APL-2014-00317
New York County Clerk's Index No. 190134/10

Court of Appeals

STATE OF NEW YORK

In Re: New York County Asbestos Litigation

RUBY E. KONSTANTIN, Individually and as Executrix of the Estate of DAVE JOHN KONSTANTIN, deceased,

Plaintiffs-Respondents,

—against—

630 THIRD AVENUE ASSOCIATES, *et al.*,

Defendants,

TISHMAN LIQUIDATING CORPORATION,

Defendant-Appellant.

BRIEF OF PLAINTIFFS-RESPONDENTS IN RESPONSE TO *AMICI CURIAE* BRIEF OF BUSINESS COUNCIL OF NEW YORK STATE, MANUFACTURERS ALLIANCE OF NEW YORK STATE, LAWSUIT REFORM ALLIANCE OF NEW YORK, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, NORTHEAST RETAIL LUMBER ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

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April 7, 2016

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PRELIMINARY STATEMENT[1]

In an agenda-driven attempt to assail the asbestos litigation as a whole, rather than address the controversy in issue, the Business Council asks this Court to bar the discretionary joinder of asbestos cases for trial – notwithstanding a clear statutory privilege under CPLR § 602 and the wide latitude afforded to the trial courts thereunder. In so doing, the Business Council presents a series of wildly inaccurate and misleading statistics, and advances statements that are completely untethered from the facts of this case, the issues on appeal, and the realities of joint trials of any composition. The Business Council's amici brief is nothing more than a compilation of conjecture and non sequiturs drawn from its own unreliable and patently inaccurate information.

ARGUMENT

I. THE BUSINESS COUNCIL'S REQUEST FOR JUDICIAL LEGISLATION SHOULD BE FLATLY DECLINED

The Business Council's reference to other jurisdictions' legislative and administrative positions regarding consolidation simply have no bearing on the issues of this case. Whether this Court should engage in judicial legislation (or

[1] Pursuant to 22 NYCRR 500.12 (f), the Respondent writes to respond to the arguments presented by the Business Council of New York State, et al. (hereinafter Business Council). This Court accepted the Business Council's brief on March 24, 2016.

even take administrative action) regarding all joint trials of asbestos actions is not presently on appeal. See Bingham v. New York City Transit Auth., 99 N.Y.2d 355, 359 (2003) (this Court "can only announce the law when necessary to resolve a particular dispute between identified parties") (quoting Lichtman v Grossbard, 73 N.Y.2d 792, 795 (1988)). The issue before this Court is simply whether the Appellate Division abused its discretion as a matter of law in affirming the joint trial of these two cases. Cf. City of New York v. Maul, 14 N.Y.3d 499, 509 (2010). Importantly, however, only the Legislature may amend the CPLR, and, most strikingly, it has just declined to enact the exact measures that amici request.

A. The Business Council Seeks A Legislative Remedy From this Court That The People Of This State Have Declined To Adopt

Amici requests that this Court improperly usurp the role of the Legislature by unilaterally prohibiting joint trials of asbestos actions. Initially, since CPLR § 602 controls here, such action would violate the plain meaning of CPLR § 102, which provides that only the Legislature may amend or rescind CPLR provisions.[2] See Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 251-52 (1969) ("in the light of the scheme currently provided for in our State Constitution, we have no alternative but to accord to the Legislature, and to the CPLR which it enacted, a considerable

[2] The authority to alter the CPLR was formerly vested in both the Legislature and the New York Judicial Conference. However, the Legislature long ago amended the Judiciary Law and eliminated the Judicial Conference's power. See generally Weinstein, Korn & Miller ¶ 102.00.

degree of controlling effect over the powers of the court."); A.G. Ship Maint. Corp. v. Lezak, 69 N.Y.2d 1, 6 (1986) ("rules the courts adopt must be consistent with existing legislation."); see also McKinney's Statutes § 73. In any event, the People have just spoken on this issue.

Significantly, as recently as three months ago, both houses of the New York Legislature separately considered adding a new section to the CPLR that would bar joint trials of asbestos action without the consent of all parties. See 2015 New York Assembly Bill No. 5978, New York Two Hundred Thirty-Eighth Legislative Session at § 9910; 2015 New York Senate Bill No. 5504, New York Two Hundred Thirty-Eighth Legislative Session.[3] These measures, which mirror the proposals that the Business Council asks this Court to judicially create, were referred to the respective Assembly and Senate Judiciary Committees but both failed to advance on January 6, 2016 (see Appendix A). Thus, any changes to the liberally-construed CPLR § 602 are clearly legislative in nature, and the citizens of this State have spoken that asbestos actions should not be treated differently. See

[3] The proposed bills sought to add § 9910 to the CPLR which would have provided in pertinent part: "Consolidation of claims. (1) A court may consolidate for trial any number and type of asbestos claims with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only asbestos claims relating to the exposed person and members of his or her household; (2) No class action or any other form of mass aggregation claim filing relating to more than one exposed person, except claims relating to the exposed person and members of his or her household, shall be permitted for asbestos claims; (3) The provisions of this section do not preclude consolidation of cases by court order for pretrial or discovery purposes."

