestos Litig.*, Index No. 4000/88, Amended Case Management Order, at 2 (May 26, 2011). Discarding CMO § XVII would upset this balance.

The current language regarding punitive damages was listed as one of the “Issue Swaps” on a February 29, 1996 Agenda of the CMO Drafting Committee Conference attended by representatives of both plaintiffs and defendants. Through the years, the CMO has highlighted the joint effort that went into drafting the document. *See id.* (stating the drafting was carried out “by a steering committee including the Special Master, [and] plaintiffs’ and defendants’ counsel....”); *see also* Frank M. Ortiz, Letter to Special Master Michael Rozen on NYCAL Amended CMO, May 29, 1996 (noting that plaintiff law firms’ agreement to many of the proposals in the CMO was “premised on the CMO Amendments taken as a whole.”).

This Court recently referred to the CMO as a “negotiated” document that “was crafted with great care by representatives chosen by both the plaintiffs’ and the defendants’ asbestos personal injury bar....” *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 2012 WL 6554893, *2, *9 (N.Y. Sup. Ct. New York County Nov. 15, 2012) (Heitler, J.) (quoting *In re New York City Asbestos Litig (Ames v. Kentile Floors)*, Index No. 107574/08, at 2 (N.Y. Sup. Ct. New York County June 17, 2009), *aff’d*, 66 A.D.3d 600, 887 N.Y.S.2d 580 (1st Dept 2009)).

The Court also acknowledged that the CMO “is the product of deliberate, arms-length negotiations through which, to the benefit of both sides, the parties have charted their own course.... While the plaintiffs’ bar is not completely satisfied with some of the CMO’s provisions, the defendants’ bar is similarly not content with others. That is the reality of any bargained for position, to which the parties have signed on.” *Id.* at *9. “For the [C]ourt to now vacate [CMO § XVII] which effects the intent of the parties would diminish the effectiveness of the CMO as a whole,” *id.* at *10, and give defendants cause to vacate the CMO.

III. PUNITIVE DAMAGES IN NYCAL CASES WOULD NOT SERVE THE TWIN POLICY GOALS OF DETERRENCE OR PUNISHMENT

The purposes of punitive damages generally are to punish wrongdoers and to deter those actors and others from future misconduct. *See Campbell*, 538 U.S. 408, 416 (2003); John M. Leventhal & Thomas A. Dickerson, *Punitive Damages: Public Wrong or Egregious Conduct? A Survey of New York Law*, 76 Albany L. Rev. 961, 964 (2013) (“New York has historically viewed punitive damages as somewhat penal in nature.”). The twin purposes of punitive damages do not justify imposing punitive damages in NYCAL cases. *See* Victor E. Schwartz, *A Letter to the Nation’s Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1 (2012).

First, the deterrent function of punitive damages is not served because the asbestos litigation today arises from exposures that took place long ago. In 1972, the federal Occupational Safety and Health Administration (OSHA) issued permanent standards regulating occupational exposure to asbestos. “The OSHA regulations established standards for exposure to asbestos dust and mandated methods of compliance with the exposure requirements, including monitoring work sites, compelling medical examinations, and, for the first time, labeling

products with warnings.” *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 280 (4th Cir. 1993). OSHA’s asbestos regulations became increasingly stringent over time and most uses of asbestos ceased in the United States.

Second, as Vanderbilt University Law School Professor Kip Viscusi has recognized, “[f]or long-term risks, such as asbestos, the economic players today are quite different from those who made the risk decisions decades ago at the time of exposure.” Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 383 (1998). CMO § XVII reflects Justice Freedman’s appreciation that in “many cases, the wrong was committed by a predecessor company, not even the company now charged.” Freedman, 37 Sw. U.L. Rev. at 527.

Third, the “message of deterrence, both specific and general, has been heard loud and clear in asbestos cases.” Landin et al., 16 Brook. J.L. & Pol’y at 652–53.

Fourth, as Yale Law School Professor George Priest has stated, “Punitive damages can be justified only where it is believed that compensatory damages alone will be insufficient to fully internalize injury costs to defendants.” George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 Pepp. L. Rev. 261, 266 (2003). Total spending on asbestos cases has been in the tens of billions of dollars.

Fifth, now that most primary historical defendants have filed bankruptcy, the defendants being named today are increasingly remote and therefore less culpable than the defendants that were being targeted in 1996.

By the late 1990s, the asbestos litigation had reached such proportions that the United States Supreme Court noted the “elephantine mass” of cases, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), and referred to the litigation as a “crisis.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Mass filings pressured many of the traditional defendants to

seek bankruptcy court protection, creating a domino effect and leading to a flood of bankruptcies between 2000-2002. As a result of these bankruptcies, “the net...spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract at* 2001 WLNR 1993314. As Justice Freedman explained,

The bankruptcies of most of the major raw material providers and product manufacturers have created an incentive for plaintiffs’ lawyers to find what may have been termed peripheral defendants or downstream users or consumers of asbestos containing products who either incorporated the products into their manufactured goods, or who recommended use in conjunction with products (furnaces or water heaters), or who owned premises where asbestos was present, or who acquired companies that previously manufactured asbestos containing products.

