No. 116, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

W.R. GRACE & COMPANY, *et al.*,
Defendants.

On Motion for Leave to File Complaint in Original Jurisdiction

JOINT BRIEF OF DEFENDANTS AMERICAN BILTRITE INC., AZROCK INDUSTRIES INC., BASIC INCORPORATED, CAREY CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KENTILE FLOORS, INC., OWENS-CORNING FIBERGLAS CORPORATION, PFIZER INC., TURNER & NEWALL, PLC, UNITED STATES GYPSUM COMPANY AND USG CORPORATION IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTIONS PRESENTED

1. Whether the Court has original jurisdiction of this action, given that complete diversity is admittedly lacking?

2. If the Court has original jurisdiction, whether it should decline to exercise that jurisdiction on prudential grounds?

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INTRODUCTION

This brief in opposition is submitted jointly by Defendants American Biltrite Inc., Azrock Industries Inc., Basic Incorporated, Carey Canada, Inc., The Celotex Corporation, CertainTeed Corporation, Fibreboard Corporation, The Flintkote Company, Georgia-Pacific Corpora-

tion, H.K. Porter Company, Inc., Kentile Floors, Inc., Owens-Corning Fiberglas Corporation, Pfizer Inc., Turner & Newall, PLC, United States Gypsum Company and USG Corporation.[1] By this brief, such Defendants submit that Plaintiffs' Motion for Leave to File Complaint should be denied.

COUNTERSTATEMENT OF THE CASE

The lawsuit that is bounded by the Plaintiff-states' Proposed Complaint is an artificial construct. There is in reality no such lawsuit. There are instead 29 (or more) separate lawsuits. Each lawsuit is highly dependent on its own facts, and each turns on the local law of one of 29 States. Each suit will not necessarily involve the same group of Defendants, and each would include companies not presently named. Even on the Plaintiff-states' own view of the matter, their lawsuit—which they claim is necessary so that global relief can be granted—is incomplete and misshapen; 21 of their sister States are missing from the list of Plaintiffs. This is to say nothing of the owners of other buildings whose claims and interests, if any, are omitted from the proposed "global" Complaint.

What the Plaintiff-states describe under the headings "The Asbestos Crisis," Proposed Complaint, ¶ 5, and "The National Asbestos Problem," Brief in Support of Motion for Leave to File Complaint ("Pl. Br.") at 13, is neither a national problem, nor a crisis, nor a federal issue. If reason prevails over hysteria, this Court simply need not become involved with State law issues relating to asbestos in State buildings.

I. The Nature of Plaintiffs' "Asbestos Problem."

Plaintiffs' Brief opens with a narrative characterizing what the Plaintiffs label the "National Asbestos Prob-

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[1] Such Defendants join in this brief to the extent that they may do so without waiver of or prejudice to the claim that they have not been properly served by Plaintiffs. Their statements pursuant to Supreme Court Rule 29.1 are contained in the appendix to this brief.

lem." Pl. Br. at 12-18. The Plaintiffs' primary concern appears to be that sooner or later, even if no Congressional action requires it, they will spend money removing asbestos from buildings. The heart of the matter is described in the concluding paragraph of that narrative: "It appears that federal regulation of asbestos in the States' buildings is inevitable. Despite . . . federal mandates, there are no federal funds available to assist the States. . . ." Pl. Br. at 18. Even assuming such a federal mandate exists, and it does not, this problem is not properly addressed to this Court.

Contrary to the impression created by Plaintiffs, no federal law or regulation requires the removal of in-place asbestos-containing materials ("ACM") from buildings. The National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations, 40 C.F.R. §§ 61.140 *et seq.* (1988), *see* Pl. Br. at 16-17, are intended to prevent excessive emissions of asbestos fibers into the ambient air during renovation and demolition activities. The Occupational Safety and Health Administration (OSHA) regulations require workers who, by virtue of their activities, may be exposed to certain levels of asbestos fibers to take various safety precautions. *See* 40 C.F.R. § 763.120, *et seq.* (1988); 29 C.F.R. § 1926.58 (1988). The regulations promulgated pursuant to the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. §§ 2641-2655, simply require each school district to identify the ACM in its buildings and to implement management plans for dealing with such materials. They do not require the removal of any ACM. Moreover, the AHERA regulations encourage the adoption of the least burdensome method of dealing with such materials. 40 C.F.R. § 763.90 (1988).

The Environmental Protection Agency (EPA) has repeatedly recognized that the mere presence of asbestos-containing materials in a building does not pose a hazard to building occupants. Recently, for example, the EPA advised parents and teachers to:

> . . . remember that *mere presence of asbestos in a school doesn't necessarily mean that the health of its occupants is endangered.* Again, asbestos that is managed properly and maintained in good condition poses relatively little risk. Federal regulations do not require the removal of all friable asbestos from schools until the building is demolished. In fact, during the life of the building, other methods of dealing with the material are often preferable to removal.

EPA, *The ABCs of Asbestos in Schools* (June, 1989, p. 10) (emphasis in original).

Elsewhere, the EPA further cautioned that removal of ACM may actually create a hazard:

> Removal of asbestos from buildings, although attractive in concept, is not always the best alternative from a public health perspective. In fact, improperly performed removal of asbestos can result in a very high level of exposure for the occupants of that building and perhaps others as well.

U.S. Environmental Protection Agency, *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* (1988) (attached letter from Lee M. Thomas, EPA Administrator, to the Vice President and the Speaker of the House) ("Report to Congress").[2]

Similarly, there is growing consensus in the scientific community that massive asbestos removal efforts cannot be justified in light of the available scientific data:

> In the absence of epidemiologic data or estimations of risk that indicate that the health risks of environmental exposure to asbestos are large enough to justify high expenditure of public funds, one must question the unprecedented expenses on the order of $100 billion to $150 billion that could result from asbestos abatement.

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[2] Copies of this Report to Congress were lodged with the Clerk of the Court by Plaintiffs.

Mossman & Gee, *Medical Problems, Asbestos-Related Diseases*, The New England Journal of Medicine 1721, 1729 (June 29, 1989) (footnote omitted).

In fact, current scientific and medical data on building and other extremely low-dose exposure to asbestos strongly indicate that the "asbestos panic" is not supported by the evidence and is based on misinformation or inadequate information. As noted at a recent scientific symposium, non-occupational exposure to asbestos "carries minuscule risk" and "it is difficult to see" how mesothelioma (a cancer of the lining of the lung which is associated with workplace exposure to asbestos) could be attributed to non-occupational exposure:

> Although there is little evidence on exposure-response relationships . . . it all points clearly to the risk of mesothelioma being directly related to accumulated exposure. This means, of course, that non-occupational exposure, known to be at very low levels, carries minuscule risk . . . . In summary, it is difficult to see how any mesothelioma could be attributed to non-occupational exposure in the United States today.

Liddell, *Epidemiological Observations On Mesothelioma And Their Implications For Non-Occupational Exposure To Asbestos*, Symposium On Health Aspects Of Exposure To Asbestos In Buildings, Harvard University Energy and Environmental Policy Center, December 14-16, 1988 ("Harvard Symposium") at 56. A recent article in the magazine Science echoes these sentiments, noting that it is roughly 300-6000 times more dangerous for a school age child to cross a street than to attend a school which contains ACM. *See* Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, Science, at 229, Table 2 (January 19, 1990) (comparing risks from asbestos in schools to other risks in U.S. society).

The most recent data on airborne levels of asbestos fiber in buildings further undermine Plaintiffs' assertion that there is any "asbestos crisis." In its 1988 Report to Congress, the EPA noted that an interim study of 43

federal buildings containing ACM indicated that, even in buildings containing "significantly damaged" ACM, the level of airborne asbestos fiber was virtually the same as that found in the outside ambient air.

In short, the accumulating body of scientific and medical evidence establishes that the "problem" of asbestos in buildings has been overstated, that the risks associated with exposure to in-place products are minuscule at best, and that wholesale removal of ACM is not a required or recommended course of action. There is thus scant foundation for Plaintiffs' claim that this Court should expend its precious time and energy to address the "national asbestos problem" that they profess to perceive.

II. This Case Is in Reality an Aggregation of Complex Product Liability Actions Involving Several Thousand Buildings and the Claims of 29 Separate Plaintiffs, Each Requiring Independent Determinations of Complex Factual Issues.

In constructing their unitary "national asbestos problem," and the lawsuit that they propose to address it, Plaintiffs have ignored the complex factual and legal elements of what is, in fact, a multitude of lawsuits. The proposed action is not a single case that can be resolved by reference to a single set of facts and legal principles common to all Plaintiffs and all Defendants. Rather, this lawsuit is, in reality, a series of complex products liability actions involving the separate and inherently individual claims of 29 plaintiffs. It cannot be resolved without detailed, factual evidence about each of the potentially thousands of different asbestos-containing products allegedly installed in each of the thousands of Plaintiffs' buildings.

The history of the asbestos-in-buildings litigation highlights its fact-intensive and fact-specific nature. Since 1984, approximately thirty individual cases have gone to trial.[3] The trial records from these cases show that a

[3] Defendants have won approximately half of the cases tried.

crucial issue in these cases—whether the particular product as installed in a particular building is releasing asbestos fibers into the air in sufficient quantities to require remedial action—simply cannot be resolved without specific information about *each* product and *each* building. Similarly, whether or not a building has been "contaminated" as claimed, Pl. Br. at 19, necessarily depends on the actual condition of each building.

In each case tried to date, there has been substantial factual evidence about the type of product involved, the condition of the product in-place in each building, the type and amount of asbestos involved, and the location and accessibility of the product. Indeed, in every case tried to date, the plaintiffs themselves have introduced considerable evidence about such factors as the type, condition, age, and location of the product.

