New York Court of Appeals

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

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.

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 IN SUPPORT OF DEFENDANT-APPELLANT

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), the associations represented on this brief have no parents, subsidiaries, or affiliates.

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QUESTION PRESENTED

Whether consolidation of asbestos-based personal injury actions for trial violates CPLR 602(a) where the actions differ with respect to the worksites, occupations, products, types and durations of exposure, diseases, plaintiff health statuses, defendants, and legal liability theories, and where the defendants are prejudiced by jury confusion and each plaintiff's claim is bolstered by the other plaintiff's claims.

Answer: The First Department incorrectly answered this question in the negative.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in New York and their insurers, civil justice organizations, and an association of attorneys whose practice is concentrated on civil litigation defense. *Amici* have a substantial interest in ensuring that New York's consolidation of asbestos-related personal injury cases for trial follows the letter and intent CPLR 602(a), is consistent with the application of CPLR 602(a) in non-asbestos cases, satisfies due process, and reflects sound public policy. The First Department's decision should be reversed.

STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case as relevant to our argument.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Consolidated trials can present a clash of competing interests: efficiency and fairness. In the right cases, judicial economy can be achieved by joining together actions "involving a common question of law or fact." CPLR 602(a). For instance, when a single catastrophic event occurs, joinder of cases at trial can reduce litigation costs, speed recoveries, and make more economical use of the court's time. In that type of situation, it would be highly inefficient to "reinvent the wheel" by conducting multiple trials involving essentially the same case. On the other hand, if cases are not legally and factually similar, as in this appeal, not only is there unlikely to be any efficiency as a result of consolidation, but there is a strong likelihood of substantial risk of prejudice to the defendants, raising due process concerns.

Here, giving great deference to the trial court's decision to consolidate two asbestos-related personal injury cases that were dramatically different — different worksites, different occupations, different products, different types and durations of exposure, different diseases, different plaintiff health statuses, different legal liability theories, and different defendants, counsel, and witnesses — the First Department concluded that sufficient commonality existed merely because both plaintiffs were "exposed to asbestos in a similar manner, which was by being in the immediate presence of dust that was released at the same time as they were

performing their work." *Matter of New York City Asbestos Litig. (Konstantin v. Tishman Liquidating Corp.)*, 121 A.D.3d 230, 244, 990 N.Y.S.2d 174 (1st Dep't 2014), *motion to dismiss appeal denied*, 24 N.Y.3d 1216, 4 N.Y.S.3d 598, 28 N.E.3d 33 (2015). This is like saying that apples are the same as oranges because they are both fruit. This level of generality gives trial courts too much discretion to join cases that should not be joined at all. Joinder in such circumstances violates CPLR 602(a).

The First Department's Decision and Order should be vacated and the case remanded for a new trial. Furthermore, the Court should give all parties and trial judges clear guidelines as to when consolidation is appropriate. The routine consolidation of New York City asbestos cases for trial is highly prejudicial to defendants, raising due process concerns. Consolidation of asbestos cases should be sharply limited, consistent with the clear trend nationwide and the practice in New York in non-asbestos cases.

ARGUMENT

I. NEW YORK SHOULD JOIN THE CLEAR TREND AND SHARPLY LIMIT ASBESTOS CASE CONSOLIDATIONS

A. The Trend is to Bar or Substantially Curb Consolidations

Outside of New York, a number of significant jurisdictions have ended or substantially curbed the use of trial consolidations in asbestos cases. *See Matter of New York City Asbestos Litig. (Andreadis v. ABB, Inc.)*, 2015 WL 4501189, at *3

(N.Y. Sup. Ct. N.Y. Cnty. July 24, 2015) ("the trend is to prohibit the consolidation of asbestos trials absent the consent of all parties.").[1]

For instance, the Michigan Supreme Court has precluded the "bundling" of asbestos-related cases for settlement or trial. The court's Order states:

> The Court has determined that trial courts should be precluded from "bundling" asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only.

Mich. Supreme Court, Admin. Order No. 2006-6, Prohibition on "Bundling" (Aug. 9, 2006).[2] A justice who supported making the Michigan Supreme Court's Order permanent based on its benefits — and lack of negative impacts — explained:

> I concur with the order retaining Administrative Order No. 2006-6. I write separately to point out that, contrary to the dire predictions of the dissenters to the administrative order, the initial adoption of our antibundling order last August has not caused the sky to fall. The order has not disrupted the progress of the asbestos docket in

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[1] *See also In re Asbestos Personal Injury and Wrongful Death Litig. Global*, 2014 WL 895441 (Md. Cir. Ct. Baltimore City Mar. 5, 2014) ("[W]hen federal and state courts, legislative and judicial branches, appellate and trial benches, in nearly every region of the country, all conclude that consolidation of mass tort claims is ineffective, then we must also take heed of past mistakes so we are not condemned to repeat them.").

[2] The order was adopted, among other reasons, to "help to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as 'leverage' for the resolution of other cases." *Id.* (Markman, J., concurring); *see also* Editorial, *Unbundling Asbestos*, Wall St. J., Aug. 21, 2006, at A10 (supporting the order banning "bundling" of asbestos cases).