Freedman, 37 Sw. U.L. Rev. at 512.⁶ One plaintiffs’ attorney described the litigation as an “endless search for a solvent bystander.” *Medical Monitoring and Asbestos Litigation* - *A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (Mr. Scruggs).

⁶ Commentators have also explained that,

[F]ollowing the bankruptcies of those frontline defendants during the Bankruptcy Wave, plaintiff attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products.

Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27:17 Mealey’s Litig. Rep.: Asbestos 1 (Oct. 10, 2012); *see also* Charles Bates et al., *The Naming Game*, 24:15 Mealey’s Litig. Rep.: Asbestos 1, 4 (Sept. 2, 2009) (“As the bankrupt companies exited the tort environment, the number of defendants named in a complaint increased, on average, from fewer than 30 on average to more than 60 defendants per complaint.”); Charles Bates et al., *The Claiming Game*, 25:1 Mealey’s Litig. Rep.: Asbestos 1 (Feb. 3, 2010).

The dockets reflect that the litigation has moved beyond the era in which manufacturers, producers, suppliers, and distributors of friable asbestos-containing products or raw asbestos are the principal defendants. See Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (asbestos suits have expanded “from the original manufacturers of asbestos-related products....”). The expanded range of defendants has produced exponential growth in the dimensions of the litigation. “Parties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use.” American Academy of Actuaries, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007).

As the litigation has grown more attenuated, so has any foundation that otherwise might support the imposition of punitive damages. As summarized in a recent report:

The causal connection between earlier peripheral defendants and asbestos was clear.... However, the relationship of asbestos to some of the more recent peripheral defendants is not as obvious (e.g., Campbell’s Soup, Gerber [baby food maker], and Sears Roebuck). *This later group of peripheral defendants was not as likely to have known of the dangers of asbestos.*

Overview of Asbestos Claims Issues and Trends, supra, at 3.

Other commentators have stated that “most traditional asbestos companies have already declared for bankruptcy protection, thus, the burden of paying punitive damages falls to the peripheral defendants who have generally not engaged in conscious, flagrant wrongdoing.” Victor Schwartz et al., *A Letter to the Nation’s Trial Judges: Serious Asbestos Cases – How to Protect Cancer Claimants and Wisely Manage Assets*, 30 Am. J. Trial Advoc. 295, 327-28 (2006).

Finally, the same concerns that drove the decisions to defer punitive damages claims against the traditional asbestos defendants remain. Asbestos-related bankruptcies have not ended. “Since 2000, dozens of companies have sought to use the trust provisions of § 524(g) of

the Bankruptcy Code to globally resolve their asbestos liabilities.” William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J. Bankr. L. & Prac. 257, 257 (2008).

It is just a matter of time before additional defendants are forced to seek bankruptcy court protection from their asbestos liabilities. As Stanford Law Professor Deborah Hensler has explained in summarizing the evolution of the asbestos litigation:

To make up the difference between the total amount of money that had been available from asbestos defendants to compensate asbestos claimants and the smaller amount of money that was now available [due to major defendants filing bankruptcy], asbestos plaintiff attorneys turned to “peripheral” defendants: corporations that had not previously been central to the litigation but against whom there were colorable claims of negligence or strict liability. For many years, many of these corporations had settled claims for modest amounts of money, essentially “nuisance value,” in order to avoid greater litigation expense. Now asbestos plaintiff attorneys told these defendants that they would have to put more money on the table to avoid litigation—perhaps several times the amount paid previously by these defendants—explaining that they needed to make up for what was no longer available from target defendants. *Within a very short time, some peripheral defendants became central to the litigation, and their asbestos liability exposure ballooned. The result might have been anticipated: the once peripheral defendant corporations followed the target defendants into bankruptcy.*

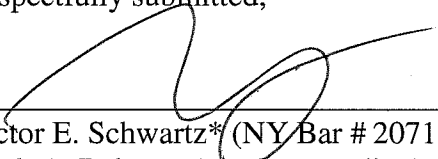
Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 272 (2006) (emphasis added).

“Actions taken by courts that could accelerate this process would be irresponsible absent a clear and compelling justification that does not exist with respect to the awarding of punitive damages in modern asbestos cases.” Behrens & Silverman, 8 Rutgers J. L. & Pub. Pol’y at 65. As Georgetown University law School Professor Paul Rothstein has said, “Continuing to award punitive damages in asbestos cases no longer makes sense.” Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 26 (2001).

CONCLUSION

For these reasons, *amici* urge the Court to enforce the CMO as written and deny requests to abandon CMO § XVII deferring punitive damages awards.

Respectfully submitted,



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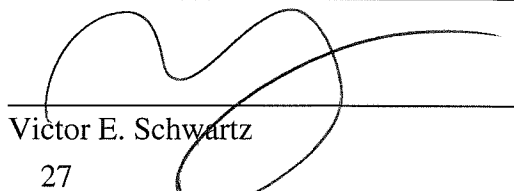
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