Further, the vast array of asbestos-containing products which are allegedly involved in this case materially differ from one another in a variety of ways. As Plaintiffs themselves concede, there are hundreds of different types of asbestos-containing products, with over 3,000 commercial applications. *See* Pl. Br. at 13. The physical characteristics of these products will vary depending on their intended uses, the formula used by the manufacturer, the amount and type of asbestos fiber the products contain, the other ingredients such products contain, the way the asbestos fiber is bound in the product, its ability to withstand wear and tear, and the dates of installations. *See, e.g., Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985) ("all asbestos-containing products cannot be lumped together in determining their dangerousness").

The federal regulatory scheme itself recognizes the distinction between different types of products, and requires an individual inspection and assessment of each asbestos-containing product in each building. For example, the regulations promulgated pursuant to AHERA

require school districts to make individual decisions about each product based on such factors as the type, condition, location and accessibility of the product in-place. 40 C.F.R. § 763.88 (1988).

The issues of Defendants' knowledge of the hazards of asbestos and their "duty . . . to warn the States of any dangers posed by their products," Proposed Complaint, ¶ 7, also require individualized factual proof. The relevant inquiry is not, as Plaintiffs claim, the general one into whether Defendants knew "of the link between exposure to asbestos fibers and disease" or failed to warn of the health hazards associated with asbestos exposure. Pl. Br. at 12. Rather, the relevant question is whether each Defendant knew that its products, *as installed*, posed a "hazard" and accordingly, had a duty to warn of this hazard. This, too, requires an individual determination of the hazards posed, if any, by each Defendant's products in place, as well as of each Defendant's knowledge of such hazards.

In addition to the overwhelmingly building-specific evidence that must be presented and considered in order to resolve the basic question of whether a building requires remediation of a "hazard," other pertinent issues, such as product identification and the existence of harm to Plaintiffs, also would have to be resolved prior to any finding on liability. These issues have been hotly contested in many of the cases tried to date, and have consumed substantial resources at trial.

Moreover the "hazard" issue, and other issues such as the state of the art of medical and scientific knowledge and product identification, are highly technical in nature and are the subject of extensive expert testimony at trial. For example, substantial medical and scientific testimony typically is introduced on the issue of hazard through a variety of expert witnesses, including pulmonologists, epidemiologists, pathologists, oncologists, industrial hygienists, microscopists, radiologists, toxicologists, biostatisti-

cians and others. Additional expert testimony is necessary on such issues as product identification and the application of the regulatory scheme to the building at issue. This expert testimony is not homogeneous, but varies from case to case depending on the facts.

The significant and complex factual disputes that must be resolved, as well as the inherently building-specific nature of the evidence, create manageability problems of such magnitude that this action should not be treated as a single action in any court, *cf.* Pl. Br. at 24, much less in an appellate court unaccustomed to functioning as a trier of fact.

SUMMARY OF ARGUMENT

I. The Motion for Leave to File should be denied because complete diversity is admittedly lacking, and therefore this case is not within the Court's original jurisdiction.

II. Plaintiffs have failed to demonstrate that no suitable alternative forum exists to hear these claims.

III. The Motion for Leave to File should be denied for each of the following prudential reasons:

A. Since it raises no issues of federal law or federalism, the Proposed Complaint is not of sufficient seriousness and dignity to warrant this Court's exercise of original jurisdiction.

B. This case is in reality an aggregation of complex product liability actions, which require building-specific fact-finding, and thus is inappropriate for the exercise of original jurisdiction.

C. Plaintiffs' Proposed Complaint under section 115 of the Restatement of Restitution raises State law issues, which have already been resolved adversely to Plaintiffs by certain State Supreme Courts. The exercise of original jurisdiction over such claims would therefore disrupt the orderly development of State law and undermine the authority of State Supreme Courts on matters of State law.

ARGUMENT

I. THIS CASE IS NOT WITHIN THE COURT'S ORIGINAL JURISDICTION.

A. Plaintiffs Improperly Seek to Bring Claims Between a State and Its Own Citizens Before This Court.

The original jurisdiction of this Court is both created and limited by Article III, Section two of the Constitution, which provides in part:

> The judicial Power shall extend to all Cases . . . between a State and Citizens of another State . . . .
>
> In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

U.S. Const. art. III, § 2, cl. 1, 2.[4] Although these provisions are "self-executing," *i.e.*, they do not require legislative implementation, *California v. Arizona*, 440 U.S. 59, 65 (1979), Congress has codified this jurisdictional grant at 28 U.S.C. § 1251(b)(3): the Supreme Court has original but not exclusive jurisdiction over "actions or proceedings by a State against the citizens of another State."

Despite this unequivocal language, Plaintiffs are attempting to bring an original action on behalf of all the Plaintiff-states against all Defendants, "regardless of their citizenship." *See* Proposed Complaint at ¶ 4. Plaintiffs make this representation even though they admit that at least 20 of the 26 Defendants are citizens of the Plaintiff-states. *Id.*, Exhibit A. Thus, for example, Connecticut has asserted claims against at least two Connecticut citizens (W.R. Grace & Co. and Raymark Industries), Delaware has raised claims against numerous Delaware citizens, and so on. *See id.* at ¶¶ 2-4. Plain-

[4] Even though clause two of section two speaks of "all" cases in which the state is a party, it is clear that this provision does not expand the Court's original jurisdiction beyond those cases specified in clause one, *e.g.*, between a state and citizens of other states. *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 465 (1945); *Massachusetts v. Missouri*, 308 U.S. 1, 19-20 (1939).

tiffs therefore are asking the Court to extend its jurisdiction beyond the plain language of Article III, and resolve claims between a State and its own citizens. However, this Court has frequently recognized that its jurisdiction cannot be extended to such cases.

The rule of *California v. Southern Pacific Co.*, 157 U.S. 229 (1895), as it has been applied and reaffirmed over the years, compels the conclusion that the Court's jurisdiction cannot be extended to this case. In *Southern Pacific*, the Court explicitly considered whether its original jurisdiction "can be held to embrace a suit between a State and citizens of another State *and* of the same State." *Id.* at 261-62 (emphasis added).[5] After reviewing the relevant constitutional and statutory provisions, as well as the case law, the Court concluded that the presence of an in-State citizen as a defendant divested the Court of original jurisdiction to consider the case. The State's claims were accordingly dismissed. *Id.* at 260-62. Here, by the Plaintiffs' own admission 20 of the 26 Defendants—taking the narrowest possible view of corporate citizenship—are citizens of one or another of the Plaintiff-states. Thus, the complete diversity required by *Southern Pacific* is demonstrably lacking.

To Defendants' knowledge, the Court has never deviated from the complete diversity rule, and has never permitted a state to maintain an original action where *any* of the defendants were citizens of the plaintiff-state. *See id.* at 258 ("it has never been held that the court could take original jurisdiction of controversies between a State and citizens of another State and its own citizens"). *Accord, Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 463 (1945) ("[i]f either of the defendants . . . is a citizen of Georgia and is a necessary party, leave to file would have been denied"); *New Mexico v. Lane*, 243 U.S.

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[5] The suit as filed in *Southern Pacific* apparently did not contain any California defendants, but the Court ruled that two citizens of that state were required to be joined as indispensable parties. *See id.* at 256.

52, 58 (1917) (joinder of an in-state resident would divest the Court of jurisdiction); *Minnesota v. Northern Securities Co.*, 184 U.S. 199, 245-47 (1902) (same); *Pennsylvania v. Quicksilver Mining Co.*, 77 U.S. (10 Wall.) 553, 556 (1871) (same). *See also Louisiana v. Cummins*, 314 U.S. 577 (1941) (*per curiam*) ("Leave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana").

Plaintiffs' response to this unbroken line of authority is unpersuasive. They first note, correctly, that the Court's original jurisdiction is derived directly from Article III, and not from Congress. They then point out that complete diversity is not constitutionally required for purposes of certain types of *district court* jurisdiction which are not involved in this case. Pl. Br. at 27. *See also* 28 U.S.C. § 1332(a).[6] From these two principles, Plaintiffs leap to the conclusion that there is a difference between "statutory" diversity and "constitutional" diversity in the context of *original jurisdiction*, with the latter (presumably) permitting this Court to exercise its original jurisdiction when there is only "minimal" diversity among the parties. Plaintiffs cite only one case to support this argument, *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967)—which did not even involve original jurisdiction—and acknowledge that the decisions of this Court are to the contrary. Pl. Br. at 27-28.

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[6] 28 U.S.C. § 1332(a) provides in part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy [*inter alia*] is between—
>
> (1) citizens of different states . . . .