CPLR § 104. Certainly, where both houses of the Legislature have considered but failed to act on this issue, this Court should not supplant the will of the People by stating otherwise. See Klostermann v. Cuomo, 61 N.Y.2d 525, 541 (1984) (the Court must avoid "intrud[ing] upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches."); New York State Inspection, Sec. & Law Enf't Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 240 (1984) (Court should decline to consider matters where decision-making authority is vested in a "coordinate, political branch of government."). Judicial legislation is inappropriate.[4]

B. The Business Council Misstates The Effects Of Other Jurisdictions' Decisions To Limit Consolidation of Asbestos Actions

In asserting that the curtailment of consolidation of asbestos actions in other jurisdictions led to efficiencies, the Business Council ignores supervening factors. For example, amici erroneously link changes in consolidation rules with a

[4] Amici misleadingly claim that other states' *courts* have judicially amended procedural laws to bar joint trials of asbestos matters (See, e.g., Business Council Brief at 5). This is not correct. In reality, these reforms were only implemented after state *legislative* action. For example, Ohio R. Civ. P. 42(A)(2) – which permits the courts to join asbestos actions for trial only with the consent of parties and which was cited as an example by amici – was the result of an enacted bill providing that "the General Assembly hereby requests the Supreme Court to adopt a rule that permits consolidation of asbestos claims only with the consent of all parties, and in absence of that consent, permits a court to consolidate for trial only those asbestos claims that relate to the same exposed person and members of the exposed person's household." See Amended Substitute House Bill Number 292, 125th General Assembly (Available online at http://archives.legislature.state.oh.us/bills.cfm?ID=125_HB_292). Such action was, thus, only taken by reference from the legislature. And, as noted supra at p. 2, n. 2, such authority is not vested in this Court.

reduction in the number of asbestos cases tried in the Philadelphia Court of Common Pleas (see Business Council Brief at 6-7).

That reduction of trials, however, is directly attributable to a mediation and settlement program – instituted at the same time as joinder changes – that requires more than 70% of cases in any grouping (i.e., 5-7 cases from predetermined groups of 8-10 plaintiffs) to fully resolve before trial dates will even be assigned for the remaining cases in that group. See Pa. Ct. Com. Pl. Phila. Cnty., Gen Ct. Reg. No. 2013-01 "Notice to the Mass Tort Bar: Amended Protocols and Year-End Report" at Order ¶ 8. According to the very Order cited by the Business Council, because of the mediation and settlement program, only *six mass tort cases* – which is not even limited to asbestos cases – were tried to verdict in 2012 (Id. at Report ¶ 3, 7). Certainly, where only six cases in all of mass torts are tried, consolidation in any fashion is unnecessary. Thus, any limitations on consolidation of asbestos trials instituted by legislative action are largely irrelevant to any perceived changes in inventory or efficiencies in various asbestos dockets in the country.[5]

[5] Significantly, Justice Peter Moulton – the New York City Asbestos Litigation (hereinafter NYCAL) Coordinating Judge – has recently implemented an early mediation and settlement program as part of his efforts to reform the Case Management Order. See Section III infra.

C. Amici's Due Process And Equal Protection Arguments Are Baseless

The Business Council's allegations that the application of CPLR § 602 to New York City Asbestos Litigation cases results in prejudice and/or violations of defendants' due process and equal protection rights are baseless. Strikingly, amid numerous joint trial asbestos decisions in the past 23 years dating back to this Court's affirmance of In re N.Y.C. Asbestos Litig. [Brooklyn Navy Shipyard Cases],[6] CPLR § 602 has never been challenged as unconstitutional in an asbestos action, and it has not been challenged in *any other action* in more than 50 years since its enactment. See City of New York v. State, 76 N.Y.2d 479, 485 (1990) (it is a "familiar proposition that enactments of the Legislature, a co-equal branch of government, are presumed to be constitutional; those who challenge statutes bear a heavy burden"). By all indications, defendants have implicitly acknowledged the constitutionality of the statute as applied.

Thus, New York's Legislature has declined to enact the exact measures requested by the Business Council, those measures have not produced the results as alleged by amici in other jurisdictions, and CPLR § 602 operated entirely within the bounds of Constitutional mandates in the instant trial.