> the Third Circuit Court [Detroit/Wayne County, the largest circuit court in Michigan]. Since the administrative order was adopted, we are informed that all the cases scheduled each month have been settled without trial, just as had occurred before the adoption of the order.
>
> The only reported new effect of Administrative Order No. 2006-6 is that settlement negotiations occur among the parties without court participation. Contrary to the dire predictions, the asbestos docket has not come to a grinding halt nor has our order required ten additional Third Circuit judges or dramatically increased the workload. In fact, the circuit court should have more time available because of the loss of court-ordered settlement conferences. I support Administrative Order No. 2006-6 because it continues to serve the sound and simple purpose of ensuring that each case is considered on its own individual merits.

Mich. Supreme Court, Retention of Admin. Order No. 2006-6 (June 19, 2007) (Corrigan, J., concurring).

Similarly, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to generally prohibit the joinder of asbestos cases for trial absent the consent of all parties. *See* Ohio R. Civ. P. 42(A)(2) (July 1, 2005 amendment) ("In tort actions involving an asbestos claim, a silicosis claim, or a mixed dust disease claim, the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household.").

The Mississippi Supreme Court has held that joinder of multiple plaintiffs with little in common beyond the product they claimed injured them would "unavoidably confuse the jury and irretrievably prejudice the defendants." *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1098 (Miss. 2004). In 2004, the Mississippi Supreme Court added a comment to Mississippi Rule of Civil Procedure 20 (generally precluding joinder unless cases arise out of the same transaction or occurrence and present a common question of law or fact), to require "a distinct litigable event linking the parties." The court has also severed several multi-plaintiff asbestos-related cases.[3]

In February 2012, the Philadelphia Court of Common Pleas, which handles a large docket of asbestos cases, determined that asbestos cases should never be consolidated absent an agreement of all parties, unless the cases involve, among other factors, the *same* state law, *same* disease, and *same* plaintiff's law firm.[4] With respect to different types of mesotheliomas, as in the subject action, the Philadelphia protocol states: "Pleural mesothelioma is a disease that is distinct

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[3] *See, e.g., Alexander v. AC & S, Inc.*, 947 So. 2d 891 (Miss. 2007); *Albert v. Allied Glove Corp.*, 944 So. 2d 1 (Miss. 2006); *Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853 (Miss. 2005); *Ill. Cent. R.R. v. Gregory*, 912 So. 2d 829 (Miss. 2005); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004).

[4] *See* Pa. Ct. Com. Pl. Phila. Cnty., Gen. Ct. Reg. No. 2012-01, *In re Mass Tort and Asbestos Programs*, Protocol at ¶¶ 2, 6 (Feb. 15, 2012); *see also* Pa. Ct. Com. Pl. Phila. Cnty., Gen. Ct. Reg No. 2013-01, Notice to the Mass Tort Bar, Amended Protocols and Year-End Report, Amended Protocol at ¶¶ 2, 6 (Feb. 7, 2013).

from mesotheliomas originating in other parts of the body, and will not be tried on a consolidated basis with a non-pleural mesothelioma cases."[5]

In Seattle, Washington, the asbestos case management order presumes individual trials in the absence of good cause shown (which is a rarity).[6]

In addition, statutes enacted in Texas, Kansas, Georgia, and in 2015 in West Virginia (non-malignant conditions) generally preclude the joinder of asbestos cases at trial.[7] Louisiana bans consolidations of civil cases that would cause jury

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[5] Pa. Ct. Com. Pl. Phila. Cnty., Gen. Ct. Reg. No. 2013-01, Amended Protocol at ¶ 6. After the court made these and other changes, such as the end of reverse bifurcation of asbestos trials, the flow of asbestos and other mass tort cases into Philadelphia declined 70% from 2011, there was heightened settlement activity, and the overall inventory of mass tort cases was reduced by 14% as of the end of 2012. *See* Pa. Ct. Com. Pl. Phila. Cnty., Gen. Ct. Reg. No. 2013-01, Year-End Report at ¶ 6. Also, "[f]ollowing the announced changes at the Philadelphia courts ... the [American Tort Reform Foundation] dropped Philly from its [Judicial Hellholes] list, ... hailing the new mass tort protocols as a step in the right direction." *Phila. Court Leadership: Mass Tort Filings Down 70 Percent in 2012, Rules Changes Credited With Decline*, PennRecord.com, Feb. 11, 2013.

[6] *See In re King County Asbestos Cases*, No, 89-2-18455-9, Revised Consolidated Pretrial Style Order, ¶ 1.11 (Wash. Super. Ct. King Cnty. Aug. 1, 2011) ("Asbestos claims containing more than one plaintiff may not be filed without leave of court. For this purpose, a husband and wife shall be considered one claimant or plaintiff. Unless good cause is subsequently shown, each plaintiff's case shall be tried separately.").