Section 1332 and its predecessors have always been interpreted as requiring complete diversity, even if Article III does not compel that result. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

Assuming, *arguendo,* that there is a difference between constitutional and statutory diversity in the context of district court jurisdiction, the difference has no bearing on original jurisdiction. It is well-settled that Congress has no authority to expand or restrict the Court's original jurisdiction, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 174 (1803), and thus the diversity requirement in Article III is necessarily the same as the "statutory" diversity requirement in 28 U.S.C. § 1251. As a result, the cases cited above necessarily determined that complete diversity is required in original actions as a matter of constitutional interpretation. These cases either explicitly or implicitly interpret Article III, section two, as requiring complete diversity of citizenship between *all* of the plaintiffs and *all* of the defendants in an original action. Plaintiffs' unexplained distinction between statutory and constitutional diversity does nothing to undermine this conclusion.[7]

Plaintiffs' argument also ignores a distinct line of cases foreclosing the broad reading of Article III which they seek. In *Ex parte Vallandigham,* 68 U.S. (1 Wall.) 243 (1864), for example, the Court made it clear that its

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[7] It should be noted that Plaintiffs' allegation that *Southern Pacific* and its progeny rely on a "mere incantation" of *Strawbridge v. Curtiss,* and that the analyses in those cases are cursory, Pl. Br. at 27-28, is descriptively inaccurate. Indeed, *Southern Pacific* does not rely upon *Strawbridge* at all. Moreover, the *Southern Pacific* opinion, discussed above, contains a thorough analysis of the diversity issue, and notes the potential distinction between constitutional and statutory diversity. *See Southern Pacific,* 157 U.S. at 257-62. As the *Southern Pacific* Court noted, "[w]hat Congress may have power to do . . . is not the question, but whether, where the *Constitution* provides that this Court shall have jurisdiction in cases in which the State is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State." 159 U.S. at 261-62 (emphasis added). The Court then held that its constitutional jurisdiction did not embrace such a suit. *Id.*

original jurisdiction extends only as far as the literal language of Article III will allow:

> *The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases.*

Id. at 252 (emphasis in original, footnote omitted). *Accord, Marbury v. Madison*, 5 U.S. (1 Cranch) at 175. Thus, by granting the Court power to consider original actions between States and citizens of other States, the Constitution by implication prohibits the consideration of claims by States against their own citizens. *See also California v. Southern Pacific*, 157 U.S. at 261 (Court's original jurisdiction is restrictive, and should not be expanded by judicial construction).

The Plaintiffs' citation to *State Farm v. Tashire* does not change the analysis. In that case the Court reviewed a Ninth Circuit interpretation of the federal interpleader statute, 28 U.S.C. § 1335, which requires that "two or more" of the adverse claimants be of diverse citizenship.[8] After reviewing the "language of the statute, [its] legislative purpose . . . and the consistent judicial interpretation tacitly accepted by Congress," the Court concluded that the district court's jurisdiction could be sustained where there was only minimal diversity between the parties. 386 U.S. at 530. The Court then considered whether its interpretation went beyond the jurisdictional limits set forth in the Constitution, and simply concluded

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[8] The interpleader statute provides in part:

> The district courts shall have original jurisdiction of any civil action of interpleader . . . if (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of [Title 28], are claiming or may claim to be entitled to [money held by a non-claimant] . . . .

28 U.S.C. § 1335(a). The States' claim that this jurisdictional language is "essentially the same" as that in Article III, section 2, Pl. Br. at 27, is obviously inaccurate.

that "Article III poses no obstacle to the legislative extension of federal jurisdiction . . . so long as any two adverse parties are not co-citizens" for cases arising under that statute. *Id.* at 531.

However "refined" the *Tashire* analysis may have been, Pl. Br. at 28, it was an analysis of an issue that is not the issue here. Contrary to the suggestion in Plaintiffs' Brief, *Tashire* says nothing about the scope of this Court's original jurisdiction, nor does the opinion in any sense suggest that there is a "necessary distinction between constitutional and statutory diversity." *Id.* The Court there simply held that Congress may extend the jurisdiction of the district courts—under the constitutional grant of jurisdiction over controversies between citizens of different states—to interpleader actions in which some of the claimants are citizens of the same state. It has thus been taken as establishing that, *under a grant of jurisdiction not at issue in this case,* "complete diversity is not a constitutional requirement." *Owen Equipment Erection Co. v. Kroger,* 437 U.S. 365, 373 n.13 (1978). But *Tashire* does not impair or call in question the Court's repeated decisions that the Constitution, under the grant of jurisdiction of controversies between "a State and Citizens of another State," *does* require complete diversity.

There remains only to be considered the Court's remark in *Utah v. United States,* 394 U.S. 89, 96 (1969) (*per curiam*), that if a citizen of Utah sought to intervene in that case, "we would be required to decide the difficult constitutional question as to whether this Court may retain its original jurisdiction over an action in which complete diversity of citizenship no longer exists . . . ." *Utah* concerned a long-standing dispute between Utah and the United States over the ownership of the Great Salt Lake. As a part of an effort to resolve the dispute, Congress provided for an action in this Court by Utah against the United States to determine the federal interest in the lake that Congress directed be quitclaimed to Utah. P.L. 89-441, § 5(b), 80 Stat. 192

(1966); P.L. 89-542, 80 Stat. 349 (1966). The constitutional source of judicial power, enabling Congress to provide for such a suit, was the provision of Article III extending the judicial power to "Controversies to which the United States shall be a Party."[9] Congress could direct the case to be brought in this Court originally because the case was also one in which "a State shall be Party."

The point is that the Court's jurisdiction in *Utah v. United States*, in the first instance, did *not* rest on Utah's suing a citizen of another state (which indeed Utah was not doing). A private party claiming an interest in the lake bed then sought to intervene. This Court's special master denied intervention, and the Court sustained him. It was in that context, and as an afterthought, that the Court's remark was made.

Thus, jurisdiction in the first instance did not depend on diversity but derived from a wholly different grant of Article III power. Moreover, the Court had already disposed of the intervention motion by holding that, "the presence of Morton and similar property owners is neither necessary nor appropriate." *Id.* at 92. The comment in *Utah* is a *dictum* relating only to intervention; *Southern Pacific* and its progeny are not cited or discussed. Thus, Plaintiffs' suggestion that the *Utah* Court intended to open the *Southern Pacific* rule to reconsideration (or reverse it) strains credulity, to say the least.

Ultimately, the Plaintiffs' argument is nothing more than a request to overrule (or ignore) the Court's earlier decisions, and create a new rule for this case. Plaintiffs have not offered a legitimate justification for such a dramatic move, and none is apparent.[10] The rationale for

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[9] Memorandum for the United States on Report of Special Master and Exceptions Thereto by Morton International, Inc. at 24, *Utah v. United States*, No. 31, Orig., O.T. 1968.

[10] The Plaintiffs suggest that the earlier cases should not govern the current action, because the Court has never considered a case

permitting original actions between States and citizens of other States is to prevent any local bias that may be present where a State sues a citizen of another State in the courts of another State. *See Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 289 (1888); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4046 at 209 (2d ed. 1988). This rationale has no application to a State's claims against its *own* citizens.

B. Plaintiffs' "Alternative" Basis Fails to Create Jurisdiction in This Court.

Plaintiffs obviously recognize the weakness of their arguments, because they offer an "alternative" basis for jurisdiction. They ask that they be permitted to dismiss voluntarily the claims of some States against their own citizens, leaving only the claims that each State could assert against the out-of-state Defendants. Pl. Br. at 28. Thus, as set forth in Exhibit A to the Proposed Complaint, Connecticut would purportedly dismiss its claims against the Connecticut citizens, Delaware against the Delaware citizens, and so on.[11]

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brought by "a majority of the states, in furtherance of their quasi-sovereign and proprietary interests." Pl. Br. at 28. Of course, jurisdiction is determined by the Constitution, not by a plebiscite of plaintiffs, and the scope of the Court's jurisdiction does not change because of the number of plaintiffs involved. *See Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972) (rejecting argument "that the sheer number of States that seek to invoke our original jurisdiction in this motion is reason enough for us to grant leave to file") (footnote omitted).

[11] Plaintiffs have assumed without discussion that the Defendant corporations are "citizens" only of the state where they are incorporated. However, in analogous situations a corporation is considered a citizen *both* of its state of incorporation *and* the state where it has its principal place of business. *See* 28 U.S.C. § 1332 (c) (defining "citizen" for purposes of diversity jurisdiction in district courts); 28 U.S.C. § 1335(a) (adopting definition of citizenship in § 1332 for interpleader statute); *R.G. Barry Corp. v. Mushroom Makers*, 612 F.2d 651 (2d Cir. 1979) (corporation is a "citizen"

This proposal exposes Plaintiffs' lawsuit for the sham that it is. The grand single action that, in Plaintiffs' rhetoric, promises a global solution to a unitary national problem is thus reduced to a confusing series of balkanized claims: Delaware is suing W.R. Grace & Co. and Armstrong World Industries, Inc., but not National Gypsum Co. or United States Gypsum Co.; Connecticut is suing National Gypsum Co. and United States Gypsum Co., but not W.R. Grace & Co. or Raymark Industries; [12] and so forth. *See* Proposed Complaint Exhibit A.

Before even reaching the legal adequacy of such a gerrymandered case, it must be noted that such gerry-

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of the state where it has its principal place of business for purposes of removal under 28 U.S.C. § 1441).

Two cases decided in the nineteenth century, *Pennsylvania v. Quicksilver Mining Co.*, 77 U.S. 553, 556 (1871) and *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 287 (1888), note that a corporation is a citizen of its state of incorporation for purposes of this Court's original jurisdiction. However, neither case creates an explicit constitutional rule that a corporation is *only* a citizen of its state of incorporation; indeed, Plaintiffs make no argument that these cases create such a rule.

In any event, the rationale for original jurisdiction supports the view that corporate defendants in an original action under Article III are also citizens of the State where they have their principal place(s) of business. There is no need to "protect" a State from having to sue a corporation headquartered within its borders in its own State courts, nor are there any personal jurisdiction problems with such a suit. Given the rationale, and given that this Court's jurisdiction should be narrowly construed, *see California v. Southern Pacific*, 157 U.S. at 260-61, it would be curious if a corporation were *not* considered a citizen of the state where it has its principal place of business for purposes of this Court's original jurisdiction. Because in the current case Plaintiffs' alternative proposal fails to account for the dual citizenship of these Defendants, the States are continuing to assert claims against their own citizens. As noted above, the Court's jurisdiction simply does not encompass these claims.