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[6] See In re N.Y.C. Asbestos Litig. [Brooklyn Navy Shipyard Cases], 188 A.D.2d 214, 224-25 (1st Dept., 1993) aff'd 82 N.Y.2d 821

II. THE BUSINESS COUNCIL'S JOINT TRIAL "STATISTICS" ARE EITHER DEMONSTRABLY FALSE OR CONSTRUED IN AN ERRONEOUS AND MEANINGLESS FASHION

The alleged statistics relied upon by the Business Council to attempt to disprove efficiencies in joint trials are either wildly inaccurate or so oversimplified as to be misleading. There is nothing even remotely empirical about amici's cited statistics.

To wit, the Business Council relies heavily, if not exclusively, on a non-peer reviewed article entitled *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency* (hereinafter Ableman) for its trial statistics related to New York City Asbestos Litigation actions (see Business Council brief).[7] The provenance of this article is significant, as it is authored by an asbestos defense attorney using data collected by two consultants who were compensated by asbestos defense interests. Thus, it is not surprising that biased and flatly inaccurate information was utilized to draw speculative opinions.[8]

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[7] Peggy Ableman, et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process, and Judicial Efficiency,* 14 Mealey's Asbestos Bankr. Rep. 1, 1 (Apr. 2015)

[8] As a threshold matter, it is unclear why the article's Appendix of Mesothelioma NYCAL verdicts only covers a four-year period from 2010-2014 when discretionary consolidation has occurred for decades. See In re N.Y.C. Asbestos Litig. [Brooklyn Navy Shipyard Cases], supra. It can, however, be surmised that since numerous verdicts from previous years contradict the author's defense-oriented positions, they were omitted, as discussed infra.

One flaw is the amici's attempt to establish that joint trials take longer than individual trials. The statistics relied upon by the Business Council fail to even account for the most basic of pertinent variables that affect trial length, including the number of trial defendants in each case, number of experts, additional damages claims including loss of consortium and economic loss, the trial court's schedule, the number of Article 16 defendants, and witnesses' and experts' schedules.

Instead, the statistics relied upon by the Business Council utilize mean calculations that reduce trial duration to "Trial Length per Plaintiff" (Ableman supra at Appendix 1), which is, at best, an oversimplified view that ignores trial realities that occur regardless of joinder.[9] See Symphony Fabrics Corp. v Bernson Silk Mills, Inc., 12 N.Y.2d 409, 413 (1963) (no prejudice where issues will arise "[w]ith or without a consolidation"). Certainly, in comparing the length of a joint trial to the length of an individual trial, it is relevant that the joint trial included, for example, two plaintiffs and six defendants whereas the individual trial only had one defendant; similarly, a joint trial of two plaintiffs and two defendants could be significantly shorter than an individual trial with ten defendants. The figures relied

[9] Similarly, the article's statistics regarding length of jury selection are drawn from six trials for individual cases and five trials for jointly tried cases which is too small of a sample size to glean empirical conclusions. Yet, assuming the numbers are accurate, they show that jury selection for a single-plaintiff (Carlucci - 11 days) took longer than a joint trial (Dummitt/Konstantin – 7 days). Again, the pertinent variables are not discussed.

upon by the Business Council simply ignore these factors in favor of a misleading, broad-stroke comparison.

Stunningly, even putting aside the failure to examine the appropriate variables, the actual numbers relied upon by the Business Council regarding trial length are not even remotely accurate. As just one example, the article reports that the length of the Dummitt/Konstantin trial was 43 days (Ableman supra at Appendix 1), *when, in fact, the trial lasted only 26 days* (see Respondent's Brief at 6, 27). Thus, the Business Council relied upon a metric that counted all weekends, holidays, down days, and motions days and thus inflated the trial length by nearly 65%.[10] This is not an outlier, but consistent with all the figures cited by amici. And the fact that the article relied upon by the Business Council was wrong about the most basic fact of the matter on appeal demonstrates its unreliability as a source for amici's assertions.[11]

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[10] The Ableman article's authors seemingly admit the flaw of this metric, stating in Figure 9 that trial duration is "Number of Days from Trial Start to Verdict." Such a metric is patently absurd. For instance, a trial occurring only on five consecutive Mondays would be calculated as a five-week trial or 25 days rather than five days, or a summary jury trial that commences on a Friday and finishes the next Monday would be calculated as four days rather than two days.

[11] In fact, the article does not even address that different causes of action were asserted in different asbestos-related cases. See, e.g., Peraica, supra (failure to warn, only); Croteau, supra (premises liability, negligence, and failure to warn), and Konstantin (Labor Law § 200, common law negligence, and failure to warn). The presentment of evidence to establish different claims certainly affects the length of trials.

As to jury awards, the statistics used by the Business Council improperly lump all measures of damages together without regard for whether any particular case had only past pain and suffering, or had past and future pain and suffering, or also had loss of consortium, or also had economic loss (see Ableman, supra). Clearly, a case with only past pain and suffering should not be compared to a case with past and future pain and suffering, loss of consortium, and economic loss. But the article blithely does so (Id.).