[7] *See* Ga. Code Ann. § 51-14-11 ("A trial court may consolidate for trial any number and type of asbestos claims or silica claims with the consent of all the parties. In the absence of such consent, the trial court may consolidate for trial only asbestos claims or silica claims relating to the same exposed person and members of his or her household."); Kan. Stat. Ann. § 60-4902(j) ("A court may consolidate for trial any number and type of silica or asbestos claims with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only claims relating to the exposed person and members of such person's past or present household."); Tex. Civ. Prac. & Rem. Code Ann. § 90.009 ("Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial."); W. Va. Code § 55-7G-8(d)(1) ("A court may consolidate for trial any number and type of nonmalignant asbestos or silica actions with the consent of all the parties. In the absence of such consent, the

confusion, prevent a fair and impartial trial, give one party an undue advantage, or prejudice the rights of any party. *See* La. Code of Civ. P. Art. 1561(B).

Even in New York, consolidation is highly infrequent in non-asbestos cases and only occurs in cases involving significant commonality. *See* Vincent C. Alexander, *2015 Supplemental Practice Commentary,* 7B McKinney's Consolidated Laws of N.Y., CPLR C602:1 ("Identity of law or fact on an insignificant matter ... will not suffice. *'[T]here must be* at least some *important rules of law and some substantial issues of fact* to be determined *that are in common* to both actions.'") (quoting *Gibbons v. Groat*, 22 A.D.2d 996, 997, 254 N.Y.S.2d 843, 843 (3d Dep't 1964) (emphasis added)). Asbestos cases should be treated the same.

New York's consolidation of asbestos cases for trial does not reflect the status of asbestos litigation today. It is respectfully submitted that this Court should address this issue and update New York's practices so that they are in accord with what is happening around the United States.

Furthermore, this Court should give all parties and the trial courts clear guidance as to the level of commonality that is required to consolidate cases for trial under CPLR 602(a) — like Philadelphia has done — and explain what the

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court may consolidate for trial only asbestos or silica actions relating to the exposed person and members of that person's household.").

factors in *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993), really mean. This would allow everyone to know the boundaries and stay within them.[8]

For example, the Court could say that "common worksite" in *Malcolm* means that ordinarily only cases involving the same worksite can be consolidated. The "type of disease" factor in *Malcolm* should mean that all plaintiffs share the same disease and type of evidence – i.e., impairing asbestosis cases are only tried with other impairing asbestosis cases, cases of nonsmokers with lung cancer are only tried with other nonsmokers with lung cancer, smokers with lung cancer are only tried with other smokers with lung cancer, pleural mesotheliomas are only tried with other pleural mesotheliomas, peritoneal mesotheliomas are only tried with other peritoneal mesotheliomas, pericardial mesotheliomas are only tried with other pericardial mesotheliomas, testicular mesothelioma cases are only tried with other testicular mesothelioma cases, and so on. Finally, living plaintiff cases should not be tried with deceased plaintiffs' cases, except perhaps in highly unusual circumstances.

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[8] As the Court is aware, *Malcolm* is a federal court case, but is considered by New York state courts to be the seminal decision concerning the consolidation of asbestos cases for trial. *See, e.g., Matter of New York City Asbestos Litig. (Bernard v. Brookfield Props. Corp.)*, 99 A.D.3d 410, 951 N.Y.S.2d 154 (1st Dep't 2012) (applying *Malcolm* factors to permit consolidation where there was a common disease, common defendant, and common type of exposure by the three plaintiffs).

B. Individualized Justice Would Not Clog the Trial Courts

Individualized justice in asbestos cases has not clogged the courts in Ohio, Texas, or Michigan, among others. These are not small states with insignificant asbestos filings.

Lessons recently learned in the federal multi-district asbestos litigation (MDL-875) are also instructive. For years, the federal judiciary "tried and failed" consolidation practices from "small consolidations of four to thirty cases, 'trials in the round,' and local consolidations," but none provided "any basis for a long-term solution to the so-called asbestos crisis." Eduardo Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 108 (2013). Consolidations also "raised concerns regarding due process issues because of the variety of claims and injuries handled within each suit." *Id.* Judge Robreno, the present manager of MDL-875, realized that a new approach was needed. *See id.* at 126 ("After nearly twenty years of intensive litigation in the federal courts, it seemed apparent to the court that efforts toward aggregation of cases and consolidation of claims had proven ineffective.").

"Given the apparent failure of aggregation and consolidation," Judge Robreno determined that "each case would be 'disaggregated' ... and proceed as 'one plaintiff-one claim.'" *Id.* at 127. "The purpose was to separate each case, and within each case, each claim against each defendant so that each claim could stand

on its own merit." *Id.* "Multiple plaintiffs are to be severed into single plaintiff cases." *Id.* at 187. This process has allowed the court to focus on "each claim by each plaintiff against an individual defendant...." *Id.* at 137. Judge Robreno explained the benefits of this system for the parties and the court:

> Under a 'one-plaintiff–one-claim' process, case outcomes benefit both plaintiffs and defendants. Defendants see a decline in the number of claims which they have to defend, due to an early assessment of the merit of each claim with a concomitant reduction of costs of defense. Conversely, plaintiffs see the more meritorious claim move to the head of the line, as unmeritorious claims are dismissed and removed from the docket. Both sides see the benefits and are prepared to support the court's plan.