[12] Plaintiffs do not explain how (or even whether) Connecticut's purportedly "grave" claims against W.R. Grace & Co., for example, would be resolved under the alternative proposal.

mandering makes the "complete relief" which supposedly supports jurisdiction here impossible. It also creates a hopeless bog of confused claims in an already complex case.

Moreover, Plaintiffs' proposed means of escaping their jurisdictional dilemma is legally inadequate on its face. Plaintiffs' alternative would still leave a case in which certain Defendants were citizens of certain of the Plaintiff-states, even though no claims would be asserted directly by any State against its own citizens. Under the complete diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), it has long been recognized that "where more than one plaintiff sues more than one defendant and the jurisdiction rests on diversity of citizenship, *each plaintiff* must be capable of suing *each defendant.*" *Soderstrom v. Kungsholm Baking Co., Inc.*, 189 F.2d 1008, 1013-14 (7th Cir. 1951) (emphasis added). Thus, absent a showing that the *Strawbridge* rule does not apply in this context, Plaintiffs' alternative proposal is inadequate on its face.

Moreover, even if the Plaintiffs could gerrymander their claims to avoid the jurisdictional bar, the more fundamental problem adverted to at the outset of this section would remain. By "gerrymandering" their allegations so that some States are raising claims against one group of Defendants, and other States against a different group of Defendants, the practical effect is to create as many as 29 individual lawsuits,[13] rather than a single, unified case. However, the manageability problems of considering 29 individual suits, each containing the balkanized claims discussed above, would be even greater

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[13] The actual number may be lower, since more than one State may be able to assert its claims against the same group of Defendants. By failing to consider each Defendant corporation's dual citizenship, however, Plaintiffs have given no basis for determining the exact number of separate suits that would be created (*see supra*, note 11).

than the problems of resolving the 29 sets of un-balkanized claims in one case. *Cf.* pp. 33-39, *infra* (discussing the manageability problems of the current case) and Pl. Br. 24 (conceding that "manageability problems could preclude the certification of a class action" in this case). In any event, the existence of these 29 individual actions simply illustrates the lack of merit in Plaintiffs' arguments about the necessity, efficiency, and feasibility of bringing their claims in a single proceeding.

The manageability problems and other prudential concerns that counsel against accepting jurisdiction in this case are discussed more fully below. For current purposes, it is sufficient to note that: a) the Court has no jurisdiction over a suit that involves claims by a State against citizens of the same State; b) the Proposed Complaint in this case, *including* the alternative, gerrymandered allegations, contains claims by States against their own citizens; and c) individual States cannot selectively dismiss claims against individual Defendants without changing this action into a series of individual and distinct lawsuits.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT NO SUITABLE ALTERNATIVE FORUM EXISTS TO HEAR THESE CLAIMS.

The jurisdictional statute invoked by Plaintiffs—28 U.S.C. § 1251(b)(3)—provides that the jurisdiction of this Court is original but not exclusive. Nevertheless, Plaintiffs argue that the Court should exercise its nonexclusive jurisdiction because they "have no other tribunal to which they may turn." Pl. Br. at 22. This argument is unpersuasive in two respects. Principally, it is wrong in its premise. There is no reason why there must be a single forum capable of hearing the 29 separate lawsuits that Plaintiffs have bundled into one purported action. In any event, Plaintiffs have not demonstrated that there is in fact no alternative forum available for their bundle of lawsuits.

It is unclear whether Plaintiffs' argument is based on the belief that other courts would lack subject matter jurisdiction over the case, personal jurisdiction over the Defendants, or both. Plaintiffs are certainly correct to the extent they postulate that no other *federal* court could exercise *subject matter* jurisdiction over the claims raised in the Complaint; there is no federal question presented, and "28 U.S.C. § 1332 (1982) does not include matters in which a state is a party." Pl. Br. at 22.[14] However, Plaintiffs' entire argument on the availability of a *State* court, as a forum for their 29 cases masquerading as one, is the unsupported assertion that "there is no one state forum that can adequately obtain jurisdiction over all of the parties." Pl. Br. at 23. This cryptic, conclusory assertion appears to address itself to limits on *personal* jurisdiction.[15]

Putting aside the question whether this Court may exercise broader personal jurisdiction than a State court of general jurisdiction (a point simply assumed by the Plaintiffs), Plaintiffs have failed to show that there is no state forum that could exercise personal jurisdiction over all the Defendants. Indeed, in this age of expanded long-arm jurisdiction, Plaintiffs' unsupported assertion that there is no such State forum is most dubious. Although Defendants do not concede that there is such a forum,

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[14] *But see Asbestos School Litigation,* Master File No. 83-0268 (E.D. Pa.), in which the district court, sitting solely in diversity, dismissed with prejudice the claims of the State of Hawaii against two settling defendants in a class action. The district court apparently assumed it could exercise pendent party jurisdiction over Hawaii to accomplish this. *But see Finley v. United States,* 109 S.Ct. 2003 (1989). The United States Court of Appeals for the Third Circuit dismissed Hawaii's appeal as untimely. *See* 862 F.2d 310 (3d Cir. 1988) (table), *cert. denied,* 109 S. Ct. 1955 (1989)

[15] This assertion presumably refers to perfecting personal jurisdiction over *Defendants.* Plaintiffs do not appear to argue that they could not voluntarily submit themselves to the personal jurisdiction of a single State court.

Plaintiffs' mere allegation, without any evidence or analysis, does not justify the conclusion that one or more Defendants would be beyond the jurisdictional reach of every State court in the country.

A more serious problem with Plaintiffs' argument is that their underlying premise is wrong. Even were there no single alternative forum, Plaintiffs have given no persuasive reason why they must bring their 29 separate claims to a single court in a single proceeding. Given the need to apply 29 different sets of State laws, a point more fully addressed below, any purported efficiency in considering these claims together will be more than offset by the hopelessly unmanageable nature of the proposed action. The obvious and logical solution to these problems is for Plaintiffs to do what several other States have already done: bring their individual claims in their own State courts. *See, e.g., Commonwealth of Kentucky v. U.S. Gypsum Co., et al.*, No. 85-CI-1915 (Ct. Just., Franklin Cir. Ct., Ky., filed Dec. 30, 1985); *Commonwealth of Virginia v. Owens-Corning Fiberglas Corp., et al.*, No. LJ-414-2 (Cir. Ct. Cty. of Richmond, Va., filed Feb. 26, 1985); *State of Maryland v. Keene Corp., et al.*, No. 1108600 (Cir. Ct. Anne Arundel Co., Md., filed Sept. 20, 1984).

Defendants recognize that the Court will not decline to exercise original jurisdiction where to do so would "disserve any of the principal policies underlying the Article III jurisdictional grant." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499 (1971). However, declination of jurisdiction here would not disserve such policies.

In *Ohio v. Wyandotte* the Court delineated the policies underlying original jurisdiction as being (1) the belief that a State should not be compelled to resort to tribunals of other States because of the appearance of partiality or partiality in fact, and (2) the necessity of an alternative forum for States in which they could obtain personal

jurisdiction over non-residents. *Id.* at 500. There, the Court found that remitting that case to the Ohio courts did not undermine either of these policies, since "[t]he courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy. . . ." *Id.*

In this case, requiring each of the Plaintiff-states to litigate its respective claims in *its own* State courts would not contravene the policies of Article III. Obviously, prosecution of its claims in each State's *own* courts would not leave the Plaintiff-state subject to potential local bias in favor of a local defendant.[16] In addition, there has been no showing that personal juridiction problems exist, and thus there is no need to invoke the jurisdiction of this Court to avoid such problems. *See Ohio v. Wyandotte*, 401 U.S. at 499-501.

Moreover, State trial courts have two significant advantages over this Court in adjudicating this case: (1) they are far more familiar with the State law principles which govern Plaintiffs' claims, and (2) as trial courts, they are equipped for and accustomed to the fact-finding which this case will require.

There is, in short, no conceivable ground for concern that, if this Court denies the Motion for Leave to File, Plaintiffs will be left without an appropriate tribunal or tribunals to hear and decide their claims. Indeed, the State trial courts provide far more appropriate forums for the fact-intensive, State law claims which Plaintiffs propose to bring.

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[16] Indeed, Plaintiffs' attempt to bring this action in this Court is ironic in that it is beyond dispute that each Plaintiff could bring its claim in *its own courts*, but has chosen not to. Article III original jurisdiction was not intended to be employed where, as here, a State seeks an alternative to its own courts.

III. THE COURT SHOULD DENY LEAVE TO FILE FOR PRUDENTIAL REASONS.

Pursuant to Article III, Section 2, clause 2 of the Constitution and 28 U.S.C. § 1251(b)(3), this Court has original but non-exclusive jurisdiction over actions by a state against the citizens of another state.[17] However, the Court has recognized that the exercise of non-exclusive jurisdiction is discretionary. Indeed, in recent years, it has limited access to original jurisdiction in these types of suits. *See Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Arizona v. New Mexico*, 425 U.S. 794 (1976).[18] In that regard, the Court has consistently expressed the view that its original jurisdiction under Article III, Section 2, "should be invoked sparingly." *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972) (quoting *Utah v. United States*, 394 U.S. 89, 95 (1969)). In that case, the Court outlined its philosophy and reasoning as follows:

> We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet

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[17] As noted earlier, this grant was originally based upon a concern by the framers of the Constitution that there be a forum for the adjustment of interstate differences without "the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens." *Wisconsin v. Pelican Insurance Company*, 127 U.S. 265, 289 (1888).