Nor do these alleged statistics account for the most basic damages factors, such as intensity, quantity, quality, and duration of pain and suffering (Id.). Certainly, a plaintiff like Mr. Konstantin with 51 months of pain and suffering should not be compared to a plaintiff with only 11 months of pain and suffering. But the article blithely does so (Id.).

As to the ultimate results of joint trials compared to individual trials, the article amici relies upon does not even provide a remotely accurate or complete accounting of the number of verdicts in favor of plaintiffs versus defendants (Id.). For example, the article notes that three plaintiffs' verdicts were reached in the Brown/McCloskey/Terry joint trial (Id at Appendix 1). However, out of nine defendants that went to verdict in these three matters (which overlapped in several cases), six were awarded defense verdicts. See McCloskey v. A.O. Smith Water Products, 2014 WL 4311725 at * 10 (Sup. Ct., N.Y. Cty. 2014). The jury was even

able to differentiate between the same defendants in two cases. See Id.[12] The article relied upon by the Business Council makes no mention of, and does not factor in, the six defense verdicts rendered in that joint trial (see Ableman, supra).

Furthermore, even while examining total damages as these statistics do, many verdicts – including several that were omitted from the statistics relied upon by the Business Council – tell a different story than suggested by amici, as in the following individual trials that resulted in awards significantly higher than the majority of trial awards:

- Croteau v. AC & S, Index No. 118793/01 (NYCAL 2008) ($43.1 million)[13]
- Brown v. AC & S, Index No. 120595/00 (NYCAL 2002) ($53 million)[14]
- Miller v. BMW of North America LLC, et al., Index No. 190087/2014, (NYCAL 2015) ($25 million)[15]
- Hillyer v A.O. Smith Water Products Co., et al., 2015 WL 2280657 Index No. 190132/2013 (NYCAL 2014) ($20 million)
- Peraica v A.O. Smith Water Products Co., et al., 2013 WL 6003218 Index No. 190339/2011 (NYCAL 2013) ($35 million)

[12] Notably, the jury also apportioned liability differently in each of the three cases and awarded different amounts for pain and suffering, as well as for loss of consortium. See McCloskey, supra.

[13] Cited by In re New York City Asbestos Litig.[D'Ulisse], 16 Misc. 3d 945, 950 (Sup. Ct. 2007)

[14] See Id.

[15] See Appendix B – Trial Transcript including Verdict

And, the awards in Hillyer and Peraica were for past pain and suffering only, which far exceed the $7 million and $16 million awards in Konstantin and Dummitt, respectively. Thus, the conclusions drawn by the Business Council that joint trials inflate jury awards is an obvious non sequitur that disregards nearly every germane factor that influences award size. When those pertinent factors are considered, the inescapable conclusion is that joint trials actually produce fairer results than individual trials.

Simply stated, by using unreliable and incorrect data to paint all jointly tried asbestos trials and verdicts with broad brushes, amici are conducting inappropriate comparisons that are far-removed from the facts and circumstances of each trial, and from the notions of due process.

III. THE REMAINDER OF THE BUSINESS COUNCIL'S BRIEF FAILS TO ADDRESS THE CONTROVERSY AT ISSUE, AND IT BLITHELY ATTEMPTS TO RAISE ISSUES THAT ARE NOT BEFORE THIS COURT

Tellingly, in an appeal addressing whether it was an abuse of discretion as a matter of law to have affirmed the joint trial of the Konstantin and Dummitt actions, neither the word "Konstantin" nor "Dummitt" appear anywhere in the body of Business Council's amici brief, and amici do not even attempt to examine any case-specific facts.

Instead, the Business Council seeks to assail the asbestos litigation as a whole by raising issues that are clearly not before this Court on this appeal, such as punitive damages, joint and several liability, bankruptcy, causation, and duty (see Business Council Brief at 12-16, 21-23). Not only are those issues immaterial to the appeal at hand, but they are presently before the Honorable Peter H. Moulton, the Coordinating Justice of the NYCAL docket. See generally In re New York City Asbestos Litigation, Index No. 40000/88 (Sup. Ct., N.Y. Cty., Aug. 28, 2015) (discussing the negotiation and drafting of a new Case Management Order) (see Appendix C). As such, amici's brief is nothing more than a propaganda piece intended to inflame this Court and impugn the asbestos litigation as a whole, without reference to the narrow issue on appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Appellate Division should be affirmed in its entirety, with costs awarded to Respondent.

Dated: New York, New York
April 6, 2016

Respectfully submitted,
BELLUCK & FOX, LLP

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APPENDIX A

Bill Tracking (1)

2015 New York Assembly Bill No. 5978 New York Two Hundred Thirty-Eighth Legislative Session

NEW YORK BILL TRACKING

TITLE: Amends the CPLR by adding a new article for asbestos related actions.