Id. at 189. The system has worked. "For all practical purposes, MDL-875 is near its end." *Id.*

Influential scholars have noted the success of Judge Robreno's approach. *See* Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation The Answer to the Asbestos Mess?*, 88 Tul. L. Rev. 1039, 1067-68 (2014) (Reporter to the ABA Tort Trial and Insurance Practice Section's Asbestos Task Force: "Of course, during the 1990s and early 2000s, I was not alone in thinking that using aggregation to resolve mass tort cases was a good thing.... Leading into the first Task Force hearings in Washington, D.C. [in June 2013], my initial instinct was to think that aggregation was the answer," but "it appears that one-on-one litigation, with proper disclosures, managed by strong judges getting cases ready for trial, and not aggregation, may be the best solution to wrapping up the elephantine mass.");

Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 Nev. L.J. 1445, 1477 (2015) ("For old-school aggregationists who have begun a process of rethinking of (or re-education about) the virtues of aggregation, perhaps a good starting point is an appreciation of the fact that — contrary to received wisdom — it is not impossible to adjudicate large-scale dispersed litigation on an individualized basis. Judge Robreno has shown the way.").[9]

The successful adjustment made by Judge Robreno and other courts across the country regarding asbestos case trials is instructive. It is respectfully submitted that New York courts would not be clogged either if this Court were to require the *Malcolm* standards be actually applied.

C. Permissive Consolidation Would Augment Other Fairness Problems for NYCAL Defendants

Approval of the First Department's permissive approach to consolidation would serve as a litigation catalyst because it would amplify other significant fairness problems for NYCAL defendants. Some of these issues could be addressed in a new case management order, but presently include:

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[9] *See also* Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 Rev. Litig. 883, 924 (2007 ("The procedural progress of recent mass toxic torts suggests that judges may be changing their practices regarding this litigation as well.... Over time, judges who once thought the sole way of clearing their dockets of mass tort cases was to press for global settlement may be learning that summary judgment and dismissals offer another--sometimes more appropriate--avenue for resolving mass claims.").

- a decision that might lead to end the nearly twenty-year NYCAL practice of deferring punitive damages awards[10] — though "under current [United States] Supreme Court precedent, consolidating plaintiffs' cases for trial when plaintiffs assert punitive damages claims is quite likely a per se constitutional violation." James M. Beck, *Little in Common*, 53 No. 9 DRI For The Def. 28, 33 & 82 (Sept. 2011);[11]
- imposition of joint and several liability — contrary to the intent of New York's modified joint liability reform statute (CPLR 1602) — because of the routine charging of juries (as was the case here) on "recklessness," even when the evidence falls below the bar set by this Court in *Maltese v. Westinghouse Electric Corp.*, 89 N.Y.2d 955, 655 N.Y.S.2d 855, 678 N.E.2d 467 (1997);

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[10] *See Matter of New York City Asbestos Litig.*, 2014 WL 1767314 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 8, 2014) (modifying NYCAL CMO § XVII to lift deferral of punitive damages). The First Department recently held that the NYCAL Coordinating Justice (then Hon. Sherry Klein Heitler) had the authority to modify the CMO, but struck down her plan to leave defendants guessing until the close of evidence at trial as to whether punitive damages would be sought by the plaintiff, and stayed the resumption of the filing of punitive damages claims. The First Department remanded the matter to the Coordinating Justice (now Hon. Peter Moulton) to review the CMO to determine whether punitive damages claims should be allowed and, if so, what procedural protocols to adopt to ensure that defendants' due process rights are protected. *See Matter of New York City Asbestos Litig. (All New York City Asbestos Litigation Cases v. A.O. Smith Water Prods. Co.),* 130 A.D.3d 489, 13 N.Y.S.3d 398 (1st Dep't 2015).

[11] *See Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) ("no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("A defendant should be punished for the conduct that harmed the plaintiff...."). Consolidation raises the possibility the jury may consider conduct as to one plaintiff that affected another.

- uneven application of *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 824 N.Y.S.2d 584, 857 N.E.2d 1114 (2006), regarding the level of proof for legal causation;[12]
- a ruling that is being interpreted by NYCAL plaintiffs' counsel to erode an important CMO provision[13] that compels the filing of asbestos

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[12] *Compare Matter of New York City Asbestos Litig. (Juni v. A.O. Smith Water Prods. Co.)*, 48 Misc.3d 460, 11 N.Y.S.3d 416 (N.Y. Sup. Ct. N.Y. Cnty. 2015) (Jaffe, J.) (setting aside a plaintiff's verdict on post-trial motion by the defendant where the plaintiff's expert had opined that plaintiff's cumulative exposure to asbestos, no matter how small and without any quantification, was a substantial contributing factor to the development of his mesothelioma), *and Matter of New York City Asbestos Litig. (Hillyer v. A.O. Smith Water Prods. Co.)*, 2015 WL 2280657 (N.Y. Sup. Ct. N.Y. Cnty. May 15, 2015) (Kern, J.) (declining to set aside verdict where plaintiff's expert testified that plaintiff's cumulative exposure increased his cumulative risk of developing mesothelioma and all of the exposures contributed to his mesothelioma).