[18] Cases in which the Court has accepted jurisdiction in recent years have involved the interpretation of federal statutes or other significant issues of federal concern or interest. *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945) (federal antitrust claims); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (state use tax impacts interest of United States); *South Carolina v. Regan*, 465 U.S. 367 (1984) (Internal Revenue Code and the Anti-Injunction Act).

> beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.

Id.

The prudential factors on which the Court has primarily focused in deciding whether to exercise its original jurisdiction are: the existence of other forums for the resolution of the claims, the nature of the plaintiff's claims as they relate to the Court's role in the federal judicial system, and the ability of the Court to act as a trier of fact in the proposed litigation. These factors cry out for a declination of jurisdiction here.

As previously demonstrated, there exist other more appropriate forums for the resolution of these 29 claims. Even assuming the existence of jurisdiction, the Court should deny the motion for leave to file in its discretion because, as will be more fully demonstrated below, (A) the issues raised here are exclusively State law issues; they do not implicate the important problems of federal law or federalism for which this Court is primarily responsible, and for which its limited time and energies should be reserved; (B) these claims require the resolution of complex technical and factual questions which would seriously tax the Court's resources—to the point, indeed, that it might have to sit with a jury for the first time in two centuries (*see infra*, note 29)—and impinge upon its primary duty as the final federal appellate court; and (C) the exercise of original jurisdiction in these State law cases would necessarily interfere with the development of State law and undermine the authority of State Supreme Courts on matters of State law.

A. Since It Raises No Issues of Federal Law or Federalism, the Proposed Complaint Is Not of Sufficient Seriousness and Dignity to Warrant This Court's Exercise of Original Jurisdiction.

1. *Plaintiffs' Claims Are Based On State Law and Thus Are Outside This Court's Primary Responsibility.*

This Court has repeatedly said that, unless it places prudential limitations on the exercise of its original jurisdiction, it will find itself embroiled in all manner of local disputes to the detriment of its role as the federal appellate tribunal of last resort.[19] To avoid this result, the Court has consistently held that it will not exercise such original jurisdiction unless, *inter alia*, important issues of federal law or federalism are involved.[20] *See*,

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[19] This concern was perhaps best explained in *Ohio v. Wyandotte Chemicals Corp.*:

> As our social system has grown more complex, the states have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. . . . It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies. The simultaneous development of 'long-arm jurisdiction' means, in most instances, that no necessity impels us to perform such a role. And *the evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law.* As the impact on the social structure of federal common, statutory and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. *We have no claim to special competence in dealing with the numerous conflicts between States and non-resident individuals that raise no serious issues of federal law.*

401 U.S. at 497-98 (emphasis added).

[20] Insofar as this Court's earlier cases reflect the exercise of original jurisdiction over other kinds of cases, such as those raising essentially State law claims (*e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)), they generally reflect the absence of

e.g., Missouri v. Illinois, 180 U.S. 208 (1901); *Kansas v. Colorado*, 206 U.S. 46 (1907); *New York v. New Jersey*, 256 U.S. 296 (1921); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); and *Oregon v. Mitchell*, 400 U.S. 112 (1970). In recent years the Court has refused to accept original jurisdiction in cases which are "bottomed on local law," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 497, or which because of the nature of the factual issues involved would best be considered "in the context of localized situations." *Washington v. General Motors*, 406 U.S. at 116.

In *Ohio v. Wyandotte*, for example, the State of Ohio sought leave to file a complaint against three chemical manufacturers to abate an alleged nuisance. The nuisance alleged was the contamination and pollution of Lake Erie from the dumping of mercury into its tributaries. Finding that the Court's "paramount responsibilities . . . lie almost without exception in the domain of federal law," the Court declined to exercise jurisdiction because the matters were based in State nuisance law and would best be resolved in a State forum.[21] 401 U.S. at 497.

Here, Plaintiffs attempt to create some semblance of a federal issue by premising their claim on section 115 of the Restatement of Restitution, as if the Restatement were a universal statute or federal common law which

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long-arm jurisdiction in that era and the concomitant absence of personal jurisdiction in another forum. *See* the discussion in *Ohio v. Wyandotte*, at 401 U.S. 497-98. They also reflect the fact that, even as late as 1907, the Court's primary duty to decide constitutional issues and issues of federal law did not weigh nearly so heavily as it does today. *Id.*

[21] The Court has since held that the Federal Clean Water Act preempts the State nuisance law involved in *Ohio v. Wyandotte*. *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). However, this in no way undermines the *Ohio v. Wyandotte* Court's conclusion that State law claims are best resolved in a State forum.

could be uniformly applied to all Defendants.[22] Contrary to Plaintiffs' claims however, the Restatement of Restitution does not transform local remedies law into federal jurisprudence. To the contrary, both this Court's decisions and the Restatements themselves demonstrate that Plaintiffs' section 115 claims arise under State law.[23]

In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that

> Except in matters governed by the Federal Constitution or by Acts of Congress, *the law to be applied in any case is the law of the State.* . . . There is no federal general common law.

Id. at 78 (emphasis added). Since *Erie*, this Court has refused to sanction the application of federal common law absent a uniquely federal interest (such as a federal obligation or the liability of a federal officer) implicated by the case. *Boyle v. United Technologies Corp.*, 487 U.S. 500, ——, 108 S.Ct. 2510, 2513-14 (1988). Plaintiffs make no argument that their section 115 claims involve any of the foregoing federal interests.[24] Accordingly, under the *Erie* doctrine, State law is to be applied.

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[22] Generally, asbestos property damage actions involve consideration of numerous State law theories of liability, including strict liability, negligence, breach of warranty, nuisance, conspiracy, and concert of action as well as defenses bottomed on State law, including statutes of limitations and repose, state-of-the-art and contributory negligence. *See generally* Note, *Asbestos Abatement: The Second Wave of the Asbestos Litigation Industry*, 27 Washburn L.J. 454, 483 (1989).

[23] We note parenthetically that at least one of the petitioning parties, the Attorney General of Illinois, would have this Court grant relief under the Public Assistance Doctrine, despite a decision of the Illinois Supreme Court expressly holding that cause of action unavailable in asbestos property damage cases. *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 137 Ill.Dec. 635 (1989).

[24] In conceding the absence of federal question jurisdiction, Pl. Br. at 23, Plaintiffs effectively acknowledge that this case is governed by State law and not by "federal common law." *See Illinois*

Moreover, the Restatements themselves indicate that restitution is a matter of local law. The Restatement (Second) of Conflict of Laws provides in section 221 that "actions for restitution . . . are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties. . . ." Thus, to determine each State's claim, the Court would look to the law of the State in which the building at issue is located, and thus would have to apply the law of 29 different States.[25]

In that regard, this Court said in *Ohio v. Wyandotte* that:

> . . . much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities lie . . . almost without exception in the domain of federal law. . . . *We have no claim to special competence in dealing with the numerous conflicts between states and non-resident individuals that raise no serious issues of federal law.*

401 U.S. at 497-98 (emphasis added). Moreover, it must be borne in mind that the State trial courts—courts

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v. Milwaukee, 406 U.S. 91, 99-100 (1972). As for Plaintiffs' reference to a case alluding to federal common law, Pl. Br. at 24-25, we note that there is no rationale here for the Court to intrude upon the domain of State legislatures and courts by adopting federal common law on the substantive points at issue here. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 109 S. Ct. 2909, 2921-22 (1989) (Court declined to adopt federal common law as to excessiveness of jury awards of punitive damages).

[25] In diversity cases, federal district courts are required to apply the choice of law rules of the State in which they sit. *See Klaxon Co. v. Stentor Elect. Mfg. Co.,* 313 U.S. 487 (1941); *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938); 28 U.S.C. § 1652. In citing to the Restatement, Defendants nevertheless recognize that, having exercised jurisdiction in so few diversity cases in the half-century since the *Erie* doctrine was adopted, this Court does not appear ever to have addressed the question of whose conflict of law rules it must apply in such cases. This threshold issue is yet another complication Plaintiffs have blithely ignored.

whose special competence *is* the application of local law *and* the fact finding which this case requires—are available as alternative forums. Accordingly, as in *Ohio v. Wyandotte* so too here, this Court should decline to exercise original jurisdiction.

2. *Despite the Alleged "Serious" Nature of Plaintiffs' Claims, They Do Not Involve the Kinds of Issues for Which This Court Is Primarily Responsible.*

Plaintiffs argue that the potentially large numbers of persons occupying state buildings who may be exposed to asbestos, and the potentially high cost of asbestos abatement, give rise to issues of a "serious and extraordinary magnitude" requiring this Court's attention. Pl. Br. at 19. As previously demonstrated, Plaintiffs' assertions in this regard are overblown, to say the least. However, even if these assertions had any merit, they still would not support the exercise of original jurisdiction in this case.

In the first instance, the extent of alleged economic injury and the number of citizens potentially affected are not the primary factors which this Court considers in evaluating whether to exercise its original jurisdiction. To the contrary, the Court is primarily concerned with the nature of the issues raised and the injuries complained of as they relate to this Court's role in the federal judicial system. Thus, the fallacy in Plaintiffs' argument is that it focuses on the asserted *economic* "gravity" of the claims. As will be demonstrated below, it is not the economic magnitude of any claim which warrants this Court's consideration of that claim; rather, it is the importance of the issues raised—seen in the context of this Court's role in our federal system—which may warrant consideration of the claim.