AUTHOR: Schimminger, Robin

SUMMARY: Add Art 99 SS9901 - 9912, amd S3101, CPLR Relates to asbestos related actions.

STATUS:

03/10/2015 (H) INTRODUCED AND REFERRED TO COMMITTEE ON ASSEMBLY JUDICIARY

01/06/2016 (H) FAILED TO ADVANCE

01/06/2016 (H) REFERRED TO ASSEMBLY JUDICIARY

2015 NY A.B. 5978 (NS)

Bill Tracking (1)

2015 New York Senate Bill No. 5504 New York Two Hundred Thirty-Eighth Legislative Session

NEW YORK BILL TRACKING

TITLE: Amends the CPLR by adding a new article for asbestos related actions.

AUTHOR: O'Mara, Thomas F.

SUMMARY: Add Art 99 SS9901 - 9912, amd S3101, CPLR Relates to asbestos related actions.

STATUS:

05/14/2015 (S) INTRODUCED AND REFERRED TO COMMITTEE ON SENATE JUDICIARY

01/06/2016 (S) FAILED TO ADVANCE

01/06/2016 (S) REFERRED TO SENATE JUDICIARY

2015 NY S.B. 5504 (NS)

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL DIV. : PART 55

WALTER MILLER,

Plaintiff,

- against -

Index No. 190087/14

ATK LAUNCH SYSTEMS GROUP, individually and successor in interest to the Friction Division of Thiokol Corporation; BMW OF NORTH AMERICA, LLC; BORGWARNER MORSE TEC, INC., as successor-by-merger to Borg-Warner Corporation; CHEVRON TEXACO CORPORATION; CONTINENTAL AG; CONTINENTAL AUTOMOTIVE SYSTEMS, INC., f/k/a Continental Teves, Inc.; DANA COMPANIES, LLC, f/k/a Dana Corporation; FEDERAL-MOGUL ASBESTOS PERSONAL INJURY TRUST, successor in interest to Felt Products Manufacturing Co.; FORD MOTOR COMPANY; GENUINE PARTS COMPANY; HENNESSY INDUSTRIES; HONEYWELL INTERNATIONAL, INC., f/k/a Allied Signal inc./Bendix; McCORD CORPORATION; MERCEDES BENZ USA, LLC; RAPID AUTOPARTS; ROUTE 59 AUTO PARTS, INC.; THE PEP BOYS MANNY MOE AND JACK OF CALIFORNIA, INC.; TOYOTA MOTOR SALES U.S.A., INC.; UNION CARBIDE CORPORATION; VOLKSWAGEN GROUP OF AMERICA, INC.; WATERFEST EVENTS, INC., as successor in interest to Rapid Auto Parts,

Defendants.

TRIAL

60 Centre Street
New York, New York
September 9, 2015

B E F O R E :

HON. CYNTHIA S. KERN,
Justice, and a Jury

(Appearances on the following page.)

ROBERT PORTAS/MONICA HORVATH
SENIOR COURT REPORTERS

Verdict

THE CLERK: Wagner?

THE FOREPERSON: 1 percent.

THE CLERK: State the total amount of damages, if any, awarded to plaintiff Walter Miller for each of the following: Past pain and suffering from the onset of his mesothelioma to the date of your verdict?

THE FOREPERSON: $10 million.

THE CLERK: Any dissenting jurors?

THE FOREPERSON: None.

THE CLERK: Future pain and suffering?

THE FOREPERSON: $15 million.

THE CLERK: Any dissenting jurors?

THE FOREPERSON: None.

THE CLERK: Was there dissenting on the percentages, I'm sorry?

THE FOREPERSON: There was none.

THE CLERK: Number of years said sum is meant to cover?

THE FOREPERSON: One year.

THE CLERK: Any dissenting jurors?

THE FOREPERSON: No.

THE CLERK: Did defendant Ammco act with reckless disregard for the safety of others, namely plaintiff, Walter Miller?

APPENDIX C

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 50

- X

IN RE: NEW YORK CITY ASBESTOS LITIGATION :

: Index No.:
THIS DOCUMENT RELATES TO : 40000/1988
:
ALL ASBESTOS CASES :

- X

Peter H. Moulton, J.S.C.

Defendants in asbestos cases pending in the New York City Asbestos Litigation ("NYCAL") move for a stay of all asbestos cases in NYCAL for 60 days, with limited exceptions for certain cases involving plaintiffs with terminal disease. Defendants' purpose in proposing a stay is to allow the parties to undertake a renegotiation of the Case Management Order that governs pretrial proceedings in NYCAL. Defendants contend that the Case Management Order does not reflect important changes in asbestos litigation and is systematically unfair to defendants in various respects.