[13] NYCAL CMO § XV(E)(2)(1) states: "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." In *Matter of New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 966 N.Y.S.2d 347 (Table), 2012 WL 6554893, at *9 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 15, 2012), the court said: "The CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within certain time limitations, not claims they may or may not *anticipate* filing." Plaintiffs' lawyers have interpreted this statement to permit the filing of bankruptcy trust claims to be delayed until after trial or settlement, contrary to the spirit of the CMO. *See* ABA TIPS Section Task Force on Asbestos Litigation and the Bankruptcy Trusts, June 6, 2013, Hrg. Trans. at 114-115 (testimony of Joseph W. Belluck, Esq.) ("[Judge Heitler] put in what is in effect an intent standard into the disclosure.... So in New York, even though claims against bankruptcy trusts may be probable, I can predict that they are going to be filed, I am not under any requirement to file them. I only have to file the claims that my client intends to file before the trial."); Joseph W. Belluck *et al.*, *7th Annual Judicial Symposium on Civil Justice Issues: George Mason Judicial Education Program: Edited Transcripts: The Asbestos Litigation Tsunami - Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 512 (2013) ("In my practice, the way we do things, we do not file the bankruptcy claims until after the case is resolved. In New York, we are not obligated to do it before. And unless my client is in a particular situation where he would benefit from the filing of the claims we do not file them during the pendency of the action.") (quoting Joseph W. Belluck, Esq.).

bankruptcy trust claim forms before trial to promote honesty in litigation and allow defendants to obtain setoffs;[14] and

- cases such as the two appeals before the Court[15] that have applied a one-paragraph opinion, *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dep't 2001), to create a rule that an equipment manufacturer has a legal duty to warn about every asbestos-containing product that could have been foreseeably used with that equipment, contrary to the "stream of commerce" approach to liability in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992), and the clear national trend.[16]

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[14] *See* Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185 (2014); Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071 (2014); Peggy Ableman *et al., A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.,* 30:19 Mealey's Litig. Rep.: Asbestos 1 (Nov. 4, 2015).

[15] *See Matter of Eighth Jud. Dist. Asbestos Litig. (Suttner v. Crane Co.)*, 115 A.D.3d 1218, 1218, 982 N.Y.S.2d 421, 421 (4th Dep't), *lv. granted*, 24 N.Y.3d 907, 20 N.E.3d 662, 995 N.Y.S.2d 716 (Table) (2014); *Matter of New York City Asbestos Litig. (Dummitt v. Crane Co.)*, 121 A.D.3d 230, 990 N.Y.S.2d 174 (1st Dep't 2014), *motion to dismiss appeal denied*, 24 N.Y.3d 1216, 28 N.E.3d 33, 4 N.Y.S.3d 598 (2015. *Dummitt* was consolidated with the subject action for trial.

[16] *See* Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association,* 37 Am. J. Trial Advoc. 489 (2014); *see also* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595 (2008).

Together, these rulings have been viewed as contributing to a perception that New York's legal climate is unfair to defendants, making it harder for New York to attract and keep businesses that bring jobs to the state. The Court, of course, cannot address all of these problems in a single decision, but a fair and sound decision with respect to the consolidation of asbestos cases would be significant.

II. NYCAL CONSOLIDATIONS ARE HIGHLY PREJUDICIAL TO DEFENDANTS, RAISING DUE PROCESS CONCERNS

"Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." Beck, *supra*, at 29.

A "maelstrom of facts, figures, and witnesses" is created that juries cannot keep straight. *Malcolm*, 995 F.2d at 352. Inflammatory facts in one case can color a jury's perception of joined cases and amount to guilt by association. *See Armond*, 866 So. 2d at 1101 ("the potential is that the collective evidence will be applied to all defendants, thereby prejudicing each [defendant]."); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 461 (E.D. Mich. 1985) (denying consolidation; "If the unique circumstances of the cases are considered together in one trial, the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice."). "In consolidated trials, there is a higher probability that at least one defendant will appear callous, and this benefits

all plaintiffs." Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 373 (June 2006).

Furthermore, consolidation can bolster weak or novel claims because jurors may simply assume that if multiple plaintiffs allege injuries from a particular product, then the claims must have merit, even when they lack objective support. *See Bradford v. Coleman Catholic High Sch.*, 110 A.D.2d 965, 966, 488 N.Y.S.2d 105, 105 (3d Dep't 1985) (noting potential for consolidation "to bolster each claim, to defendants' disadvantage.").[17] Jurors also may have trouble differentiating asbestos products with different fiber types and potencies,[18] lumping them together as simply "asbestos."