Maryland v. Louisiana, 451 U.S. 725 (1981), on which Plaintiffs mistakenly rely, Pl. Br. at 20, is illustrative. In that case, the Court made clear that in evaluating the

magnitude of the claims of several States, it considered more than the mere monetary value of the alleged injury. There the Court accepted jurisdiction over a constitutional challenge to Louisiana's "first-use" tax. However, it did so because the case presented issues having serious implications for interstate relations, not because of the dollar amount involved. In explaining its decision, the Court stated:

> Unlike the day-to-day taxing measures which spurred the Court's observations in *Wyandotte*, it is not at all a "waste" of this Court's time to consider the validity of a tax with the structure and effect of Louisiana's First-Use Tax. Indeed, there is nothing ordinary about the Tax. *Given the underlying claim that Louisiana is attempting, in effect, to levy the Tax* as a substitute for a severance tax on gas extracted from areas that belong to the people at large *to the relative detriment of the other States in the Union, it is clear that the First-Use Tax implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction.*

Id. at 744 (emphasis supplied).[26]

The issues involved here are clearly distinguishable from the issues of federalism involved in *Maryland v. Louisiana*. Here, the action is, in essence, nothing more than a group of claims for property damage under product liability law involving principles of local law. Like the claims in *Ohio v. Wyandotte*, the instant claims

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[26] In his dissenting opinion, Justice Rehnquist recognized the Court's need to consider the " 'nature of the interests of the complaining state,' " and " 'the essential quality of the right asserted.' " *Id.* at 764. He added the view that "Requiring that a State's claim implicate sovereignty interests also serves the oft-repeated expression in our opinions that the Court will not interfere with action by one State unless the injury to the complaining State is of 'serious magnitude.' " *Id.* at 766 n.3 (citing *Alabama v. Arizona*, 291 U.S. 286, 292 (1934); *Colorado v. Kansas*, 320 U.S. 383, 393 and n.8 (1943)).

do not "implicate serious and important concerns of federalism" and lack the "seriousness and dignity" of the few other State claims that the Court has chosen to hear in recent decades.

Even if the problems Plaintiffs cite were as significant as Plaintiffs claim [27] the exercise of original jurisdiction still would be inappropriate. In *Ohio v. Wyandotte*, for example, the Court specifically noted that although it declined jurisdiction, it nevertheless recognized that the issues presented were of public importance and deserving of careful consideration by the appropriate tribunal:

> What has been said here cannot, of course, be taken as denigrating in the slightest the public importance of the underlying problem Ohio would have us tackle. Reversing the increasing contamination of our environment is manifestly a matter of fundamental import and utmost urgency. What is dealt with above are only considerations respecting the appropriate role this Court can assume in efforts to eradicate such environmental blights. We mean only to suggest that our competence is necessarily limited, not that our concern should be kept within narrow bounds.

401 U.S. at 505.

Likewise, in *Washington v. General Motors*, 406 U.S. 109 (1972), the Court declined to exercise jurisdiction despite the number of States which joined in the motion [28] and the fact that the proposed Complaint under the federal antitrust laws "plainly present[ed] important questions of vital national importance." *Id.* at 112.

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[27] As noted above on pp. 2-6, Plaintiffs' unsupported claims about the scope of the "asbestos problem" in buildings simply do not bear scrutiny.

[28] In addition to the 18 named plaintiffs, 16 States and the City of New York filed a brief as *amicus curiae*, supporting the plaintiffs' Motion. *Id.* at 113 n.3.

The instant case, whether or not Plaintiffs' purported "asbestos problem" exists, does not raise issues of federal law or federalism. It raises issues of State law, issues which are not this Court's responsibility. Accordingly, even if Plaintiffs' claims about the economic magnitude of the problem could be accepted, this would be an inappropriate case for the exercise of the original jurisdiction of the highest federal appellate court.

B. This Case Raises Numerous and Complex Factual, Scientific and Technical Issues Which Are Singularly Inappropriate for Trial in an Appellate Court.

1. *The Court Is Ill-Equipped to Deal With the Factual and Technical Complexities Which this Case Would Present.*

Plaintiffs seem to take the position that the Court should be especially receptive to their motion merely because 29 Plaintiff-states have joined. Not so. Here, where each of 29 States seeks to prosecute its own claim against a number of Defendants, the resulting jumble of parties and claims is a compelling reason to decline jurisdiction. Plaintiffs themselves underscore this point when they say that "manageability problems may preclude the certification of a class action in state courts." Pl. Br. at 24. If that is true, the manageability problems can only be worse in this nine-member, appellate tribunal.

Historically, this Court has held that considerations of convenience, efficiency and justice warrant the discretionary declination of original jurisdiction in certain cases brought by States against citizens of other States. *See, e.g., Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939); *Rogers v. Guaranty Trust Company*, 288 U.S. 123, 130-131 (1933). Specifically, the Court has found that the acceptance of original jurisdiction is inappropriate where technical or complex factual questions are presented, because the Court, as an appellate tribunal, is not well-adapted to the task of fact-finding. This concern was perhaps best articulated in *Ohio v. Wyandotte*:

> This Court is, moreover, structured to perform as an appellate tribunal, ill equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence . . . .
>
> Thus, we think it apparent that we must recognize 'the need [for] the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States.' *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939), opinion of Chief Justice Hughes . . . .

Id. at 498.

As in *Ohio v. Wyandotte*, the fact finding role which the Court would be forced to assume in this case would be immense.[29] The parties' presentation of factual evidence alone would likely take several months, at a minimum. Moreover, given the claims involved, this case would require a process of untangling particularly complicated factual issues.

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[29] Moreover, at the heart of Plaintiffs' case is the contention, as to which they seek a declaratory judgment, that Defendants had and breached legal duties—in contract or in tort—to give Plaintiffs some warning about their asbestos products or to repair Plaintiffs' buildings in which such products were installed. But that is a "legal" (not equitable) issue with respect to which the parties may be entitled to a jury trial under 28 U.S.C. § 1872, if not the Seventh Amendment. *See generally Chauffeurs Local 391 v. Terry*, 58 U.S.L.W. 4345 (U.S. March 20, 1990); *Tull v. United States*, 481 U.S. 412 (1987). The right to a jury trial is not bypassed when a dispute is heard in a specialized federal tribunal that ordinarily does not conduct jury trials. *See Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989). Even in a simple case a jury trial in this Court would be disruptive and burdensome; in *this* case it would be intolerable. The mere possibility that some of Plaintiffs' claims (or the claims or defenses of Defendants or others who become parties) might require a jury trial is itself sufficient reason for the Court to exercise its discretion to deny leave to file.

Plaintiffs' bland assurances that "any technical matters arising here have been litigated in many other trials so that there are no novel issues for resolution by this Court" and that "the legal issues presented by the States are not dependent on the local law," Pl. Br. at 23, are baseless. The true situation is demonstrated in the earlier discussion of the lessons of asbestos-in-buildings litigation. *See* pp. 6-9 above. The lessons are simple: the issues are factual and the facts vary not just from State to State but from building to building.

The trial records from the thirty-odd individual cases which have been tried to date show that a pivotal issue is whether the particular product—as installed in a particular building—is releasing asbestos fibers into the air in sufficient quantities to require remedial action. Resolution of this issue turns on individual evidence about each product as installed in each building. The issue of whether remedial action is needed simply cannot be determined absent detailed evidence about: the type of product involved, the condition of the product in-place in each building, the date of installation, the type and amount of asbestos involved, and the location and accessibility of the product.

If it is determined that remedial action is needed, the issue of who is responsible must then be resolved. Merely to ascertain what products are in a particular building, and thus which Defendants are potentially liable for the remediation, is a formidable task. Resolution of this issue requires introduction of the architectural and engineering plans and specifications, sales invoices and other evidence of distribution, testimony of installers or contractors, testimony of building maintenance personnel, and testimony regarding the physical characteristics of the product, as well as technical evidence such as bulk sample analysis and constituent identification. Such evidence has consumed substantial amounts of trial time in the cases tried to date.

Lower courts whose expertise is fact-finding have found themselves daunted by the task that asbestos-in-buildings litigation entails. In evaluating the very claims and issues which Plaintiffs seek to raise here, the United States District Court for the District of Alabama said:

> Plaintiff in its brief bottoms its Count VII on *Restatement of Restitution*, § 115. The non-existence of "restitution" as a separate legal remedy in Alabama, when there is no duty by any defendant here shown requiring it to remove an offending asbestos product, closes the door on Count VII. *The court trusts that in failing to find a single Alabama case recognizing a cause of action for something called "restitution" it is not influenced by the mind-boggling task of deciding which walls and ceilings in which schools, owned and operated by which putative class members, should be removed by which defendants, under what conditions.*

Franklin County School Board v. Lake Asbestos of Quebec, Ltd., 1988 U.S. Dist. LEXIS 12779, *19-20 (D.Ala., February 13, 1986) (emphasis added).

This Court would have to deal with each and every aspect of the foregoing in its role as factfinder. The magnitude of such an undertaking would be staggering. Because the "successful resolution [of this case] would require primarily skills of factfinding. . . . " *Ohio v. Wyandotte*, 401 U.S. at 505, and because this Court would, in all likelihood, find this case an "extremely awkward vehicle to manage," *id.* at 504, the Court should decline jurisdiction.[30]

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[30] Contrary to the Plaintiffs' assertion, the appointment of a Special Master merely compounds the problems inherent in the resolution of these questions. In *Ohio v. Wyandotte* the Court described as "unrealistic" the notion that appellate judges, even with the assistance of a Special Master, could appropriately undertake to unravel such difficult scientific, technical and factual questions. 401 U.S. at 504. In addition, when a Special Master is appointed, his recommendations are advisory only and the Court remains responsible for the ultimate decisions in the case. *Colorado v. New*

Moreover, as discussed earlier, adjudication of Plaintiffs' claim would require the application by the Court of the substantive law of 29 States. This factor makes the case even more unmanageable. There is no aspect of the case where the necessity of ascertaining, digesting, applying and explaining different State laws would not be the responsibility of the "trial judge"—this Court. The specter of a trial in this Court of factual issues unique to thousands upon thousands of buildings, governed by the disparate local laws of 29 States, cries out for this Court to decline jurisdiction.