Plaintiffs oppose any stay of NYCAL litigation. While plaintiffs concede that the Case Management Order might benefit from some minor revisions, they reject defendants' argument that it is systematically unfair to defendants. Plaintiffs argue that many of the practices and procedures that defendants wish to change via a new Case Management Order have been affirmed by the First Department.

For the reasons stated below, the court denies any stay of NYCAL litigation, but will participate with the parties in a

thoroughgoing reevaluation of the Case Management Order. The court will attempt to gain consensus of plaintiffs and defendants in any change to the Case Management Order. While the court's goal will be to craft a new Case Management Order that is wholly consented to by both sides, there may be too great a division between the two sides on certain issues to reach that goal. It may also be that a consent document will be impossible to attain given the diversity of opinion *within* the defendants' or the plaintiffs' respective camps. In any event, the reevaluation of the Case Management Order with the plaintiff and defense bars will inform the court's understanding of the parties' varied positions, and will assist the court, if necessary, in drafting a Case Management Order in the absence of complete unanimity among the parties.

THE CASE MANAGEMENT ORDER

Case Management Orders are issued in coordinated proceedings, such as New York City's Asbestos Litigation, pursuant to New York's Rules for Trial Courts section 202.69(c)(2). They are commonly used to regularize and streamline pleadings and discovery, and, in mass torts, to prioritize cases for trial. A Case Management Order has been in place in NYCAL since its inception and has been amended from time to time on consent.

THE PARTIES' CONTENTIONS

Defendants contend that periodic amendments to the CMO have not kept pace with changes in asbestos litigation. Among the fundamental changes defendants cite are the changing characteristics of the defendants and plaintiffs themselves. For the most part, the key parties responsible for the manufacture of asbestos have filed for bankruptcy. Persons who claim they were exposed to asbestos may assert claims against trusts created during bankruptcy proceedings, but the payments by the trusts are usually very low, and not commensurate with the damages suffered by claimants. The entities who are defendants in asbestos litigation today are users of asbestos products, such as premises owners, construction contractors, and companies who incorporated asbestos products in their own products, or encouraged consumers to do so. This latter category is a diverse collection of manufacturers of a variety of products, from boilers to pizza ovens, from car brake pads to floor tiles. While these types of defendants have always been present in NYCAL, they now predominate due to the absence of the bankrupt entities.

Defendants also assert that plaintiffs' claimed disease has gradually shifted from mostly mesothelioma and asbestosis -- diseases where the connection to asbestos is certain -- to lung cancer and other cancer cases -- where the disease's potential causes are more varied. According to defendants, the disclosure

required by the CMO needs to account for these shifts.

Defendants claim that these and other changes have been exacerbated by the recent modification to the CMO allowing punitive damages, and by various trial practices common in NYCAL litigation that defendants would like to see curtailed by a new, amended CMO.

The reintroduction of plaintiffs' right to seek punitive damages in 2014 is the primary change in NYCAL litigation decried by defendants. Since 1996 the CMO provided for the indefinite deferral of all punitive damages claims. In 2013, plaintiffs moved to modify the CMO to allow punitive damages claims. Defendants opposed the motion and sought to continue the deferral.

The motion was granted by then-Coordinating Justice Sherry Klein Heitler in April 2014 ("the April 2014 decision") and plaintiffs were thus free to seek to seek punitive damages. In the wake of the April 2014 decision, no trial judge in NYCAL has granted a plaintiff's application to assert a punitive damages claim.

The April 2014 decision was recently affirmed as modified by the First Department. (In re New York City Asbestos Litigation, 130 AD3d 489.) The First Department found that the Coordinating Justice had the power to amend the CMO to allow for the assertion of punitive damages, but held that defendants were entitled to more notice and discovery of a plaintiff's claim for punitive damages than provided by the April 2014 decision and subsequent decisions.

The First Department stayed any claim for punitive damages pending further modification of the CMO to provide for "procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages." (In re New York City Asbestos Litigation, supra, 130 AD3d at __, 13 NYS3d at 404.)

Defendants argue in the instant motion that the reintroduction of claims for punitive damages has thrown the CMO off of equipoise. They make this argument even though no trial Judge in NYCAL to date has granted a plaintiff's application to assert punitive damages. According to defendants, the in terrorem effect of the possibility of punitive damages compromises their ability to properly defend themselves, and compels them to agree to settlements when they may have strong defenses. Punitive damages are not covered by defendants' insurance contracts. Any punitive damages would thus be paid out of defendants' pockets.[1]

In response, plaintiffs make the argument that animates the April 2014 decision: plaintiffs in NYCAL may not be deprived of a right (the right to seek punitive damages where warranted by the facts) that is afforded all other personal injury plaintiffs in New York courts outside of NYCAL. Plaintiffs may feel that this argument has now been vindicated by appellate authority. The First

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[1]Further litigation could arise from the allegation by the insured that its insurance company refused to settle a case at a reasonable amount, followed by an award of punitive damages at trial. Such a scenario opens up the possibility of lawsuits between defendants and their insurers.