Other risks of prejudice arise when cases of asbestos plaintiffs with different diseases are joined for trial, or when personal injury claims are joined with wrongful death claims. *See Malcolm*, 995 F.2d at 351 ("The opportunity for prejudice is particularly troubling where ... asbestosis sufferers, who may under

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[17] *See also Alter v. Oppenheimer & Co., Inc.*, 8 Misc.3d 1008(A), 801 N.Y.S.2d 776 (Table), 2005 WL 1539251, at *5 (N.Y. Sup. Ct. N.Y. Cnty. June 30, 2005) ("where the consolidation of the cases, and the presentation to the same jury tends to bolster each claim, to defendants' disadvantage, this would constitute prejudice to a substantial right.").

[18] *See In re Asbestos Litig.*, 911 A.2d 1176, 1181 (Del. Super. Ct. New Castle Cnty.) ("[I]t is generally accepted in the scientific community and among government regulators that amphibole fibers are more carcinogenic than serpentine (chrysotile) fibers."), *appeal refused*, 906 A.2d 806 (Del. 2006); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

certain circumstances expect close to normal life spans, are paired for trial with those suffering from terminal cancers, such as mesothelioma and lung cancer."); *In re Joint E. & S. Dists. Asbestos Litig.*, 125 F.R.D. 60, 65-66 (E.D.N.Y. 1989) ("dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living. The prejudice lies in the possibility that the living claimants' asbestos-related diseases in fact may not prove fatal.").[19]

Empirical evidence shows that consolidated trials of small groups of plaintiffs, such as those in New York City "significantly improve outcomes for plaintiffs." Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 574 (2007); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319 (2002) (finding that asbestos plaintiffs' probability of winning in small consolidated trials compared to individual trials is "statistically significant."); *see also* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive*

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[19] *See also Matter of New York City Asbestos Litig. (Carpozio v. A.C. & S., Inc.)*, 22 Misc.3d 1109(A), 880 N.Y.S.2d 225 (Table), 2009 WL 104628, at *4 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 9, 2009) (consolidating wrongful death case with living plaintiffs' cases would prejudice the defendant "because of the possibility that a jury will attribute the fate of the deceased to the living plaintiffs...."); Ableman *et al.*, *The Consolidation Effect, supra,* at 6-7 ("the life status of a plaintiff at trial can have an emotional influence on jury awards, with NYCAL plaintiffs living at the time of trial receiv[ing] more than double the average award than NYCAL plaintiffs not living at the time of trial." The increased trial risk for defendants in living plaintiff cases can extend to cases that involve plaintiffs not living at the time of trial when such plaintiffs are consolidated together).

Processing of Evidence, 85 J. of Applied Psychol. 909, 916 (2000) (study of jury behavior in controlled setting found that juries in small trial consolidations were significantly more likely on a statistical basis to find for the plaintiff and render a larger award than if the cases were tried individually); Irwin A. Horowitz & Kenneth S. Bordens, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & Psychol. Rev. 43, 66 (1998) ("empirical research shows clearly that consolidation can alter the patterns of verdicts and awards handed down by jurors" and these changes "are generally more favorable to the plaintiffs than the defense.").

Recent "NYCAL data suggests that consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts." 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). An example is the $ 190 million verdict in the joint trial of five mesothelioma plaintiffs in Manhattan in 2013. The "award is believed to be the largest verdict of its kind in U.S. history." *Id.* It is also believed that the $60 million individual amounts to two of the plaintiffs are the largest individual sums awarded in a New York asbestos case. *See Jury Awards $190 Million in 5 NYC Asbestos Cases (Assenzio v. A.O. Smith Water Prods.)*, 35 No. 22 Westlaw J. Asbestos 2 (Aug. 16, 2013).

"[F]rom 2010 through 2014, NYCAL jury awards in consolidated trials have totaled a staggering $324.5 million across 14 plaintiffs for an average of more than $23 million. These consolidated verdicts are 250% more per plaintiff than NYCAL awards in individual trial settings over that same span, and 315% more per plaintiff than the national average award." Ableman *et al.*, *The Consolidation Effect, supra,* at 1. Furthermore, the jury bias caused by consolidation has increased the frequency of plaintiff victories in cases that go to verdict. "Since 2010, 88% of plaintiffs (14 of 16) in NYCAL consolidated verdicts received jury awards, as compared to 50% of plaintiffs (4 of 8) in NYCAL individual trials, and approximately 60% nationwide." *Id.* at 2.

It is respectfully submitted that the permissive, prejudicial, and routine consolidation of asbestos cases for trial, particularly in New York City, should not be permitted.[20] "Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990).[21]

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[20] *See* Joseph J. Welter *et al.*, *Asbestos Litigation: Alive and Strong in 2014*, 56 No. 4 DRI For The Def. 50, 54 (Apr. 2014) ("[A] careful review of joint trial decisions in New York demonstrates that at least in that jurisdiction, courts now routinely grant joint trials.... [T]hese courts have either eroded or ignore the bedrock *Malcolm* factors.").