2. ***The Trial of this Case Would Consume Enormous Amounts of the Court's Time and Resources and Would Interfere With the Court's Ability to Perform Its Appellate Functions.***

As is obvious from the foregoing, the investigation, presentation and resolution of this case would consume a disproportionate amount of the Court's time. Accordingly, acceptance of original jurisdiction would seriously interfere with the Court's primary responsibility: to decide the cases of true federal significance appropriately brought

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Mexico, 467 U.S. 310, 317 (1984). This procedure can cause diffusion of factual determinations.

> As Justice Rehnquist has recently indicated:
>
> None of these concerns are adequately answered by the expedient of employing a Special Master to conduct hearings, receive evidence and submit recommendations for our review. It is no reflection on the quality of work by the Special Master in this case or any other master in any other original-jurisdiction case to find it unsatisfactory to delegate the proper functions of this Court. Of course this Court cannot sit to receive evidence or conduct trials—but that fact should counsel reluctance to accept cases where the situation might arise, not resolution of the problem by empowering an individual to act in our stead. *I for one think justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should.*

Maryland v. Louisiana, 451 U.S. 725, 762-763 (1981) (Rehnquist, J., dissenting) (emphasis added).

before it as the highest federal appellate tribunal. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 505; *Washington v. General Motors Corp.*, 406 U.S. at 113-114.

This Court has itself taken note of the primary importance of its role as the final federal appellate court, and its diminished importance as a court of original jurisdiction. With an eye toward these considerations, great discretion has been employed in exercising original jurisdiction, lest the Court's appellate docket be impaired.

In *Ohio v. Wyandotte*, in discussing its discretion, the Court stressed that

> We have no . . . reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. *Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role* as the supreme federal appellate court *could, in our view, be justified only by the strictest necessity*, an element which is evidently totally lacking in this instance.

401 U.S. at 505 (emphasis added).

The Court reaffirmed its commitment to its appellate docket one year after the decision in *Ohio v. Wyandotte*, in *Washington v. General Motors Corp.*, 406 U.S. 109 (1972). There the Court noted that

> The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired. . . . [citing *Massachusetts v. Missouri*, 308 U.S. 1, 19; *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497-499].
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> * * * *
>
> "To open this Court to actions by States . . . [against] citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original juris-

> diction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it."

Id. at 113-114 (quoting *Massachusetts v. Missouri*, 308 U.S. 1 (1939)).

As set forth at length above, the detailed factfinding and the State law issues necessarily involved in this case make it particularly unsuitable for trial in this tribunal. The enormity of the undertaking will necessarily interfere with the Court's federal appellate duties.

In such a circumstance, the Court will accept jurisdiction based only on the "strictest necessity." *Ohio v. Wyandotte*, 401 U.S. at 505. However, no such necessity exists here.[31] The Plaintiffs are free to pursue their claims in their own trial courts—courts far better equipped for finding facts and applying State law in any event. Moreover, the proposed Complaint raises no issues of federal law or federalism. Thus, given that "strict necessity" is demonstrably lacking, the Court should decline jurisdiction.

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[31] Plaintiffs allude to the prospect of "interstate competition" among States in trying to be among the first to reach judgment and collect from a "limited pool of assets." Pl. Br. at 21, 24. This concern is unfounded. Although States have known of the present "problem" of asbestos in their buildings for some years, there has been no evidence of States racing to court. Prior to this action only a few States have sued, and more than 20 States evidently declined to join this action. Moreover, the claims of the Plaintiff-states are but one of a number of types of claims against Defendants and other asbestos companies by other public and private building owners, present and former employees and others. If there were a potential problem of "a limited pool of assets," this Court's exercise of jurisdiction in this case would have little impact on it. Finally, the parade of horribles Plaintiffs sketch is not unique to the asbestos "problem"; the same rationale for original Supreme Court litigation could be conjured up in a variety of contexts.

C. Plaintiffs' State Law Claims Have Already Been Rejected by Certain State Supreme Courts. Thus, the Exercise of Original Jurisdiction Would Disrupt the Development of State Law and Undermine the Authority of State Supreme Courts on Matters of State Law.

1. Plaintiffs' Claims Have Been Held to Fail to State a Claim Under the Public Assistance Doctrine by the Supreme Court of Plaintiff Illinois.

Plaintiffs purport to state a claim under section 115 of the Restatement of Restitution. Proposed Complaint, ¶¶ 12-18. This section of the Restatement, commonly referred to as the Public Assistance Doctrine, provides that

> [a] person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

Restatement of Restitution, § 115 (1937). As previously demonstrated (pp. 26-30), a claim to restitution under this doctrine arises under State law. It is generally governed by the local law of the State with the most significant relationship to the occurrence and the parties; this would typically be the law of the State where the building is located.

Although one would not know it from Plaintiffs' Brief, certain State Supreme Courts have already held that claims for asbestos removal fail to state a claim under the Public Assistance Doctrine.

In order to recover under the Public Assistance Doctrine, a plaintiff must first establish that the party who allegedly failed to act had a duty to do so. Restatement of Restitution § 115. *See also Board of Education of City*

of Chicago v. A, C and S, Inc., 131 Ill.2d 428, 464-65, 546 N.E.2d 580, 597, 137 Ill.Dec. 635, 652 (1989). Contrary to Plaintiffs' claims herein, the Supreme Court of Illinois (whose decisions in this regard are absolutely dispositive of the rights of Illinois, one of the Plaintiff-states) has already held that asbestos companies have *no duty* under section 115 to remove asbestos. *Id.* at 465-66, 546 N.E.2d at 598, 137 Ill.Dec. at 653.

In *Board of Education of City of Chicago*, 34 school districts filed suit against 78 defendants[32] to recover the cost of removing asbestos from their schools, much as the Plaintiffs have in this case. The Illinois Supreme Court dismissed the plaintiffs' claim for restitution, holding that "the proper interpretation of section 115 is that the defendant must have a duty in the first instance and such a duty does not exist with the defendants before us." *Id.* at 465, 546 N.E.2d at 597, 137 Ill.Dec. at 652. The Supreme Court of Illinois reasoned that

> [a] section 115 cause of action does not result merely because the defendants' product may be hazardous or damage the plaintiffs' buildings . . . . *In this instance there exists no duty to inspect, repair or replace the product after it has been installed in the plaintiffs' buildings.*

Id. at 466, 546 N.E.2d at 598, 137 Ill.Dec. at 653. (emphasis added). As in *Board of Education of City of Chicago*, so too here, the Defendants have no duty to remove the asbestos from the Plaintiffs' buildings.[33] Accordingly, under State law as set down by the Supreme Court of Illinois, Plaintiffs cannot satisfy the requirements of a

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[32] The defendants ranged from lumber yards to multinational corporations who allegedly engaged in the "mining, manufacturing, marketing, sales and/or installation of asbestos, asbestos materials and/or friable asbestos materials." *Id.* at 436, 546 N.E.2d at 584, 137 Ill.Dec. at 639.

[33] Despite the decision of the Illinois Supreme Court which is directly on point, Plaintiffs rely on several dissimilar cases for the proposition that the Defendants have a duty to remove asbestos from the Plaintiffs' public buildings and that if Plaintiffs under-

claim under the Public Assistance Doctrine and thus, they fail to state a claim upon which relief can be granted.[34]

2. *Plaintiffs' Claims Have Been Held to Be Premature by the Supreme Court of Plaintiff Vermont.*

In another case involving the removal of asbestos, *University of Vermont v. W.R. Grace & Company*, 565 A.2d 1354 (Vt. 1989), the Supreme Court of Vermont

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take to remove the asbestos, they are entitled to reimbursement. *See Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), *United States v. Consolidated Edison Co. of New York*, 580 F.2d 1122 (2d Cir. 1978), and *United States v. P/B STCO*, 756 F.2d 364 (5th Cir. 1985). Pl. Br. at 29-30. Each of these cases, however, is distinguishable from the present case in that each defendant had a statutory duty to act. Here, as in *Board of Education of City of Chicago*, no such duty exists.