Department's affirmance of the April 2014 decision, however, does not explicitly state that plaintiffs in NYCAL have a right to punitive damages. Rather the decision focuses on the power of the Coordinating Justice to reintroduce punitive damages. The First Department states at near the end of the decision:

> [We] ... remand the matter to the Coordinating Justice for a determination of procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages. We note, however that this decision does not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the April Order, including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance.

(130 AD3d at __, 13 NYS3d at 404.)

Apart from the reintroduction of punitive damages, defendants argue that a number of other provisions of, or omissions from, the CMO are systematically unfair to NYCAL defendants.

The first of these additional issues raised by defendants is the absence of any limitation on joinder. It is common practice for NYCAL trial justices to join two or more plaintiffs' cases for trial. Defendants assert that joinder of several cases is inherently confusing to a jury. They claim that frequently two or more plaintiffs' cases are joined for trial where there is little or no commonality with respect to the facts in each case. Apart

from juror confusion, defendants also contend that joinder leads to prejudice. A sympathetic plaintiff with strong proof of liability might assist another plaintiff with a more tenuous case. Defendants also assert that a single, more culpable, defendant can tar other less culpable (or non-culpable) defendants, causing a jury to rule against all. Defendants assert that this concern is magnified when one or more plaintiffs seek punitive damages against one or more defendants in cases joined for trial. Instead of individualized attention to liability and damages, defendants contend that they face, in joined trials, a situation in which jurors frequently indiscriminately rule against all defendants.

In response, plaintiffs point out that the First Department has given broad discretion to trial judges to join asbestos cases for trial in In Re New York City Asbestos Litigation (Konstantin/Dummitt) (121 AD3d 230). Plaintiffs point out that the large number of plaintiffs in NYCAL, many of whom are facing imminent death, requires the joinder of cases. They also raise examples of trials where the jury found for certain defendants, and not others, indicating that juries are fully capable of distinguishing between claims in consolidated trials.

Defendants also seek some requirement that plaintiffs make claims to bankruptcy trusts before commencing trial. Defendants are concerned that the jury hear about all potential defendants that may possibly carry a portion of fault. Under the

current CMO:

> Any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.

Defendants assert that plaintiffs sometimes delay making such claims, on the pretense that they do not "intend" at a given time to submit a claim, in order to reduce the number of potential tortfeasors on the jury sheet at trial.[2] Plaintiffs' counter that the current provision is adequate, and that any intended claims are asserted by plaintiffs in accordance with the CMO. Plaintiffs argue that they must have the ability to submit a claim to a bankruptcy trust in case they learn of new facts post-trial that would allow the assertion of such a claim.

Other changes to the CMO sought by defendants appear to be blocked by the CPLR or existing case law. These include the forum selection case law in NYCAL, which has allegedly allowed some plaintiffs to bring suit in NYCAL when they had very little asbestos exposure in New York City compared to their alleged exposures in other jurisdictions. (Eg Golden v Alliance Laundry Systems, LLC, ___ Misc3d ___, Sup Ct, New York County, February 5, 2014, Heitler, J., Index No.:190160/13.) However, the doctrine of

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[2]The existence of this strategy in another jurisdiction, and its effects, is discussed in In re Garlock Sealing Technologies, 504 BR 71, 84-7. (Bankruptcy Ct., WD North Carolina, 2014].)

forum non conveniens is well-established in New York State, and defendants are not foreclosed from making such motions.

Defendants also complain about their lack of success in obtaining dismissal of marginal claims via summary judgment. They appear to complain that the burden to disprove a plaintiff's claim has been unfairly placed on them. However, that is essentially the standard for summary judgment. At trial, of course, plaintiff has the burden to prove his case. On summary judgment, by contrast, the movant must demonstrate its prima facie entitlement to judgment as a matter of law. (See Vega v Restani Construction Corp., 18 NY3d 499.) Therefore, pursuant to well-established appellate authority, summary judgment in NYCAL is denied where a defendant is unable to "unequivocally establish that its product could not have contributed to the causation of plaintiff's injury." (Reid v Georgia-Pacific Corp., 212 AD2d 462, 463.) A third complaint of defendants that appears beyond the reach of any amendment to the CMO is defendants' contention that NYCAL trial justices are too amenable to charging the jury on recklessness. It would appear that whether or not a jury is to be given a recklessness charge is a question best reposed with the trial judge who has heard the facts come into evidence.

DISCUSSION

Defendants have not demonstrated the need for the injunction they seek: a stay of all NYCAL litigation, with limited exceptions, while the parties re-negotiate the CMO. In balancing the parties' interests, the court finds that the current state of NYCAL is not so rampantly unfair as to warrant suspending the trials, or the preparation for trials, of hundreds of cases where the plaintiffs have a mortal illness.