[21] *See also Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness."); *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("The benefits of efficiency can never be purchased at the cost of fairness ... and we must take care that each individual plaintiff's — and

III. THERE ARE FEW, IF ANY, EFFICIENCIES TO BE GAINED BY CONSOLIDATING ASBESTOS CASES

A. Asbestos Parties Are Increasingly Remote

The asbestos litigation environment today is very different than it was at the time *Malcolm* was decided in 1993. In the *Malcolm* era, consolidated cases often involved plaintiffs from the same workplace (e.g., Brooklyn Navy Yard) who were exposed around the same time to the same products. Thus, their diseases manifested around the same time and their cases involved the same defendants.[22] Consolidation may have made sense in those circumstances because the cases would have shared the same evidence. This is not true today. *See Matter of New York City Asbestos Litig. (Abrams v. Foster Wheeler Ltd.)*, 2014 WL 3689333, at *3 (N.Y. Sup. Ct. N.Y. Cnty. July 18, 2014) ("state of the art evidence is specific to a particular occupation or industry, and may differ among, for example, automotive or friction products, powerhouse workers, and Navy engineers.").

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defendant's — cause not be lost in the shadow of a towering mass litigation."); *Curry v. Am. Standard*, 2010 WL 6501559, at *2 (S.D.N.Y. Dec. 13, 2010) ("caution against consolidation").

[22] *See, e.g., Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985) (consolidating claims of 15 plaintiffs who worked at the same plant over substantially the same period of time and were exposed to asbestos from supplier defendants); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985) (consolidating claims of four insulators who worked at the same location during the same time, had the same condition and were treated by the same physician, and had nearly identical medical prognoses); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.), *cert. denied sub nom. Oman v. H.K. Porter Co.*, 474 U.S. 970 (1985) (consolidation of claims by four shipyard workers who worked at same shipyard and developed asbestosis after exposure to defendants' insulation).

In the early 2000s, a surge in asbestos-related bankruptcies triggered "a search for new recruits to fill the gap in the ranks of defendants...." Hanlon & Smetak, 62 N.Y.U. Ann. Surv. Am. L. at 556.[23] "[P]laintiff 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*, 27:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012). One plaintiffs' attorney described the asbestos 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 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

This trend was described in *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014) ("Beginning in early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer

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[23] *See also* Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiii (RAND Corp. 2005) ("When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions . . . the resulting stays in litigation . . . drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock.").[24]

Bankruptcy filings due to asbestos-related liabilities continue to this day. *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

The plaintiffs in today's asbestos litigation are also increasingly remote. Workers who were exposed to significant amounts of asbestos (i.e., those prior to the advent of OSHA in 1971) are aging out. Now, cases often involve plaintiffs who can only claim minor exposures or who can only speculate that they may have breathed some asbestos because it was in a building.[25]

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[24] *See generally Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) ("The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system."); Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial Advoc. 479, 486, 488 (2014).

[25] *See, e.g.*, Paul M. Barrett, *The Smoking Congresswoman and Her Asbestos Lawsuit*, Bloomberg.com, Nov. 11, 2013 (describing asbestos-related lung cancer suit by "avid smoker" who claimed exposure "to trace amounts of asbestos because her father and brothers worked as boilermakers in U.S. Navy yards and power plants.").

Thus, asbestos trials are now often factually and legally dissimilar, as in the present case (e.g., different worksites, occupations, products, durations of exposure, diseases, and plaintiff health statuses). There are few, if any, efficiencies to be gained through consolidation. *See* Ableman *et al.*, *The Consolidation Effect, supra,* at 12 ("an examination of the trial duration for both individual and consolidated trial proceedings in NYCAL shows that the Court is not saving a material level of resources through consolidation."). In fact, more trial time *per plaintiff* can be taken up on consolidated trials. *See also Matter of New York City Asbestos Litig. (Abrams v. Foster Wheeler Ltd.)*, 2014 WL 3689333, at *4 (N.Y. Sup. Ct. N.Y. Cnty. July 18, 2014) ("of the most recent 13 asbestos trials in New York County, those with only one plaintiff lasted up to two weeks each, whereas those with more lasted as long as 16 weeks.... A case I tried recently commenced with three plaintiffs and 14 defendants. At the verdict, there remained three plaintiffs and five defendants. Jury selection lasted approximately two weeks, and the trial approximately 12 weeks. In the last case that I tried, we began with three plaintiffs and 10 defendants, jury selection took four weeks, and the three plaintiffs took approximately three weeks to present their cases against the three remaining defendants, with the trial lasting approximately five weeks.").

One reason is that jury selection takes longer in multi-plaintiff trials because jurors are asked to serve weeks, if not months. "[F]inding jurors who will commit

to a lengthy trial prolongs jury selection, as does the necessity of selecting extra alternates against the possibility that one or more jurors will seek to be released before the trial concludes." *Id.* This, in turn, leads to less diverse jury pools, another potential due process problem raised by consolidated trials.