[34] *Accord, County of Knox v. The Celotex Corp.*, No. Civ-3-87-925 (U.S.D.C., E.D. Tenn, December 22, 1988) (Magistrate's report); *City of Greeneville v. National Gypsum Co.*, No. CIV-2-83-294 (U.S.D.C., E.D. Tenn., December 21, 1983) (Magistrate's report); *Town of Hooksett School District v. W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984); *University System of New Hampshire v. National Gypsum Co.*, No. 84-716-L (U.S.D.C., D.N.H., July 2, 1985); *Crotched Mountain Rehabilitation Center, Inc. v. National Gypsum Co.*, No. C85-488-L (U.S.D.C., D.N.H., December 27, 1985); *Franklin County School Board v. Lake Asbestos of Quebec, Ltd.*, 1988 U.S. Dist. LEXIS 12779 (N.D. Ala., February 13, 1986); *Altoona Area Vocational Technical School v. United States Mineral Products Co.*, Civil Action No. 86-2498 (U.S.D.C., W.D. Pa., April 13, 1988); *Independent School District No. 709 v. Air-O-Therm Application Co.*, File No. 155716 (Minn. Dist. Court, 6th Dist. May 29, 1987). *But see Drayton Public School District v. W.R. Grace & Co.*, 1989 WL 159948 (U.S.D.C., D.N.D. 1989); *City of Berea v. United States Gypsum Co.*, Civil Action No. 86-172 (U.S.D.C., E.D.Ky. March 3, 1989); *Linton Public School District No. 36 v. W.R. Grace & Co.*, Civil No. 85-525 (N.D.Dist.Ct., Cass County, February 27, 1987); *Perlmutter v. United States Gypsum Co.*, Civil Action No. 87-M-510 (U.S.D.C., D.Colo., September 15, 1987); *Adams-Arapahoe School District v. Celotex Corp.*, 637 F.Supp. 1207 (D.Colo. 1986); *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S. 2d 782 (Sup.Ct., N.Y.Co. 1986), *aff'd w/o opinion*, —— App.Div.2d ——, 513 N.Y.S.2d 1004 (1st Dept. 1987).

held that, where there is no allegation that the plaintiff has in fact removed the asbestos from its building, a claim for restitution is premature. *Id.* at 1356 n.2. This case is particularly significant because Vermont also is one of the Plaintiffs herein.

The Proposed Complaint implies that the Plaintiffs have already incurred some of the costs of removing asbestos from their buildings. *Id.*, ¶ 10. However, Plaintiffs state in their supporting brief that they "must act to protect the public health," Pl. Br. at 33, thus raising the question of whether the true status of their removal actions is that they intend to undertake asbestos removal in the future. Moreover, the allegations that the Plaintiffs "have acted" to "abate the hazard," Proposed Complaint ¶¶ 10, 15, 17, fall far short of averments that asbestos has actually been removed,[35] as *University of Vermont* requires.

Such allegations in Plaintiffs' Proposed Complaint and supporting brief do not establish that they have removed the asbestos. Instead, Plaintiffs are seeking to impose on the Defendants the cost of abatement *prior* to their taking remedial action. Because the Plaintiffs have not actually removed the asbestos from their buildings and have not yet incurred the costs for which they seek reimbursement, their claim for restitution is premature under the law as announced by the Supreme Court of Vermont.

3. *This Court Should Decline to Interfere with the Development of State Law.*

As demonstrated above, Plaintiffs ask this Court to create a duty to remove asbestos on the part of the De-

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[35] The lack of clarity as to Plaintiffs' true contentions is due in part to the generalized amalgamation of claims that one or more of the 29 Plaintiff-states believes they may have against one or more of the Defendant companies. Before such an amorphous litigation could be allowed to go forward, Plaintiffs' allegations would have to be refined to make clear that Plaintiffs had actual non-premature claims to be made as to all Defendants.

fendants, where at least one State Supreme Court has held that none exists. *See Board of Education of City of Chicago*, 131 Ill.2d at 563-567, 46 N.E.2d at 596-98, 137 Ill.Dec. at 651-53. They also ask the Court to permit them to bring an action for restitution before removing the asbestos, where at least one State Supreme Court has held that such an action is premature. *University of Vermont*, 565 A.2d at 1356, n.2.

Since Plaintiffs' claims arise under State law, decisions of the Vermont Supreme Court and the Illinois Supreme Court are absoutely dispositive of the rights of Plaintiffs Vermont and Illinois in this action. Plaintiffs' Brief does not point out that the exercise of original jurisdiction, at least in the case of Illinois' and Vermont's claims, would require the Court to disregard decisions of their respective State Supreme Courts in order to grant relief, an option not available to the Court. *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 488 (1976) (decision of a State Supreme Court on a matter of State law is binding on this Court).

Plaintiffs will no doubt argue that *Board of Education of City of Chicago* and *University of Vermont* are limited to Illinois and Vermont and that other cases (*see, e.g.*, those cited *supra*, note 34) correctly set forth the law of other States. However, this argument simply illustrates the conundrum which this Court would face if original jurisdiction were exercised.

Even accepting Plaintiffs' argument that the law of other States differs from that of Illinois and Vermont, this Court then would be called upon to resolve unsettled matters of State law—matters in which the Court has "no claim to special competence." *Ohio v. Wyandotte*, 401 U.S. at 497-98. In so doing, the Court would unnecessarily disrupt the development of State law.[36]

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[36] On the one hand, this Court's ruling on State law, like that of any federal court, would be binding only upon the parties to this litigation. Thus, other courts applying the same State's law might

Moreover, if the Illinois and Vermont cases correctly set forth the law, then Plaintiffs simply have no cause of action at all.[37] For these reasons as well, the Court should decline to exercise jurisdiction over this State law case.

CONCLUSION

For all the above reasons, the Motion for Leave to File should be denied.

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make a conflicting ruling in comparable circumstances. On the other hand, the presence of a decision by this Court on the State law issues involved might lead a State court to adopt the position taken by this Court so as to avoid perceived conflict, even if that position were not thought to be the better view under that State's law. We note in this context that there is no foundation for Plaintiffs' concern about a flood of appeals to this Court from State courts if the Court does not exercise jurisdiction in this case, Pl. Br. at 23; as State law governs there should be few legitimate grounds for this Court's review, which would be limited to federal questions. 28 U.S.C. § 1257.

[37] Should the Proposed Complaint be filed, it can be anticipated that motions to dismiss it on this ground would follow.

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APPENDIX

APPENDIX

RULE 29.1 STATEMENT OF JOINING DEFENDANTS

The Joining Defendants submit the following statement of their parents and subsidiaries pursuant to Supreme Court Rule 29.1:

American Biltrite Inc.'s parents and non-wholly owned subsidiaries consist of Compania Hulera Sula, S.A.

Azrock Industries Inc., Fibreboard Corp., H.K. Porter Company, Inc., and Kentile Floors, Inc. have no parents or non-wholly owned subsidiaries.

Basic Incorporated's parents and non-wholly owned subsidiaries consist of Combustion Engineering, Inc.

Carey Canada, Inc. is a subsidiary of the Celotex Corporation; it has no non-wholly owned subsidiaries.

The Celotex Corporation is a wholly-owned subsidiary of Jim Walter Corporation, which itself is a subsidiary of Jasper Corporation; it has no non-wholly owned subsidiaries.

CertainTeed Corporation's parent corporation is Compagnie de Saint-Gobain, its non-wholly owned subsidiaries consist of Precision Meters, Inc.

Georgia-Pacific Corporation's parents and non-wholly owned subsidiaries consist of Great Northern Nekoosa Corp. and Thacker Land Company, Inc.

The Flintkote Company's parents and non-wholly owned subsidiaries consist of Imasco Limited and Canada Trust Company.

Owens-Corning Fiberglas Corporation's parents and non-wholly owned subsidiaries consist of Veroc Technology A/S.

Pfizer Inc. has no parent corporation; its non-wholly owned subsidiaries consist of Laboratories Pfizer S.A., Pfizer Laboratories (Bangladesh) Ltd., Pfizer Egypt S.A.E., Pfizer Limited (Ghana), Agricare Limited, Pfizer Limited (India), PT Pfizer Indonesia, Livestock Feeds Limited, Pfizer Products Limited, Pfizer Laboratories Limited, Pfizer Korea Limited, Pfizer Bioquimicos, S.A., Pfizer Limited (Sri Lanka), Pfizer C. & G. Inc., Laboratorie Beral, S.A., Quigley Italiana S.p.A., SudFarma S.r.l., Pfizer, S.A., Pfizer Pharmaceuticals Ltd., Pfizer Quigley Korea Ltd., Dideco N.V., and Sofracob S.A.

Defendant United States Gypsum Company is a wholly-owned subsidiary of defendant USG Corporation. The following corporations are non-wholly-owned affiliates of defendants United States Gypsum Company and/or USG Corporation: 101 South Wacker Co.; American Metals Corporation; BHI International, Inc.; C-S-W Drywall Supply Company; C.N.G. Distribution Limited; CGC Inc.; CIKSA, S.A. de C.V.; Construcciones, Recumbrimientos Y Acabados S.A. de C.V.; DAP Canada; DAP Inc.; Darswan, Inc.; Donn Australia; Donn Canada Ltd.; Donn Far East SDN BHD; Donn France S.A.; Donn International, Inc.; Donn International Sales Corporation; Donn Pacific Ltd.; Donn Products (U.K.) Ltd.; Donn Products GmbH; Donn South Africa (Pty) Limited; Gypsum Communications Co.; Gypsum Energy Management Co.; Gypsum Transportation Ltd.; L & W Supply Corporation; Little Narrows Gypsum Co.; Marstrat, Inc.; North Baldwin Park Corp. (formerly Hollytex); Panama Gypsum Company, Inc.; Panama Wallboard, Inc.; Sequoyah Carpet Corp.; Stocking Specialists, Inc.; USG Enterprises, Inc.; USG Foreign Investments, Ltd.; USG Foreign Sales Corp.; USG Industries, Inc.; USG Interiors, Inc.; USG International, Ltd.

(DISC); USG Properties, Inc.; United States Gypsum Export Company; Westbank Planting Company; Westlake Land (Canada) Ltd.; Windsor Shipping Limited; Yeso Mexicano S.A.; Yeso Panamericano, S.A. de C.V.; Yesomet, S.A. de C.V.

T&N plc (formerly known and sued herein as Turner & Newall PLC), is an English company that has no parent and no United States subsidiary companies (other than wholly-owned subsidiaries) except Chempolymer Corporation. T&N has numerous subsidiaries (other than wholly-owned subsidiaries) outside the United States and will provide a list upon request.