However, the court agrees that defendants have raised important issues that warrant a complete re-examination of the CMO. A top to bottom re-examination is necessary for at least two reasons. First, the CMO has many interdependent provisions, and changes to one portion may affect other aspects of the litigation. Second, the court intends to assist the parties in reaching a negotiated agreement. In such a negotiation it is useful at the outset to leave all aspects of the CMO "on the table," so that the parties have the greatest leeway to reach agreement.

Negotiation shall proceed as set forth below. This framework for negotiations is by necessity provisional, as it is impossible to foresee all impediments to negotiation that might arise.

In a litigation with so many stakeholders, an initial challenge is how to negotiate in a way that gives voice to the diversity of opinion among the NYCAL bar. While the court will

ensure that every practitioner will be able to give input, it is not possible to meet and have a coherent discussion with hundreds of participants. Accordingly, both plaintiffs and defendants shall have four representatives, respectively, who will present the parties' positions to the court and to the other side.

The CMO has long provided for liaison counsel in NYCAL, who "facilitate communications among the Court and counsel, minimize duplication of effort, coordinate joint positions, and provide for the efficient progress and control of this litigation." (Case Management Order, § VII(A).) These individuals, Charles Ferguson and Jordan Fox for the plaintiffs, and Judith Yavitz and Robert Malaby for the defendants, have served with distinction under my predecessors Justice Helen Freedman and Justice Sherry Klein Heitler. In my brief tenure as Coordinating Justice I have been impressed by their collective institutional knowledge of NYCAL. I have found them to be strong advocates for their respective sides but also honest brokers. Therefore, these four people shall serve on the CMO negotiating committee. For the remaining two representatives for each side, the plaintiffs and defendants should each choose their representatives. For purposes of the remainder of this decision, the eight representatives shall be collectively referred to as "the CMO representatives." The role of the parties' CMO representatives is to canvas their respective sides and negotiate on their behalf.

A provisional time line for the negotiations is described

below.

1) Plaintiffs and defendants shall each pick their two additional representatives to serve as CMO representatives by September 18, 2015.

2) Plaintiffs' and defendants' CMO representatives shall caucus without court intervention to determine what common ground exists. The court notes that there was some overlap between the parties' respective proposed modified CMOs presented to the Special Master in December 2014. For example, to the extent that the parties can agree on standardized pleadings, discovery requests, and the like, they should do so. Additionally, at oral argument on the instant motion the parties both indicated that a side agreement that would continue the tenure of the Special Master would be possible even if there was not complete agreement on the CMO.

The defendants' and plaintiffs' CMO representatives shall prepare a joint document for the court that specifies points of agreement and disagreement. Both sides may set forth brief summaries of their respective positions with respect to disagreements. However, in preparing this document the points of disagreement may be set out in brief summaries, as the parties' motion papers, and letters to the court, have already mapped out their respective positions. This document shall be submitted to the court by October 9.

4) The court will meet with the CMO representatives at 60 Centre Street to attempt to reach a negotiated settlement. The

court will block out five days to conduct the negotiation.[3] It may turn out that more or less time is necessary. The goal of the negotiation is to reach agreement on a new draft CMO, which will be presented to the NYCAL bar at large for comment. The days that the court has available currently are October 26 to November 13.

5) The court will prepare a draft CMO arising from its negotiation with the CMO representatives, which will be posted on the NYCAL website. Thereafter, there will be a suitable period for comment on the draft CMO from any law firm that currently appears in NYCAL. The comments will be shared, either via the website or some other means, with all counsel who appear in NYCAL. If substantial changes are made to the CMO by the court as a result of these comments, it may be necessary to have a second comment period.[4]

The framework set forth in the above numbered paragraphs is not set in stone. There may be impediments that slow the process. Rosh Hashanah and Yom Kippur, as well as a large asbestos litigation conference in San Francisco, may limit counsel's availability in September.

At the conclusion of this process the court will issue a new NYCAL Case Management Order.

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[3] I will be unavailable on Tuesday mornings, as that is my motion day.

[4] The court would also consider holding a "Town Hall" at some point in the process if the parties think it is warranted, to take questions and comments from the NYCAL bar.

CONCLUSION

The motion for a stay is denied. The motion to negotiate a modification of the NYCAL Case Management Order is granted to the extent set forth above. To reiterate: the goal of the negotiation is to reach complete agreement on a new CMO. It may be that partial agreement is all that is possible. If consensus is not possible, then the court will issue a new Case Management Order informed by its dialogue with the parties.

This constitutes the decision and order of the court.

Dated: New York, NY
August 28, 2015

Hon. Peter H. Moulton
JSC