Trials are also more complex. Efforts must be made to try to reduce juror confusion, and these instructions take time — yet still fail to prevent prejudice to defendants and potential due process problems. *See* Ableman *et al.*, *The Consolidation Effect, supra,* at 7 ("The disparity in the value of awards between plaintiffs in NYCAL consolidated and individual trials, as well as the rate of plaintiff victories in NYCAL consolidated trial settings, illustrates that a prejudice against NYCAL trial defendants is created during a consolidated trial despite whatever jury instructions, notebooks or other court devices are put in place to guard against confusion and bias.").

Then, there are the inevitable post-trial motions and appeals that flow from the extraordinary verdicts that are common in consolidated asbestos actions:

> In fact, 10 of the 14 NYCAL consolidated plaintiff awards since 2010 have been reduced on remittitur by an average of nearly 75%, with two additional jury awards getting vacated on appeal. In contrast, since 2010, none of the four plaintiff verdicts awarded in NYCAL individual trials have been remitted, with remittitur still pending in one case.

Id. at 2. Consolidation increases, rather than decreases, many burdens on the already overburdened courts, particularly the appellate courts. *See id.* ("[T]he

post-trial attorney and judicial resources required to correct these initial outcomes erases any judicial economy that consolidated trial settings were intended to achieve.").

B. Consolidations Invite More Filings

Consolidations are also inefficient because they encourage the filing of more cases. As Duke Law School Professor Francis McGovern has explained:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).[26]

These observations are often directed at mass trials, but they also apply to trial consolidations involving smaller numbers of plaintiffs. When leverage is applied to force defendants to settle weak or meritless cases, or pay inflated amounts to settle stronger cases, it is inevitable that plaintiffs will flock to take

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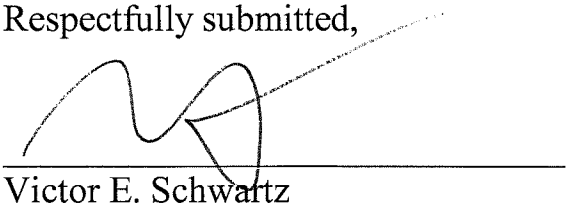
[26] *See also* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 232 (2006) ("However well-intentioned, these experiments [with aggregation] failed, not only as mechanisms to clear dockets and to adjudicate the claims then pending, but also by facilitating the increasing rate of claim filings. . . ."); Hensler, 26 Rev. Litig. at 910 (adoption of unconventional strategies to resolve asbestos cases "had the unintended consequence of attracting more litigation"); Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 249 (2000) (courts that emphasize efficiency over fairness invite litigation).

advantage of this situation. *See* Helen E. Freedman, *Product Liability Issues in Mass Torts — View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) ("Increased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases"); Robreno, *supra*, at 187 ("Aside from the significant due process issues raised by forcing parties to litigate or settle cases in groups, aggregation promotes the filing of cases of uncertain merit. The incentive becomes the number of cases that can be filed, *not* the relative merit of the individual case."); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945, 954 (2003) ("When plaintiffs learn that a particular forum will coerce settlement procedurally irrespective of the merits of their claims, one doubts whether that forum will remain unclogged for long."); *In re Asbestos Personal Injury and Wrongful Death Litig. Global*, 2014 WL 895441 (Md. Cir. Ct. Baltimore City Mar. 5, 2014) (rejecting a mass trial proposal, in part, because it "could breed forum shopping, thereby increasing the number of filings in this Court…."). Further, unjustified or exaggerated payments to earlier filing claimants could threaten recoveries by deserving future claimants.

CONCLUSION

For these reasons, the First Department's Decision and Order should be vacated and the case remanded for a new trial.

Respectfully submitted,



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Dated: February 29, 2016

IN THE NEW YORK COURT OF APPEALS
Docket No. APL-2014-00317

IN THE MATTER OF NEW YORK CITY 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.*	New York County Clerk's Office Index No. 190134/10 **AFFIDAVIT OF SERVICE FOR *AMICI CURIAE* BRIEF OF BUSINESS COUNCIL OF NEW YORK STATE *ET AL.* IN SUPPORT OF APPELLANT**

WASHINGTON, DISTRICT OF COLUMBIA) ss:

VICTOR E. SCHWARTZ, being duly sworn, deposes and says:

That deponent is an attorney duly admitted to practice before the Courts of the State of New York, that he is not a party to this action, he is over the age of eighteen years and resides in Virginia, and that on February 29, 2016, as counsel of record for *amici* Business Council of New York State *et al.* in the above-captioned matter he served three copies of the foregoing brief on the attorneys for the parties by overnight mail addressed to the following:

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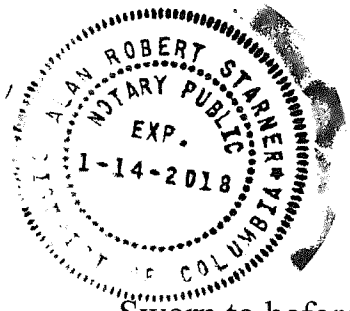

Victor E. Schwartz

Sworn to before me on the 29th day of February, 2016:

Notary Public

ALAN ROBERT STARNER
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 14, 2018